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## **AN AUSTRALIA–INDONESIA ARRANGEMENT ON REFUGEES: EXPLORING THE STRUCTURAL, LEGAL AND DIPLOMATIC DIMENSIONS**

### ABSTRACT

Australia must engage cooperatively with its regional neighbours on asylum issues facing the region. A proposal for cooperation between Australia and Indonesia on refugees is explored as to its structural, legal and diplomatic dimensions. Obstacles to that arrangement are rigorously analysed. Useful recommendations are then made to move such an arrangement forward. The discussion shows that support from both countries for this arrangement can be developed. Critically though, this arrangement is between two countries and so cannot succeed to protect refugees on its own. Rather, cooperation between multiple countries is necessary to successfully protect refugees and thereby undermine irregular boat journeys to Australia and generally. Policy discussions in this area must continue, including as to what other concrete arrangements could be developed between states benefitting refugees in various ways. As Australia's existing arrangements for offshore processing with Papua New Guinea and Nauru, which see asylum seekers detained in facilities in those countries, are unravelling, finding alternative and principled policies is imperative.

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## I INTRODUCTION

We are where we are, however we got here. What matters is where we go next –  
Isaac Marion<sup>1</sup>

This article examines a specific proposal for a bilateral refugee arrangement between Australia and Indonesia. This arrangement has previously been mooted as an alternative to Australia's current policies towards asylum seekers arriving by boat,<sup>2</sup> namely arrangements with Nauru and Papua New Guinea ('PNG') for offshore processing, and return of asylum seeker vessels intercepted by Australian authorities. For reasons that will become apparent, the author favours Australia and Indonesia pursuing an arrangement. It is acknowledged, however, that references to this as an 'Indonesian solution'<sup>3</sup> are prone to deceive. No single bilateral arrangement can succeed in comprehensively addressing asylum issues impacting upon the entire Southeast Asian region<sup>4</sup> and Australia.<sup>5</sup> Issues span multiple countries, meaning that notwithstanding any bilateral arrangement that Australia enters into, the aim must be for broad engagement with, and between, neighbouring countries.

This article is divided into four parts. Part I is this Introduction. Part II details Australia's existing bilateral arrangements with each of Nauru and PNG. Together those arrangements constitute the 'Pacific Solution Mark II'.<sup>6</sup> The author reiterates a view that these arrangements are, at least from a refugee protection perspective, abysmal failures and are presently unravelling. Brief reference is made to the deal between Australia and the USA, which shows the need to find alternatives. This 'one-off' deal would see the USA take refugees from facilities on Nauru and PNG; beyond

<sup>1</sup> Isaac Marion, *Warm Bodies* (Vintage Books, 2013) 86.

<sup>2</sup> Frank Brennan, 'An Indonesian Solution? A Better Approach to Asylum Seeker Policy' (Paper presented at National Asylum Summit 2013, The University of South Australia, 27 June 2013). Regarding cooperation between Australia and Indonesia generally, see Paul Toohey, 'That Sinking Feeling: Asylum Seekers and the Search for the Indonesian Solution' (2014) *Quarterly Essay* 1; Alex Reilly, 'How Labor can Create a Humane Refugee Policy Without Reviving Boat Arrivals', *The Conversation* (online), 8 July 2015 <<http://theconversation.com/how-labor-can-create-a-humane-refugee-policy-without-reviving-boat-arrivals-44132>>.

<sup>3</sup> Brennan, above n 2; Toohey, above n 2.

<sup>4</sup> Southeast Asia is defined by the member countries of the Association of Southeast Asian Nations ('ASEAN'), which are currently Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. See Association of Southeast Asian Nations, *ASEAN Member States* <<http://www.asean.org/asean/asean-member-states>>.

<sup>5</sup> John Menadue, 'A Regional Cooperation Framework' (Speech delivered at the International Association of Refugee Law Judges Australian Chapter, Melbourne, 3 February 2012) <<https://cpd.org.au/2012/02/john-menadue-a-regional-cooperation-framework-international-association-of-refugee-law-judges-australian-chapter/>>.

<sup>6</sup> Refugee Action Coalition, *Refugee Action Coalition Fact Sheet: The Pacific Solution Mark II* <<http://www.refugeeaction.org.au/wp-content/uploads/2012/10/Pacific-Solution-II-fact-sheet.pdf>>.

this information, details were scant at the time of writing. Part III examines a new approach, which is a bilateral arrangement between Australia and Indonesia. The structural, legal and diplomatic dimensions of this arrangement are covered, including the core elements of the arrangement and international law issues arising. Alongside their emphasis on protection, these elements have a clear deterrence purpose. While deterrence aspects usually raise the most concern from a refugee protection perspective, these concerns can be managed. Next, diplomatic obstacles to this arrangement are canvassed. The author adopted a research methodology primarily comprising archival research, but supplemented this with several interviews. The research interrogated the viability of a bilateral arrangement between Australia and Indonesia. The ultimate conclusion from the research is that existing obstacles may be overcome to make this arrangement a reality. To be successful however, the arrangement must be pursued alongside the kinds of cooperative policies with other countries set out. Part IV sums up and recalls how crucial it is for Australia to develop alternative regional asylum policy.

## II THE PACIFIC SOLUTION

Australian government policy is that no asylum seekers arriving to Australia by boat without visa documentation, or indeed attempting such a journey, will ever be resettled in Australia.<sup>7</sup> Instead, persons are sent to Nauru or PNG for processing and, at least in theory, eventual local settlement (or, in limited cases, resettlement to a third country). From the Australian government's perspective, once persons are transferred they become the responsibility of Nauru or PNG (as the case may be). This is the Pacific Solution in a nutshell. Latterly, reference is made to the 'Pacific Solution Mark II' in recognition that Australia resurrected this approach in 2012,<sup>8</sup> following recommendations of a government-appointed Expert Panel.<sup>9</sup>

As to the legislative mechanics of the scheme, the *Migration Act 1958* (Cth) provides for persons to be taken offshore to Nauru or PNG as designated regional processing

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<sup>7</sup> See Department of Immigration and Border Protection, 'Operation Sovereign Borders' (Factsheet, Department of Immigration and Border Protection, 2017) 1: 'If your family and friends get on a boat without a visa they will not end up in Australia.'

<sup>8</sup> Both of these arrangements recommended in 2012, in a form very similar to their previous operation, hence the reference to the 'Pacific Solution Mark II'. See generally Mary Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergence in the Asia-Pacific', (2014) 63 *International and Comparative Law Quarterly* 247, 265–7; Refugee Action Coalition, above n 6.

<sup>9</sup> Angus Houston, Paris Aristotle and Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (Report, Expert Panel on Asylum Seekers, August 2012) 15–16. The Gillard Government appointed the Expert Panel on 28 June 2012. The Panel made 22 key recommendations to government on the policy options to 'prevent asylum seekers risking their lives on dangerous boat journeys to Australia': 9.

countries.<sup>10</sup> Section 198AD(2) requires an officer to take an ‘unauthorised maritime arrival’ from Australia to a ‘regional processing country’. The *Maritime Powers Act 2013* (Cth) may also be relied on to take persons to Nauru and PNG (or another place outside Australia) in circumstances where a person is not yet in Australia.<sup>11</sup> For example, where a person’s boat is intercepted on the high seas. This Australian domestic legislation is supplemented with separate bilateral arrangements with Nauru and PNG.

Under the original terms of those arrangements, Australia transferred persons to those countries’ facilities for processing.<sup>12</sup> PNG had agreed to locally settle *all* refugees it processed,<sup>13</sup> while Nauru agreed to settle a quota of refugees agreed upon each year with Australia during ministerial meetings.<sup>14</sup> Australia’s specific obligation is to assist Nauru ‘to settle in a third safe country’ refugees who exceed that quota.<sup>15</sup>

A litany of reasons can be given for why these existing bilateral arrangements with Nauru and PNG, the crux of the Pacific Solution Mark II, have failed. Principally, these arrangements have not worked as contemplated. PNG has not been able to settle *all* refugees under the arrangement with Australia. As such, the PNG Supreme Court decided in April 2016 that Manus Island transferees had been improperly denied their right to ‘personal liberty’ in violation of the PNG Constitution.<sup>16</sup> Both the Australian and PNG governments were ordered to:

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<sup>10</sup> See *Migration Act 1958* (Cth) s 198AB(1): ‘The Minister may, by legislative instrument, designate that a country is a *regional processing country*’; Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 10 September 2012 (*MOU between Australia and Nauru*’); Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 9 October 2012 (*MOU between Australia and PNG*’).

<sup>11</sup> *Maritime Powers Act 2013* (Cth) s 72(4).

<sup>12</sup> A subsequent development discussed below, namely the PNG Supreme Court decision in *Belden Norman Namah v Minister for Foreign Affairs & Immigrations* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) (*Namah v Pato*’), puts in issue the extent to which the PNG government still considers itself bound by the terms of the MOU between it and the Australian government.

<sup>13</sup> *MOU between Australia and PNG*, Preamble, cl 13.

<sup>14</sup> *MOU between Australia and Nauru*, Preamble, cls 12, 13, 14.

<sup>15</sup> *MOU between Australia and Nauru*, cls 12, 13.

<sup>16</sup> *Namah v Pato* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) [74(1)] (Kandakasi J); *Constitution of the Independent State of Papua New Guinea* s 42(1). Interestingly, less than three months earlier, the Australian High Court upheld the validity of the offshore detention in Nauru according to Australian law in *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (*Plaintiff M68*’). The essence of the Court’s reasoning is that no violation of the implied constitutional prohibition

forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.<sup>17</sup>

Notwithstanding this ruling, no date has been set for closure of the Manus Island facility<sup>18</sup> and genuine refugees continue to be held there given that, understandably, only a few have accepted the PNG government's offers of resettlement to mainland PNG, where social conditions are notoriously dangerous.<sup>19</sup> A change is that Manus Island detainees have been allowed to leave the facility to visit the main town on the island. Their right to personal liberty continues to be limited, however, by the fact

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on extra-judicial detention could be attributed to the Australian government, because the Nauruan government was responsible for the plaintiff's treatment on Nauru. Chief Justice French, Kiefel and Nettle JJ held at 68–9 [36]:

Once it is understood that it was Nauru that detained the plaintiff, and that the Commonwealth did not and could not compel or authorise Nauru to make or enforce the laws that required that the plaintiff be detained, it is clear that the Commonwealth did not itself detain the plaintiff.

With respect, the reasoning in this decision is neat and apt to allow government avoidance of an important safeguard — the constitutional prohibition on extra-judicial detention — by means of similar offshore regimes: see David Hume, '*Plaintiff M68-2015 — Offshore Processing and the Limits of Chapter III*' on *AUSPUBLAW* (26 February 2016) <<https://auspublaw.org/2016/02/plaintiff-m68-2015/>>.

<sup>17</sup> *Namah v Pato* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) [74(6)] (Kandakasi J).

<sup>18</sup> The PNG Prime Minister announced that the centre would shut following the decision of the PNG Supreme Court. See, eg, Stephanie Anderson, 'Manus Island Detention Centre to be Shut, Papua New Guinea Prime Minister Peter O'Neill Says', *ABC News* (online), 27 April 2016 <<http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>>.

<sup>19</sup> Reports on the exact numbers of refugees resettled on mainland PNG vary, but it is clear that conditions there are unsafe and inappropriate for refugee resettlement. See, eg, Eric Tlozek, 'Manus Island: Asylum Seekers and Refugees No Longer in Detention, PNG Authorities Say', *ABC News* (online), 12 May 2016 <<http://www.abc.net.au/news/2016-05-12/png-authorities-say-manus-refugees-no-longer-in-detention/7407826>>; David Fedele, 'Resettling Refugees in Papua New Guinea: A Tragic Theatre of the Absurd', *The Guardian* (online), 20 May 2016 <<https://www.theguardian.com/commentisfree/2016/may/20/resettling-refugees-in-papua-new-guinea-a-tragic-theatre-of-the-absurd>>; Karen Jacobsen, 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' (Working Paper No 45, United Nations High Commission for Refugees Evaluation and Policy Analysis Unit, 2001) 27. Jacobsen's work on local integration concludes that: 'Local integration will only work if it is acceptable to host governments, to the local community and to refugees. It should not be advocated if it threatens the security and stability of either the local community or the refugees.'

that they must sign an agreement accepting responsibility for their safety, and accept government arranged transport to and from the facility.<sup>20</sup>

On Nauru, refugee settlement has also been problematic. Refugees have been free to leave the Nauru detention centre since it was made an ‘open centre’ facility by the Nauruan government in October 2015.<sup>21</sup> However, local conditions on Nauru are not conducive to peaceful refugee settlement, with numerous reports of refugees being abused within the detention facility and in the local Nauruan community.<sup>22</sup> The conclusion to be drawn is that the arrangement with Nauru, like that with PNG, does not offer genuine prospects of refugee settlement.

An additional problem with the arrangement with Nauru is that Nauru has not agreed to settle every refugee it processes. As noted, Australia has an obligation to assist Nauru ‘to settle in a third safe country’ such refugees.<sup>23</sup> A deal had initially been brokered by Australia with Cambodia, whereby Cambodia agreed to resettle refugees.<sup>24</sup> Originally only four refugees elected to settle in Cambodia, all four of whom have since decided to leave Cambodia and return to their countries of origin in Iran and Myanmar.<sup>25</sup> A further two refugees were transferred to Cambodia in November 2015 and November 2016 respectively.<sup>26</sup> The Cambodian government had previously indicated in August 2015 that it would not accept further refugees for

<sup>20</sup> Tlozek, above n 19.

<sup>21</sup> This decision was taken immediately prior to the Australian High Court hearing a challenge to the Australian government’s detention of refugees on Nauru: see *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42. See above n 16 for analysis of the decision. See also Tom Allard, ‘Nauru’s Move to Open its Detention Centre Makes it “More Dangerous” for Asylum Seekers’, *The Sydney Morning Herald* (online), 9 October 2015 <<http://www.smh.com.au/federal-politics/political-news/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html>>.

<sup>22</sup> See, eg, Australian Broadcasting Corporation, ‘The Forgotten Children: The Young Refugees Stranded on Nauru’, *Four Corners*, 17 October 2016 (Debbie Whitmont) <<http://www.abc.net.au/4corners/stories/2016/10/17/4556062.htm>>; Stephanie Anderson, ‘Nauru Police Launch Investigation after Claims Six-Year-Old Refugee Sexually Assaulted’, *ABC News* (online) 7 January 2016 <<http://www.abc.net.au/news/2016-01-07/refugee-child-allegedly-sexually-abused-on-nauru/7073452>>.

<sup>23</sup> *MOU between Australia and Nauru*, cls 12, 13.

<sup>24</sup> Two instruments constitute this arrangement with Cambodia: (1) *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees* (26 September 2014); and (2) *Operational Guidelines for the Implementation of the Memorandum of Understanding on Settlement of Refugees in Cambodia* (26 September 2014). See Madeleine Gleeson, ‘The Cambodia Agreement’ (Factsheet, Andrew & Renata Kaldor Centre for International Refugee Law, January 2017) 1 <<http://www.kaldorcentre.unsw.edu.au/publication/cambodia-agreement>>.

<sup>25</sup> Gleeson, above n 24.

<sup>26</sup> *Ibid.*

resettlement from Nauru.<sup>27</sup> More recently, in April 2016 a Cambodian government spokesperson described the arrangement as a ‘failure’.<sup>28</sup> These comments cast doubt over the Cambodia arrangement, which may mean that for some refugees on Nauru there is no country willing to accept them: Australia refuses their resettlement, Nauru may not locally settle them, and transfers to Cambodia under that deal may not be viable.

Conditions in facilities on Nauru and Manus Island have been found to breach international human rights law, providing a further basis on which to reject these arrangements. A United Nations (‘UN’) special rapporteur has found that Australia, by virtue of its control over the Manus Island facility, has violated the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>29</sup> Specifically noted are the detention of children, the detention conditions, and the failure to stop violence and tension in the facility.<sup>30</sup> On Nauru, the situation is not far different. As noted, reports of abuse of refugees have come to light.<sup>31</sup>

While these conditions and lack of settlement options may deter persons from journeying to Australia by boat, this has come at significant cost to human lives. As Hamilton properly puts it: ‘Because human dignity is inviolable and non-transferrable, any disrespect for ... human dignity cannot be justified by the benefits received by others involved in the policy.’<sup>32</sup> Additionally, as described, local conditions on Nauru and PNG are not conducive to refugee settlement, nor does it seem refugee processing. For these reasons, the Pacific Solution Mark II is an abysmal failure.

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<sup>27</sup> Ben Doherty, ‘Cambodia Deal Doomed after Just Four Nauru Refugees Resettled for \$55m’, *The Guardian* (online) 31 August 2015 <<http://www.theguardian.com/world/2015/aug/31/cambodia-has-no-plans-to-take-more-nauru-refugees-in-55m-australia-deal>>.

<sup>28</sup> Gleeson, above n 24; Lindsay Murdoch and Michael Koziol, ‘Australia’s Cambodia Refugee Resettlement Plan “a Failure”’, *The Sydney Morning Herald* (online), 3 April 2016 <<http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>>.

<sup>29</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 23 ILM 1027 (entered into force 26 June 1987).

<sup>30</sup> Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (5 March 2015) [19], [26], [31].

<sup>31</sup> Australian Broadcasting Corporation, above n 22.

<sup>32</sup> Andrew Hamilton, ‘Ethical Demands of a Regional Solution’ on *Eureka Street* (29 June 2011) <<http://www.eurekastreet.com.au/article.aspx?acid=26997#Vq-FyY1id8Q>>. Note, these comments were made in the context of the so called ‘Malaysia Solution’. See below n 66 regarding the Malaysia Solution.

Australia must develop alternative bilateral arrangements before existing arrangements completely unravel.<sup>33</sup>

### III A NEW APPROACH? AUSTRALIA AND INDONESIA

Exploring a refugee arrangement between Australia and Indonesia makes good sense. It is in line with the Australian government-appointed Expert Panel's 2012 recommendation that 'bilateral cooperation on asylum seeker issues with Indonesia be advanced as a matter of urgency'.<sup>34</sup> Further, Indonesia and Australia are geographically proximate. This has facilitated asylum seekers travelling by boat from Indonesia to Australia, many having originated from countries such as Pakistan, Afghanistan and Iran. If Australia wants to manage these boat flows, then engagement with Indonesia, the country of departure, is imperative. Australia's overall goal must be to improve the situation for refugees and asylum seekers in Indonesia. Indeed, the majority of people arriving by boat to Australia have been found to be entitled to international protection.<sup>35</sup>

#### *A Core Elements*

The proposed arrangement between Australia and Indonesia would operate as follows.<sup>36</sup>

#### *1 Interception Operations by Australia*

Australia would, with Indonesia's consent, intercept asylum seeker boats en route from Indonesia to Australia. Australia has, if its existing (unilateral) maritime interception operations are a reliable indicator, existing capacity for this. Indonesia, on the other hand, does not have a strong naval capacity<sup>37</sup> and so probably does not have capacity presently to assume this obligation.

<sup>33</sup> At the time of writing, the Australian government had recently announced a 'one-off' deal with the USA whereby the USA would accept an unspecified number of refugees from Nauru and Manus Island for settlement. If the deal ultimately proceeds, it will address the issue of where to send some or all of the people currently in facilities on Nauru and Manus Island. It does not, however, provide a long-term response to the issue of asylum seeker boat arrivals to Australia. Ongoing regional asylum policies need to be developed to address this issue, including the how and where of those persons' processing and (re)settlement. The proposed Australia–Indonesia arrangement takes up these aspects.

<sup>34</sup> Houston, Aristotle and L'Estrange, above n 9, 15.

<sup>35</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016); Refugee Council of Australia, 'Government Figures Show Boat Arrivals are Not "Economic Migrants"' (Media Release, 1 March 2016) <<http://www.refugeecouncil.org.au/latest/6055/>>.

<sup>36</sup> Key elements discussed here are drawn from Brennan, above n 2.

<sup>37</sup> Toohey, above n 2, 77.

Under what circumstances Australia could validly intercept asylum seeker vessels consistent with international law is a technical legal question.<sup>38</sup> The location of an asylum seeker vessel will be key to determining whether Australia may lawfully intercept that vessel.<sup>39</sup> Subject to meeting specific requirements set out in the *United Nations Convention on the Law of the Sea* ('*LOSC*'), Australia may conduct asylum seeker boat interceptions consistent with international law in its territorial sea which is 12 nautical miles offshore from the mainland,<sup>40</sup> and in its contiguous zone which is 24 nautical miles offshore from the mainland.<sup>41</sup>

## 2 *Search and Rescue Operations*

Search and rescue operations would continue to take place, alongside interception operations, as is required under international law.<sup>42</sup> Key treaties impose a requirement on states to come to the aid of vessels in distress.<sup>43</sup> As between Australia and Indonesia, an existing bilateral arrangement establishes those countries' respective maritime search and rescue regions.<sup>44</sup> This arrangement, made pursuant to the *Search and Rescue Convention*,<sup>45</sup> recognises the need 'to collaborate and cooperate',<sup>46</sup> for

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<sup>38</sup> See generally Natalie Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 *Melbourne Journal of International Law* 414.

<sup>39</sup> *Ibid* 6.

<sup>40</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) arts 2–3, 19(1), 19(2)(g), 25(1), 27–8, cited in Klein, above n 38, 6.

<sup>41</sup> *LOSC*, art 33(1)(a), cited in Klein, above n 38, 6–7. See also Brennan, above n 2.

<sup>42</sup> Brennan does not explicitly note this element, probably because it is so obviously mandated by international maritime law: Brennan, above n 2.

<sup>43</sup> *LOSC*, arts 98(1)(a)–(b). See also *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) ('*Search and Rescue Convention*'); *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) ('*SOLAS Convention*'). The *Search and Rescue Convention* paras 2.1.1 and 2.1.9 require that States provide assistance to persons who are or appear to be 'in distress at sea'. The *SOLAS Convention* annex ch V reg 10(a) requires masters of ships to assist 'persons in distress'.

<sup>44</sup> International Maritime Organization ('IMO'), *Area Search and Rescue Plans: Notification of an Arrangement on Search and Rescue Regions and Co-Ordination of Search and Rescue Services in Accordance with Paragraph 2.1.4 of the Annex to the International Convention on Maritime Search and Rescue, 1979, as Amended*, IMO Doc SAR.6/Circ.22, (13 April 2004) ('*Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*').

<sup>45</sup> The *Search and Rescue Convention* requires specific search and rescue regions be established, either individually or in co-operation with other states (*Search and Rescue Convention*, annex para 2.1.4) and in respect of which states have specific responsibilities (*Search and Rescue Convention*, annex para 2.1.9).

<sup>46</sup> *Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*, Preamble.

exchange of information concerning distress situations,<sup>47</sup> and for mutual assistance in search and rescue missions.<sup>48</sup> Special provisions also exist to determine which country is responsible for initiating search and rescue action.<sup>49</sup> These aspects would continue under the proposed arrangement regarding vessels, including those carrying asylum seekers.

### 3 *Transfer and Processing in Indonesia*

Australia would transfer asylum seekers from boats intercepted or rescued by it to Indonesia, after a brief screening process to check that those persons are not fleeing persecution in Indonesia.<sup>50</sup> Australia would rely on assurances from Indonesia that it will not engage in prohibited *non-refoulement* of transferred persons.<sup>51</sup> Taking this assurance from Indonesia is imperative; Indonesia is not presently a party to either the *Refugee Convention*,<sup>52</sup> which contains the Article 33 *non-refoulement* obligation, or the *Refugee Protocol*.<sup>53</sup>

Indonesia would provide temporary protection<sup>54</sup> to transferred persons, and assume legal responsibility for their processing. Refugee processing in Indonesia is currently

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<sup>47</sup> Ibid cl 2.1.

<sup>48</sup> Ibid cl 2.2.

<sup>49</sup> Ibid cl 5.

<sup>50</sup> Brennan, above n 2. This is necessary to ensure Australia is not *refouling* persons upon transferring them back to Indonesia, ie that such persons have not fled persecution in Indonesia.

<sup>51</sup> Ibid.

<sup>52</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*'). Neither is Indonesia a party to the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

<sup>53</sup> However, *non-refoulement* is considered, at least by some, to be a rule of customary international law and so is applicable to all states, regardless of whether they are party to the *Refugee Convention*. See, eg, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 248 (emphasis in original):

The principle of non-refoulement can thus be seen to have crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.

<sup>54</sup> For discussion of the idea of 'temporary protection', see Alice Edwards, 'Temporary Protection, Derogation and the 1951 *Refugee Convention*' (2012) 13 *Melbourne Journal of International Law* 595.

undertaken by the United Nations High Commission for Refugees ('UNHCR').<sup>55</sup> Documentation issued by the Office of the UNHCR in Indonesia is in practice recognised by the Indonesian government as a basis for not deporting an individual, but it is the UNHCR which assumes processing responsibility.<sup>56</sup> This would change under the arrangement, and Indonesia (not the UNHCR or Australia) would assume legal responsibility for processing persons transferred to it. This has to be the case for two main reasons. First, the UNHCR may not agree to continue responsibility for processing under such an arrangement between Australia and Indonesia. Traditionally the UNHCR has been reluctant to bear the processing responsibility under the transfer type arrangement envisaged here.<sup>57</sup> Concerns are not to assume state responsibilities or preclude the building of 'local asylum systems'.<sup>58</sup> Second, the UNHCR has limited resources which are already spread thinly.<sup>59</sup> Again, this suggests that the UNHCR may not agree to continue its current processing role in Indonesia under this arrangement.<sup>60</sup>

Neither should Australia, on an extra-territorial basis, assume processing responsibility in Indonesia. That would also undermine local asylum systems being built in Indonesia, and in any case Indonesia is unlikely to accept Australia applying its asylum laws within Indonesia.<sup>61</sup> It is not advisable that Australia conduct processing in Indonesia. This would expose Australia to uncertain international legal liability for any legal contraventions in Indonesia.<sup>62</sup> The informed view is that Indonesia, not Australia or the UNHCR, must assume processing responsibility. Australia should,

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<sup>55</sup> This follows from the fact, as noted, that Indonesia is not a party to the *Refugee Convention* or *Refugee Protocol*.

<sup>56</sup> The UNHCR issues letters verifying a person is seeking refugee status, and following the Refugee Status Determination process issues letters of determination of that refugee status to refugees. See Jesuit Refugee Service, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (Clung Wicha Press, 2012) 17; Crock, above n 8, 259–60.

<sup>57</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016). See also United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 1: 'The primary responsibility to provide protection rests with the State where asylum is sought.'

<sup>58</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* However, Feller noted that the UNHCR has in recent times signalled a willingness to assume a more 'hands on role'.

<sup>61</sup> *Ibid.*

<sup>62</sup> United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 3:

In addition, the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.

however, with the UNHCR, provide significant financial and technical support to Indonesia to ensure it can properly assume this processing responsibility.<sup>63</sup>

#### 4 *Enhancing Protection in Indonesia*

Australia must also improve refugee protection in Indonesia as part of this arrangement.<sup>64</sup> Empirical research conducted by the author shows that conditions for refugees in Indonesia do not meet basic standards. Presently, asylum seekers in Indonesia elect to enter detention to receive appropriate material assistance and more timely access to status determination processes.<sup>65</sup> Outside of detention, there is less guarantee of these needs being met. Until conditions in Indonesia improve, the arrangement cannot properly proceed.<sup>66</sup> Asylum seeker transfers cannot proceed if international human rights law standards in Indonesia are not met.<sup>67</sup> The UNHCR *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers* (May 2013), while not ruling out transfers of persons to Indonesia as proposed,<sup>68</sup> sets out guiding principles to assess their legality and appropriateness. Australia (as the transferring state) would be obliged to ensure conditions in

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<sup>63</sup> Indonesia does not currently have the administrative infrastructure or local laws necessary to support an asylum processing system: Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>64</sup> Brennan refers to Australia cooperating ‘more closely with Indonesia’ to provide ‘basic protection’, and to the negotiation of minimum safeguards for asylum seekers sent to Indonesia: Brennan, above n 2.

<sup>65</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>66</sup> On a related point, the Australian High Court has previously confronted the issue of whether asylum seeker transfers to another country, namely Malaysia, could lawfully proceed under Australian domestic law. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 it was held that the Minister lacked power under Australia’s migration legislation to effect transfers of asylum seekers to Malaysia in pursuance of a 2011 bilateral arrangement between those two countries. The court focussed on the lack of legal protections for transferred asylum seekers, preferring not to base its’ reasoning on material conditions for refugees within Malaysia. See further Michelle Foster, ‘The Implications of the Failed “Malaysia Solution”’: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13 *Melbourne Journal of International Law* 395; Naomi Hart, ‘*Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)’ (2011) 18 *Australian International Law Journal* 207.

<sup>67</sup> United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 3: ‘transfer arrangements of asylum-seekers for asylum processing need to take into account and ensure that: applicable refugee and human rights law standards are met ...’.

<sup>68</sup> *Ibid* 1, noting that ‘asylum-seekers and refugees should *ordinarily* be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them’ (emphasis added).

Indonesia (as the receiving state) *in practice* meet, among other things, ‘accepted international standards’.<sup>69</sup> According to the Guidance Note, this means that transferees to Indonesia must be met with appropriate reception arrangements, access to health, education and basic services, safeguards against arbitrary detention and, if they have specific needs, assistance for these.

In Indonesia, improving refugees’ immediate needs for food, shelter and water, among other things, are priority needs.<sup>70</sup> Australia could quickly make a significant impact by improving material needs and other conditions — ensuring that the proposed arrangement may properly proceed. This is because the proportion of refugees in Indonesia is small compared to elsewhere in the region.<sup>71</sup> While Australia already funds the International Organization for Migration (‘IOM’) in Indonesia,<sup>72</sup> concerns exist that funding is being used for detention facilities in Indonesia.<sup>73</sup> Greater levels of funding for Indonesian refugees are also needed,<sup>74</sup> with the qualification that any funding must actually reach refugees in the form of having their basic needs met.

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<sup>69</sup> Ibid 2.

<sup>70</sup> Refugee Council of Australia, ‘Improving Refugee Protection in Asia-Pacific: How Australia Can Make a Practical Difference’ (Discussion Paper, Refugee Council of Australia, July 2015) 4 <<http://www.refugeecouncil.org.au/wp-content/uploads/2014/08/Australias-response-to-region-150720.pdf>>.

<sup>71</sup> There were 5957 refugees and 7591 asylum seekers residing in Indonesia in 2015: United Nations High Commission for Refugees, *Indonesia*, Global Focus <<http://reporting.unhcr.org/node/10335>>. In contrast, Malaysia was home to 94 030 refugees (as well as 60 415 asylum seekers) in 2015: United Nations High Commission for Refugees, *Malaysia*, Global Focus <<http://reporting.unhcr.org/node/2532>>.

<sup>72</sup> Department of Immigration and Border Protection, *Annual Report 2014–15* (Report, Department of Immigration and Border Protection, September 2015) 143:

Under the IOM Regional Cooperation Arrangements (RCA), the Department funded IOM to provide food, accommodation, emergency medical assistance and counselling to asylum seekers in the Indo-Pacific region, primarily in Indonesia in 2014–15. Under the RCA, IOM also provided assistance to people who wish to return voluntarily to their country of origin.

<sup>73</sup> See generally Savitri Taylor, ‘Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility’ (2010) 33 *UNSW Law Journal* 337; Amy Nethery and Carly Gordyn, ‘Australia–Indonesia Cooperation on Asylum-Seekers: A Case of “Incentivised Policy Transfer”’ (2014) 68 *Australian Journal of International Affairs* 177, 190:

the cooperation between Australia and Indonesia is one more bilateral relationship ... that works to undermine the refugee protection regime. The implications for asylum-seekers in the Asia-Pacific region are substantial: to seek asylum in the region is expensive, dangerous, damaging and a long process.

<sup>74</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016):

the funding [to Indonesia] is clearly not enough and it’s created this perverse set of conditions where people basically believe they need to be in detention to get access to

Indonesia, like many Southeast Asian states, is still developing. It will take time for protection conditions to improve, even with Australian support. Difficulty exists then in knowing exactly when conditions for refugees in Indonesia will be sufficient for this arrangement to proceed. One view is that transfers to Indonesia should only occur if conditions in Indonesia do not violate *any* human rights standards. Alternatively, and the author's view tends in this direction, there should initially be room for *some* flexibility.<sup>75</sup>

As a minimum, transfers may only proceed if refugees in Indonesia have their basic material needs met, are properly safe from *refoulement*, and have access to timely status determination. Beyond this, requiring conditions in Indonesia to *fully* satisfy other international human rights standards as a pre-condition to the arrangement proceeding may preclude the arrangement from ever lifting off. Beyond the minimum, protection conditions can continue to be levelled up once the arrangement is operational. It is more beneficial for arrangements, such as that proposed, to proceed as soon as possible to spark cultural change in Southeast Asia, a region that does not generally exhibit overt concern for refugees, who have particular needs distinct from other migrants.

To conclude, Australia must ensure adequate refugee protection conditions in Indonesia. This is necessary for it to transfer persons back to Indonesia in accordance with international law. Additionally, this would communicate to the Indonesian government that Australia is serious about sharing responsibility for refugees, thus improving prospects for Indonesia to cooperate to make the whole arrangement a reality.<sup>76</sup> Also, Australia should improve conditions for refugees in Indonesia as by doing so it would gain an immediate benefit. Refugees in Indonesia will be less likely to take a boat to Australia if their essential needs are met in Indonesia.<sup>77</sup>

### 5 Resettlement in Australia

Australia would permanently resettle refugees from Indonesia. Any resettlement places offered by Australia under the arrangement should be additional to Australia's

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support through IOM. You can see how ... those conditions come about. IOM's got a very limited budget so they decided to prioritise those in detention as those being in greatest need ...

<sup>75</sup> See Brennan, above n 2:

Just as people living in neighbouring countries do not have an entitlement from the Australian government to the same living standard as the poor and welfare dependent in Australia, Australia has no obligation to provide the same welfare assistance to asylum seekers resident in other countries.

<sup>76</sup> Keane Shum, 'A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration' (2011) 1 *Oxford Monitor of Forced Migration* 60, 65.

<sup>77</sup> Refugee Council of Australia, above n 70, 4: 'If refugees are able to get their most pressing needs met, they are much more likely to remain where they are while durable solutions are developed.'

existing resettlement quota. If that were not the case, and the places were to come from the existing quota, the arrangement would merely reduce refugee protection elsewhere so as to enable Australian resettlement under this arrangement to proceed. Feller makes that point and considers that ‘from an international perspective’ a reduction in resettlement places in this way ‘would be very unfortunate.’<sup>78</sup> Such a reduction cannot be consistent with the overall goal of increasing refugee protection across multiple countries.

Resettlement is a particularly important aspect of this arrangement. Other ‘durable solutions’<sup>79</sup> may not be available for those found to be refugees, under this arrangement, in Indonesia.<sup>80</sup> Local integration on a permanent basis is not formally offered to refugees by most Southeast Asian states hosting refugees,<sup>81</sup> including Indonesia, something which is unlikely to change immediately. Similarly, safe repatriation to their country of origin is not an option for many refugees in the region. For refugees coming from Afghanistan and Myanmar, where protracted conflicts continue, that is the case. Resettlement by Australia is thus fundamental to this arrangement.

In terms of resettlement numbers, Australia is unlikely to resettle all persons who are refugees in Indonesia under this arrangement. A quota approach would most likely be taken, with Australia reassessing its numerical commitment each year. This means that Indonesia would need to explore local integration of refugees not resettled under the Australian commitment (or by other countries). In this way, the arrangement would not merely replicate the unsustainable patterns of the Comprehensive Plan of Action (‘CPA’) during the Indochinese refugee crisis,<sup>82</sup> whereby developed states such as Australia assumed the entire resettlement burden. Davies considers that the

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<sup>78</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>79</sup> Three durable solutions for refugees are outlined in Core Group on Durable Solutions, ‘Framework for Durable Solutions for Refugees and Persons of Concern’ (Framework, the United Nations High Commission for Refugees, May 2003) 5–6. These are: (1) local integration in country of asylum; (2) resettlement to a third country; and (3) safe repatriation in country of origin.

<sup>80</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>81</sup> Savitri Taylor, ‘Civil Society and the Fight for Refugee Rights in the Asia Pacific Region’ in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 35, 36.

<sup>82</sup> For a discussion of the Indochinese refugee crisis, see United Nations High Commissioner for Refugees, ‘Flight from Indochina’ in Mark Cutts (ed), *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action* (Oxford University Press, 2000) 79:

The upheavals which followed the communist victories in 1975 in the former French colonies of Indochina — Viet Nam, Cambodia and Laos — caused more than three million people to flee these countries over the next two decades. The sustained mass exodus from the region and the massive international response to the crisis thrust UNHCR into a leading role in a complex, expensive and high profile humanitarian operation.

CPA ‘institutionalised non-compliance’ by Southeast Asian states with refugee law.<sup>83</sup> Southeast Asian states were able to compel the international community to provide resettlement places (via the CPA) by threatening non-compliance with refugee law.<sup>84</sup>

Seeking that Indonesia offer refugee local integration on a formal basis may be a significant hurdle to overcome. Financial aid (including for development) and resettlement places (offered by Australia here) could, it has been suggested, be linked to commitments by states to locally integrate refugees.<sup>85</sup> Depending on prevailing diplomatic and in-country conditions, the proposed arrangement could incorporate such trade-off aspects.

### *B Deterrence Alongside Protection*

Alongside the protection aspects discussed above, aspects of this arrangement seek to deter asylum seekers. The interception of persons travelling by boat from Indonesia to Australia, and transfer of these people back to Indonesia for processing, renders these journeys futile. These deterrence aspects are justified here.<sup>86</sup> Irregular boat journeys, and the people smuggler industry facilitating these, are particularly dangerous. The UNHCR considers that ‘mixed maritime movements in South-East Asia were three times more deadly than in the Mediterranean last year’.<sup>87</sup> Deterring these journeys does have a humanitarian basis.

Deterrence must not, however, come at the expense of refugee protection. The arrangement as proposed ensures that this is not the case through the improvement of refugee conditions in Indonesia (to enable transfers to proceed), and the resettlement of refugees in Australia. This sets it apart from Australia’s current arrangements with Nauru and PNG, which violate the dignity of hundreds of men, women and children by detaining persons in sub-human conditions and not offering genuine prospects for resettlement.<sup>88</sup>

Transfers of persons back to Indonesia for processing should not raise concerns, as long as the elements discussed above are implemented, especially that (i) Australia first sets about enhancing material conditions in Indonesia for refugees and asylum

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<sup>83</sup> Sara E Davies, *Legitimising Rejection: International Refugee Law in South East Asia* (Martinus Nijhoff Publishers, 2008) 188.

<sup>84</sup> *Ibid* 226.

<sup>85</sup> Shum, above n 76, 60; Anne McNevin, ‘Why We Would Gain from a Regional Approach to Refugee Protection’, *Inside Story* (online), 31 July 2013 <<http://insidestory.org.au/why-we-would-gain-from-a-regional-approach-to-refugee-protection>>.

<sup>86</sup> Brennan, above n 2.

<sup>87</sup> Andreas Needham, United Nations High Commission for Refugees, ‘UNHCR Calls for Safer Alternatives to Deadly Bay of Bengal Voyages’ (Press Briefing, 23 February 2016) <<http://www.unhcr.org/56cc51c76.html>>.

<sup>88</sup> See Brennan, above n 2: ‘There would be no need to try unprincipled, unworkable deterrents like offshore processing in Nauru or Manus Island or offshore dumping in Malaysia.’

seekers and offers significant resettlement places for Indonesian refugees; and (ii) Indonesia accepts legal responsibility for refugee processing. Transfers back to Indonesia should thus not involve the return of persons to persecution, noting that Indonesia is mostly a transit country for refugees to Australia (not a refugee source country), and to that extent transfers there should generally not enliven the *non-refoulement* obligation.<sup>89</sup>

### *C Distinguishing the EU–Turkey Deal*

Detractors may liken the proposed Australia–Indonesia arrangement (or indeed the Pacific Solution Mark II) to the problematic EU–Turkey deal entered into on 18 March 2016.<sup>90</sup> Under that deal, irregular migrants travelling from Turkey to the Greek Islands can, as of 20 March 2016, be returned to Turkey. The European Union (‘EU’) bears the costs of these returns, described as ‘a temporary and extraordinary measure which is necessary to end the human suffering and restore public order.’<sup>91</sup> The ultimate goal is ‘to end the irregular migration from Turkey to the EU.’<sup>92</sup>

Certainly there are similarities between the EU–Turkey deal and the Australia–Indonesia arrangement set out. Both envisage the transfer of asylum seekers by one country to another (from Australia to Indonesia, and from Greece to Turkey), as a way to deter irregular boat movement. These are the similar deterrence aspects. Both involve a wealthier partner agreeing to resettle refugees processed outside its territory (the EU agrees to resettle those certified to be refugees from Turkey,<sup>93</sup> just as Australia would from Indonesia under the proposal set out). Both arrangements also see financial or other support given by the wealthier partner to a less developed country temporarily hosting refugees. Turkey receives EU funding for refugees under that deal. An additional €3 billion from the EU to enhance material conditions in Turkey has been allocated, once an existing EU allocation of €3 billion under

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<sup>89</sup> Ibid.

<sup>90</sup> Jeff Crisp tweeted on 17 March 2016: ‘There’s a good essay to be written on the way that the EU–Turkey deal has been informed by Australia’s appalling refugee policy. Any takers?’ Jeff Crisp (17 March 2016) Twitter <<https://twitter.com/JFCrisp/status/71042001677318401>>.

<sup>91</sup> Council of the European Union, ‘EU–Turkey Statement’ (Media Release, 144/16, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

<sup>92</sup> Ibid.

<sup>93</sup> The EU will resettle one Syrian from Turkey for each Syrian it returns to Turkey under the transfer mechanism (up to a specified limit). As at 18 March 2016, 18 000 resettlement places remained from an earlier commitment by EU Member states. Further resettlement places will, if needed, similarly be offered on a voluntary basis, limited to 54 000 places. In selecting particular persons for resettlement, the UN Vulnerability Criteria are used. Priority is also ‘given to migrants who have not previously entered or tried to enter the EU irregularly’: Council of the European Union, above n 91.

the Facility for Refugees in Turkey is near exhausted.<sup>94</sup> Similarly, Australia would provide increased funding to Indonesia, as part of that proposed arrangement, to enhance conditions for refugees in Indonesia.

A main problem with the EU–Turkey deal is that conditions in Turkey are not adequate for EU transfers there to proceed.<sup>95</sup> The EU should not be returning persons with clear protection needs to Turkey while this is the case.<sup>96</sup> Persons returned to Turkey may not practically be safe from the risk of *refoulement*,<sup>97</sup> let alone have their basic material needs met. This major criticism cannot equally be levelled at the proposed Australia–Indonesia arrangement. Protection of refugees and asylum seekers in Indonesia is a key feature of that arrangement, and the context is entirely different.

With regard to context, the EU–Turkey deal responds to the Syrian refugee situation. By contrast, the Australia–Indonesia arrangement is not a direct response to any particular crisis or conflict. Refugee numbers in Indonesia thus pale in comparison to the numbers seeking to enter the EU recently via boat from Turkey to the Greek Islands.<sup>98</sup> Because of this difference, and as discussed, Australian efforts to improve conditions for refugees in Indonesia could make a sizeable impact relatively quickly.

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<sup>94</sup> Ibid.

<sup>95</sup> A recent decision of a ‘secondary appeals panel’ in Lesbos, Greece, casts doubt on whether the EU–Turkey deal can proceed in this way. The decision finds Turkey not to be ‘a safe third country to send refugees back to’: Jon Stone, ‘EU Plan to Send Syrian Refugees Back to Turkey Jeopardised by Greek Court’, *The Independent* (online), 20 May 2016 <<http://www.independent.co.uk/news/world/europe/refugee-crisis-eu-syrian-refugees-turkey-blocked-by-greek-court-a7039886.html>>. Whether the EU–Turkey deal is destined to fail on this basis remains to be seen.

<sup>96</sup> Amnesty International (‘AI’) refers to the deal as ‘horse trading with a country that has an inadequate record of respecting’ the right to seek asylum. According to AI, Turkey refuses to offer effective protection (as distinct from ‘temporary protection’) to non-Europeans and has ‘repeatedly pushed Syrians back into the war zone and closed borders to others seeking to flee’: Salil Shetty, Ken Roth and Catherine Woollard, *Say No to a Bad Deal with Turkey* (17 March 2016) Amnesty International <<https://www.amnesty.org/en/latest/news/2016/03/say-no-to-a-bad-deal-with-turkey/>>.

<sup>97</sup> Cf Council of the European Union, above n 91: ‘This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.’

<sup>98</sup> Comments from the UNHCR support this argument. See Volker Türk, ‘Statement’ (Speech delivered at the 2<sup>nd</sup> Special Meeting on Irregular Migration in the Indian Ocean, Bangkok, 3–4 December 2015):

Compared to other parts of the world, it is important to keep things in perspective. By way of example, the total number of migrants and refugees in the Bay of Bengal and Andaman Sea in May and June 2015 is matched or even doubled in many parts of the Middle East and Europe every day. This suggests that the numbers we are seeing in this region can be managed. Only about 1,000 people have made the sea journey in the Bay of Bengal and Andaman Sea since September 2015.

Once this occurs, transfers there can justifiably proceed in accordance with the other elements of the arrangement set out earlier. Not so for EU transfers of persons to Turkey. Even with the overall €6 billion pledged by the EU, Turkey cannot properly be expected to sufficiently enhance conditions for the over 2 million refugees and asylum seekers living there,<sup>99</sup> such that people transfers back to Turkey become justifiable. This shows that both arrangements apply to vastly different refugee contexts and so should not be subject to the same critique. The Australia–Indonesia arrangement, as set out, is an ethically-sound policy response to those countries’ shared refugee issues.

### D *Obstacles*

The focus shifts now from the structural and legal dimension to the diplomatic dimension. Consideration is given to why no Australia–Indonesia arrangement has yet emerged. As will be shown, a number of obstacles exist to an Australia–Indonesia arrangement. As with matters of international law compliance generally, these relate to underlying state concerns which preclude action being taken.

#### 1 *A Perceived Lack of Incentive*

The greatest obstacle to this arrangement is states’ *perceived* lack of incentive to enter into it. States have freedom to choose which international arrangements to sign up to.<sup>100</sup> It follows that unless compelling incentive exists, states will typically not sign onto arrangements which may limit state sovereignty.

From Australia’s perspective, it may be argued that there is no incentive for it to enter an arrangement with Indonesia. Offshore processing on Nauru and PNG, and *unilateral* maritime interdiction, so the argument goes, serve Australia’s interests by stopping refugee boats from reaching Australia’s shores. If this analysis is accepted, there would appear to be no reason to seek an alternative arrangement with Indonesia. Underpinning this view is what Suhrke calls ‘the seductive logic of unilateral action’.<sup>101</sup> This logic holds that, unlike in a military context, in refugee matters cooperation with other states is unnecessary. States can respond to refugee matters without outside help. Suhrke states that even ‘small and weak’ states have been able to respond to refugees.<sup>102</sup> Australian policies appear to follow this logic by not cooperating with countries in the region with which Australia shares refugee problems.<sup>103</sup> To the extent it can be said that Australia adopts this logic, this operates as a significant

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<sup>99</sup> United Nations High Commission for Refugees, *Turkey*, Global Focus <<http://reporting.unhcr.org/node/2544?y=2016#year>>.

<sup>100</sup> This is referred to in international law as the Principle of Consent.

<sup>101</sup> Astri Suhrke, ‘Burden-Sharing during Refugee Emergencies: The Logic of Collective Versus National Actions’ (1998) 11 *Journal of Refugee Studies* 396, 403.

<sup>102</sup> *Ibid* 401.

<sup>103</sup> PNG and Nauru are not part of the region’s refugee problems in the sense that neither produces significant numbers of refugees, nor are they transit countries for refugees.

obstacle to Australia pursuing, and cooperating under, a bilateral arrangement with Indonesia.

From Indonesia's perspective, the arrangement with Australia may also be seen to lack incentive. At least four reasons can be identified for this. The first relates to how refugees, and refugee policy, are perceived in Indonesia. Indonesia's refugee population is small, relative to its overall population,<sup>104</sup> and compared to refugee populations elsewhere.<sup>105</sup> It follows that refugee policy may not be seen as significant enough politically within Indonesia so as to justify commitments under the envisaged arrangement.<sup>106</sup> More likely, refugees may not be perceived as worthy of attention at all. Negative perceptions of refugees in Indonesian society may also be an obstacle here. This includes perceptions that refugees and asylum seekers impact the national budget, and represent social and security problems.<sup>107</sup> The perspectives that refugees are an insignificant issue, or even persons likely to cause problems for the state, negate any incentives for an arrangement aimed at their protection.

Second, the Indonesian government may perceive asylum seekers and refugees as Australia's responsibility. Informing this particular view is the reality that the majority of asylum seekers are only in Indonesia to travel to Australia, and perceptions (admittedly not without basis) that armed conflicts Australia has participated in have made these persons refugees.<sup>108</sup> Similarly, Indonesia may consider that as a developing country it already does enough by affording refugees temporary protection pending resettlement.<sup>109</sup> For these reasons, Indonesia may view refugees

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<sup>104</sup> Veronica Koman, 'Indonesia Has Better Option for Refugee Issue', *The Jakarta Post* (online), 10 September 2015 <<http://www.thejakartapost.com/news/2015/09/10/indonesia-has-better-option-refugee-issue.html>>: 'The 13,170 refugees and asylum seekers currently present in Indonesia are a drop in our 250 million-strong ocean.'

<sup>105</sup> Cf Malaysia, a country which as previously noted was home to 94,030 refugees (as well as 60,415 asylum seekers) in 2015: United Nations High Commission for Refugees, above n 71.

<sup>106</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>107</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

<sup>108</sup> See Toohey, above n 2, 72 for a summary of the views of Indonesian law expert and academic Tim Lindsey:

Indonesia's leaders resented the view that they should be doing more to stop the boats, because asylum seekers were only in Indonesia to get to Australia; they saw it as hypocritical that we would not accept asylum seekers, yet expected they should; they resented our Fortress Australia mindset; they viewed the Afghanistan and Iraq wars, which Indonesia did not support, as having created an asylum problem within Indonesia; and furthermore, Lindsey argued, Indonesia was more interested in building its diplomatic ties elsewhere and didn't see great political value in assisting Australia.

<sup>109</sup> Taylor, 'Civil Society and the Fight for Refugee Rights in the Asia Pacific Region', above n 81, 51.

as Australia's responsibility, and thus be reticent to itself assume responsibility under the proposed arrangement.

Third, Indonesia may consider that the status quo adequately serves its interests, thereby ruling out any incentive for a new arrangement. Dave McRae, a former research fellow at the Lowy Institute for International Policy's East Asia Program, makes the point that 'boat departures [to Australia] have largely allowed Indonesia to bypass' finding durable solutions for refugees.<sup>110</sup> Australia's existing hard line asylum policies may also assist Indonesia to practically avoid its refugee responsibility.<sup>111</sup> Australia's policies of offshore processing in PNG and Nauru, refusal to resettle in Australia, and maritime interdiction effectively close off Australian borders to boat arrivals. Indonesia should then (eventually) become undesirable as a transit country en route to Australia because there would be no prospect of getting to Australia. For this reason, Indonesia may prefer the status quo, than to assume obligations under an arrangement.

Fourth, and finally, the arrangement may be seen by Indonesia as potentially damaging to its relations with other Southeast Asian states. Specifically, the arrangement may offend the non-interference principle,<sup>112</sup> which has operated to preclude discussion of refugees within ASEAN.<sup>113</sup> The principle holds that Southeast Asian states will not interfere in the affairs of other states.<sup>114</sup> Indonesia may be wary of an arrangement with Australia as (indirectly) offending the principle. This is because other Southeast Asian states may feel pressure to assume refugee responsibilities if Indonesia does so under the arrangement with Australia. Indonesia may thus consider the arrangement not to be in its broader regional interests and as a member of ASEAN.

In short, Australia and Indonesia both have reason to perceive minimal, or no incentive, to pursue the arrangement. This perception presents a significant obstacle to a successful arrangement.

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<sup>110</sup> Quoted in Toohey, above n 2, 71.

<sup>111</sup> Ibid 89: 'It was suggested by one commentator, Ross Taylor, the chairman of the WA-based Indonesia Institute, that Indonesia quietly saw itself as the beneficiary of the turn-back policy, because it was helping solve its own asylum-seeker problems.'

<sup>112</sup> For Davies, the potential for violation of the non-interference principle is seen as another reason for why Southeast Asian states have not committed to international refugee law: Davies, *Legitimising Rejection*, above n 83, 9.

<sup>113</sup> Bhatara Ibnu Reza, 'Challenges and Opportunities in Respecting International Refugee Law in Indonesia' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 117, 132–3.

<sup>114</sup> *Charter of the Association of Southeast Asian Nations*, opened for signature 20 November 2007, (entered into force 15 December 2008) art 2(2)(a), whereby the members agree to 'respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States'. ASEAN was established on 8 August 1967. See above n 4 for its current Member States.

## 2 *Fear of an Arrangement Becoming a ‘Pull Factor’*

Another obstacle is a fear that this arrangement will serve as a ‘pull factor’.<sup>115</sup> Refugee protection will be enhanced under the arrangement. Indonesia is to assume processing responsibility. Australia would offer resettlement places to refugees processed in Indonesia,<sup>116</sup> and seek to improve conditions for asylum seekers in Indonesia. A fear is that these improvements will induce more refugees to seek the help of Australia and Indonesia under the arrangement.<sup>117</sup>

On the Indonesian side, this fear can be understood. Indonesia already struggles to deal with irregular migration from Malaysia.<sup>118</sup> The prospect that migration to Indonesia may increase under an arrangement would therefore likely concern the Indonesian government. Whether justifiable or not, concerns may relate to increased economic costs and threats to social cohesion from migration.<sup>119</sup> Also, without an established refugee status determination process, Indonesia cannot properly distinguish refugees from those who may lawfully be returned due to not qualifying for international protection. This compounds pull factor concerns.

Even if Indonesia were to implement a proper refugee status determination process, the fear of the pull factor may remain. Persons not found to be refugees under this arrangement, where they cannot be returned home, would have no option but to remain indefinitely in Indonesia. Feller points out:

it is not easy, it has not been easy for a long time to return people for different reasons, partly because of administrative obstacles put up in the way of return by their countries of origin themselves. Countries of origin are quite keen to have a lot of their population dispersed in a kind of diaspora which is sending back remittances and ... a number of countries have traditionally ... put a lot

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<sup>115</sup> Two interviewees perceived this as an obstacle to an arrangement: Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016); Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>116</sup> Cf Current Australian government policy which is that asylum seekers who are found to be genuine refugees by the UNHCR in Indonesia on or after 1 July 2014 will not be resettled in Australia: Department of Immigration and Border Protection, *Operation Sovereign Borders*, Australian Government <<http://osb.border.gov.au/en/In-Australia>>.

<sup>117</sup> The same fear cannot be said to exist in respect of Australia’s arrangements with each of Nauru and PNG, which have in practice not operated as a pull factor attracting refugees to those places. This is because those arrangements do not protect refugees, but rather are focussed on punitive deterrence. Conditions in PNG and Nauru may not be seen by refugees as holding out genuine possibility of a new life.

<sup>118</sup> Toohey, above n 2, 40.

<sup>119</sup> Davies offers these as general reasons for Southeast Asia’s lack of commitment to international refugee law: Davies, *Legitimising Rejection*, above n 83, 10–12.

of obstacles in the way of return of their nationals because they actually do not want them back. They want them to find work somewhere and send back money. Indonesia could fear that it would be left with a sizeable number of people for whom there is no solution, which will never be taken on resettlement, who cannot be returned ...<sup>120</sup>

This provides a further basis for Indonesia to be wary of the arrangement.

Pull factor concerns also arise on the Australian side. Potential for increased migration under the arrangement may translate into uncertainty around the number of resettlement places Australia may need to provide. As noted, most asylum seekers coming to Australia in the past have had clear protection needs.<sup>121</sup> Australia's fear of the arrangement may not be unfounded, given this reality. The above discussion shows pull factor concerns may operate as a disincentive for each country to pursue the arrangement.

### 3 *The Security Discourse*

The way refugees are perceived can also undermine successful refugee arrangements, especially when protection is the overall imperative. Kneebone traces the evolution of a discourse that sees refugees as a security threat to nation states; a so-called 'security discourse'.<sup>122</sup> This, and related characterisations of refugees as a political embarrassment, threat to sovereignty and social identity,<sup>123</sup> all underplay 'the refugee' as one in need of protection, and so are contrary to proposed arrangements, such as between Australia and Indonesia, to protect refugees.<sup>124</sup>

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<sup>120</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>121</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016). See also Refugee Council of Australia, 'Government Figures Show Boat Arrivals are not "Economic Migrants"' (Media Release, 1 March 2016) <<http://www.refugeecouncil.org.au/latest/6055/>>.

<sup>122</sup> Susan Kneebone, 'ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate, 2014) 295, 298–301.

<sup>123</sup> *Ibid* 297–8.

<sup>124</sup> Susan Kneebone, 'The Labelling Problem in Southeast Asia's Refugee Crisis', *The Diplomat* (online), 12 August 2015 <<http://thediplomat.com/2015/08/the-labeling-problem-in-southeast-asias-refugee-crisis/>> explains the 'regional securitized discourse' and how terms used by ASEAN such as 'irregular migration' create ambiguity as to which persons are properly entitled to protection as 'refugees'.

Important multilateral forums, such as ASEAN and the Bali Process,<sup>125</sup> have been infiltrated by the security discourse.<sup>126</sup> For example, ASEAN, of which Indonesia is a member, addresses refugee issues within the security arm known as the ASEAN Political-Security Community.<sup>127</sup> Refugees are mentioned there infrequently.<sup>128</sup> This is a significant obstacle given that both ASEAN and the Bali Process are key diplomatic channels through which an agreement such as that proposed could be pursued.

#### *4 Problems with the Bali Process*

The Bali Process is a key diplomatic forum in which Australia and other countries, including Indonesia, discuss forced migration challenges. Members have recently described the Bali Process ‘as a voluntary, inclusive, non-binding forum for policy dialogue, information sharing and capacity building’.<sup>129</sup> Since being established in 2002, membership has grown to 44 countries as well as non-state actors, including: the UNHCR, the IOM, and the UN Office on Drugs and Crime.

At the most recent Bali Process ministerial meeting in March 2016, recommendations exhibited a refugee protection focus, probably explained by the Southeast Asian refugee crisis having occurred only months earlier.<sup>130</sup> Ministers recognised the need to expand ‘safe, legal and affordable migration pathways’ to provide an alternative

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<sup>125</sup> The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (*The Bali Process*) is the main regional forum in which countries meet to discuss asylum issues. It was established in 2002 and Ministerial meetings occur every two years, with Australia and Indonesia as co-chairs. The Bali Process is a key, but non-binding, diplomatic forum in which Australia, Indonesia and other countries discuss forced migration challenges.

<sup>126</sup> Kneebone, ‘ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States’, above n 122, 300.

<sup>127</sup> *Ibid* 305.

<sup>128</sup> *Ibid* 306:

Refugees are mentioned within the ASEAN Community, only in the APSC Blueprint, and in the context of ‘post-conflict peace building’ (see B.3), and in particular under the heading at B.3.1., namely ‘Strengthen ASEAN humanitarian assistance’. Thus refugees are conceived doubly narrowly, both within a security paradigm and as ‘victims of conflict’, for whom ‘orderly repatriation’ and resettlement (as internally displaced persons) is promoted. There is no reference to basic principles of *non-refoulement* or asylum. It is also significant that despite the reference in the APSC Blueprint to promoting non-discrimination on the basis of race, or religion, there is no evidence of any understanding that refugees within the region suffer from such discrimination.

<sup>129</sup> ‘Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime’ (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 5.

<sup>130</sup> This contrasts with earlier meetings, which have focussed on security issues and the criminalisation of people smuggling and trafficking.

to people smuggler-facilitated journeys.<sup>131</sup> Encouragement was given to consider opening up labour migration opportunities for those with international protection needs.<sup>132</sup>

While it remains to be seen if the recommendations from the March 2016 meeting will result in significant policy changes, history does not provide a basis for optimism.<sup>133</sup> Past Bali Process developments, such as the Regional Cooperation Framework<sup>134</sup> and the Regional Support Office,<sup>135</sup> have so far not produced any significant bilateral or multilateral arrangements that benefit refugees in concrete ways.<sup>136</sup> To say that the Bali Process has provided states with a smokescreen for inaction, masking a general disinclination of its members towards actions for refugee protection, would not be baseless. The Bali Process thus presents something of an obstacle to achieving an effective refugee protection arrangement between Indonesia and Australia. It may also be ineffective at achieving this where the ‘security discourse’<sup>137</sup> masks refugee protection needs,<sup>138</sup> and where its broad membership could inhibit close cooperation between nearby states, such as Australia and Indonesia.

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<sup>131</sup> ‘Co-Chairs’ Statement’ (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 2.

<sup>132</sup> Sam Tyrer, ‘As the Pacific Solution Unravels, Bali Provides a Lead’ (2 November 2016) *Inside Story* (online) <<http://insidestory.org.au/as-the-pacific-solution-unravels-bali-provides-a-lead>>. This article provides further detailed analysis and an overview of key recommendations made at the March 2016 ministerial meeting.

<sup>133</sup> *Ibid.*

<sup>134</sup> The Regional Cooperation Framework (‘RCF’) dates to 2011 and is described by Bali Process members as ‘an inclusive but non-binding regional cooperation framework’: ‘Co-Chairs’ Statement’ (Fourth Ministerial Conference of the Bali Process, Bali, 29–30 March 2011) 3.

<sup>135</sup> The Regional Support Office (‘RSO’) dates to 2012 and exists to develop ‘practical measures to implement the RCF’: see generally ‘Bali Process Steering Group Note on the Operationalisation of the Regional Cooperation Framework in the Asia Pacific Region’ (Fifth Meeting of Bali Process Ad Hoc Group Senior Officials, Sydney, 12 October 2011) 1–2, which recommended the establishment of the RSO; ‘Co-Chairs Statement’ (Fifth Meeting of Bali Process Ad Hoc Group Senior Officials, Sydney, 12 October 2011) 3; ‘Co-Chairs’ Statement’ (Sixth Meeting of Bali Process Ad Hoc Group Senior Officials, Bali, 1 June 2012) 4.

<sup>136</sup> Tyrer, above n 132.

<sup>137</sup> Kneebone, ‘ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States’, above n 122, 298–301.

<sup>138</sup> Sara Davies, ‘Time to Protect Southeast Asia’s Refugees’, *The Diplomat* (online) 12 September 2015 <<http://thediplomat.com/2015/09/time-to-protect-southeast-asias-refugees/>>:

In practice, systems based on deterrence are not likely to deliver the protection that is needed to erode the people smugglers’ business model. Only the facilitation of safe and legitimate avenues for protection can do that. This is what plagues the current Bali Process, and other regional frameworks such as the Bangkok Declaration. All too often regional cooperation has focused more on transference of the problem than on the need for protection solutions.

### 5 Existing Australian Policies

Australia's existing policies damage prospects for an Australia–Indonesia arrangement (and Australian engagement with the region generally). Those policies run counter to cooperation between countries, which in other regions has led to successful regional arrangements.<sup>139</sup> Other countries may believe that Australia is not committed to refugee protection and responsibility sharing in the region.<sup>140</sup> Offshore processing on Nauru and PNG, neither of which have significant refugee problems of their own, sends the message Australia will not engage properly with other countries in the region.<sup>141</sup> One view is that, through those arrangements, Australia shields itself from having to resettle refugees from the region.<sup>142</sup> Mathew and Harley write: 'Australia has inverted the moral responsibility for resettling refugees by sending asylum seekers to developing countries in order to evade the hard legal obligations of allowing unauthorised boat arrivals to seek asylum in Australia.'<sup>143</sup> Similarly, by closing its border to refugees from Indonesia,<sup>144</sup> Australia has created particular difficulties for Indonesia in finding solutions for refugees. An asylum seeker processing backlog has increased in Indonesia.<sup>145</sup> These policies may give Indonesia (and other countries) cause to doubt Australia's bona fides, and thus feed a reluctance to pursue future arrangements with Australia.

Indeed, empirical research confirms that these policies have already impacted diplomatic relations with Indonesia. The Indonesian government perceives Australia's unilateral interception of asylum seeker boats as a violation of Indonesian sovereignty and breaking diplomatic relations.<sup>146</sup> The Indonesian public also takes a view that Australia has breached Indonesian sovereignty.<sup>147</sup> Such negative sentiments generated in Indonesia by Australia's policies suggest the Indonesian government will be unlikely to promote an arrangement with Australia, a country that is domestically unpopular in Indonesia because of its existing asylum policies. In that sense, Australia's policies are a material obstacle to this arrangement.

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<sup>139</sup> See generally Penelope Mathew, 'Responsibility, Regionalism and Refugees: What Lessons for Australia?' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 13.

<sup>140</sup> Ibid 32.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 10.

<sup>144</sup> Department of Immigration and Border Protection, above n 116.

<sup>145</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

<sup>146</sup> Ibid. The interviewee was informed by a conversation with a member of the Indonesian Ministry of Foreign Affairs.

<sup>147</sup> Ibid.

### E *Ways to Move Forward*

The obstacles discussed do not rule out an Australia–Indonesia arrangement becoming a reality. It is possible to develop the necessary incentives for each country to cooperate, to overcome pull factor concerns, and to counter the security discourse. As will become clear though, to achieve these things the Australia–Indonesia bilateral arrangement must be approached as part of a broader strategy of regional engagement, including negotiations and commitments vis-a-vis other states.

#### 1 *Developing the Necessary Incentives*

Perceptions that there is no incentive for this arrangement are just that — perceptions. This means they can change, and that they may not be entirely accurate. Betts, an international relations theorist, has made significant contributions here as regards developing effective refugee arrangements. As he explains: ‘States have not contributed to refugee protection for its own sake but have done so insofar as contributing to this global public good has simultaneously offered linked private benefits in other areas.’<sup>148</sup> By identifying ‘states’ perceived interests in areas such as migration, security, development, and peacebuilding’ and linking those to the ‘refugee issue’, progress can be made to achieve cooperative arrangements among states.<sup>149</sup> In other words, explicit identification of otherwise ‘hidden’ reasons for states to enter refugee arrangements is a way to develop incentives for action. Betts acknowledges this is not the only way to achieve successful arrangements, but the significance of the analysis should not be ignored.<sup>150</sup>

Applying Betts’ analysis to the present context, finding incentives for the proposed Australia–Indonesia bilateral arrangement may not be as difficult as one might think. On the Australian side, the clear incentive to enter such an arrangement with Indonesia is that it is a preferable means of managing migration flows. Detaining asylum seekers in Nauru and PNG, and unilateral boat tow backs, has not served Australia’s interests. Human rights violations, economic expense and strained diplomatic relations make these arrangements ‘unprincipled, unworkable deterrents’ of irregular migration.<sup>151</sup> And as noted, the arrangement with the PNG government for Australia to transfer asylum seekers there may no longer apply following the PNG Supreme Court’s decision in *Namah v Pato*<sup>152</sup> and the subsequent announcement by the PNG Prime Minister that the Manus Island processing facility will close. Australia’s long-term future relationships with Southeast Asian countries will also benefit from Australia sharing responsibility for refugee protection under arrangements such

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<sup>148</sup> Alexander Betts, ‘North–South Cooperation in the Refugee Regime: The Role of Linkages’ (2008) 14 *Global Governance* 157, 174–5.

<sup>149</sup> *Ibid* 174.

<sup>150</sup> *Ibid* 175.

<sup>151</sup> Brennan, above n 2.

<sup>152</sup> (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016).

as with Indonesia.<sup>153</sup> Good diplomatic relations should be enough of an incentive for the Australian government to embrace this refugee arrangement and share burdens, especially given Indonesia's current negative perception of Australia discussed above.

On the Indonesian side, locating the necessary incentives is more difficult. As discussed, a small refugee population combined with the status quo appearing to benefit Indonesia negates any incentives Indonesia may otherwise have had for an arrangement with Australia. An arrangement may fail were Indonesia to seek significant concessions from Australia in other areas to compensate for the lack of incentive,<sup>154</sup> should Australia refuse to give these. While this is a possibility, one must not be so quick to assume such a nihilistic result. The Australia–Indonesia relationship extends beyond refugee issues. Both countries value cooperation on criminal and security matters. In August 2014, for example, both countries reaffirmed the *Lombok Treaty*,<sup>155</sup> which focuses on cooperation in the areas of defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety and security and proliferation of weapons of mass destruction.<sup>156</sup> This reveals that a strong relationship exists between the two countries, at least in respect of these areas.

Admittedly, relations between the countries have been at a low ebb in recent years. The execution of Australians Andrew Chan and Myuran Sukumaran by the Indonesian state for drug offences in 2015 and the trespassing upon Indonesia's territory resulting from Australia's asylum seeker boat turn back operations have had their impact. Yet, it appears the relationship is entering a new period. Australia and Indonesia are currently in talks to strengthen economic ties via a free trade agreement referred to as the 'Indonesia–Australia Comprehensive Economic Partnership Agreement' ('IA-CEPA'). The Australian government's Department of

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<sup>153</sup> Power sees the success of Australia's diplomatic relationships as linked to responsibility sharing, commenting in interview:

If the driving focus of Australian policy remains on deterrence, then we may be able to deter some people in some ways for particular periods of time but the fundamental problems are not being addressed and either we will see movement towards Australia manifested in new ways in the future or *we may see much greater pressure on neighbouring countries which will then become a political problem for Australia because there will be a sense that Australia has helped to create these circumstances by not playing its role in the sharing of responsibility within the region.*

Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016) (emphasis added).

<sup>154</sup> Lindsey states that 'Indonesia would not enter into such an arrangement lightly or quickly. There would need to be serious inducements made. Significant money and resources need to be offered': quoted in Toohey, above n 2, 72.

<sup>155</sup> See *Joint Understanding on a Code of Conduct between the Republic of Indonesia and Australia in Implementation of the Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (signed and entered into force 28 August 2014); *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, signed 13 November 2006, 2649 UNTS 103 (entered into force 7 February 2008) ('*Lombok Treaty*').

<sup>156</sup> *Lombok Treaty*, art 3 (Areas and Forms of Cooperation).

Foreign Affairs and Trade website explained, as at January 2017, that the ‘IA-CEPA will help bring Southeast Asia’s two largest economies closer together forming a key part of Australia’s regional economic integration. Indonesia is already a significant economic and regional partner for Australia.’<sup>157</sup> According to Australian Minister for Trade, Tourism and Investment, Steven Ciobo MP, negotiations are expected to conclude at the end of 2017.<sup>158</sup> Both countries stand to gain significant economic benefits under any free trade agreement.

If Australia could cause Indonesia to see the proposed refugee arrangement with Australia as worthwhile to a successful diplomatic relationship in these other areas (albeit possibly not having much further significance to Indonesia beyond this), Indonesia may then have some incentive for an arrangement with Australia.<sup>159</sup> The question that follows is this: is Australia doing what it can to enhance the Indonesian relationship such that Indonesia would countenance the proposed refugee arrangement in aid of good overall diplomatic relations? That is not possible to answer definitively, but policymakers and diplomats, especially those involved in the IA-CEPA, should take note that there is scope for Australia to create the incentive for Indonesia to enter a refugee arrangement by aligning other areas of the relationship with that goal.

The discussion has shown that an Australia–Indonesia arrangement can be in both countries’ respective national interests, depending on how the relationship is progressed in other areas to create the necessary incentives.

## 2 *Overcoming Pull Factor Concerns*

The pull factor concern that refugee flows will *drastically* increase because of this arrangement is an oversimplification that ignores local context. Southeast Asia’s refugees and asylum seekers are in many cases integrated into local populations. Malaysia is a case in point, where refugees may form part of an irregular

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<sup>157</sup> Department of Foreign Affairs and Trade, *Indonesia–Australia Comprehensive Economic Partnership Agreement*, Australian Government <<http://dfat.gov.au/trade/agreements/iacepa/pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx>>.

<sup>158</sup> Mark Kenny, ‘Canberra and Jakarta to Push Ahead on Trade Deal’, *The Age* (online), 6 November 2016 <<http://www.theage.com.au/federal-politics/political-news/canberra-and-jakarta-to-push-ahead-on-trade-deal-20161106-gsj5ap.html>>.

<sup>159</sup> Power suggests that there may be little other bases on which Indonesia may be interested in pursuing an arrangement with Australia, stating:

‘I haven’t really seen too much evidence that there has been much Indonesian interest in addressing the issue [of an arrangement with Australia] except in relation to the relationship with Australia’ and ‘it appears to me as being overwhelming, or almost exclusively viewed from the perspective of the relationship with Australia’.

Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

workforce given their lack of legal work rights.<sup>160</sup> With employment, these refugees in Malaysia (and many others like them elsewhere) may be reluctant to travel further afield. A desire by refugees to remain close to their country of origin also tends against onward travel. For example, for non-Rohingya minority ethnic groups from Myanmar, this means staying in nearby Malaysia and not moving elsewhere.<sup>161</sup> Refugees' desire to one day return home, and to remain in paid employment, both operate as a disincentive to travel to countries far away from their country of origin or first refuge, such as Australia. An Australia–Indonesia arrangement will simply not be a pull factor for *all* refugees in the region, and so this cannot properly be seen by countries as an obstacle to the arrangement.

Even to the extent refugee numbers increase, there are ways for Indonesia and Australia to properly manage this, including through broad regional engagement. Seeking commitments from other states to accept refugees for resettlement would directly address concerns that Indonesia and Australia may not be able to handle increased numbers.<sup>162</sup> Malaysia particularly stands out as one of the more economically developed states<sup>163</sup> that could be approached to offer resettlement places (either as a third party to an Australia–Indonesia arrangement, or via separate but related commitments). Outside the region, the United States, Canada and New Zealand could offer resettlement places as part of 'a joint strategy which actually addresses refugee protection needs in Southeast Asia and South Asia much more effectively'.<sup>164</sup>

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<sup>160</sup> Crock, above n 8, 258–9. For a historical overview of Malaysia's reliance on migration as a labour source for its rubber and tin industries, see Amarjit Kaur, 'Migration and the Refugee Regime in Malaysia: Implications for a Regional Solution' (2007) 18 *UNEAC Asia Papers* 77, 79 <<http://pandora.nla.gov.au/pan/10530/20071020-0006/www.une.edu.au/asiacenter/No18.pdf>>:

Malaya had vast quantities of mineral resources and land suitable for large-scale plantation agriculture, but only a small population. The global connecting of Malaya with industrialised Britain and the West through imperialism, technological change and modern capital investment led to the development of the tin and rubber industries and saw the entry of thousands of migrant workers, primarily from China, India and Java to work in these industries.

<sup>161</sup> Based on conversations with community representatives in Malaysia, Power comments, 'it seems to me as though the general wish amongst refugees from Eastern ethnic states of Burma who are in Malaysia is that they'd be able to return home at some point soon': Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>162</sup> Brennan, above n 2: 'Both governments could negotiate with other countries in the region to arrange more equitable burden sharing in the offering of resettlement places for those proved to be refugees.'; Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016): 'if Australia is to have a positive influence across more than one or two countries in terms of the refugee protection environment then we need to be working closely with other resettlement nations ...'.

<sup>163</sup> Refugee Council of Australia, above n 70.

<sup>164</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

Another option is for Indonesia and Australia to develop readmission agreements with other countries in the region.<sup>165</sup> Under these agreements countries agree to the return of their nationals found not to be refugees. This overcomes the undesirable prospect from governments' perspectives that such persons may not be returned by Australia or Indonesia, due to their country of origin refusing to accept them.<sup>166</sup> As a mechanism, these arrangements should offset pull factor concerns.

For clarity, readmission agreements are different to voluntary return programs which help persons return home, but do not secure countries' agreement to return of their nationals.<sup>167</sup> The *Voluntary Return Support and Reintegration Assistance for Bali Process Member States* is an example of a voluntary return program. The program

provides a regional mechanism to assist the voluntary, safe and dignified return of irregular migrants. It also supports asylum seekers and refugees wishing to voluntarily return to their country of origin on the basis of an informed decision and in accordance with established UNHCR principles and procedures.<sup>168</sup>

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<sup>165</sup> For general discussion on readmission agreements, see Goodwin-Gill and McAdam, above n 53, 407–8. Readmission arrangements already operate in the Southeast Asian region, however to what extent, and between which countries, is not immediately clear. See United Nations High Commission for Refugees, *Bay of Bengal and Andaman Sea – Proposals for Action* (May 2015) <<http://www.unhcr.org/55682d3b6.html>>: 'Effective bilateral arrangements are already in place among some of the affected countries to facilitate the return of such individuals in conditions of safety and dignity.' These country to country arrangements 'waive administrative penalties for vulnerable groups, to facilitate return to their country of origin.' Bali Process members have recently recognised these agreements, noting their link to the 'integrity and efficiency' of orderly migration. See 'Co-Chairs' Statement' (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 2: 'Ministers agreed that a Technical Experts Group would be established to exchange best practices with respect to returns and reintegration. Model readmission agreements would also be developed for use by interested member states.' This followed recommendations of the Bali Process Roundtable on Returns and Reintegration on 3–4 December 2015. See also 'Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime' (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 9, where members have recently expressly recognised 'that timely, safe and dignified return of those found not to be entitled to international protection is an important element of orderly migration' and encouraged members to 'recognise the responsibility of states to accept the return of their nationals.'

<sup>166</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>167</sup> For further discussion of Assisted Voluntary Return programs, see generally United Nations High Commission for Refugees, 'The Return of Persons Found Not to be in Need of International Protection to their Countries of Origin: UNHCR's Role' (Protection Policy Paper, November 2010) 14.

<sup>168</sup> See The Bali Process, *Regional Support Office Activities* <<http://www.baliprocess.net/regional-support-office/activities>>. The IOM implements this project, which according to the RSO website saw 482 persons returned in the first two years. For further discussion of Assisted Voluntary Return programs, see Helen Morris and

Depending on the circumstances, a further response is to engage with refugee source countries to explore ways to reduce refugee outflows. The plight of many Rohingya caught in the 2015 Southeast Asian refugee crisis links to ongoing minority persecution in Myanmar. Engaging with Myanmar to address this may enable refugees scattered across the region to return home and ensure that this situation does not put undue pressure on a future Australia–Indonesia arrangement.<sup>169</sup> In this way, a bilateral arrangement between Australia and Indonesia should, as noted at the outset, be approached as part of a strategy of broad regional engagement.

To summarise here, pull factor concerns tend to be overstated. Not all refugees will travel to avail themselves of protection arrangements. Even to the extent refugee numbers increase, there are responses that Australia and Indonesia can pursue with other countries to appropriately manage this protection issue.

### *3 Promoting Solidarity*

Mathew recommends that ‘Australia needs to do more to focus on solidarity within the region’.<sup>170</sup> This has to be useful to progressing a cooperative arrangement with Indonesia because, as discussed above, Australia’s existing policies run counter to cooperation with Indonesia. In particular, unilateral maritime interception is seen to violate Indonesian sovereignty.<sup>171</sup> Australia may improve solidarity by ensuring it shares refugee burdens and is itself committed to refugee protection. Immediately finding appropriate resettlement opportunities for refugees on PNG and Nauru would communicate Australia’s commitment to protecting refugees.

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Machiel Salomons, ‘Difficult Decisions: A Review of UNHCR’s Engagement with Assisted Voluntary Return Programmes’ (Report PDES/2013/11, United Nations High Commissioner for Refugees Policy Development and Evaluation Service, July 2013) 1. These programs are seen by states as beneficial as they obviate the alternative ‘expensive, unworkable and unpalatable response’ of states detaining, then forcibly deporting individuals. However, such programs raise a number of concerns, as discussed therein. See also United Nations High Commission for Refugees, *Bay of Bengal and Andaman Sea — Proposals for Action* (May 2015) <<http://www.unhcr.org/55682d3b6.html>>: ‘IOM manages several Assisted Voluntary Return and Reintegration programmes that provide additional capacity for the return of individuals who are found not to be in need of international protection.’

<sup>169</sup> Peter Browne, ‘The Asylum-Seeker Plan that Keeps Disappearing over the Horizon’, *Inside Story* (online), 9 April 2014 <<http://insidestory.org.au/the-asylum-seeker-plan-that-keeps-disappearing-over-the-horizon>>:

The other target for Australian action should be the countries from where asylum seekers are fleeing – or at least those where our efforts are likely to bring about gains in security for minority groups. The obvious starting point is Myanmar, a country Australia can seek to influence through its own diplomacy and with the help of neighbouring countries.

<sup>170</sup> Mathew, above n 139, 32.

<sup>171</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

In refugee emergencies, Australia could do far more than it did in response to the Southeast Asian refugee crisis of 2015. Its contribution of humanitarian aid represented a limited response. If Australia had promptly offered persons asylum, it is possible that other states in the vicinity of the stranded persons would have rescued the asylum seekers sooner and also offered asylum. This greater Australian contribution would have helped allay any fear held by other states that they would be left with all the responsibility for providing asylum.<sup>172</sup> It would also have sent the message to other states, including Indonesia, that Australia is committed to working with its regional neighbours to address the shared challenges of forced migration.

#### 4 *Countering the Security Discourse*

Civil society organisations can counter the security discourse. As noted, the security discourse undermines refugee protection arrangements by obscuring refugee protection needs. Instead, that discourse emphasises refugees as a security threat.<sup>173</sup> Civil society, through relevant advocacy campaigns both in Australia and Indonesia, can counter that refugees have legally recognised protection needs. This may garner support for an arrangement such as that proposed between Australia and Indonesia.

SUAKA<sup>174</sup> is an example of a national civil society organisation operating in Indonesia.<sup>175</sup> SUAKA's stated mission is to protect and promote human rights for refugees and asylum seekers in Indonesia, including by '[r]aising public awareness' and '[a]dvocating for policies' consistent with the mission.<sup>176</sup> SUAKA has targeted public awareness campaigns to particular groups such as students and academics.<sup>177</sup> The presumed logic here is that these persons are more likely to occupy influential positions and, once made aware of refugees' protection needs, may be more likely to promote state policies consistent with refugee protection. Feller considers there is

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<sup>172</sup> Suhrke, above n 101, 412 makes reference to ensuring 'no individual, participating state would therefore become sole host — and tempted to close its borders — in a refugee emergency'.

<sup>173</sup> Kneebone, 'ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States', above n 122, 299–301.

<sup>174</sup> For an explanation of SUAKA's origins, see SUAKA, *About Suaka*, Indonesian Civil Society Network for Refugee Rights Protection <<http://suaka.or.id/about/>>:

'SUAKA' is the *Bahasa Indonesia* word for asylum. The network came together in October 2012 when a group of like-minded individuals and organisations realised that there was a gap in providing legal assistance and human rights advocacy for asylum seekers and refugees in Indonesia.

<sup>175</sup> As distinct from those which are global. Jesuit Refugee Service and Amnesty International are examples of global civil society organisations (of course, these operate through local branches in countries). See Taylor, 'Civil Society and the Fight for Refugee Rights in the Asia Pacific Region', above n 81, 38 (citations omitted).

<sup>176</sup> SUAKA, above n 174.

<sup>177</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

‘a possibility to build up in civil society’, with ‘entities now which are working with governments which are tolerated and which have a broader understanding’.<sup>178</sup>

#### IV CONCLUSIONS

This article has considered the structural, legal and diplomatic dimensions of a bilateral arrangement between Australia and Indonesia. That arrangement would see asylum seekers travelling to Australia by boat, from Indonesia, returned to Indonesia for claims processing. If found to be refugees, these persons would be resettled in Australia (or other countries). Eventually, some persons would also be locally integrated in Indonesia where appropriate. This arrangement would deter dangerous boat journeys to Australia, while at the same time protect refugees in Indonesia by requiring Australia to first improve refugee protection conditions in Indonesia.

Obstacles exist to an Australia–Indonesia arrangement succeeding. Both countries may perceive there to be no incentive, and fear the arrangement will be a pull factor for more refugees. Research has highlighted ways to overcome these obstacles. With sufficient political will, the arrangement might yet succeed. For Australia, this arrangement is a way to share refugee burdens with an important ally, and improve that diplomatic relationship. And surely it presents a more humane alternative to existing arrangements with Nauru and PNG.<sup>179</sup> Undoubtedly, it will be more effective too.

It is an ideal time to pursue this arrangement. Australia and Indonesia are making diplomatic inroads towards a free trade agreement. Regional asylum policy could be negotiated alongside this economic partnership and may thus be more readily seen by both as necessary to improving the overall diplomatic relationship. Similarly, Australia’s Pacific Solution is fast unravelling, in part prompted by the PNG Supreme Court’s decision that found detention of persons on Manus Island in the manner that had been occurring was illegal in violation of that country’s constitution. That consideration provides a further basis for Australia to examine this refugee arrangement. The Bali Process may have provided a smokescreen for inaction on refugee protection previously, but it is obvious that, at least from Australia’s perspective, this cannot continue.

Critically, an Australia–Indonesia bilateral arrangement is not a ‘solution’ to the refugee issues facing the whole region. Rather, it should be seen by Australia and Indonesia as one part of what must be a broader strategy of regional engagement. Additional resettlement places will need to be sought from other countries to help Australia and Indonesia manage refugee numbers and lessen any pull factor fears. Readmission agreements should similarly be secured with neighbouring countries. It is clear that all countries must continue to work together on forced migration issues to make this arrangement a reality.

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<sup>178</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>179</sup> Brennan, above n 2.

The hope in writing this article is that it prompts further consideration of the kinds of arrangements that could be developed to protect refugees and deter dangerous boat journeys. From Australia's perspective, it is at a crossroads in terms of future regional asylum policy. Australia must seriously consider which countries to engage with and how refugee responsibilities should be shared. Perhaps this quote best describes the sense of it: 'We are where we are, however we got here. What matters is where we go next.'<sup>180</sup>

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<sup>180</sup> Marion, above n 1.

