

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

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## Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

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SALLY CLARK, AUG 24 2018

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Developed nation-states are pursuing aggressive border security policies designed to exclude forced migrants from territories where the rights of asylum are enshrined. In many instances these policies reach beyond the sovereign state into extra-territorial regions, blurring the traditional and functional elements of the national borders they seek to protect. One of the implications of this is that developed states of the Global North now protect themselves from unwanted migration through direct incursions on the sovereignty of less powerful neighbours. These policies are designed to impede access to protection spaces and foster the creation of transit zones where asylum seekers become immobilised. While there is extensive literature that charts this process across the Global North, less attention has been paid to this phenomenon in Southeast Asia, despite the insights such a comparison provides.

This chapter explores the effects of these exclusionary practices on forced migrants and the transit countries that host them. It will begin by providing an overview of the European literature, drawing attention to the significant pattern of state behaviour and its effects on asylum flows across the region. A consideration of how similar processes can be witnessed in the relationship between Australia and Indonesia will then be enunciated. It is argued that Australia's border security policies designed to reduce the number of asylum seekers with whom it must deal have played an instrumental role in reconfiguring the search for asylum in Southeast Asia through policies that shift the burden of protection onto regional neighbours – replicating the discernible European pattern of human rights avoidance. One consequence of this is that in recent years Indonesia has become the prime processing centre for asylum seekers otherwise destined for Australia.

### **The Refugee Convention and State Responsibility**

The 1951 *Convention Relating to the Status of Refugees* is the primary legal instrument relating to the protection of refugees, and provides the most comprehensive codification of the rights of refugees at the international level. The document outlines the responsibility of all signatory states towards asylum seekers and refugees and provides states the framework for the assessment of protection claims. The Convention is one of the most active and drawn upon pieces of international human rights law to date, with aspects such as Article 33 *prohibition of expulsion or return* (refoulement) taking on the status of customary international law (United Nations High Commissioner for Refugees (UNHCR) 2001, 16–18). Yet, despite its successes in developing a near universal architecture of protection, there are deficiencies in the legal framework that have been exploited by powerful states. Of concern here is the narrow interpretation and application of the geographical limitation at the heart of the Convention. In recent years, this geographical limitation has been erroneously interpreted by states to mean that their protection obligations are not activated until an asylum seeker has physically set foot on national soil. While this interpretation has been critiqued in the literature (Taylor 2010; Francis 2009; Hyndman and Mountz 2008; Brouwer and Kumin 2003), state practice continues to operate on this basis.

As a result of this interpretation, powerful states now direct significant resources towards ensuring asylum seekers

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

are not able to physically arrive in their territories. This is achieved through a series of border control policies designed to intercept, interdict and detain potential asylum seekers before the border. Thus, states are able to significantly limit the activation of their Convention obligations through the implementation of 'non-arrival regimes' that aim to directly impede access to asylum (Gibney 2005, 4). These practices, that are largely invisible to the natural citizen, highlight the oft ignored logic of border control in a globalised world – that it rarely takes place at or near the border. As Vaughan-Williams notes, 'states are increasingly ephemeral, electronic, non-visible, and located in zones that defy straightforwardly territorial logic' (Vaughan-Williams in Jerrems 2011, 2)

## Non-Arrival Regimes across the Global North

There is a significant body of literature that has explored the creation of non-arrival regimes across Europe. The key themes that emerge from this body of work highlight a substantial pattern of state behaviour that has a significant impact on both neighbouring states and the asylum seekers who become entangled in the exclusionary zones these practices create. The examination of these patterns is important for our understanding, as they foreshadow a similar logic practiced by Australia in regards to the Asia Pacific.

One of the prime ways the European Union (EU) performs its border control is through the paradoxical approach of blurring rather than fortifying its boundaries, creating what many have dubbed the EU's *borderlands* (Del Sarto 2009; Gibney 2005; Papadopoulou 2005; Kirisci 2004; Boubakri 2004). These borderlands function as an effective buffer zone between core and peripheral states, with the new frontier capable of performing traditional border functions, denying access to would be asylum seekers to the EU. Importantly, developed states do not guard their borders against unwanted incursions through strength of arms or military force, but rather through the co-option of economically subordinate states.

Powerful states are able to negotiate cooperation arrangements on border control with neighbouring countries in return for favourable treatment in areas such as trade, security and development (Del Sarto 2009; Balwin-Edwards 2007; Gibney 2005). An asymmetric power dynamic is central to the forging of these types of agreements, as they are achieved by providing much needed economic and political support to peripheral states on the proviso that they adopt the preferred migration policies of their benefactors (Klepp 2010; Balwin-Edwards 2007; Zhyznomirska 2006; Gibney 2005; Papadopoulou 2004; Collinson 1996).

One of the key policy levers Western Europe (and later the EU more broadly) has used to export its migration agenda to the region at large has been the development of policies such as the European Neighbourhood Program (ENP). Through this policy, core EU governments are able to penetrate sovereign states through diplomatic, economic, trade, travel and security alliances, blurring the traditional borders between powerful EU states and their less developed neighbours. This is based on what Del Sarto labels 'positive conditionality', whereby 'cooperative southern states undoubtedly obtain a better deal from Brussels' (Del Sarto 2009, 11).

Beyond the exercise of 'positive conditionality', the EU has developed a raft of policies designed to construct a non-arrival regime that specifically excludes would-be asylum seekers from the common Schengen area. This has been achieved through a variety of complex and interlocking processes that shift the burden for refugee processing and protection onto peripheral states and transit countries. These strategies include the 'Safe Third Country' policy (codified in the Dublin II Regulation), readmission agreements with EU and non-EU states, and the shifting of migration control to the private sector through the introduction of carrier sanctions.

Pre-departure initiatives, such as the requirement that foreign nationals hold a valid entry visa prior to arrival in the common territory, transform the nature of immigration control away from the physical border to a range of new places such as the high seas, consular officers, and foreign airports. These initiatives allow the EU to restrict legitimate travel opportunities to people based on nationality, economic or character grounds, allowing for the 'screening out' of undesirable migrants (read potential asylum seekers) before they are able to arrive at the border (Francis 2009; Weber 2006; Brouweer and Kumin 2003).

Coupled with pre-departure initiatives are carrier sanctions, whereby commercial airlines and other authorised

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

migration carriers face heavy penalties if detected bringing in persons without proper authorisation or documentation (Rodenhauser 2014; Francis 2009; Brouwer and Kumin 2003). By imposing harsh carrier sanctions, states effectively shift the onus of border control away from government regulated borders and government officials to private enterprises and their employees in third countries.<sup>[1]</sup> Such targeted closure of legal migration channels interrupts linear travel, so that forced migrants have little choice but to travel irregularly, either by land or sea, crossing multiple frontiers in their search for refuge.

The third major strategy in Europe's non-arrival regime is the implementation of the 'safe third country' concept, that allows for the shifting of responsibility for claim processing from one EU state to another if it can be proven that the claimant transited through that state prior to arriving in the destination state. This has led to accusations that developed states are playing a central role in the construction of transit migration through policies that funnel forced migrants into peripheral regions, while simultaneously demanding that these same transit countries do more to stop onward movements to their regions (Lutterbeck 2009; Kirisci 2004; Koser 1997; Lavenex 1998; Collinson 1996). According to Lavenex (1998) the 'safe third country' concept was designed to prevent 'migration shopping' or the simultaneous lodgement of asylum applications across multiple states. Additionally, it was conceived of by the EU as a 'redistributive mechanism' to ensure appropriate burden-sharing for refugee protection across the common Schengen area. Yet in reality, this concept has been used to shift the protection burden away from core states to the periphery of the EU where asylum seekers are now funnelled into by design.

The 'safe third country' concept also includes non-EU member countries considered 'safe' by the EU. To facilitate this, EU states have sought readmission agreements with selected states from Eastern Europe and North Africa to ensure asylum seekers who pass through these regions can be forcibly returned and that the responsibility to process protection claims is that of the first 'safe country' which the forced migrant enters (Collinson 1996). In short, readmission agreements exist to facilitate the expulsion of undocumented 'third country' nationals from states in which they are unauthorised to reside.

Unsurprisingly, research has found that these actions have thrust inequitable protection responsibility onto transit countries, while simultaneously diminishing the protection experienced by asylum seekers due to the disparities in processing systems (or lack thereof) across the region (Gerand and Pickering 2012; Fekete 2011; Gammeltoft-Hansen 2012; Schuster 2011; Lutterbeck 2009; Garlick 2006; Abell 1999; Lavenex 1998; Collinson 1996).

The European Council itself has recognised the considerable effect the intensification of protection responsibilities would have upon peripheral regions, stating that 'the implementation of asylum policies poses severe budgetary and operational problems for these countries' (Collinson 1996, 84). This is compounded by the fact that a number of countries labelled 'safe third countries' by the EU are developing nations, characterised by limited resources, porous borders, underdeveloped reception policies, political instability and often poor human rights records (Hamood 2008; Chatelard 2008; Gil-Bazo 2006; Garlick 2006; Legomsky 2003). For example, Libya, Tunisia, Morocco, Turkey and Jordan are all classified as 'safe third countries', and are thus responsible for the processing of a disproportionate number of asylum applications each year under this policy (Baldwin-Edwards 2007). Meanwhile, core EU states such as France, Germany and Belgium are safeguarded from the majority of arrivals by these peripheral states and retain the ability to forcibly return those who do make it through these exclusionary barriers.

This situation has led to a serious reduction in the safeguards (codified in the Refugee Convention) that are essential to the protection of forced migrants' human rights. In his case study of irregular migration in North Africa, Baldwin-Edwards (2007, 320) details how Italy established readmission agreements with Morocco, Tunisia and Libya in 2003 through linking development aid with migration policy. Through these agreements, Italy returned thousands of irregular migrants after denying them the right to apply for asylum. Subsequently it was found that a large number of individuals expelled from Italy to Libya were later refouled to Egypt and Nigeria in breach of international law. In response to criticism of this practice, Klepp (2010) claims Italy sought to strengthen its extra-territorial controls, particularly in Libyan territorial waters, to reduce the number of asylum seekers who may arrive at its border in the future.

Through the strengthening of non-arrival regimes – operationalised in neighbouring regions – Italy was able to secure

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

its own border and shift the burden for refugee protection back on to Libya, and was thus able to avoid future accusations of refoulement by immobilising migrants before the border.

A further challenge posed by these policies is the downstream effects they have on neighbouring regions. Many peripheral states have been forced to make policy changes that mimic their powerful neighbours. This is due to rising fears that they would be left to deal with disproportionate levels of asylum seekers, as was the case for many Central European states immediately following the breakup of the former Yugoslavia (Papadopoulou 2005). Amnesty International has argued that this process will continue to replicate itself, proposing that under increased pressure more states will be inclined to follow the agenda set by Western Europe, privileging border security over human rights, thereby putting the entire refugee protection system in jeopardy (cited in Collinson 1996, 84). Forced migrants, compelled to move, find they have less capacity to do so, leading to the paradoxical situation whereby 'Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum' (Gibney 2005, 4).

Furthermore, research has found that these transit sites are encountering new social and political issues resulting from the rapid increase in the number of irregular migrants in their jurisdiction. According to the former Assistant High Commissioner for the Protection of Refugees, Erika Feller, 'large scale arrivals are seen as a threat to political, economic or social stability and tend increasingly to provoke hostility and violence' (Feller 2006, 514). Numerous studies have looked at the impact of this process on newly transformed transit countries (Gerard and Pickering 2012; Lutterbeck 2009; Baldwin-Edwards 2007; Zhyznomirska 2006; Papadopoulou 2005 and 2004; Kirisci 2004). Turkey is considered a prime example of this trend. The challenges it faces in trying to balance its international responsibilities to protect refugees whilst reforming its immigration policies as a condition of membership into the EU demonstrates the competing interests acting on the country. While Member States now have the power to return irregular migrants to Turkey, the lack of bargaining power has left Turkey unable to secure such agreements with its neighbouring countries such as Iraq, Iran and Egypt, whose citizens are transiting through Turkey *en route* to Europe. Kirisci (2004, 12) concludes that without adequate burden-sharing mechanisms in place, Turkey could become a buffer zone, rather than a Member State that shares benefits and responsibilities equitably.

Similar themes can be found in Papadopoulou's (2004) analysis on transit migration in Greece, and Johnson's (2013) study on the borderland between Morocco and Spain, both of which highlight the inequitable conditions forced onto these states and the negative impacts that follow. Papadopoulou (2004, 167) claims Central and Eastern European countries have come under extreme pressure in the past to reform their immigration policies in line with the desires of core EU states, arguing that 'to a large extent, the institutional framework of migration and asylum in the EU Member States is one of control and restriction'.

Yet perhaps the most pertinent example of how migration policies of the Global North can impact upon peripheral regions is in the case of Malta. Prior to 2001, the main entry point into Europe was through the Adriatic route between Albania and Italy (Lutterbeck 2009, 122). Yet efficient border control in this area diverted forced migrants through Malta, which has since witnessed a rapid increase in irregular migration. According to Lutterbeck (2009 123):

This diversion effect shows how migration into Malta is also profoundly affected by the immigration control measures of other Southern European countries, and how plugging one hole in the EU's outer perimeter quickly leads to enhanced pressure on other parts of its external borders.

As a result, Malta – once a country of emigration – has quickly been transformed into a transit country, leading to claims that Malta is the victim of Italy's successful border closure (Lutterbeck 2009, 123). Due to Malta's new position as a prime transit route into Europe, it has come under increased pressure regarding border patrol. Unsurprisingly, Malta has been one of the most outspoken opponents to the Dublin II regulation and the principle of the 'safe third country', given the massive increase in their own protection role as a result of these agreements and its transformation into an asylum seeker buffer zone (Gerard and Pickering 2012).

One final consequence of the EU's non-arrival regime is the impact on irregular migration. Since the late 1990s, scholars have been examining the correlation between restrictive asylum policies and the growth of people

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

smuggling operations that subvert them. Mounting research suggests that at least in regards to Europe, non-arrival regimes coupled with the dismantling of traditional migration routes has resulted in the growth of people smuggling operations, accessed by both economic migrants and asylum seekers alike (see for example Koser 2001 and 1997). As Morrison and Crosland (cited in Koser 2000, 92) state, 'the fear is that the social construction in policy agendas of all asylum seekers as illegal migrants is becoming a social reality as asylum seekers are forced to turn to traffickers in order to enter Europe and apply for asylum'.

The following section will examine a similar impulse in Australia's approach to border security, demonstrating how it has externalised its border controls to minimise the arrival of asylum seekers. In a fashion similar to the EU, the outcome of this approach can be witnessed in a multitude of negative ways: burden shifting leading to the intensification of protection responsibility thrust onto regional neighbours (in this case Indonesia), through the increase in irregular migration as asylum seekers attempt to overcome exclusionary barriers erected in transit sites, and through the decline in protection more broadly as human rights standards are avoided or curtailed in morally and legally dubious ways.

## Australia's Non-Arrival Regime and Architecture of Exclusion

A review of Australia's migration and border control policies since 2001 shows that it has been engaged with the production and maintenance of its own non-arrival regime, elements of which reflect the European model. One direct parallel, for example, is the strict implementation of pre-departure screenings and carrier sanctions that have proven so effective at closing down legitimate migration pathways for potential asylum seekers. However, faced with a unique geopolitical setting and lacking the broader bargaining power of enticements such as membership into the EU, Australia has instead had to innovate creative strategies for gaining the cooperation of regional neighbours in order to suit its migration agenda. The most recognisable of these uniquely Australian tactics is the policy bundle known as the 'Pacific Solution'. Implemented in 2001 by the Coalition government, the Pacific Solution possessed all the hallmarks of a non-arrival regime; the primary architecture of exclusion being the annexation of Australia's island territories and the development of an intercept and detain model of offshore processing. The Pacific Solution allowed the government to physically intercept boats on the high seas and transfer the asylum seekers on board directly to offshore processing centres in third countries or specially designated areas outside Australia's migration zone, thus destroying people's ability to lodge protection claims in Australia.

Australia can be understood as drawing heavily on the notion of 'positive conditionality' when negotiating with third countries, in order to establish arrangements to intercept and transfer asylum seekers to Australian funded detention centres in these sovereign states. For example, Nauru and Papua New Guinea have both received handsome financial compensation for their cooperation (Grewcock 2014), while in 2014 Australia and Cambodia reached a controversial resettlement deal that would see Australia provide more than AU\$40 million in aid funding on the quid-pro-quo that Cambodia permanently resettle Convention Refugees who had been processed offshore in Australian funded detention centres (University of New South Wales 2014). In each of these cases there was considerable backlash from citizens in these states, yet the economic and political capital governments gained through their acquiescence to Australia's requests proved hard to refuse, exposing an asymmetrical power relationship that echoes that of core and peripheral states across Europe.<sup>[2]</sup> Much has been written about this particular aspect of Australia's response to asylum seekers, and therefore will not be revisited here (for detailed accounts see: Briskman, Latham and Goddard 2008; Burnside 2008; Hyndman and Mountz 2008; Gordon 2007; Mares 2002 and 2007; Crock, Saul and Destyari 2006; Howard 2003).

Attention will instead be directed towards Australia's less examined interactions with Indonesia. In the Australian media, Indonesia is rarely presented as a willing partner due to it being the prime departure point for asylum seekers looking to reach Australia. Yet this framing appears ignorant of the crucial role Indonesia has played in Australia's migration agenda, which at times appears in stark opposition to its own interests.

Since the late 1990s, Australia has sought to implement a readmission agreement with Indonesia similar to those practiced across Europe. However, Indonesia has been uncompromising on its stance that it will not readmit undocumented foreign nationals into its territory, insisting that once asylum seekers pass into Australian territorial

## Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

waters the responsibility for their protection is Australia's alone.<sup>[3]</sup> This position has led the Australian government to pursue extraterritorial strategies that contain asylum seekers within Indonesia, removing their ability for onward migration. This is despite the fact that Indonesia is not a signatory to the Refugee Convention, nor can it be considered a 'safe country' of first asylum given the lack of human rights protections (Kneebone 2015). According to Goodwin-Gill a minimum standard of protection 'would appear to entail the right of residence and re-entry, the right to work, guarantees of personal security and some form of guarantee against return to a country of persecution' (Goodwin-Gill cited by UNHCR 2004, 1); factors that are currently lacking in Indonesia at present. Despite this, Australia has pursued a number of arrangements that shift the burden of refugee processing and protection onto Indonesia. Similar to the EU, Australia has used diplomatic channels (covered in a veneer of international cooperation) alongside more overtly coercive levers to achieve this goal.

Since early 2000, Australia and Indonesia have been party to a bilateral regional cooperation agreement (RCA) in partnership with the International Organisation for Migration (IOM) and their local partners, World Church Services (WCS) and the Jesuit Refugee Services (JRS) (UNHCR Indonesian Factsheet, September 2014). Under this agreement, the Australian government funds large scale projects in Indonesia in return for Indonesia's cooperation in preventing the flow of irregular migration to Australia. This is achieved by monitoring and intercepting suspected asylum seekers and referring them to the IOM for case management and care in Indonesia (Howard 2003). This arrangement was designed to prevent asylum seekers from moving irregularly from Indonesia to Australia by providing a processing system in Indonesia where individuals could have their refugee claims assessed. Since Indonesia is not a signatory to the Refugee Convention and lacks a legal framework to process these claims, the UNHCR fills this gap through a Memorandum of Understanding (MoU) with the Indonesian government (UNHCR South-East Asia 2013, 1). In accordance with regulations outlined by the Indonesian Director General of Immigration, those migrants who indicate their desire to lodge a refugee application are referred by IOM to UNHCR who 'assess these claims pursuant to its own international mandate' (Taylor and Rafferty-Brown 2010, 138). Through the RCA, Australia has also played a key role in reshaping Indonesia's immigration detention system. According to Taylor (2010), before Australia's intervention the Indonesian government's preferred policy practice was to allow people who fell within the scope of the RCA to live freely in the community, yet this penchant for using alternatives to detention was steadily replaced with a drive to detain asylum seekers in Australian funded detention centres across the archipelago.

Significantly, neither government, nor the contracting partners, have revealed the cost of this agreement (Kneebone 2015; Taylor 2009). Nonetheless, occasional indicators suggest that the sum of money invested in this process is high. In May 2014, the Australian government announced that it will provide Indonesia with a further AU\$86.8 million to support stranded refugees and asylum seekers over the following three years (SUAKA 2014).

Australia has also used other multilateral forums to push for changes to Indonesia's domestic law to further its containment agenda. Under sustained economic and political pressure from Australia, Indonesia has introduced a raft of new legislation in recent years that criminalises people smuggling, increases surveillance and interceptions operations, and rapidly expands immigration detention systems (Human Rights Watch 2013; Missbach 2012; Taylor 2010; Taylor 2009).

Beyond efforts that leverage Australia's economic and political clout for cooperation in this area are a number of practices that are far more coercive and legally dubious. Prime among these is the reintroduction of the controversial 'turnback' policy in 2013, where Australian Navy and Customs officers intercept suspected asylum seekers to turn back, or physically tow boats into international waters – an action that is akin to forced readmissions to Indonesia. Shrouded in secrecy, this militarised response operating under the codename 'Operation Sovereign Borders' has been widely criticized by Indonesia, who sees it as an attack on its sovereignty, a claim boosted by revelations that Australian Navy ships were operating in Indonesia's territorial waters without authorisation (Bourke 2014). The UNHCR also objected on the basis that Australia has breached its obligations under international law to assess the protection claims of asylum seekers in its territory (Refugee Council of Australia 2014).

Further techniques used to dissuade asylum seekers from attempting onward migration from Indonesia include, the removal of all rights to apply for Protection Visas for any irregular maritime arrival, 'unless the Minister for Immigration

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

personally intervenes to lift the bar' (Refugee Council of Australia 2017). The removal of this protection means that for many asylum seekers the UNHCR office in Jakarta is their last hope of accessing international protection despite its clear deficiencies. This move has been accompanied by a widespread advertising campaign '*No Way. You Will Not Make Australia Home*' (Laughland 2014). This 'reverse tourism' advertisement was designed to psychologically disincentivise asylum seekers from pursuing protection claims in Australia.

While far from exhaustive, the above discussion attempts to highlight just some of the extraterritorial strategies Australia pursues in order to protect itself from unwanted migration and minimise its protection obligations by shifting these to Indonesia. The consequence of this is that Australia has removed all feasible ways for asylum seekers to legally access protection in its territories. Simultaneously, these policies have contributed to the increased protection responsibility felt by Indonesia, as it is slowly transformed into one of the last places in the region where asylum seekers can have their protection claims accessed.

On the individual level, Australia's non-arrival regime is experienced by asylum seekers as a further assault on their human rights (in a manner reminiscent of the European literature). This truncation comes about through their effective immobilisation in transit states that lack the appropriate framework for their protection. In this liminal state, asylum seekers reside for many years without legal status, without government support, without civil and political rights and, most significantly, without hope of a durable outcome. Their deliberate exclusion from protection zones and relegation to areas that fall outside the international protection system means the only hope of resettlement must come through selection to a voluntary 'third country' humanitarian program – the kind responsible for the resettlement of less than one per cent of the world's refugee population annually. Unsurprisingly, it is this reality that has given rise to irregular migration between Indonesia and Australia, directly echoing the border pattern established across Europe as desperate people search for ways to seek protection. In Australia this situation has then precipitated a further 'securitised' response by the state looking to exclude asylum seekers through increasingly punitive and militaristic efforts, contributing to the further destruction of human rights.

What becomes apparent through case studies such as these is that despite the brevity of human rights legislation – recognised across most of the developed world – states are now implementing pre-emptive measures that effectively neutralise their obligations. The result of this is that the architecture of international refugee protection appears intact, despite the purposeful dismantling of almost all legal ways for asylum seekers to access such rights, delegitimising the search for asylum and exposing people to increasingly vulnerable situations in legally ambiguous spaces in the process. To overcome this situation it is imperative that states implement migration policies that reflect the unique status of asylum seekers. Furthermore, the Convention states must recognise that their duty of care stretches beyond the border of the nation-state, beginning whenever state apparatus interacts with forced migrants, be it in foreign embassies, third countries or on the high seas. This will prevent the uncoupling of deterritorialised border control and the flouting of state responsibility.

## Notes

[1] While many of these pre-emptive measures appear to perform the legitimate function of border control they must be considered problematic when they lack the appropriate safeguards to ensure the rights of people with genuine protection claims are not violated (see for example Francis 2009).

[2] Many have viewed Australia's engagement with its Pacific neighbours through a neo-colonial lens, arguing that the Pacific Solution functions through the exploitation of aid dependent, impoverished, island nations (see for example Hayden 2002; Grewcock 2014).

[3] The Oceanic Viking and Jaya Lestari incidents serve as prime case studies of Indonesia's refusal to readmit 'third country' nations to its territory. For more information, see Missbach and Sinanu 2011.

## References

Abell, N.A. 1999. "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

Refugee." *International Journal of Refugee Law* 11, no. 1: 60–81.

Baldwin-Edwards, Martin. 2005. "Migration in the Middle East and Mediterranean." *Global Commission on International Migration*, Geneva.

Baldwin-Edwards, Martin. 2007. "Between a Rock and a Hard Place: North Africa as a Region of Emigration, Immigration and Transit Migration." *Review of African Political Economy*, no. 108: 311–324.

Betts, Alexander. 2006. "Towards a Mediterranean Solution? Implication for the Region of Origin" *International Journal of Refugee Law* 18, no. 3/4: 652–676.

Bigo, Didier, Sergio Carrera, Elspeth Guild and R.B.J. Walker. 2009. "The Changing Landscape of European Liberty and Security: The Mid-term Report of the CHALLENGE Project." *International Social Sciences Journal* 59, no. 152.

Boubakri, Hassen. 2004. "Transit Migration between Tunisia, Libya and Sub-Saharan Africa: Study Based on Greater Tunis." *Migrants in Transit Countries: Sharing Responsibility for Management and Protection* Conference Paper.

Bourke, Latika. 2014. "Navy Breached Indonesian Waters Six Times under Operation Sovereign Borders, Review Finds." *ABC News*, 20 February 2014. <http://www.abc.net.au/news/2014-02-19/navy-breached-indonesian-waters-six-times,-review-finds/5270478>.

Briskin Linda, Chris Goddard and Susie Latham. 2008. *Human Rights Overboard: Seeking Asylum in Australia*. Melbourne: Scribe Publications.

Brouwer, Andrew and Judith Kumin. 2003. "Interception and Asylum: When Migration Control and Human Rights Collide." *Refugee* 21, no. 4: 6–23.

Burnside, Julian. 2007. "Australia's Refugee Policy." In *Yearning to Breathe Free: Seeking Asylum in Australia*, edited by Dean Lusher and Nick Haslam. Annandale: The Federation Press.

Castles, Stephen. 2003. "Towards a Sociology of Forced Migration and Social Transformation." *Sociology* 37, no. 1: 13–34.

Chatelard, Géraldine. 2008. "Iraqi Asylum Migrants in Jordan: Conditions, Religious Networks and the Smuggling Process." In *Poverty, International Migration and Asylum. Studies in Development Economics and Policy*, edited by George Borjas and Jeff Crisp: 341–370. Basingstoke: Palgrave Mcmillan.

Collinson, Sarah. 1996. "Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and Readmission': The Development of an Asylum 'Buffer Zone' in Europe." *Transactions of the Institute of British Geographers, New Series* 21, no. 1: 76–90.

Crisp, Jeff and Nicholas Van Hear. 1998. "Refugee Protection and Immigration Control: Addressing the Asylum Dilemma." *Refugee Survey Quarterly* 17, no. 3: 1–27.

Crock, Mary, Ben Saul and Azadeh Dastyari. 2006. *Future Seekers II: Refugees and Irregular Migration in Australia*. Leichhardt: Federation Press.

Dastyari, Azadeh. 2014. "Explainer: The legal Implications of Tow-Backs." *The Conversation*, 20 January 2014. <https://theconversation.com/explainer-the-legal-implications-of-tow-backs-22151>.

Del Sarto, Raffaella. '2009. "Borderlands: The Middle East and North Africa as the EU's Southern Buffer Zone." In *Mediterranean Frontiers: Borders, Conflicts and Memory in a Transnational World*, edited by Dimitar Bechev and

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

Kalypso Nicolaidis. London: Oxford University Press.

Fekete, Liz. 2011. "Accelerated Removals: The Human Cost of EU Deportation Policies." *Race and Class* 52: 89–97.

Feller, Erika. 2006. "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come." *International Journal of Refugee Law* 18, no. 3/4: 509–536.

Francis, Angus J. 2009. "Removing Barriers to Protection at the Exported Border: Visas, Carrier Sanctions, and International Obligation." In *Sanctions, Accountability and Governance in a Globalised World*, edited by Jeremy Farrall, and Kim Rubenstein: 378–406. Cambridge: Cambridge University Press.

Gammeltoft-Hansen, Thomas. 2012. "Outsourcing Asylum: The Advent of Protection Lite." In *Europe in the World: EU Geopolitics and the Making of European Space*, edited by Luiza Bialasiewicz. Routledge.

Garlick, Madeline. 2006. "The EU Discussion on Extraterritorial Processing: Solution or Conundrum?" *International Journal of Refugee Law* 18, no. 3/4: 601–629.

Gerard, Alison and Sharon Pickering. 2012. "The Crime and Punishment of Somali Women's Extra-legal Arrival in Malta." *British Journal of Criminology* 52: 514–533.

Ghosh, Bimal. 1998. "Huddled Masses and Uncertain Shores: Insight into Irregular Migration." *International Organisation for Migration*, The Hague.

Gibney, Matthew. 2005. "Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees." *Global Migration Perspectives*, no. 22. Global Commission on International Migration, Geneva.

Gil-Bazo, María-Teresa. 2006. "The Practice of the Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Thirds Country Concept Revisited." *International Journal of Refugee Law* 18, no. 3: 571–600.

Gordon, Michael. 2007. "The 'Pacific Solution'." In *Yearning to Breathe Free: Seeking Asylum in Australia*, edited by Dean Lusher and Nick Haslam. Annandale: The Federation Press.

Green, Penny and Mike Grewcock. 2002. "The War against Illegal Immigration." *Current Issues in Criminal Justice* 14: 87–101.

Grewcock, Mike. 2013. "Australia's Ongoing Border Wars." *Race and Class* 54, no. 3: 10–31.

Grewcock, Mike. 2014. "Australian Border Policing: Regional 'Solutions' and Neocolonialism." *Race and Class* 55, no. 3: 71–78.

Hamood, Sara. 2008. "EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?" *Journal of Refugee Studies* 21, no. 1: 19–42.

Hayden, Bill. 2002. "The Pacific solution is a fraud on us." *The Age*, 20 March 2002. <http://www.theage.com.au/articles/2002/03/14/1015909883881.html>.

Howard, Jessica. 2003. "To Deter and Deny: Australia and the Interdiction of Asylum Seekers." *Refuge* 21, no. 4: 35–50.

Human Rights Watch. 2013. "Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia." 23 June 2013. <https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia>.

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

Hyndman, Jennifer and Alison Mountz. 2008. "Another Brick in the Wall? Neo-Refoulement and the Externalisation of Asylum by Australia and Europe." *Government and Opposition* 43, no. 2: 249–269.

Jerrems, Ari. 2011. "Bordering Beyond State Boundaries: Nick Vaughan-Williams, Border Politics: The Limits of Sovereign Power. Book Review" *Borderlands e-Journal* 10, no. 1.

Johnson, Heather. 2013. "The Other Side of the Fence: Reconceptualising the "Camp" and Migration Zones at the Border of Spain." *International Political Sociology* 7: 75–91.

Kirisci, Kemal. 2004. "Reconciling Refugee Protection with Efforts to Combat Irregular Migration: The Case of Turkey and the European Union." *Global Migration Perspectives*, no. 11. Global Commission on International Migration, Geneva.

Klepp, Silja. 2010. "A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea." *European Journal of Migration and Law* 12: 1–12.

Kneebone, Susan. 2005. "The legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows Australia." *Seeking Asylum in Australia: 1995–2005: Experiences and Policies*, Conference paper.

Koser, Khalid. 1997. "Negotiating Entry into Fortress Europe: The Migration Strategies of "Spontaneous" Asylum Seekers." In *Exclusion and Inclusion of Refugees in Contemporary Europe*, edited by Philip Muun: 157–70. Utrecht: ERCOMER.

Koser, Khalid. 2000. "Asylum Policies, Trafficking and Vulnerability." *International Migration*: 91–111.

Koser, Khalid. 2001. "New Approach to Asylum?" *International Migration* 39, no. 6: 85–102.

Koser, Khalid. 2005. "Irregular Migration, State Security and Human Security." Global Commission on International Migration, Geneva.

Laughland, Oliver. 2014. "Australian Government Targets Asylum Seekers with Graphic Campaign." *The Guardian*, 11 February 2014 <https://www.theguardian.com/world/2014/feb/11/government-launches-new-graphic-campaign-to-deter-asylum-seekers>.

Lavenex, Sandra. 1998. "'Passing the Buck': European Union Refugee Policies towards Central and Eastern Europe." *Journal of Refugee Studies* 11, no. 134: 126–145.

Legomsky, Stephen H. 2003. "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection." *International Journal of Refugee Law* 15, no. 4: 567–677.

Lutterbeck, Derek. 2009. "Small Frontier Island: Malta and the Challenge of Irregular Immigration." *Mediterranean Quarterly* (Winter): 119–144.

Mares, Peter. 2002. *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa*. Sydney: UNSW Press.

Missbach, Antje. 2012. "Easy Pickings: The Plight of Asylum Seekers in Indonesia." *Asian Currents, the Asian Studies Association of Knowledge*: 1–3.

Missbach, Antje and Frieda Sinanu. 2011. "'The Scum of the Earth?' Foreign People Smugglers and their Local Counterparts in Indonesia." *Journal of Current Southeast Asian Affairs* 30, no. 4: 57–87.

Morrison, John and Beth Crosland. 2000. "The Trafficking and Smuggling of Refugees: The End Game in European

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

Asylum Policy?" Final Draft Report for UNHCR, Working Paper. No. 39. <http://www.unhcr.org/3af66c9b4.pdf>.

Papadopoulou, Aspasia. 2004. "Smuggling into Europe: Transit Migrants in Greece." *Journal of Refugee Studies* 17, no. 2: 167-184.

Papadopoulou, Aspasia. 2005. "Exploring the Asylum-Migration Nexus: A Case Study of Transit Migration in Europe." *Global Migration Perspectives*, no. 23. Global Commission on International Migration, Geneva.

Pirjola, Jari. 2009. "European Asylum Policy, Inclusion and Exclusions under the Surface of Human Rights Language." *European Journal of Migration and Law* 11, no. 4: 347-366.

Refugee Council of Australia. 2014. "UN High Commissioner Criticises Australia's 'Strange' Obsession with Boat." [http://www.refugeecouncil.org.au/n/mr/140618\\_UNHCRNGO.pdf](http://www.refugeecouncil.org.au/n/mr/140618_UNHCRNGO.pdf).

Refugee Council of Australia. 2017. "Recent Changes in Australian Refugee Policy." <https://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>.

Rodenhauser, Tilman. 2014. "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control." *International Journal of Refugee Law* 26, no. 2: 223-247.

Schuster, Liza. 2011. "Turning Refugees into 'Illegal Migrants': Afghan Asylum Seekers in Europe." *Ethics and Racial Studies* 34: 1392-1407.

SUAKA. 2014. "Funding for Regional Cooperation on Refugees and Asylum Seekers in Indonesia Must be Directed to Protection Needs." <http://aprrn.info/funding-for-regional-cooperation-on-refugees-and-asylum-seekers-in-indonesia-must-be-directed-to-protection-needs/>.

Taylor, Jessie. 2009. *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia*. <https://www.safecom.org.au/pdfs/behind-australian-doors-examining-the-conditions.pdf>.

Taylor, Savitri and Bryanna Rafferty-Brown. 2010. "Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution." *International Journal of Refugee Law* 22, no. 4: 558-592.

Taylor, Savitri. 2010. "Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility." *UNSW Law Journal* 33, no. 2: 337-359.

United Nations High Commissioner for Refugees (UNHCR). 2001. "The Scope and Content of the Principle of Non-Refoulement: Opinion." <http://www.unhcr.org/en-au/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html?query=non-refoulement>.

United Nations High Commissioner for Refugees (UNHCR). 2013. "South-East Asia '2013 UNHCR Regional Operations Profile- South-East Asia.'" <http://www.unhcr.org/pages/4b17be9b6.html>.

United Nations High Commissioner for Refugees (UNHCR). 2014. "Indonesian Fact Sheet." <http://www.unhcr.org/50001bda9.pdf>.

University of New South Wales (UNSW). 2014. *Fact Sheet: The Cambodia Agreement*, Andrew and Renata Kaldor Centre for International Refugee Law. [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cambodia\\_agreement\\_fact\\_sheet\\_0.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cambodia_agreement_fact_sheet_0.pdf).

Weber, Leanne. 2006. "The Shifting Frontiers of Migration Control." In *Borders, Mobility and Technologies of Control*, edited by Sharron Pickering and Leanne Weber. Dordrecht: Springer.

# Australia's Extraterritorial Asylum Policies and the Making of Transit Sites

Written by Sally Clark

Zhyznomirska, Lyubov. 2006. "Externalities of the EU Immigration and Asylum Policy: The Case of Ukraine." *Review of European and Russian Affairs* 2, no. 2: 30-55.

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**Sally Clark** attained her doctorate from Swinburne University in 2016. Her PhD, titled 'Navigating Asylum: Journeys from Indonesia to Australia' charts the precarious nature of life in transit for Hazara asylum seekers undergoing refugee status determination and explores the connection between conditions in transit and irregular migration. She is currently lecturing in international politics and conducting research on displacement and exceptionality in marginalised groups.