

Introduction

Regional cooperation frameworks for refugee protection and solutions are sometimes seen as the answer to refugee movements. Examples of these include the agreement on principles for a regional cooperation framework within the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime,¹ the Common European Asylum System² and arrangements in Latin America associated with the Cartagena Declaration on Refugees.³ This book critically analyses the extent to which particular regional arrangements have resulted in protection and durable solutions for refugees. It also examines how responsibility for refugees has been shared at the regional level. The book explores ideas about sharing responsibility with respect to refugees, asking who should be responsible, and why and how they should be responsible.⁴ It questions whether regional arrangements do provide answers by fairly sharing responsibility for refugees.

¹ *The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* <<http://www.baliprocess.net>>.

² See generally Commissioner for Home Affairs, *A Common European Asylum System* (European Commission, 2013). This arrangement is discussed in detail in Chapter 7 of this book.

³ *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3. These arrangements are discussed in Chapter 8 of this book.

⁴ This book is concerned with responsibility-sharing in a proactive, prospective sense: the book concerns efforts to share more equitably the physical and financial effort involved in protecting refugees. Lawyers will be more familiar with the term responsibility in the sense of 'state responsibility' – a retrospective reckoning concerning breaches of international obligations or injuries sustained, which may also be 'shared' among several states. On the latter, see Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: a Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359.

By way of introduction, we sketch here two manifestations of regional approaches that do not equitably share responsibility for refugee protection. They are the international response to the Syrian refugee crisis and the move by Australia to use its regional neighbours for processing and resettlement of unauthorized boat arrivals. These scenarios represent two extremes in responses to refugees. On the one hand, countries neighbouring Syria bear the brunt of the Syrian refugee crisis. On the other hand, Australia has done all it can to avoid granting asylum to those arriving without a visa on boats organized by people smugglers. These two extremes informed some of our initial thinking about regionalism and responsibility and set the scene for the analysis that follows.

THE SYRIAN REGIONAL RESPONSE PLAN: SUCCESSSES, CHALLENGES AND THE RISK OF CONTAINMENT

The importance of sharing responsibility for refugees is highlighted by many humanitarian tragedies. While this book was being written, the Syrian refugee crisis was prompting calls for a responsibility-sharing approach. Civil war erupted in Syria in March 2011. The ensuing conflict in Syria has led to a severe economic crisis in the country, the disruption of essential medical services and the destruction of more than 3000 schools.⁵ There has been an enormous outflow of refugees (over four million) to countries such as Jordan, Lebanon, Iraq, Turkey and Egypt as the conflict has worsened.

The United Nations High Commissioner for Refugees (UNHCR) adopted a 'regional response plan' (RRP) for the Syrian crisis. It has now been replaced by the 2015 Regional Refugee and Resilience Plan (3RP).⁶ The RRP began as a relatively small effort to deal with the 40 000 Syrians who had fled to Jordan, Lebanon, Turkey and Iraq between March 2011 and March 2012,⁷ but it has quickly escalated to become one

⁵ UNHCR, *2014 Syria Regional Response Plan: Strategic Overview* (United Nations, 2014) <<http://www.unhcr.org/syriarrp6/docs/Syria-rrp6-full-report.pdf>> 12.

⁶ United Nations, *Regional Refugee & Resilience Plan 2015–2016 In Response to the Syria Crisis: Regional Strategic Overview* (United Nations, 2015) <<http://www.3rpsyriacrisis.org/wp-content/uploads/2015/01/3RP-Report-Overview.pdf>>.

⁷ UNHCR, *Syria Regional Response Plan, March 2012* (United Nations, 2012) <<http://www.unhcr.org/4f6c80a49.html>> 4.

of the largest plans for dealing with displaced persons since the Second World War.⁸ In November 2015, the number of registered Syrian refugees had reached 4,289,792.⁹

The RRP differs from the regional arrangements discussed in this book, as it is essentially a refugee crisis response coordinated by the United Nations. Nevertheless, the crisis and response, including the regional focus, set the scene for our book. For our purposes, it is noteworthy that the RRP has served to protect refugees, but it has not generated enough by way of responsibility-sharing. This may well demonstrate that what is required in a regional refugee crisis is not simply a regional response, but a global and comprehensive response – that is, a response that involves states beyond the region of the refugee flow and opens up all of the traditional durable solutions to refugees, such as local integration in the country in which refugees first seek protection, voluntary repatriation to the country of origin and resettlement in countries beyond the immediately impacted region.

Under the RRP, hundreds of UN agencies and non-governmental organizations (NGOs) have come together to implement a coordinated response to the influx of refugees in the five main countries of asylum: Jordan, Lebanon, Iraq, Turkey and Egypt.¹⁰ The RRP was led by UNHCR, but implemented in collaboration with host governments and other UN agencies, numerous NGOs and international donors, whereas the 3RP is country-led with support from the UN and NGOs. The Syrian RRP and 3RP have utilized elements of a concept known as ‘refugee aid and development’ which was developed and implemented through some of the regional arrangements discussed in later chapters of this book, including targeting both local and refugee communities in the provision of services, and stimulating local economies through refugees’ participation in them.

The Syrian RRP has assisted Syrian refugees by bringing together relevant actors to develop a coordinated response to deal with the protection needs of refugees, by increasing services (in part through developing mobile registration units) that enable Syrians to register for refugee status, and by providing life-saving humanitarian assistance to refugees such as access to food, water and housing.

⁸ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 38.

⁹ UNHCR, *Syria Regional Refugee Response* (November 2015) <<http://data.unhcr.org/syrianrefugees/regional.php>>.

¹⁰ UNHCR, *2014 Syria Regional Response Plan*, above n 5; United Nations, *Regional Refugee & Resilience Plan 2015–2016*, above n 6.

The Syrian RRP has encountered numerous difficulties. As UNHCR has documented, the dramatic increase of Syrian refugees in neighbouring countries has placed considerable pressure on the capacity of host states to absorb and protect refugees.¹¹ The International Human Rights Clinic at Boston University School of Law has described this pressure succinctly:

[c]ountries hosting the vast majority of the refugee flow out of Syria are stretched to the limits of their resources. Jordan, Lebanon and Egypt have huge refugee populations pre-dating the Syrian influx. Many, if not most, of these preexisting refugee groups live in desperate conditions, and host countries cannot meet all the refugees' assistance and protection needs. Lebanon and Egypt's unemployment rates are in the double-digits. Jordan is the fourth most water-stressed country in the world, with insufficient potable water for its own people. Lebanon and Egypt have extremely volatile political environments, and unstable governments. The Lebanese consider the Syrian conflict to have already crossed inside their territory and fear another civil war as a direct consequence if the war inside Syria is not halted soon. Turkey, the most stable host country, has already expended over \$2.5 billion on assisting refugees from Syria – a figure exceeding the entire EU contribution to the crisis thus far – and cannot by itself continue indefinitely to provide for the needs of the ever-growing refugee population coming over its long border with Syria.¹²

These host countries are experiencing difficulties providing health, education, food, water and sanitation services to refugees. For example, with respect to education, the 2014 version of the RRP documented that fewer than 40 per cent of the 735 000 school-age refugee children were enrolled in school.¹³ Further obstacles included language and curriculum differences, fears of harassment, school-related expenses, overcrowding, and certification and accreditation difficulties.¹⁴ In Egypt, the situation was particularly bad, with 90 per cent of school-age refugee children not attending school.¹⁵ The No Lost Generation strategy has been developed

¹¹ Jeff Crisp et al, *From Slow Boil to Breaking Point: A Real-Time Evaluation of UNHCR's Response to the Syrian Refugee Emergency PDES/2013/10* (UNHCR Policy Development and Evaluation Service, 2013) 3.

¹² Sarah Bidinger et al, *Protecting Syrian Refugees: Law, Policies, and Global Responsibility Sharing* (Boston University School of Law International Human Rights Clinic, 2014) <<https://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf>> 1.

¹³ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 24.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

to ensure that a generation of Syrian refugee children will not suffer from lack of education while they are displaced.¹⁶

Economic difficulties affecting both refugees and citizens abound. In Lebanon, the World Bank and the UN stated that US\$1.4–\$1.6 billion were needed in 2014 alone ‘to stabilize and restore access and quality of health, education and social safety net services to pre-conflict level’.¹⁷ Health problems affect both refugees and citizens of host countries. Polio reemerged because of ‘low immunization rates among children, coupled with large population movements’,¹⁸ leading to mass immunization campaigns during 2014.¹⁹

As a consequence of these pressures, host states have at times implemented restrictive measures with regards to refugees. For example, Jordan and Iraq have insisted on opening camps in border areas.²⁰ Some host states have closed their borders, temporarily or indefinitely, and limited the assistance available to refugees residing outside the camps.²¹ Lebanon, which has a total population of four million, was hosting around 1.1 million refugees at the time of writing. The UN has warned of the serious threat this poses to Lebanon’s security and regional stability.²² As UNHCR argues, without ‘a visible and tangible demonstration of international solidarity and responsibility sharing, the protection environment for refugees can be expected to deteriorate rapidly’.²³

Funding for the Syrian RRP has also fallen short. While the 2014 RRP stated that donor support for the arrangement ‘has been generous’, with donors contributing over US\$2 billion to the regional arrangement in 2013, additional funding is needed.²⁴ In the 2014 RRP, the UN estimated that an additional US\$4.2 billion would be needed in 2014 for the Syrian RRP to work effectively.²⁵

States outside the region have been reluctant to offer resettlement places for Syrian refugees, thus limiting the options for refugees to bring

¹⁶ *No Lost Generation* <<http://nolostgeneration.org/>>.

¹⁷ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 35.

¹⁸ *Ibid* 10.

¹⁹ United Nations, *Regional Refugee & Resilience Plan 2015–2016*, above n 6, 31.

²⁰ Crisp et al, above n 11, 3.

²¹ *Ibid*.

²² ‘UN warns Syrian refugee crisis could destabilize region’, *Fox News* (online), 3 July 2014 <<http://www.foxnews.com/world/2014/07/03/un-refugee-chief-warns-syrian-refugee-crisis-could-pose-serious-security-threat/>>.

²³ Crisp et al, above n 11, 3.

²⁴ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 4.

²⁵ *Ibid* 6.

their displacement to an end. While Germany offered 28 500 resettlement places for Syrian refugees in 2014,²⁶ similar offers from other states are rare and small in relation to the numbers of persons displaced. A review of UNHCR's response to the Syrian crisis has argued that resettlement on a limited scale can nevertheless play an important role as it can provide protection to small numbers of particularly vulnerable refugees and serves to reassure 'host countries and communities that the international community is sharing responsibility for the Syrian refugees'.²⁷ Others have been more critical of the international community's very limited response. The Boston University School of Law International Human Rights Clinic argues that the RRP,

like the majority of reports and requests to the international community of states and donors, focuses on funneling financial resources into the countries hosting the refugees from Syria. While this aid is certainly important, we believe that it illustrates a containment paradigm that is unsustainable and dangerous, rather than an approach that more equitably shares the responsibility towards the individual refugees among the wider community of states outside the current host region. Antonio Guterres, the UN's High Commissioner for Refugees, has emphasized the critical need to change the paradigm, saying: 'it is not only financial, economic, and technical support to these States which is needed It also includes ... resettlement, humanitarian admission, family reunification, or similar mechanisms [for] refugees who are today in the neighboring countries but who cannot find a solution outside the region.'²⁸

REGIONALISM AS DETERRENCE AND RESPONSIBILITY-SHIFTING: DEVELOPMENTS IN AUSTRALIA

If the Syrian RRP may be viewed as masking regional containment of a refugee crisis through the international community's relative inaction, recent developments in Australia highlight the capacity of states to misuse regionalism in their response to refugee flows. Well before the Syrian crisis erupted in 2011, a low but rising tide of unauthorized boat arrivals in Australia and the Opposition's concerted criticism of this phenomenon provoked the Prime Minister at the time, Julia Gillard, to

²⁶ Migration Policy Centre, *Syrian Refugees: A snapshot of the crisis – in the Middle East and Europe* (October 2014) <<http://syrianrefugees.eu/>>.

²⁷ Crisp et al, above n 11, 4–5.

²⁸ Bidinger et al, above n 12, 1–2.

propose a 'regional solution' for boat arrivals. In announcing the proposal she noted the insignificant numbers of asylum seekers received in Australia: 'in the context of our migration program, the number of asylum seekers arriving by boat to Australia is very, very minor. It is less than 1.5 per cent of permanent migrants each year; and indeed it would take about 20 years to fill the [Melbourne Cricket Ground] with asylum seekers at present rates of arrival.'²⁹ The contrast with a country like Lebanon, where a quarter of the population is now Syrian refugees, could not be greater. Nevertheless, the Prime Minister went on to propose 'a regional approach to the processing of asylum seekers, with the involvement of the UNHCR, which effectively eliminates the onshore processing of unauthorized arrivals and ensures that anyone seeking asylum is subject to a consistent process of assessment in the same place.'³⁰

The backstory to this call for a regional solution is not a real refugee crisis like the Syrian crisis, but a 'crisis' manufactured for political purposes. The badging of various proposed solutions as 'regional' is also politically motivated. The arrival of refugees by boat has been a prominent focus of Australian national politics since the early 1990s, and increasingly so since the early 2000s. Prime Minister Howard (1996–2007) seized on the arrival in 2001 of 433 'boat people' rescued by the Norwegian freighter *Tampa* as an opportunity to project his competence as a strong political leader. He contested and won the 2001 Australian federal election using the slogan 'We will decide who comes to this country and the circumstances in which they come'.³¹ The government established offshore detention centres located in Nauru and Papua New Guinea, hoping that other countries would resettle those who were determined to be refugees in those centres, under a policy implemented from 2001 to 2007 known as the 'Pacific Solution', which suggested the Pacific region provide a solution for Australia's problems through 'extra-territorialisation'³² of protection responsibilities. It also implemented a

²⁹ Julia Gillard, 'Julia Gillard's Speech to the Lowy Institute on Labor's New Asylum-Seekers Policy for Australia', *The Australian* (online), 6 July 2010 <<http://www.theaustralian.com.au/archive/politics/julia-gillards-speech-to-the-lowy-institute-on-labors-new-asylum-seeker-policy-for-australia/story-e6frgczf-1225888445622?nk=92551f8d5d506223350018d42edbce9>>.

³⁰ Ibid.

³¹ John Howard, *Election Speech Delivered at Sydney, NSW, October 28th, 2001* <<http://electionspeeches.moadoph.gov.au/speeches/2001-john-howard>>.

³² Madeline Garlick, 'EU "Regional Protection Programmes": Development and Prospects' in M Maes et al (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant, 2011) 356.

program of maritime interception to ensure that boats carrying asylum seekers would not reach Australian territory.

In 2008, when the number of people arriving by boat was low and the Howard government had wound back the Pacific Solution, the newly elected Labor government dismantled the offshore detention centres in Nauru and Papua New Guinea. During the 2010 and 2013 federal election campaigns, as the number of asylum seekers arriving by boat was on the rise, the Opposition Leader, Tony Abbott, reprised Howard's 2001 campaign mantra and pledged to 'stop the boats'.³³ In the hung parliament resulting from the inconclusive 2010 election, the Opposition used the increase in boat arrivals to force the Gillard government to change direction. Thus, by 2010, Prime Minister Julia Gillard was proposing a regional solution to boat arrivals which included the establishment of a 'processing' centre – that is, a centre at which refugee status determination was to be conducted – on Timor-Leste.³⁴ Regrettably, Timor-Leste, a small, newly independent and impoverished country, had not been properly consulted about the idea, which was essentially a pre-election pitch designed primarily for a domestic Australian audience and the proposal was rejected.

Subsequently, the Gillard government developed another concept, dubbed the 'Malaysia swap'. In exchange for resettlement in Australia of 4000 UNHCR-recognized refugees over a period of four years, Malaysia agreed to accept back from Australia 800 unauthorized boat arrivals.³⁵ However, implementation of this agreement was stymied by an action in the High Court of Australia which ruled that the determination by the Immigration Minister that Malaysia was a safe third country to which to return the 800 was invalid as it did not comply with the requirements of the *Migration Act*,³⁶ which included a legal obligation, either as a matter of international or domestic Malaysian law, to protect refugees.³⁷

Although the *Migration Act* was later changed, it took three attempts to pass amending legislation as each of the major parties had different views

³³ Tony Abbott, *Election Speech Delivered at Brisbane, Qld, August 8th, 2010* <<http://electionspeeches.moadoph.gov.au/speeches/2010-tony-abbott>>; Tony Abbott, *Election Speech Delivered at Brisbane, Qld, August 25th, 2013* <<http://electionspeeches.moadoph.gov.au/speeches/2013-tony-abbott>>.

³⁴ Julia Gillard, above n 29.

³⁵ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed 25 July 2011).

³⁶ *Migration Act 1958* (Cth).

³⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

on which destinations for returned or intercepted asylum seekers might serve their purposes. The Opposition insisted that it was appropriate to return to offshore processing on Nauru and Papua New Guinea, while the government was equally insistent on the Malaysia swap, no doubt to avoid reinstating the policies of the Howard era and thus being perceived as admitting that it had been misguided in changing from Howard's approach.

Eventually the government not only revived offshore detention and processing of refugee claims on Nauru and Papua New Guinea, but also negotiated two new 'regional resettlement arrangements'³⁸ intended to ensure that refugees were not just accommodated temporarily in these countries but permanently resettled there. Following the 2013 election, the incoming Coalition government built on this approach by adopting a new regional resettlement arrangement with Cambodia.³⁹

The use of the phrase 'regional resettlement arrangement' in this context is anomalous. It is notable that UNHCR uses the term 'relocation' rather than resettlement to describe the agreements between Australia and Papua New Guinea, Nauru and Cambodia.⁴⁰ The agreements display an upside-down approach to resettlement. Resettlement may be viewed as a discretionary process that implements a moral obligation to share some of the responsibility for refugees that is borne increasingly by the developing world. Statistics show that the proportion of the global number of refugees sheltered in the developing world has increased from

³⁸ For the versions of these arrangements current at the time of writing, see *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, 3 August 2013 <<http://www.dfat.gov.au/geo/Documents/nauru/nauru-mou-20130803.pdf>> and *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, 6 August 2013 <<http://www.dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.html>>.

³⁹ *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia* (signed and entered into force 26 September 2014) <<http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf>>.

⁴⁰ UNHCR, 'UNHCR Statement on Australia-Cambodia agreement on refugee relocation' (Press Release, 26 September 2014) <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=513:unhcr-statement-on-australia-cambodia-agreement-on-refugee-relocation&catid=35:news-a-media&Itemid=63>.

70 per cent to 86 per cent over the last decade.⁴¹ 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 unauthorized boat arrivals to seek asylum in Australia.

Further problematic language use occurs with respect to the agreements with Papua New Guinea, Nauru and Cambodia in the use of the word 'regional', particularly in the phrase 'regional cooperation'. For example, the memoranda of understanding (MOUs) with each of the three countries refer in their preambles to the regional cooperation framework adopted under the Bali Process on People Smuggling, Trafficking and Related Transnational Crime (Bali Process). While the focus on deterrence in these MOUs might be consistent with the original focus of the Bali Process, they do not, however, truly implement the regional cooperation framework, as the following brief synopsis of the Bali Process shows.

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in the Asia Pacific region began as a regional initiative to deal with the crimes of people smuggling and human trafficking.⁴² Its focus on transnational crime has been attractive to governments and, since its inception in 2002, the number of member states has increased to 45.⁴³

Despite the original focus on crime, Bali Process members agreed in 2011 to develop a Regional Cooperation Framework (RCF) to strengthen regional cooperation on irregular migration in a way that is protection-sensitive (although the word 'protection' was deliberately not used in the RCF). The RCF originated from a proposal UNHCR developed at a workshop on Regional Cooperation and Irregular Migration in Manila in November 2010. The proposal presented four potential initiatives for reducing irregular onward movements in the region: better data exchange to prevent use of fraudulent identity documents; more uniform and consistent asylum procedures to reduce so-called 'forum' or 'venue'

⁴¹ UNHCR, *Global Trends 2013: War's Human Cost* (UNHCR, 2014) 2; UNHCR, *Global Trends 2014: World at War* (UNHCR, 2015) 2.

⁴² See Foreign Ministers of Indonesia and Australia, *Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime: Co-Chairs Statement 26–28 February 2002* <<http://www.baliprocess.net/files/ConferenceDocumentation/BRMC1.pdf>>.

⁴³ In addition to the 48 members (45 states and 3 international organizations), another 18 states and 10 agencies participate in the Bali Process.

shopping;⁴⁴ more uniform standards of treatment for asylum seekers; and timely durable solutions for refugees to ease the burden on countries of first asylum.⁴⁵ Although UNHCR may have preferred a regional cooperation framework built solely around refugee protection issues rather than people smuggling and human trafficking,⁴⁶ it pragmatically channelled the interests of states within the Bali Process towards the enhancement of refugee protection in the region. According to UNHCR, the engagement of refugees with people smugglers would greatly decrease if states in the Asia Pacific region eradicated many of the factors that influence refugees to move onwards in search of protection, which include diversity in national responses to refugee issues, instability and unpredictability of protection for refugees, and lack of durable solutions for refugees in the region.⁴⁷

Bali Process members responded positively to UNHCR's proposals at the Fourth Ministerial Conference in March 2011 and the Bali Process Co-Chairs incorporated many of them into the RCF.⁴⁸ The Co-Chairs stated that asylum seekers should have access to consistent assessment processes in the region, that those found to be refugees should be provided with a durable solution, and that voluntary return options should be developed for those not in need of protection.⁴⁹ Furthermore, the Co-Chairs stated that any arrangement should 'promote human life and dignity' and 'reflect the principles of burden-sharing and collective responsibility'.⁵⁰

⁴⁴ We do not endorse the use of the term 'shopping' in this context, as we consider it offensive to say that a search for meaningful protection amounts to mere shopping.

⁴⁵ UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement* (Discussion Paper, November 2011) <<http://www.refworld.org/docid/4e92d7c32.html>> 5 ('*Regional Cooperative Approach*').

⁴⁶ UNHCR has not wished to focus on people smuggling and human trafficking in other regional processes. See Kristina Zitanova, *Refugee Protection and Migration Dynamics in Central Asia* (Background paper for the Regional Conference on Refugee Protection and International Migration in Central Asia, Almaty, Kazakhstan, 15–16 March 2011) <<http://www.unhcr.org/4ddf8459.html>>.

⁴⁷ UNHCR, *Regional Cooperative Approach*, above n 45, 5.

⁴⁸ Foreign Ministers of Indonesia and Australia, *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011*.

⁴⁹ Ibid [16](i)–(iv).

⁵⁰ Ibid [19] (i), (iii).

Although Australia, Cambodia, Papua New Guinea and Nauru are members of the Bali Process, the reference in the MOUs between Australia and each of them to the RCF endorsed by the Bali Process is misplaced. To begin with, a conception of ‘burden-sharing and collective responsibility’ that shifts protection to developing countries on the basis of monetary exchange is problematic. We explore this critique in Chapter 3 of this book.

It is clear that relocation to countries such as Nauru, Papua New Guinea and Cambodia is intended to deter future unauthorized boat arrivals and neatly fits the Abbott (and Turnbull) government’s ‘regional deterrence framework’⁵¹ which is designed to ‘stop people coming into the region and getting towards Australia’.⁵² The MOUs with Papua New Guinea and Nauru both identify deterrence as an objective of the agreement, stating that the transfer arrangements and establishment of processing centres are ‘a visible deterrent to people smugglers’.⁵³ In one sense, the deterrent is simply that people won’t be settled in Australia, but it could be argued that deterrent value also lies in the countries to which people are being relocated; so the region itself is used as a deterrent. This seems unlikely to cohere with other Bali Process members’ conceptions of regional cooperation. Furthermore, while bilateral agreements are contemplated under the RCF,⁵⁴ Australia has been prepared to ride roughshod over the concerns of at least one important regional neighbour – Indonesia. Australia has unilaterally intercepted boats and returned them to Indonesia, with Australian vessels entering

⁵¹ For the document outlining the framework announced during the 2013 election, see Liberal Party of Australia and The Nationals, *The Coalition’s Policy for a Regional Deterrence Framework to Combat People Smuggling* (August 2013) <<http://www.nationals.org.au/Portals/0/2013/policy/13-08-23%20The%20Coalition%E2%80%99s%20Policy%20for%20a%20Regional%20Deterrence%20Framework%20to%20Combat%20People%20Smuggling.pdf>>.

⁵² Scott Morrison, ‘Reintroducing TPVs to resolve Labor’s asylum legacy caseload, Cambodia’ (Press Conference, 25 September 2014) <<http://reliefweb.int/report/australia/reintroducing-tpvs-resolve-labors-asylum-legacy-caseload-cambodia>>.

⁵³ *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia*, above n 38 [1]; *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia*, above n 38, [1].

⁵⁴ Foreign Ministers of Indonesia and Australia, *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011* [17].

Indonesian waters at times, although reportedly inadvertently.⁵⁵ It also declared that it will not resettle refugees recognized by UNHCR Indonesia after July 2014.⁵⁶ Thus Australia has been engaging in selective bilateralism or unilateralism, rather than regional cooperation.

Finally, consideration of the outcomes of detention in the offshore centres and problems in the three countries selected for resettlement undermines any claim that Australia's policies are protection-sensitive and consistent with the RCF. The dire conditions in the detention centres in Nauru (which Nauru has since declared will be open centres) and Papua New Guinea have been criticized by non-governmental organizations such as Amnesty International and by UNHCR and the Australian Human Rights Commission.⁵⁷ Two people have died as a result of conditions in the Manus Island Detention Centre. A young Iranian

⁵⁵ Six incidents were the subject of a review by the Defence and Customs Departments which concluded that incursions into Indonesian territorial waters had been inadvertent. Australian Customs and Border Protection, 'Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders is Completed' (Media Release, 19 February 2014) <<http://newsroom.customs.gov.au/releases/joint-review-of-positioning-of-vessels-engaged-in-operation-sovereign-borders-is-completed>>. The public report was redacted and the Australian Senate's Foreign Affairs, Defence and Trade References Committee launched its own inquiry (see Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Breaches of Indonesian Territorial Waters* (2014)). The Committee was unable to glean much information from officials giving evidence because the Minister for Immigration claimed public interest immunity. Noting that there were two policy constraints on vessels involved in interceptions, namely that returns only be carried out where it was safe to do so and that activities were to be carried out beyond 12 nautical miles from Indonesia's archipelagic baseline, the Committee drew the following conclusion: 'Based on the paucity of evidence before it, the committee can only speculate on situations where a vessel commander, in following the first policy direction, may have inadvertently breached the second policy direction, particularly to ensure safety of life at sea.' Ibid cl 3.4.

⁵⁶ Sarah Whyte, 'Scott Morrison cuts off access to Australia for refugees in Indonesia', *The Sydney Morning Herald* (online), 18 November 2014 <<http://www.smh.com.au/federal-politics/political-news/scott-morrison-cuts-off-access-to-australia-for-refugees-in-indonesia-20141118-11p7ww.html>>.

⁵⁷ UNHCR, *UNHCR Mission to the Republic of Nauru 3–5 December 2012: Report* <http://unhcr.org.au/unhcr/images/Amended%20footnote%202012-12-14%20nauru%20monitoring%20report%20final_2.pdf>; Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (Amnesty International Australia, 2013) <http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf>; Australian Human Rights Commission,

asylum seeker, Reza Barati, was killed during a riot,⁵⁸ apparently by local detention centre workers.⁵⁹ Another young Iranian asylum seeker, Hamid Kehazaei, contracted septicaemia when he cut his foot on the island and died in an Australian hospital.⁶⁰

Similarly, the promotion of durable solutions referred to in the RCF is unlikely to be realized in Australia's resettlement arrangements with Nauru, Papua New Guinea and Cambodia; their prospects of success are dim. In Papua New Guinea, refugee resettlement is beset by problems such as a lack of private land, the largely monoracial society and high levels of violence.⁶¹ Nauru's reality is reflected in the terms of its MOU with Australia. The MOU states that the 'Republic of Nauru undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between Participants on arrangements and numbers.'⁶² Further, the 'Commonwealth of Australia will assist the Republic of Nauru to settle in a third safe country all Transferees who the Republic of Nauru determines are in need of international protection, other than those who are permitted to settle in Nauru'.⁶³ The reality for Nauru is that it is a small island of 21 square kilometres, with large swathes of land rendered uninhabitable by phosphate mining and an island society that could be difficult for the few refugees who could theoretically be resettled there to adjust to. In

The Forgotten Children: National Inquiry into Children in Immigration Detention (November 2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf> ch 12.

⁵⁸ Robert Cornall, *Review into the Events of 16–18 February 2014 at the Manus Regional Processing Centre* (Department of Immigration and Border Protection, 23 May 2014). <https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf>.

⁵⁹ At the time of writing, two Papua New Guinean men were on trial for the murder of Reza Barati.

⁶⁰ Max Chalmers, 'It's 145 Days Since Hamid Kehazaei Died, and the Abbott Government is Still Keeping the Final Death Report Secret', *New Matilda* (online), 28 January 2015 <<https://newmatilda.com/2015/01/28/its-145-days-hamid-kehazaei-died-and-abbott-govt-still-keeping-final-death-report-secret>>.

⁶¹ Andrea Babon, 'What life can a resettled refugee expect in PNG?', *The Conversation* (online), 23 July 2013 <<http://theconversation.com/what-life-can-a-resettled-refugee-expect-in-png-16297>>.

⁶² *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia*, above n 38, cl 12.

⁶³ *Ibid* cl 13.

September 2015, allegations of rape made by refugees cast grave doubt on the capacity of Nauru to act as a place of resettlement.⁶⁴

The situation in Cambodia is not promising either. In November 2014 Human Rights Watch interviewed a number of refugees who were in Cambodia and noted that Cambodia does not apply the provisions of its own law, which requires issuance of a Cambodian residence card,⁶⁵ thus creating problems for refugees in accessing employment and education.⁶⁶ In its MOU with Australia, Cambodia undertakes to grant permanent residence status to refugees,⁶⁷ while Australia has committed significant funds for their resettlement and additional aid funding.⁶⁸ Theoretically the Australian commitment should be sufficient incentive for the implementation of the MOU, including the granting of permanent residence under Cambodian law, but levels of corruption⁶⁹ in Cambodia give rise to pessimism about whether this will be achieved.

The refugees interviewed by Human Rights Watch described endemic corruption, discrimination against refugees and living in poverty in Cambodia. Human Rights Watch also noted the lack of mental health services, which are much needed by victims of trauma such as refugees, and criticized the requirement that after a temporary period of accommodation in the capital, Phnom Penh, refugees are to be resettled in rural locations where it will be even more difficult for refugees to integrate.⁷⁰ The MOU with Cambodia displays the same problems as Australia's 'Malaysia swap' MOU, as it has been negotiated with a view to what might happen in the future and as a financial deal, rather than with any real regard to the track record of Cambodia in the protection of refugees.

⁶⁴ Timna Jacks, 'Two Refugees allege they were raped on Nauru', *Sydney Morning Herald*, 29 September 2015.

⁶⁵ Human Rights Watch, 'Australia: Reconsider Nauru Refugee Transfers to Cambodia', *Human Rights Watch* (online), 20 November 2014 <<http://www.hrw.org/news/2014/11/20/australia-reconsider-nauru-refugee-transfers-cambodia>>.

⁶⁶ Ibid.

⁶⁷ *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia*, above n 39, cl 8.

⁶⁸ Ibid cl 12; Samantha Hawley, 'Cambodia Refugee Deal: Protests outside Australian Embassy in Phnom Penh as Scott Morrison signs agreement', *ABC News* (online), 27 September 2014 <<http://www.abc.net.au/news/2014-09-26/immigration-minister-to-sign-cambodia-refugee-deal/5770468>>.

⁶⁹ In 2014 Cambodia ranked 156th out of 175 countries in Transparency International's Corruption Perceptions Index, with a score of 21.

⁷⁰ Human Rights Watch, above n 65.

LEARNING FROM PAST AND PRESENT REGIONAL ARRANGEMENTS

The twin poles of the refugee problem described in this chapter – the largest refugee crisis since the Second World War and Australia’s response to boat arrivals, which is arguably one of the most extreme of any Western industrialized country – demonstrate the importance of close examination of the concepts of responsibility-sharing and regionalism in refugee protection. Examination of these concepts is critical to ensuring that only best practices developed in the context of regional arrangements are applied in responses to present and future refugee flows and that misuse and abuse of the concepts of regionalism and responsibility-sharing are discouraged.

This book examines past and present regional arrangements for refugees from several different regions of the world – the Comprehensive Plan of Action for Indochinese Refugees in Southeast Asia, the International Conferences on Assistance to Refugees in Africa, the International Conference on Central American Refugees, the Common European Asylum System, and the present arrangements in Latin America.

We argue that regional arrangements such as these may play a pivotal role in responding to refugee situations if they address the specific needs of refugees in the region, foster greater attention to these needs from states, and are developed in accordance with international human rights standards. The clear and fair apportioning of responsibility among states could greatly enhance protection for refugees and minimize conflict between states. However, as we have examined past and current arrangements, we have been puzzled by the description of some of them as ‘regional’ and we interrogate the conception of ‘regionalism’ that may underpin some of them. Like the authors of the Boston Human Rights Clinic’s report on the Syrian refugee crisis,⁷¹ we are concerned that regionalism may serve as a containment device that does not adequately respond to refugee protection needs. We have also been struck by the fact that as refugees are usually fleeing from, as well as sheltered in countries in the developing world which are often ill-equipped to host them, cooperation between the Global North and the Global South is essential for equitable responsibility-sharing.

⁷¹ Bidinger et al, above n 12.

AN INTRODUCTION TO THE KEY CONCEPTS EXPLORED IN THIS BOOK

When referring to a refugee, this book adopts the international legal definition contained in the 1951 Convention Relating to the Status of Refugees (Refugee Convention).⁷² Article 1A(2) of the Refugee Convention, as modified by the 1967 Protocol Relating to the Status of Refugees,⁷³ defines a refugee as someone who is outside their country of origin and unable or unwilling to return or to avail themselves of that country's protection owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Under international law, a person becomes a refugee as soon as they meet the criteria contained in the definition – not when a court or other state body declares that the person is a refugee.⁷⁴ Thus this book refers to persons as refugees if they fulfil the criteria of the definition, even if they have not undergone any process to determine their status as refugees. Nevertheless, recognizing that some persons seeking recognition as refugees may not in fact meet those criteria, the book sometimes uses the term 'asylum seekers' for potential refugees. Where appropriate the book also utilizes the regional definitions of a refugee adopted in Africa and Latin America. In both these regions an expanded definition of a refugee that includes people fleeing generalized violence has been adopted.⁷⁵

Although we use the present legal definitions, we recognize that if responsibility for refugees is to be shared equitably, it would be helpful if the broader regional definitions of a refugee/beneficiaries of protection were to be adopted universally. A fragmented definition of a refugee undermines effective cooperation between regions.

⁷² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention').

⁷³ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁷⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR, 1979 re-edited 1992) 28.

⁷⁵ *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); *Cartagena Declaration on Refugees*, above n 3.

We examine the extent to which regional arrangements for the protection of refugees have shared responsibility for refugee protection. The term responsibility-sharing refers to arrangements in which the effort regarding refugee protection and durable solutions is shared among states. This may include the demarcation of different roles and responsibilities among states with respect to refugees. Responsibility-sharing includes sharing responsibility both for physically hosting refugees and for financing refugee protection. It may also include sharing resources other than financial resources, such as specialized personnel, information or technology among states.

Finally, the book explores the notion of regionalism as implemented, whether consciously or not, through these arrangements for refugee protection. Some regional arrangements for refugee protection may be regional only in the sense that they involve states in a particular geographical part of the globe. Other so-called regional arrangements may begin as a response to a refugee flow that is regional in origin, but may draw in many states beyond that region. Some arrangements may also encapsulate various forms of regionalism that reflect an imagined sense of community or regionally distinct approaches to refugee protection, whether positive or negative.

As a starting point for unpacking the conceptions of regionalism that may be at work in these arrangements, we adopt the definition of regionalism offered by the political theorist Louise Fawcett, who suggests that regionalism involves the pursuit or promotion of common goals among a group of states that share identifiable patterns of behaviour.⁷⁶ Regionalism may involve an imagined community, a geographical relationship or a degree of mutual independence between states. Thus regionalism is broader than the mere geographic reality of states sharing a common space on the globe. With respect to refugees, regional approaches have been developed in part, we suggest, because of the regional nature of refugee movements, and in part because of external factors such as shared impacts on, and interests among states, shared cultures and traditions, and the limitations of unilateral and global responses.

⁷⁶ Louise Fawcett, 'Exploring Regional Domains: A Comparative History of Regionalism' (2004) 80 *International Affairs* 429, 433.

STRUCTURE OF THE BOOK

The book is divided into two parts. In the first part, we examine the concepts of regionalism, responsibility for refugees and responsibility-sharing with respect to refugees. Chapter 1 looks at regionalism in international politics and refugee law before considering the realities of refugee protection in the major regions of the world and the theoretical merits of regional arrangements for refugees. Chapter 2 examines the philosophical and ethical reasons why states should take responsibility for refugees. In other words, it explores why nation states should not return refugees to places of persecution and why they should respect the rights of refugees, thus establishing a basis from which the concept of responsibility-sharing can be developed. In Chapter 3 we examine why and how responsibilities for refugees should be shared amongst states.

Part II of the book looks at the regional arrangements for the protection of refugees in some detail, focusing on past regional arrangements first, and then turning to look at two regional arrangements for the protection of refugees that are presently in operation. For each of the five regional arrangements examined in Part II, we consider whether they have resulted in better refugee protection and durable solutions, the extent to which responsibility for protection of refugees was shared, in what sense the arrangement could be considered 'regional' and whether a particular kind of 'regionalism' is or was at work.

Finally, we compare and contrast all five regional arrangements for refugees and consider what lessons can be learned from these arrangements, what features of these arrangements can be utilized in future for the protection of refugees and whether regional approaches offer something valuable to the international refugee regime.

