

AUSTRALIA'S NEW REFUGEE POLICY AND THE IMPLICATIONS FOR CAMBODIA AND SOUTHEAST ASIA

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INTRODUCTION

The number of people who became displaced by armed conflicts, persecution, poverty and environmental changes hit 51 million at the end of 2013 – the highest since World War II.¹ Many were forced to flee civil wars or seek better economic opportunities abroad. Whenever normal travel routes are unavailable, many migrants use hazardous, irregular channels as they attempt to reach their destination.

Pursuing the promise of a better life through such channels has led, in conjunction with other already implied risks, to a rising number of dead migrants who drown at sea, die of thirst while crossing deserts or suffer from other accidents in transit. While Europe faces an ongoing tragedy in the Mediterranean Sea, reports from other regions are also emerging that indicate even more clearly the worldwide nature and global scope of this issue.

However, the international community has not yet found a common approach towards this issue. In the search for appropriate and effective strategies, a variety of approaches was chosen by single states or regional state unions.

In the case of the European Union (EU), the migration law consists of numerous acts, statutes and conventions. The critical Dublin Regulation No 604/2013 also has implications for national

1 | Cf. UNHCR, *Global Trends 2013, 2014*, <http://unhcr.org/5399a14f9.html> (accessed 18 Sep 2015).

administrative law, provisions of individual national Constitutions and the European Convention on Human Rights (ECHR). The complex system lacks a coherent, swift and efficient asylum procedure; a proportional distribution of migrants and implied expenses; an enforcement that is compatible with human rights and ethical standards as well as a common political determination.

Accordingly, some voices in the EU appeal to Australia's refugee policy in search for more effective alternatives.² Australia indeed has reduced irregular oversea arrivals in the past few years to an insignificant number. This has mainly been achieved through strict compliance with and application of the Pacific Solution, which is based on the military-led mission Operation Sovereign Borders and the maintenance of offshore processing facilities for migrants and their asylum claims. The border mission and especially the detention camps have been strongly and repeatedly criticised by refugee and human rights organisations and the United Nations High Commissioner for Refugees (UNHCR). However, with the political will to stick to the Pacific Solution, the Australian Government extended its engagement in Southeast Asia by establishing a new offshore processing facility in Cambodia. To determine whether the Australian approach can be a role model for migration policy, it is important to closely examine not only Australia and the short-term implications of its policy, but the long-term outcomes for the whole region as well. Therefore, the historical and political context of the present Australian refugee policy will be set out below and analysed with a focus on the new agreement between Australia and Cambodia and an evaluation of its regional impacts.

AUSTRALIA'S REFUGEE POLICY AND THE "PACIFIC SOLUTION"

As a founding member of the United Nations (UN) and signatory of the Universal Declaration of Human Rights (UDHR), Australia has politically committed itself to fundamental human rights and freedoms and, therefore, to the right of asylum, as expressed in Article 14 of the UDHR.

2 | Cf. Paul Farrell, "Could Australia's 'stop the boats' policy solve Europe's migrant crisis?", *The Guardian*, 22 Apr 2015, <http://gu.com/p/47y77/stw> (accessed 18 Sep 2015); "Wie Australien den Flüchtlingsstrom stoppte", *Der Tagesspiegel*, 22 Apr 2015, <http://tagesspiegel.de/politik/11673810.html> (accessed 18 Sep 2015); Monika Griebeler, "Australia's refugee policy: Should Europe emulate it?", *Deutsche Welle*, 22 Apr 2015, <http://dw.com/p/1FCUU> (accessed 18 Sep 2015).

Australia has also signed the associated 1951 Convention Relating to the Status of Refugees and passed domestic legislation bringing it into force. The Refugee Convention provides the basic legal definition for refugee status and states the prerequisites and rights attendant to status as a refugee. In 1973 Australia also signed the 1967 Protocol Relating to the Status of Refugees. Using these provisions, the Australian Government and the UNHCR, the leading refugee agency of the United Nations, have worked closely together for many years to enforce the Geneva Refugee Convention.³

This cooperation took on new urgency when the war in Vietnam and domestic repression and genocides in other Southeast Asian countries led to an increasing number of displaced persons after 1975. Many of these persons sought safety by boat and later, after international pressure made it harder to emigrate by sea, gathered in refugee camps set up by the UNHCR. In order to provide services for this growing population of refugees, the UNHCR established a coordinated Refugee and Humanitarian Program for resettlement. Australia participated in this program by sending officials to process refugee resettlement in Australia.⁴

Australia has been a country of immigrants ever since settlers arrived on the continent. Therefore, it soon became a matter of national interest to regulate the immigration process.

In addition to responding to a humanitarian crisis, Australia also aimed to protect its national security and defense interests through its participation in the Refugee and Humanitarian Program. Australia has been

a country of immigrants ever since European and other settlers arrived on the Australian continent. Therefore, it soon became a matter of national interest to regulate the immigration process and prevent irregular migration. With this background, it is clear that Australia already hoped in the beginning of the resettlement program that it could prevent irregular migration of undesirable persons by engaging in this humanitarian resettlement program in Southeast Asia. In other words, there was, in addition to philanthropic motives, the assumption that people would always try

3 | The 1951 Convention Relating to the Status of Refugees and the amended 1967 Protocol Relating to the Status of Refugees are often referred to as the Geneva Refugee Convention, even though this designation can be misleading, as there are actually several conventions drafted in Geneva where many UN agencies have their headquarters. However, the term will be used below in reference to both agreements.

4 | Cf. Jo Coghlan/Robyn Iredale, "Australia and Asia – Refugee Practices and Policies", in: *Seeking Refuge: Asylum Seekers and Politics in a Globalizing World*, 2005, Vol. 1, pp. 50-54.

to reach Australia and that it would be better to have a regulated, controllable procedure for those wanting to migrate.

When Australia has worked together with the UNHCR in the resettlement program, it has annually set aside a number of places for the humanitarian intake of refugees from UNHCR camps and protracted humanitarian situations. In the period of 2012 to 2013, Australia increased its previously provided number of places from 13,750 to 20,000.⁵

In line with the previously set out security policy, one aim of the additional intake of persons was to strengthen the regular program as preferable to irregular migration. At that time, the Labour government preferred this approach to discouraging irregular migration to other approaches.

However, after federal elections and a change of Government in 2013, Australian refugee policy underwent another shift and the Refugee and Humanitarian Program were reduced to its initial number of places.⁶ The – at the time new – Government under Prime Minister Abbott, which had begun already to focus heavily on migration policy during the election campaign, promoted a more restrictive and repressive policy and the strict application of the Pacific Solution to stop irregular migration.⁷

The Pacific Solution was originally invented as an alternative policy to the Refugee and Humanitarian Program after the number of maritime arrivals increased from 200 in 1998 to 3,721 in the following year and remained at higher than historical levels. A

- 5 | Cf. Australian Department of Immigration and Border Protection, Information Paper, Dec 2013, <https://www.border.gov.au/Refugeeandhumanitarian/Documents/humanitarian-program-information-paper-14-15.pdf> (accessed 30 Sep 2015).
- 6 | Cf. Refugee Council of Australia, Australia's Refugee and Humanitarian Program 2014-15, 2014, http://www.refugeecouncil.org.au/r/r/isub/2014-15_Intake%20sub.pdf (accessed 18 Sep 2015).
- 7 | The national security policy of the Abbott Government has actually raised a number of issues relating to international human rights and freedoms, especially due process and freedom of expression. Because the Government keeps the terror alert in Australia at a high level, it has been able to push through several questionable counter-terror laws. An overview is accessible at "National security and anti-terrorism laws in Australia", *The News Manual*, http://thenewsmanual.net/Resources/medialaw_in_australia_06.html (accessed 18 Sep 2015). A profound statement can be found at George Williams, "Anti-terror laws need proper scrutiny", *UNSW Australia*, 7 Oct 2014, <http://law.unsw.edu.au/news/2014/10/anti-terror-laws-need-proper-scrutiny> (accessed 18 Sep 2015).

new record was reached in 2001 with 5,516 people in 43 boats,⁸ and the Pacific Solution was then established by the Howard Government to prevent further irregular arrivals to Australia outside the obligations under the Geneva Refugee Convention.⁹



Asylum seekers arriving by boat: The Pacific Solution aims at stopping irregular maritime arrivals on the open sea before they reach Australia's mainland. | Source: © Scott Fisher, picture alliance/dpa.

Due to changed political majorities, but also as the number of irregular arrivals dropped to a comparably low level, the Pacific Solution program was dismantled in 2008 by the center-left-wing Rudd Government.

Concededly, the number of irregular arrivals erratically grew again after the suspension, from 985 in 2008-2009 to 5,327 in the following period. The already higher number of unofficial migrants arriving by sea reached its overall peak in 2012-2013 with 25,173 arrivals.¹⁰ In the 2013 federal election Tony Abbott, leader of the right-wing Liberal Party, made unofficial migrants, derogatorily called Boat People, the centerpiece of the party's election

8 | Cf. Janet Phillips/Harriet Spinks, *Boat arrivals in Australia since 1976*, Department of Parliamentary Services, 2013, p.22, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5P1X6/upload_binary/5P1X6.pdf (accessed 18 Sep 2015).

9 | The Pacific Solution's legal basis was initially set out by amendments to the Migration Act of 1958 adopted in 2001 and by further amendments in 2013.

10 | N. 8, p. 23.

campaign and won majority support. Afterwards, the Abbott Government reinforced the Pacific Solution with the enactment of Operation Sovereign Borders under the supervision of the Minister for Immigration and Border Protection subject to Division 8 of the Migration Act 1958.

The objectives of the Pacific Solution are set out in s.198AA as combating the regional problem of people smuggling and putting a stop to the undesirable consequences of people migrating by sea in substandard vessels, such as drowning and disease. The mission's cornerstones to achieve these objectives are outlined in the Migration Act 1958 as follows:

First, in the Australian Government and High Court's interpretation of the Geneva Refugee Convention, a nation's responsibility for migrants is defined by its migration zone which is usually, but not necessarily, the state's territory. With regard to the Migration Act 1958, Australia's Parliament excised its external islands from the state territory in 2001 and reduced the migration zone on the mainland. The Migration Act 1958 was further amended in 2013 with a change of s.5 ss.1 that led to the additional excision of the mainland for maritime arrivals.¹¹ Therefore, Australia sees no reason to exercise its jurisdiction in terms of maritime arrivals, or asylum seekers who are at sea. It denies to these irregular migrants access to its administrative and legal system, with no processing of asylum claims by Australia.

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Second, Australian officers are obligated, in accordance to s.198AD ss.12 under the cooperative leadership of the Australian Defense Forces, to stop irregular maritime arrivals on the open sea before they reach Australia's mainland.

Third, the Minister for Immigration and Border Protection designates, pursuant to s.198AB ss.1 by legislative instrument, regional processing countries.

11 | Migration Amendment (Unauthorized Maritime Arrivals and Other Measures) Act 2013 removed the definition of "offshore entry person" in s.5 ss.1 of the Migration Act 1958 and inserted a new definition of "unauthorised maritime arrivals" in s.5AA. Hence, unauthorised maritime arrivals are persons who enter Australia by sea at an excised offshore place, or any other place, and become unlawful non-citizens as a result.

Fourth, the operatives are required by s. 198AD ss. 2 to “remove as soon as reasonably practicable an unlawful non-citizen” and bring them to a detention center in a regional processing country for the verification of their asylum claims.

For the execution of the Pacific Solution, Australia maintained an offshore detention center on the excised Christmas Island and financed two more facilities operated by its regional processing partners on Manus Island, Papua New Guinea, and Nauru.

The set-up of a regional processing center on Nauru, the smallest state in the South Pacific with a population of 9,434 citizens,¹² was continuously criticized by NGO’s and the UNHCR. The detainees destroyed and burned down most of the detention center in a domestic riot in July 2013.¹³ The UNHCR report on a monitoring visit later in the same year highlighted “significant setbacks” with the inappropriate system for processing refugee claims as well as generally unsafe and inhumane conditions at the center. Accordingly, the UNHCR voiced “serious concerns” about the arrangement of transfers to this processing center.¹⁴

In the search for alternatives, due to the ongoing criticism and the domestic difficulties in Nauru, but with the political will to maintain the Pacific Solution as a policy, Australia’s reaction was to start an in-depth partnership with Cambodia.

The initial information regarding the bilateral agreement between the two nations was revealed in August 2014 by Cambodian officials.¹⁵ Soon after, international newspapers and the UNHCR voiced their concerns about the unexpected involvement of Cambodia in the Pacific Solution.¹⁶ The main issues of concern were from the beginning the low development stage of Cambodia as well as

12 | Cf. Federal Foreign Office, “Länderinformationen. Nauru”, 2015, http://auswaertiges-amt.de/DE/Aussenpolitik/Laender/Laenderinfos/01-Nodes_Uebersichtsseiten/Nauru_node.html (accessed 18 Sep 2015).

13 | Cf. Oliver Laughland, “Nauru detention centre burns down”, *The Guardian*, 20 Jul 2013, <http://gu.com/p/3hee9/stw> (accessed 18 Sep 2015).

14 | UNHCR, “UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013”, 26 Nov 2013, <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> (accessed 30 Sep 2015).

15 | Daniel Pye/Vong Sokheng, “Deal for refugees expected very soon”, *Phnom Penh Post*, 11 Aug 2014, <http://phnompenhpost.com/national/deal-refugees-expected-very-soon> (accessed 18 Sep 2015).

16 | UNHCR, “UNHCR warns Australia-Cambodia agreement on refugee relocation could set worrying precedent”, 26 Sep 2014, <http://unhcr.org/5425570c9.html> (accessed 30 Sep 2015).

its corrupt administration, ineffective local authorities and the general poor economic conditions.¹⁷ Despite these issues, in September 2014, the Australian Immigration Minister and Cambodian Deputy Prime Minister signed a Memorandum of Understanding (MOU), related to the settlement of refugees to Cambodia.



Asylum seekers receiving a traditional welcome in Nauru: For the execution of the Pacific Solution, Australia set up a regional processing center on the island of Nauru, one of the smallest states in the world. | Source: © Angela Wylie, picture alliance/dpa.

IMPLICATIONS OF THE NEW PARTNERSHIP

The MOU's preamble states that its aim is to achieve the objectives of the Geneva Refugee Convention through regional cooperation. Under this cooperation, Cambodia, which is one of the few states in the region that is a party to the Geneva Refugee Convention,¹⁸ has the role of a safe third country for asylum seekers brought to Nauru by Australia. The MOU states: "The Government of the Kingdom of Cambodia will provide safe and permanent settlement opportunities for refugees from the Republic of Nauru, based on humanitarian spirit" in accordance with Sub-Decree No.224 on "Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia" issued in 2009.

17 | Ian Lloyd Neubauer, "Australia's Plan to Outsource Its Refugee Problem to Cambodia Won't Work", *The Time*, 29 Sep 2014, <http://ti.me/1vq3tbc> (accessed 26 Sep 2015).

18 | Currently, in June 2015, only China, Cambodia, Papua New Guinea, Nauru and the Philippines are member states to the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees.

Sub-Decree No.224 is Cambodia's migration law regarding to asylum seekers and found with some reservations commendation in a former UNHCR review. Refugees are defined and legally protected in accordance with the Geneva Refugee Convention and the administrative provisions set out an overall sufficient procedure.¹⁹ Hence, the nation's legal basis to enforce the MOU would be in wide parts suitable if executed as set out in the wording.

The additional clauses of the MOU provide the operational details, including reference to the Operational Guideline (OG), for long-term resettlement. The prerequisites for resettlement under the MOU are: the conferment of refugee status in Nauru, the provision and explanation of information regarding life in Cambodia to refugees and a voluntary commitment to resettle by those with refugee status. Once these steps are fulfilled, the refugees will be transferred to Phnom Penh for processing and then relocated to provincial areas outside the city for the purpose of reestablishing a self-reliant life in Cambodia. The assistance provided in Cambodia will be on par with local community standards, and, like the direct costs of the resettlement, financed by Australia. Another part of the agreement aims for the involvement and cooperation of the UNHCR in line with its supervisory responsibility.



Refugee deal: Despite international concerns, the Cambodian Deputy Prime Minister (r.) and the Australian Immigration Minister (l.) signed an agreement on the resettlement of refugees in 2014. | Source: © Sovannara, picture alliance/landov.

19 | UNHCR, *Submission by the United Nations High Commissioner for Refugees – For the Office of the High Commissioner for Human Rights' Compliant Report – Universal Periodic Review*, 2013.

The Australian Government and its Cambodian counterpart celebrated and presented the MOU with confidence and optimism. Nevertheless, the UNHCR voiced “deep concern [and] a worrying departure from international norms” regarding this partnership.

Cambodia remains a developing country with one of the lowest per capita incomes in the region.²⁰ The Government and civil sector rely on foreign aid and international support. In this context, Australia is Cambodia’s fourth largest national donor, but the annual donation of 86.9 million Australian dollars in 2013-2014 was reduced to an estimated 79 million Australian dollars in 2014-2015.²¹ Additionally, the MOU guarantees special development aid to achieve the agreed upon objectives. Based on its obligations under the MOU, Australia announced that it estimates it will spend 15.5 million Australian dollars for the resettlement services and the refugee’s education, health and training in Cambodia, albeit this amount has been cut from the officially agreed Australian development cooperation assistance budget. At the same time another 40 million Australian dollars special, non-conditional, and therefore strongly controversial fund was earmarked by Australia to the Cambodian Government.²²

Those 15.5 million Australian dollars by which the Australian Development Assistance Budget for Cambodia was cut in 2014/2015 will now be spent on resettlement services and the refugees’ education, health and training in Cambodia.

Due the widespread problem of bribery and other corruption in Cambodia,²³ the Australian Opposition leader in the Lower House raised concerns of who in the end will receive the additional aid money.²⁴ In two protest marches, Cambodian civil society also voiced objections.

20 | Cf. The World Bank, “Cambodia. World Development Indicators”, 2015, http://data.worldbank.org/country/cambodia#cp_wdi (accessed 18 Sep 2015).

21 | Cf. Australian Department of Foreign Affairs and Trade, “Overview of Australia’s aid program to Cambodia”, 2015, <http://dfat.gov.au/geo/cambodia/development-assistance/Pages/development-assistance-in-cambodia.aspx> (accessed 18 Sep 2015).

22 | Cf. Daniel Pye/Cheang Sokha, “Aus reveals refugee funding”, *The Phnom Penh Post*, 27 May 2015.

23 | Cf. Transparency International, “Ending corruption for a better future for all”, 24 Sep 2014, http://transparency.org/news/feature/cambodia-corruption_concerns_amid_hopes_for_the_future (accessed 29 Sep 2015).

24 | Cf. Rodion Ebbighausen, “Australia plans to set up a refugee camp in Cambodia”, *Deutsche Welle*, 29 Aug 2014, <http://dw.de/p/1D3hZ> (accessed 18 Sep 2015).

However, others found the MOU, apart from the material impact, to be: "inappropriate, immoral and likely illegal" on its structural basis.²⁵ This harsh judgment is founded on the undependable application of Cambodian law and the expected role of Australia in light of its political tradition and ethical obligations.

Cambodia seems unlikely to fully implement the MOU. The Cambodian social sector lacks capacity and the Royal Government has

Refugees, who already live in Cambodia, voice serious concerns: The resident cards they have been issued are not accepted as identification documents and are also insufficient for employment or renting accommodation or vehicles.

not demonstrated the experience and functionality to fulfill all of its contractual duties under the MOU. In the past Cambodia has violated the essential rule under the Geneva Refugee Convention of non-refoulement by returning a group of asylum seekers to China without processing their claims or consider-

ing possible persecution.²⁶ Additionally, refugees, who already live in Cambodia, voice different, serious concerns: The resident cards they have been issued²⁷ are not accepted as identification documents and are also insufficient for employment or renting accommodation or vehicles. In the meantime, refugees are charged higher "foreigner" prices, based on the fact that skilled foreigners' salaries tend to be relatively high, and face other discrimination by state officials and the public. At the same time, Cambodia has a competitive unskilled labour market with many positions available at low salaries. Teachers sometimes expect bribes to accept foreign children into their classes and access to education is often denied.²⁸

According to the MOU, the health insurance for refugees is supposed to be "commensurate with local community standards".²⁹ Currently, social security standards in Cambodia are very low

25 | Alastair Nicholson (former Chief Justice of the Australian Family Court on behalf of Amnesty International, the Refugee Council of Australia, and Save the Children) quoted by Robert Carmichael, "Australia-Cambodia refugee resettlement deal slammed by rights groups", *Deutsche Welle*, 26 Sep 2014, <http://dw.de/p/1DLbM> (accessed 18 Sep 2015).

26 | In December 2009, after the adoption of Sub-Degree No. 224, Cambodia deported 20 Uighur asylum seekers to China without due process and violated Article 33 of the Geneva Refugee Convention with their refoulement; since December 2014 also 45 Montagnards were deported and sent back to Vietnam, without their asylum claims being processed.

27 | Subject to clause No. 11 of the OG and Article 15 of Sub-Degree No. 224.

28 | Cf. Human Rights Watch, "Australia: Reconsider Nauru Refugee Transfers to Cambodia", 20 Nov 2014, <https://shar.es/17haJb> (accessed 18 Sep 2015).

29 | Subject to clause No. 10 of the MOU.

and still need further development and improvement. Freedom of expression is also limited, as refugees cannot freely lodge complaints to the authorities and according to Sub-Decree No.224, they have no access to courts.

Cambodia could be blamed for the long list of difficulties, but as the UNHCR report stressed, with some encouragement, Cambodia shows development progress in many areas. Developing countries cannot be expected to provide the same standards of protection and welfare as industrialised nations could. Therefore, Cambodia might be criticised for signing an agreement it will unlikely be able to comply with. However, with respect to dependence on international aid, Cambodia received a 55.5 million Australian dollars offer, which is difficult to refuse in light of the simultaneous cut of the main donor's development aid. The Royal Government has confidently announced its intention to fulfill the MOU, but it is Australia's obligation to determine if the Cambodian administration and society can actually implement it.

Cambodia shows development progress in many areas. Yet, developing countries cannot be expected to provide the same standards of protection and welfare as industrialised nations could.

The partnership on refugees leads also to Australia's involvement in Cambodia. The responsible Minister for Immigration and Border Protection, Peter Dutton, condemned the criticisms of the refugee arrangement as being non-objective and arbitrary.

The critics complain that by pursuing this partnership with Cambodia, Australia denies its responsibility for vulnerable refugees and contravenes its humanitarian and legal obligations. The UNHCR has repeatedly stressed the necessity for developed countries to take responsibility for the protection of refugees and not shift their responsibilities to developing countries.³⁰ Industrialised nations have the necessary resources to provide shelter and those nations, which signed the Geneva Refugee Convention, the legal obligation to provide comprehensive refuge. If more asylum seekers than projected are coming through regular or irregular channels and when their number begins to challenge the political will and social commitment of society, a price will have to be paid on either side.

30 | Cf. UNHCR, UNHCR warns Australia-Cambodia agreement on refugee relocation could set worrying precedent, 2014.

Australia, however, is willing to buy its way out of political responsibility with extensive financial outlays for the resettlement program. Australia spent an estimated amount of ten billion Australian dollars between 2007 and 2014, with costs of 440,000 Australian dollars per person in offshore processing facilities.³¹ This raises the question, aside from the political implications, as to how financially sustainable the program can be. Moreover, so far only four refugees agreed to resettle and have made the journey to Cambodia.³²

IMPACTS OF AUSTRALIA'S PRACTICE ON THE SITUATION OF REFUGEES IN SOUTH EAST ASIA

It is important to note that the Geneva Refugee Convention binds the signatory states to protect asylum seekers in the signatory's jurisdiction and ensures the fundamental principles of *non-discrimination* on personal grounds, *non-penalisation* for the means of entry and residence, and *non-refoulement* to a territory where asylum seekers fear threats to their life or freedom.

The principle of *non-refoulement* is described in the Geneva Refugee Convention's preface as "so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ('refouler') a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom".³³ This ensures the existence of reliable contact points for those in search of refuge and creates signatory states the inviolable obligation to conscientiously process lodged asylum claims under their jurisdiction and provide access to their courts.

Nevertheless, to ensure that the purported humanitarian and the vaunted security elements of Australia's Operation Sovereign Borders can be enforced under any circumstances s. 197C of the Parliament's Migration Act 1958 states that: "For the purposes of section 198 [the legal basis and outline of Operation Sovereign Borders], it is irrelevant whether Australia has non-refoulement

31 | Cf. Nick Evershed, "Mandatory immigration detention is a billion-dollar business – analysis", *The Guardian*, 25 Aug 2014, <http://gu.com/p/4xvmm/stw> (accessed 18 Sep 2015).

32 | Cf. Lauren Crothers/Paul Farrell, "First four refugees from Nauru land in Cambodia in \$ 40m resettlement deal", *The Guardian*, 4 Jun 2015, <http://gu.com/p/49fdb/stw> (accessed 18 Sep 2015)

33 | Cf. UNHCR, *Convention and Protocol Relating to the Status of Refugees*, "Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR)", 2010, <http://unhcr.org/3b66c2aa10.pdf> (accessed 18 Sep 2015).

obligations in respect of an unlawful non-citizen.” The term unlawful non-citizen defines a “national from another country who does not have the right to be in Australia; that is they do not hold a valid visa”.³⁴



Protests in Melbourne: Many Australians disagree with their government's policy regarding refugees and asylum seekers. | Source: © Asanka Brendon Ratnayake, picture alliance/Anadolu Agency.

Whoever comes to Australia must have an Australian-issued permit to enter the country and those who violate this rule may not be justified under any circumstances, even by the common standards of international law and agreements. Indeed, irregular maritime arrivals, even if their refugee status is confirmed, are refused entry and remain in detention with the only possibility of resettling to Cambodia.

While the number of irregular arrivals in Australia has declined, its regular resettlement program is clogged with an increasing number of international asylum seekers.³⁵ This increase in asylum seekers and Australia's response raises questions regarding the sustainability of the resettlement program and evinces a distressing shift towards a utilitarian approach to human rights and moral values.

34 | Cf. Phillips/Spinks, n.8, p. 28.

35 | Cf. UNHCR, *Global Trends 2013*, 2014.

In the changing global context, Australia searches for new ways to promote its national objectives. In the area of migration, Australia worked together with Indonesia on a joint strategy and promoted a tougher approach towards asylum seekers in the Southeast Asian context. The objective was to stop maritime arrivals by setting up multiple detention camps in Indonesia to hinder asylum seekers from leaving or passing through Indonesia.³⁶ Australia financially supported the construction and operation of the detention facilities and Indonesia saw them as a suitable solution for its rising number of migrants. Despite the funding, the humanitarian conditions in these camps were poor, and while Indonesia saw itself as not bound by international law, the Australian Government denied its responsibility.³⁷

Although the Pacific Solution is presented as a sustainable, regional solution, its prospects as a long-term strategy may not be feasible. In May 2015, authorities in Thailand found mass graves of Rohingya refugees as well as detention camps run by human traffickers along the Thai-Malaysian border.³⁸ Later in the same month, more mass graves were found on the Malaysian side of the border.³⁹ Both countries then closed their borders to irregular migrants in order to prevent more deaths from human trafficking.

Deprived of the option to travel over land, many more thousands of Rohingya refugees and other migrants from Bangladesh

The Australian Government refuses to offer any assistance or accommodation to the irregular maritime refugees and supports the practice of pushing back the boats.

have attempted the journey towards safe havens in boats. First Indonesia, and later Thailand and Malaysia, rejected them and pushed their boats back out into open water. Stranded on boats in the Bay of Bengal and

Strait of Malacca, they were helplessly forced to wait for support under desperate circumstances. That help arrived late after international pressure from the UN and the U.S. plead with Indonesia

36 | Cf. Amy Nethery et al., "Exporting Detention: Australia-funded Immigration Detention in Indonesia", *Journal of Refugee Studies* 1/2012, 26, pp. 98-102.

37 | *Ibid.*, pp. 105-106.

38 | Cf. Terry Fredrickson, "Border camp horrors revealed, official arrested", *Bangkok Post*, 4 May 2015, <http://bangkokpost.com/learning/learning-from-news/549355/suspected-migrant-graveyard-discovered-in-songkhla> (accessed 18 Sep 2015).

39 | Cf. Jethro Mullen, "Malaysia finds human-trafficking mass graves near Thai border", *CNN*, 25 May 2015, <http://cnn.it/1FwQ71d> (accessed 18 Sep 2015).

and Malaysia to grant temporary refuge several weeks later.⁴⁰ The Australian Government refused to offer any assistance or accommodation to the refugees and supported the practice of pushing back the boats.⁴¹ In search for a regional solution and common strategy for the problem, the U.S., Australia, Myanmar, Bangladesh and the ASEAN countries met together with international organisations in Bangkok. At the conference, Indonesia criticised Australia's hard line of no practical participation or political cooperation and pointed out that Australia, as a signatory to the Geneva Refugee Convention, it should honor its obligations under the treaty and be responsible enough to act accordingly.

In contrast to the Australian course of action regarding a fair regional distribution, the Philippines declared, like the U.S., to accept refugees. Several Filipino officials declared that the Philippine Government sees itself as obliged to assist by the Geneva Refugee Convention and under a moral responsibility to act according to the Christian values of mercy and compassion.⁴²

FUTURE OUTLOOK

In response to the migrant crisis, several high representatives of the UN requested in a joint statement, that the states in the region cooperatively return to humanitarian values as the key principles in their regional migrant policy: the recognition and protection of human rights, including *non-refoulement* and *non-penalisation*, and a revision of immigration laws to expand avenues for safe and legal labour migration.⁴³ Despite limited resources, Countries such as the Philippines demonstrated throughout the crisis that a different attitude towards the refugees is indeed possible. Overall, it is clear that, in order to find long-term solutions for the migration situation, cooperation among the countries in the region and the willingness to take responsibility are indispensable factors for

40 | Cf. Amy Maguire, "Australia can do better on Asian boat crisis than 'nope, nope, nope'", *The Conversation*, 29 May 2015, <https://theconversation.com/australia-can-do-better-on-asian-boat-crisis-than-nope-nope-nope-42255> (accessed 18 Sep 2015).

41 | Cf. Shalailah Medhora, "'Nope, nope, nope': Tony Abbott says Australia will take no Rohingya refugees", *The Guardian*, 2 May 2015, <http://gu.com/p/494n6/stw> (accessed 18 Sep 2015).

42 | Cf. "South-East Asian migrant crisis: 2,000 trapped in boats off Myanmar facing hunger and violence, UN says", *ABC*, 20 May 2015, <http://abc.net.au/news/2015-05-19/6481892> (accessed 30 Sep 2015).

43 | The UNHCR, "UNHCR, Director General of IOM, and Special Representative of the UN Secretary General voiced their deep concerns and issued ten demands while calling for a change in migrant policy", Geneva, 19 May 2015.

humanitarian refugee policies. After Australian Prime Minister Tony Abbott has been ousted by Malcolm Turnbull on 15 September 2015, it remains yet to be seen, whether and in what way Australia responds to the UN's request on regional cooperation and whether it moves its attitude towards refugees in a different direction.