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Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific

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Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific

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The Andrew & Renata Kaldor Centre for International Refugee Law

The Andrew & Renata Kaldor Centre for International Refugee Law is the world's first research centre dedicated to the study of international refugee law. Through high-quality research feeding into public policy debate and legislative reform, the Centre brings a principled, human rights-based approach to refugee law and forced migration in Australia, the Asia-Pacific region, and globally.

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List of acronyms and defined terms

AMMTC	ASEAN Ministerial Meeting on Transnational Crime
ASEAN	Association of Southeast Asian Nations
Bali Declaration	Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (2016)
Bali Process	Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime
CPP	Community Proposal Pilot
IOM	International Organization for Migration
Kaldor Centre	Andrew & Renata Kaldor Centre for International Refugee Law, UNSW
Nauru	Republic of Nauru
PNG	Papua New Guinea
RCF	Regional Cooperation Framework
Refugee Convention	1951 Convention relating to the Status of Refugees
RSD	refugee status determination
RSO	Regional Support Office
SAR	search and rescue
SDGs	Sustainable Development Goals
UNHCR	United Nations High Commissioner for Refugees
UNODC	UN Office on Drugs and Crime

Executive summary

Introduction

1. On 12–13 September 2016, the Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) convened a two-day Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific at UNSW (the Roundtable). This report, which has been prepared by the Kaldor Centre, provides a general overview of the discussions, ideas and opinions expressed over these two days – noting, where appropriate, the issues on which opinions converged or differed. The Roundtable was held under the Chatham House Rule and involved some discussion of sensitive information. It did not seek to reach consensus on the issues under consideration. As such, this report does not provide a comprehensive account of all matters that were discussed, and its contents do not necessarily reflect the individual views of any participant or organisation in attendance.

2. Participants at the Roundtable included a select but diverse range of academics, legal practitioners, civil society representatives and other subject-matter experts, as well as representatives from the United Nations High Commissioner for Refugees (UNHCR) Regional Representations in Canberra and Bangkok. The participants were selected to be broadly representative of various perspectives and disciplinary backgrounds, and to provide expertise on the relevant topics – including international refugee law, related areas of international law, refugee protection and specific country information. A full list of participants is included at the end of the report.

3. The Roundtable provided a unique opportunity to bring these experts together to discuss some of the most important but difficult questions about refugee protection facing the Asia-Pacific region. These discussions took place at a time of record global displacement, with more people displaced by war and persecution than at any other time since UNHCR records began.[1] They also took place just over a year after some 5,000 Rohingya and Bangladeshis were stranded in the Bay of Bengal and Andaman Sea, triggering a humanitarian emergency, and at a time of growing concern about Australia's policies on asylum seekers arriving by boat. In this context of increasing pressure on the international refugee protection regime, various individuals, organisations and groups were looking for creative ways forward to address critical protection concerns in Australia and the Asia-Pacific region more broadly. There had been many proposals and calls for a 'regional' approach to refugee protection. However, at the time of the Roundtable, the specifics of what such regional cooperation should look like, and how it might be achieved, remained unclear.

4. In convening the Roundtable in this context, the Kaldor Centre was motivated by concern that public debate and policy making on these issues had become mired in divisive rhetoric, was affected by increasingly polarised views, and did not demonstrate due regard for the relevant international law standards. The goal of the Roundtable was to focus on these standards and move the debate forward from abstract ideas to concrete strategies. Specifically, it sought to:

- identify some of the main obstacles and unanswered questions that had been holding the region back from meaningful progress on improving refugee protection and cooperation;

- identify the key legal principles and protection considerations that should shape cooperative efforts moving forward; and

- propose some concrete 'next steps' to move the region's protection capacity from 'here' to 'there', in the next stage of the search for regional cooperation on refugee protection.

5. The two days of the Roundtable were divided into four substantive sessions, with each session producing a rich exchange of views. While the discussion revealed broad consensus on some points, there were others on which participants expressed differing views and approaches – often reflecting their respective backgrounds, disciplines and areas of expertise. While this report seeks to record in summary form the general areas on which there was agreement or disagreement amongst participants, it should be noted that the two days of discussion spanned many complex aspects of law and policy, the full nuance of which cannot be captured in this report.

Summary of discussion

Offshore processing in Nauru and PNG

6. In the first session, the Roundtable considered the transfer of asylum seekers who had arrived in Australia by boat to the Republic of Nauru (Nauru) and Manus Island in Papua New Guinea (PNG) for 'offshore' or 'regional' processing. Key outcomes from this session included:

    - recognition that asylum seekers could, in principle, be processed 'extraterritorially' in third countries in a manner consistent with international law;

    - broad agreement that offshore processing in Nauru and PNG was unsustainable and had no discernible future in its present form;

    - broad agreement that an exit strategy from Nauru and PNG should be pursued as a matter of priority, and a range of views on how such a strategy should be formulated. Some participants stressed the need to be mindful of the fact that the way in which the current situation was resolved would likely affect what came next, while others took the view that a resolution should not be delayed until all the broader policy questions about irregular migration in the region had been addressed;

    - a shared view amongst international law experts that responsibility for resolving the situations in Nauru and PNG rested primarily with Australia (either solely or together with those countries);

    - a general discussion about the minimum standards and conditions that must be met for a country to be considered a viable resettlement country, as a matter of both international law and good practice; and

- support for the development of a suite of options as possible solutions for the people in need in Nauru and PNG, which could possibly include some limited local integration, but would more likely involve resettlement elsewhere. There was a strong view that these options should include at least some solutions in Australia where appropriate or required by international law (for example, where families had been separated between countries).

Protection at sea

7. In the second session, under the broad topic of 'protection at sea', the Roundtable looked at Australian maritime interception policies and the practice of turning or taking people intercepted at sea back to the country where they embarked. During this session:

    - participants reaffirmed the core international norms relevant to maritime interception, including the rights to life and security of the person, the universal right to seek asylum, and the prohibition on *refoulement.* International law experts recalled that any authority to intercept vessels that was conferred on states under the law of the sea was subject to their other obligations under international law (including those arising under international human rights and refugee law);

    - participants expressed general frustration and concern at the lack of transparency about the maritime interception operations carried out by Australian authorities at sea. There was particular concern about the lack of public information on these operations, and the apparent lack of independent oversight or accountability for them;

    - this lack of information prevented participants from considering the specifics of Australian maritime interception practices in depth. However, they did engage in a general discussion about the minimum standards that would need to be met in order for a state to turn or take an asylum seeker back to their place of departure in a manner consistent with international law. On the basis of what was known about current Australian practices, a number of participants expressed strong doubts that current Australian practices met these minimum standards;

    - participants considered a range of alternative possibilities for addressing maritime mixed migration and increasing protection at sea, including search and rescue, the targeted use of family reunification programs, strategic resettlement, and multilateral responsibility-sharing arrangements. It was noted that international law prohibits policies that discriminate against certain groups of refugees by ascribing them different rights based on their method of arrival in a country of asylum; and

    - a number of participants questioned the pre-occupation with sea journeys and maritime migration in countries like Australia, urging instead that the focus shift to guaranteeing access to protection for all those in need of it, regardless of the manner in which they travelled to a country of asylum.

Protection in the region

8. On the second day, the Roundtable shifted its focus to the broader context of refugee protection, displacement and cooperation in the Asia-Pacific. During this third session:

    - participants explored some of the larger philosophical and practical questions underlying calls for regional cooperation, including what it meant to be a 'region', where the Asia-Pacific was at in terms of cooperation on refugee protection, and the opportunities that might already exist for building greater cooperation in the future;

    - participants sought to articulate a common understanding of what refugee protection should look like in the Asia-Pacific, with support for a system that guaranteed safe entry to countries of asylum, stabilised people's situations there as quickly as possible, met their immediate humanitarian needs, and provided durable solutions for those who required them;

    - there was a shared view that any regional cooperation framework should contribute to the enhancement of the overall protection space in the region, be grounded in commitments to genuine responsibility-sharing, be sustainable and informed by what was realistic, ensure refugee status determination (RSD) and temporary stay arrangements were linked to work rights and durable solutions, be subject to effective oversight, and have the capacity to respond flexibly to emergencies;

    - without seeking to reach agreement on a particular approach, the Roundtable discussed the possible merits and limitations of advancing cooperation on refugee protection through a range of regional structures or models, including by:

        - building it into various existing mechanisms (such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process), the Association of Southeast Asian Nations (ASEAN) or Track II dialogues, such as the Asia Dialogue on Forced Migration);

        - pursuing refugee protection through a more general development or human rights approach;

        - negotiating a core region-wide agreement on refugee protection;

        - establishing a series of unilateral, bilateral or trilateral measures, to build multilateral cooperation on refugee protection gradually; or

        - creating a regional system of centralised refugee processing;

    - there was a strong view that, in a region where political will on this issue was relatively limited and variable, any opportunity to improve refugee protection should be seized, and subsequently built upon; and

    - participants proposed a series of concrete 'next steps' that could be taken to improve cooperation on refugee protection in the region, including strengthening existing human rights architecture, promoting practical pilot programs, and improving the region's capacity to protect asylum seekers at sea and respond to situations of mass influx.

Safe Pathways to Protection

9. In the fourth session, participants considered how to expand and improve access to safe pathways to protection, whether through traditional resettlement programs or alternatives. Key outcomes from this session included:

    - clarification of the relevant international law principles, including those concerning temporary protection, and the attachment of geographic or other limitations as conditions on entry permits for refugees;

    - a general reflection on resettlement, and the benefits of using resettlement programs more strategically and generously to alleviate the pressures of displacement at both the regional and global levels;

    - in-depth consideration of the benefits and limitations of various alternatives to resettlement, including public or community sponsorship programs, in-country processing and other protected entry procedures, and protection-sensitive migration pathways for skilled workers, people with family in Australia and students; and

    - a shared view that while there were benefits to policy making in parallel tracks, and alternatives to resettlement could provide a valuable contribution by increasing the number of places available for those in need, any new or alternative approaches should not detract from or undermine the existing refugee protection regime.

General comments

10. Throughout the four substantive sessions, participants grappled with a series of recurring challenges and points of contention. These arose in part from the diversity of perspectives represented at the Roundtable. In particular, there was a rich debate about the ‘right’ way to engage constructively with policy- and decision makers (and other stakeholders) to improve refugee protection and cooperation mechanisms in the region. Participants considered the respective merits of a ‘principled’ versus a ‘pragmatic’ approach, and reflected on whether it was always necessary to compromise one in favour of the other. Participants also examined whether existing international law was sufficient to respond to the reality of displacement today, and discussed the importance of international law setting protection standards for the region to work towards.

Session one: Offshore processing

Introduction

11. The first session of the Roundtable focused on the 'offshore processing' (or 'third country processing') of asylum seekers in Nauru and on Manus Island in PNG, and the related question of durable solutions for those people found to have international protection needs. The background paper for the session noted that the history of this policy, and the circumstances and living conditions of asylum seekers and refugees in Nauru and PNG, had been covered extensively elsewhere.[2] This session concentrated instead on what an exit strategy from the arrangements in Nauru and PNG might look like, and whether offshore processing could ever comply with international law.

12. At the outset, the Roundtable took note of recent reports and assessments highlighting significant concerns about the mental health and well-being of a large number of people who had been transferred to Nauru and PNG. In light of these reports, there was a shared view that the current arrangements for asylum seekers and refugees in these countries were unsustainable and had no discernible future in their present form.

13. The Roundtable noted that, despite various rumours, there had been no open and transparent public engagement or consultation about the options that were being considered for the future of people transferred to Nauru and PNG. However, participants also acknowledged that a lack of public engagement should not be mistaken for inaction at the government level. Some participants suggested there was awareness within government that a solution needed to be found, but that assistance might be required to develop and implement it.

14. It was noted that there had been very little cross-pollination of different ideas between critics and supporters of the current policy, and that better dialogue between these two groups was necessary. With momentum building around the issue, the Roundtable provided a timely occasion for constructive inputs into the discussion. A number of participants remarked that this input should focus not just on the possible future of offshore processing (the change 'from'), but also on what might come next (the change 'to').

Does offshore processing have any role to play in the future of Australian refugee law and policy?

15. As a preliminary question, the Roundtable considered whether offshore processing in Nauru and PNG (or similar arrangements elsewhere) had any role to play in the future of Australian refugee law and policy.

16. Participants took note of key issues and recent developments that could affect the future and sustainability of offshore processing, including:

    - the decision of the Supreme Court of PNG in April 2016 that the detention of asylum seekers at the regional processing centre on Manus Island was unconstitutional and illegal,[3] and ongoing follow-up matters in that court;

- announcements that two of the main private contractors providing services on Nauru and Manus Island under contracts with the Australian government (Broadspectrum and Wilson Security) were planning to withdraw from both locations in 2017;[4]

- the Australian budget, and the amount of money that would be required to continue supporting the current arrangements on an ongoing basis;

- possible sources of tension between the governments of Australia, Nauru and PNG; and

- potential problems arising from the lack of continuity of government in Australia and Nauru since 2012, and the impression (whether justified or not) that government policy and commitments were subject to constant change.

17. Participants approached the question of the future of offshore processing in different ways. Some participants maintained that offshore processing was a pointless exercise with no role to play, noting that Australia had now attempted offshore processing twice without achieving a sustainable protection outcome, and that refugees had been subjected to violence and were unwelcome in Nauru and PNG. Other participants submitted that some form of 'extraterritorial' processing could have a future role to play in theory, but agreed that there was no discernible future for the policy in its present form. They stressed that to have a viable future, offshore processing would need to operate in a fundamentally different way from the current policy (for example, in different countries, with clearer arrangements regarding responsibility, and with the guarantee of appropriate resettlement for refugees at the end of the process).

18. Overall, there was a shared view that the critical issue was whether offshore processing was linked to durable solutions. Without a fair RSD procedure leading to clear and predictable outcomes for people found to be in need of international protection, it was argued that offshore processing – either in Nauru and PNG, or anywhere else – would not be appropriate.

Can offshore processing comply with international law?

19. As a related question to the future of offshore processing, participants considered whether and how such a policy might comply with international law.

20. In theory, asylum seekers could be processed in a third country in a manner consistent with international law.[5] However, a number of participants argued that it was unlikely that the current policy could henceforth be brought into line with the relevant standards. There were steps that could be taken to address some of the more acute human rights concerns under the current model (such as greater oversight and improved physical conditions), but a number of participants took the view that these efforts would be insufficient to bring the arrangements into line with international human rights and refugee law.

21. Participants discussed the notion of 'deterrence' underlying offshore processing (and indeed the entire package of policies employed by Australia to prevent the arrival of asylum seekers by sea), and the 'return-oriented environment' said to be fostered under the arrangements with Nauru and PNG. Some participants noted that even if there were

a way to make offshore processing in these countries consistent with international law, doing so could undermine the purpose of the policy, being to deter migration by sea. On this view, the more that offshore processing complied with international law, the less effective it would be in achieving its stated purpose.

22. While accepting that this view might have influence with some policy- and decision makers, other participants noted that it rested on the questionable logic that offshore processing itself served as a deterrent. The increase in the number of people arriving in Australia by boat in the first year of offshore processing being reinstated appeared to cast doubt on this claim.[6]

An exit strategy from the current arrangements in Nauru and PNG

23. Having discussed the potential future and legality of offshore processing in the abstract, participants moved to the specifics of what an exit strategy from the current arrangements in Nauru and PNG might look like. Participants considered the possibility of refugees settling locally in Nauru and PNG, as well as the question of where they would go if they were to leave those countries.

General considerations

24. The Roundtable acknowledged the need to consider what Australian refugee policy should transition *to,* as part of the question of what it should transition *from.* However, while there was broad agreement that an exit strategy should be pursued as a matter of priority, participants shared a range of views on how such a strategy should be formulated. Some stressed the need to be mindful of the fact that the way in which the current situation was resolved would likely affect what came next. Without disputing this point, a significant number of other participants took the view that a resolution to the situations in Nauru and PNG should be pursued as a discrete and urgent issue, and not be held up by broader policy questions about irregular migration in the region that were yet to be addressed.

25. Moreover, many participants took the view that asylum seekers and refugees with pressing humanitarian and health needs should not be forced to remain in Nauru and PNG until a complete exit strategy could be devised. Some parts of the arrangements would be more complex and take longer than others to dismantle, and discussions over a longer period of time could be necessary to determine what role (if any) offshore processing would play in the future. However, these discussions were envisioned as running in parallel to, rather than delaying, the immediate action required to address serious concerns about people's well-being in Nauru and PNG.

26. Participants engaged in a general discussion about the political feasibility of various durable solutions that might be available for refugees in Nauru and PNG (as well as the 'transitory persons' in Australia and liable to be returned). However, the bulk of discussion focused on the normative question of how each of these solutions would comply with international law.

27. The Roundtable discussed the key requirements and minimum standards that should be in place for any resolution of offshore processing in Nauru and PNG. A majority of participants shared the view that:

- it was essential to avoid erosion of the basic principles of international human rights and refugee law, including the right to seek asylum;
- any solution would need to address the indefinite and uncertain nature of the current arrangements;
- additional protections and special arrangements would likely be necessary for stateless people;
- refugees do not have an unfettered right to choose where they will be resettled. While a refugee's preference of resettlement country may be taken into consideration (especially where he or she has ties to a country), and while no person should be forcibly moved to another country against his or her will, it would be inappropriate to introduce 'voluntariness' as a criterion for determining where refugees are relocated following RSD;
- however, as a general rule, there are certain minimum standards and conditions that must be met in order for a country to be considered a viable resettlement country. These include:
    - guarantees that refugees will be protected from *refoulement*, in any manner whatsoever;
    - guarantees that refugees will also enjoy the rights to which they are entitled under the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (Refugee Convention) and human rights law, in full and without discrimination, in law and in practice;
    - an adequately resourced integration programme which provides the services and support needed by refugees to adjust to a new society;
    - that family reunification is available, and supported; and
    - that the receiving State is capable of, and the local community is committed to, sustaining the resettlement arrangement;[7] and
- in addition to these general conditions, there are some objective criteria that countries should consider on an individual basis for each refugee – either as a matter of legal obligation or good policy – and which should be given sufficient weight in any resettlement program. These include whether a refugee has direct links to a country, the best interests and particular needs of refugee children, and the principle of family unity.

28. According to some participants, any resolution of the situations in Nauru and PNG would need not only to meet the general resettlement conditions set out above, but also be sensitive to the fact that all people transferred to those countries required a higher standard of services to remedy the effects of their extended detention there. There was a strong view that people who had been transferred to Nauru and PNG comprised a distinct caseload, with very different circumstances from other refugees seeking a durable solution. It was recalled that these people presented with unprecedented levels of mental health problems, and that there was a 'humanitarian imperative' to address

their critical health needs in a place where the appropriate professional expertise and capacity were already well-established. While the existence of adequate psychological support might not ordinarily be a determinative criterion for the viability of a resettlement country, some participants deemed it essential in this case. It was noted that there could be both an ethical basis for this differentiation (since the relevant harm was inflicted by the Australian government, or as a result of Australian policies), and a legal basis (since Australia's legal obligations continued to be engaged with regard to those people it had transferred offshore).

29. Overall, the Roundtable took the approach that an exit strategy from Nauru and PNG was fundamentally about linking all people transferred to those countries with long-term and appropriate solutions. There was support for the development of a suite of options, if it was not possible for everyone to be relocated to the same place under the same conditions. These options could possibly include some limited local integration in Nauru and PNG, but would more likely involve resettlement to other countries. These options should also include at least some solutions in Australia where appropriate or legally necessary, for example where families had been separated between Australia and Nauru or PNG.

Settlement in Australia

30. At the outset of the discussion about solutions in Australia, a number of participants noted that bringing people back to Australia from Nauru or PNG should properly be called 'relocation' or 'settlement', instead of 'resettlement'. Rather than being about 'resettling' refugees to a third country better positioned to meet their needs, movements of this kind would involve returning people to the country in which they first sought asylum, and which continued to owe them protection obligations throughout the period of their processing elsewhere.

31. The Roundtable discussed a range of legal, practical and ethical reasons why at least some people found to be refugees in Nauru and PNG should be settled in Australia. In particular, participants discussed:

    - the fact that Australian policies had separated families, with some family members in Australia and others in Nauru or PNG. The principle of family unity, other international law provisions protecting families and children, and the general principle that a refugee's direct links to a country should be given weight in resettlement decisions, all indicated that refugees with family in Australia should be reunited with them as a matter of priority;

    - the need to uphold basic principles of the refugee regime, including the right to seek asylum, and how Australia's refusal to settle any person arriving by boat no matter what their circumstances might derogate from these basic principles; and

    - how without the possibility of any settlement in Australia, the current arrangements risked undermining efforts to enhance regional cooperation by disregarding Australia's international commitments and modelling responsibility-shifting rather than responsibility-sharing. It was noted that such arrangements did not enhance the overall protection space for refugees in Australia, in Nauru or PNG, or in the region as a whole.

32. While there was strong support for the view that at least some refugees should be settled in Australia, participants flagged potential difficulties that could arise if this were to occur, and which would need to be addressed appropriately. Some questions that were raised included:

- What would happen in cases where family members in Nauru or PNG had been determined to be refugees, and other members in Australia were still waiting for an outcome through the fast-track process?
- Would refugees and asylum seekers brought back from Nauru or PNG (including children) be detained in Australia?
- Would extra humanitarian places be made available for people to be settled as a one-off arrangement (like that which was announced for 12,000 Syrian refugees in September 2015), or would they be taken out of the existing humanitarian caseload?
- What additional services would be made available to address the distinct mental health and other needs of people brought back from Nauru and PNG, and facilitate their smooth integration into Australian communities?
- What visas would refugees be eligible to apply for in Australia, and would special conditions be attached? A number of participants noted with particular concern the possibility that refugees could be denied their right to reunification with immediate family members overseas (which could in fact undermine Australia's viability as a settlement country, by the above-listed criteria).

Local integration in Nauru or PNG

33. In order for local integration in Nauru or PNG to be a viable durable solution, those countries would need to meet the same core criteria as any other resettlement country (for example, guarantees against *refoulement,* guarantees that refugees would enjoy the full range of rights to which they are entitled, an adequately resourced integration programme, family reunification, and a sustainable resettlement arrangement).

34. The Roundtable noted that a very small number of refugees had been able to build a life and integrate into society in Nauru and PNG, albeit on a short-term basis. However, the Roundtable also took note of the many other cases in which settlement had proven problematic. Primary concerns in PNG included the overall security situation, the lack of adequate mental health care, and difficulties in integrating into PNG society. Settlement had also failed in Nauru for various reasons, notwithstanding the efforts that had recently been made to facilitate integration. Accordingly, participants generally supported the public views of UNHCR and other experts that, for the great majority of refugees transferred to Nauru and PNG, local integration in those countries would not provide a durable solution.[8]

Resettlement to other countries

35. The Roundtable briefly discussed the countries (other than Australia) that had been proposed as possible resettlement countries.[9] It was noted that the agreement between

Australia and Cambodia for the relocation of refugees from Nauru was still in place, although it was not considered a viable solution for a large number of refugees. Participants also noted that New Zealand's offer to Australia to resettle 150 refugees from Nauru or PNG was still on the table, and that the Australian government had been steadfast in refusing to accept it. There was some difference of opinion as to whether this refusal was driven by concern that refugees would subsequently apply for a Special Category (subclass 444) visa, which allows New Zealand citizens to visit, study, stay and work in Australia, or a concern that it would encourage people to travel to Australia by boat in order ultimately to reach New Zealand.

36. Given that Cambodia and New Zealand were unlikely to provide the sole destinations for those found to be refugees in Nauru and PNG, and given that Australia was unlikely to settle everyone (if anyone) either, participants discussed a range of other options. Some of the ideas floated included:

- resettlement in traditional resettlement countries (other than Australia), in particular for refugees with direct links and family ties to those countries;
- resettlement on a smaller scale in non-traditional resettlement countries, including possibly Japan, the Republic of Korea, or the Philippines; and
- pilot projects for refugees to enter other countries through labour migration schemes (it was noted that this option might not provide a permanent solution, and that if it were still not possible for refugees to return home in a safe and dignified way after a few years there would need to be a guaranteed opportunity for resettlement elsewhere).

37. It was noted that UNHCR and other international actors had worked for a long time to try increase the number of global resettlement places, and that there was value generally in pursuing resettlement opportunities in non-traditional resettlement countries (even if they could not meet all of the usual minimum standards in the immediate term). However, recalling that the people found to be refugees in Nauru and PNG required a particularly high level of services, many participants took the view that transfer to non-traditional resettlement countries would not be an appropriate solution in the present case.

38. A few participants, though in broad agreement with this view, took a slightly different approach. They suggested that refugees should be given the opportunity to exercise their agency, and that they might choose to take up non-traditional resettlement opportunities if properly informed about the various options, and so long as those options were adapted and appropriate to their individual needs.

Repatriation

39. The issue of repatriation to countries of origin from Nauru and PNG was discussed in relation both to failed asylum seekers, and people found to be in need of international protection who might choose to return home. In both cases, participants acknowledged that accurate information about the security and political conditions in countries of origin should be made available to potential returnees.

40. In relation to voluntary repatriation, it was noted that whether a decision is truly 'voluntary' must be assessed with due regard to the detention context. There was concern that where people had been detained for lengthy periods on Nauru or Manus, and where their poor mental health had not been properly managed or dealt with during the RSD process, these factors could have affected both the outcome of their claim and their ability to make truly 'voluntary' decisions about return.

41. Some participants also raised concerns about asylum seekers in Nauru or PNG whose claims had been rejected, despite the fact that they appeared to have genuine protection needs. This situation could have arisen for a range of reasons, including that their mental health concerns had not been adequately taken into account during the RSD process. People in this situation could be at risk of return to persecution or significant harm in their countries of origin. It was noted that any repatriation process should be alert to, and have sufficiently robust safeguards to protect against, this risk.

42. It was also noted that failed asylum seekers should not automatically or arbitrarily be detained (either in Australia or elsewhere) while awaiting removal. Some participants commented on the value of providing returnees with appropriate assistance to facilitate their reintegration into countries of origin.

Concluding remarks

43. In reflecting on this session, the Roundtable was in broad agreement that there was no discernible future for offshore processing in Nauru or PNG in its current form, and that long-term, effective solutions were required as a matter of urgency for everyone who had been transferred there (as well as transitory persons back in Australia on a temporary basis). It was generally accepted that an exit strategy might take some time, and may need to occur in stages, but participants discussed other steps that could be taken immediately to start removing the most vulnerable individuals and groups from the two countries. The resolution of the situations in Nauru and PNG was seen as predominantly Australia's responsibility, and an issue that should not be held up by parallel efforts to address irregular migration or to build a more comprehensive regional cooperation framework on refugee protection.

44. Despite these points of agreement, there was some difference of opinion about the 'right' way to engage constructively with policy- and decision makers (and other stakeholders) about the listed concerns. While some participants submitted that the effectiveness of any exit strategy rested on it being acceptable to government, and that those advocating on behalf of refugees might need to be more open to compromise, other participants maintained that the time for compromise had passed, that successive decision makers had not shown a genuine willingness to bring Australian immigration policies into line with human rights standards to date, and that the situation was now so serious as to warrant nothing short of a full withdrawal from Nauru and PNG. A third view, expressed by some others, was that this was an issue on which little could be done to influence government policy, and so the focus should instead be on identifying the most vulnerable groups and their particular needs, in the hope that this data might be fed into government policy once a decision had been made about the future of offshore processing in Nauru and PNG.

Session two: Protection at sea

Introduction

45. In the second session, participants considered a range of issues relating to protection at sea. The briefing papers for this session acknowledged the considerable work that had already been done by UNHCR, governments, academics and others to identify the relevant international norms with respect to maritime interception operations and search and rescue (SAR). These norms include those under international human rights law, refugee law, and the law of the sea, and their application both in the refugee context and the contexts of people smuggling, human trafficking and other transnational crime. Taking note of this existing body of work, the Roundtable sought to draw together the various strands of these legal frameworks, apply them to Australia's maritime interception and 'turn-back' or 'take-back' practices, and consider the policy implications of the findings.

46. The Roundtable noted that boats carrying asylum seekers had not stopped setting out for Australia (or indeed reaching Australian territory), although it did acknowledge that the numbers had dropped significantly in recent years. Participants also acknowledged that the question of how best to respond to asylum seekers arriving spontaneously by boat was especially contested in public policy debates, and that the Roundtable provided a timely and valuable opportunity to clarify how general legal principles applied to Australian policies.

47. While the session concentrated primarily on Australian policy and practice, the Roundtable remained conscious of the broader context of mixed maritime movements in the region, and the possible flow-on effects of Australian policies. Participants with regional expertise remarked that while other states were not 'following' or directly adopting the Australian approach, it did have some normative impact, and made it more difficult for government and non-government actors to criticise the push-back policies of other states as being out-of-step with regional practice.

48. The Roundtable also remained alert to incidental aspects of Australian maritime interception policies and their broader implications, including efforts to prevent, deter or discourage people from leaving countries of origin or transit in the first place. These measures of 'early interception', be they at sea or on land, raised protection concerns of equal importance that were appropriate to consider as part of the larger discussion on maritime interception.

Terminology

49. The background paper for this session noted that a single, internationally accepted definition of maritime 'interception' did not exist. The Standing Committee of UNHCR's governing Executive Committee of the High Commissioner's Programme defined interception as 'encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination'.[10] By this definition, the 'interception'

of asylum seekers travelling without the required documentation was not limited to the high seas.

50. The Roundtable took note of the fact that 'turn-backs', 'turn-arounds' and 'push-backs' were often used interchangeably in Australia, whereas 'take-back' had a different meaning. Since September 2013, under Operation Sovereign Borders, turn-backs had been defined as 'activities which involve the safe removal of vessels from Australian waters, with passengers and crew returned to their countries of departure',[11] or 'where a vessel is removed from Australian waters and returned to just outside the territorial seas of the location from which it departed'.[12] Turn-backs could involve escorting, towing or steering an intercepted vessel or a replacement vessel back to international waters. In some cases they had reportedly involved Australian authorities making unauthorised incursions into the territorial waters of other States.

51. A take-back, by contrast, was a transfer of people from one sovereign authority to another. Under Operation Sovereign Borders, a take-back occurred 'where Australia works with a country of departure in order to see the safe return of passengers and crew'.[13] While it 'typically involves the at-sea transfer from a vessel or the control of a people-smuggling vessel at sea transferring from one sovereign authority to another'[14] (e.g. from Australia to Sri Lanka), the term could also be used in the context of returns by plane (e.g. to Vietnam).

52. For completion, it was noted that 'interdiction' was a term used most commonly in the United States, referring specifically to maritime interceptions.[15]

Identifying current Australian maritime interception practices

53. The session opened with general information-sharing and discussion about what was known of current Australian maritime interception practices. The Roundtable discussed:

- the difference between 'turn-backs' and 'take-backs';
- specific known cases of people being turned back from Australia to their point of departure at sea, or handed over to the authorities of the country of departure (at sea, or after being flown back);
- types of vessels used to transport people back to their points of departure;
- methods used by Australian officials to subdue passengers and crew on intercepted boats, and to ensure compliance with their orders;
- strategies employed to convince or coerce people to return to their points of departure;
- the use of 'enhanced screening' at sea to determine whether an intercepted person engaged Australia's protection obligations;
- health and safety issues arising from these practices, as well as concerns about the risk of *refoulement*;

- possible incursions into Indonesian territorial waters by Australian officials, in the course of turn-backs; and

- allegations that Australian officials had paid crew to turn their vessels around and take passengers back to Indonesia.

54. Despite the information shared, the discussion revealed that many gaps remained in the factual record, with much still unknown about how Australian officials were intercepting asylum seekers at sea and returning them to the countries they had left. Some participants were prevented from sharing what they knew for reasons of confidentiality, while others observed that accurate information about Australian practices had become increasingly difficult to access since Operation Sovereign Borders commenced (in September 2013). The Roundtable expressed general frustration about this lack of transparency, and the apparent lack of accountability, regarding maritime operations. There was a shared view that the secrecy surrounding these operations was a cause of great concern, and distinguished Australia from other states that had varying degrees of oversight over their maritime operations – be it from independent expert observers (such as UNHCR), other agencies or even the media.

In what circumstances could maritime interceptions be lawful?

General principles

55. These gaps in information prevented the Roundtable from considering the specifics of Australian maritime interception practices in depth. However, the Roundtable did engage in a general discussion about whether maritime interceptions could ever be lawful, and if so, the minimum standards that would need to be met in order for a state to turn or take an asylum seeker back to his or her place of departure, in a manner consistent with international law. At the outset, participants reaffirmed the core international norms of relevance, including:

    - the rights to life and security of the person, together with obligations relating to the safety of life at sea;

    - the universal right to seek and to enjoy in other countries asylum from persecution;

    - the prohibition on *refoulement,* a cornerstone of international human rights and refugee law, which applies wherever the state or its agents have *de jure* or *de facto* jurisdiction, whether it be within the state's territory, at the border, on the high seas or elsewhere; and

    - the core body of other human rights obligations that may also be engaged or have effect beyond a state's borders (extraterritorially), for example where officers exercise effective control over asylum seekers at sea.

56. Starting with the source of a state's authority to undertake maritime interception, the Roundtable took note of the fact that, under the international law of the sea, states had authority to intercept and take certain actions in relation to vessels within their territorial waters (up to 12 nautical miles from the coastline) or in their contiguous zones (between 12 and 24 nautical miles from the coastline). This authority extended to appropriate

action to prevent violations of coastal states' laws, including immigration laws. As a general rule, states could not interfere with the freedom of navigation on the high seas, although in certain limited circumstances the authority to intercept could extend to vessels in these places.

57. At all times, this authority to intercept under the law of the sea remained subject to states' other obligations under international law, including duties to ensure the safety of life at sea and obligations arising under international human rights and refugee law. This second set of obligations included the need to ensure that intercepted persons were able to make claims for international protection, and that these claims were properly identified and addressed.

58. On this point, the Roundtable took note of UNHCR's public position that claims for international protection made by people intercepted at sea were 'in principle to be processed in procedures within the territory of the intercepting state'. Asylum seekers should ordinarily have their claims processed, and benefit from protection, in the territory of the state from which they claimed protection, or which otherwise had jurisdiction over them. According to UNHCR, this would usually be the most practical way to provide access to reception facilities and to fair and efficient asylum procedures, and to ensure protection of the rights of the individual.[16]

59. However, the Roundtable also acknowledged that, as a matter of practice, states could and did adopt a range of measures to prevent asylum seekers from entering their territories, which may or may not involve some element of extraterritorial processing or screening. Screening people intercepted at sea was one example of such a measure; others raised by participants included the imposition of carrier sanctions, and special procedures for assessing asylum claims at the border.

Pre-screening

60. According to UNHCR guidance, a 'pre-screening' or 'profiling' exercise involves 'a process that precedes formal RSD and aims to identify and differentiate between categories of arrivals (e.g. persons who are seeking international protection, victims of trafficking, unaccompanied children, irregular economic migrants).' The core elements of pre-screening include: 'providing information to new arrivals; gathering information about new arrivals through questionnaires and informal interviews; establishing a preliminary profile for each person; and counselling.'[17] Pre-screening may also be used as a basis to refer people to the most appropriate authorities or procedures to meet their needs and manage their cases. However, this type of process does not replace RSD, and '[i]f a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.'[18] UNHCR has stated that '[p]rofiling and pre-screening arrangements require monitoring to ensure that they are conducted transparently and do indeed identify those who are seeking international protection.'[19] These arrangements are not unique to maritime interceptions, and raise similar protection concerns whether applied on land or at sea.

61. A majority of participants generally endorsed these principles. Whether they be called 'pre-screening', 'enhanced screening', 'pre-registration', 'profiling' or any other name – and whether applied at sea or elsewhere – it was recognised that these various

processes could, if implemented properly, serve an important practical function in channelling claims through to different response mechanisms as appropriate. When enacted as part of a broader system of responsibility-sharing for asylum claims, they could improve its overall effectiveness and efficiency by identifying at the earliest possible stage cases of particular vulnerability (which may require additional safeguards), claims to be processed through an ordinary RSD system, claims appearing to be manifestly unfounded (for which an expedited procedure could be appropriate), and/or other cases requiring a different response.

62. However, there was a shared view that, in order to be lawful, they must: (i) provide for an individualised assessment of each asylum claim, sufficient to identify and capture each individual's protection needs and particular vulnerabilities; and (ii) serve as a pathway to an appropriate response, with all credible asylum claims going to a full RSD procedure.

63. A large number of participants reiterated their concerns about secrecy in this regard, and stressed that it would not be sufficient for a state simply to assert that its procedures complied with these two conditions. Effective and independent monitoring by a suitable oversight body (such as UNHCR) was generally seen as an essential pre-condition to ensuring the lawfulness of any pre-screening procedures, especially when performed at sea and carrying the risk of direct return to a person's point of departure (although even then some participants doubted whether such practices could ever be lawful, as explained in paragraph 69 below).

64. While acknowledging that pre-screening procedures would need to be especially robust in cases where people intercepted at sea faced return directly to their country of origin, a number of participants cautioned against making general assumptions that return to a 'transit country' such as Indonesia would not raise protection concerns. Participants agreed that the need for appropriate screening applied in all cases, and that the fact of UNHCR having a presence and performing RSD in a certain country did not negate the need for returning states to consider whether it was safe to return each individual and, if so, whether asylum seekers would be able to access effective RSD and durable solutions in that country.

Lawfulness of Australian maritime interception practices

65. Having discussed the general legal principles relevant to maritime interception, the Roundtable considered the specific case of Australia, and whether its practices were (or could be made to be) consistent with international law. The discussion turned primarily on the question whether any form of screening or assessment of protection claims was occurring at sea and, if so, whether that process met the two criteria set out in paragraph 62 above.

66. In undertaking this exercise, the Roundtable again lamented the lack of publicly available information about Australian practices, and the difficulties that their clandestine nature created for the purpose of assessing their lawfulness. The background papers for this session provided some information about an 'enhanced screening' process that had been introduced by the Gillard government in October 2012, and a copy of the interview form used as part of that process as at May 2013 was

made available to participants.[20] However, there were many outstanding issues on which participants were unable to settle on definitive answers, including:

- the specific details of current screening processes at sea: whether they were used only for take-backs (when returning people to the authorities of their country of origin) or also for people turned back to transit countries such as Indonesia; which nationalities or groups were subject to screening; the questions asked and steps involved; how the process was explained to asylum seekers and the support (if any) they received in articulating their case; the availability of procedural safeguards and avenues for review; the circumstances in which asylum seekers could be referred for full RSD; any special procedures for particularly vulnerable people, including unaccompanied minors; and the average time taken for screening (anecdotal evidence from some participants suggested that the process could last as little as 20 minutes, or as long as several weeks);

- whether the 'enhanced screening' process had remained substantially the same since October 2012, or had changed over the years; and

- whether there were (or had been) different policies to screen asylum seekers at sea as opposed to on land, or whether the same procedures were applied regardless of how an asylum seeker entered the country.

67. No evidence was cited to support a conclusion that the Australian authorities who engaged in turn-backs and take-backs were conducting appropriate and individualised assessments of the protection needs and vulnerabilities of intercepted people, nor that credible asylum claims were being identified and referred to a full RSD procedure. Conversely, some participants were aware of cases in which asylum seekers had been returned to their countries of origin and subsequently exposed to treatment amounting to persecution or other serious harm, and/or had been recognised as refugees in other jurisdictions. The Roundtable noted both the difficulty and the importance of post-return monitoring in such cases.

68. A number of participants submitted that the apparent deficiencies in any enhanced screening process were part of a deliberate strategy to prevent asylum seekers from accessing an appropriate RSD process with procedural safeguards in Australia. In what some described as an effort to 'frustrate' Australia's obligations under the Refugee Convention, there was a view that these policies were designed to deprive asylum seekers of the opportunity to have their claims considered at all, in an attempt to avoid triggering Australia's protection obligations under international law.

69. Overall, a majority of participants – especially the international law experts – expressed strong doubts that current Australian practices complied with international human rights and refugee law. Turning then to the question whether these practices could, in the future, be brought into line with the relevant standards, participants expressed different views. Some argued that there were reasonable changes that could be made to ensure Australian maritime interception policies complied with the relevant law, namely appropriate screening and effective oversight. Other participants argued that even if Australia were to introduce and implement a screening process that purported to comply with the two criteria set out in paragraph 62, a series of further concerns would continue to affect the viability of such screening, including:

- the distress, confusion and health issues likely to affect intercepted people, impairing their ability to understand and engage effectively with any process while at sea;

- the lack of transparency, scrutiny or oversight by independent authorities or international organisations;

- the lack of procedural safeguards in the process, including the lack of independent review of screening decisions by a senior authority outside the department or agency making the initial decision;

- difficulties in securing access to interpreters and legal representation, including in cases where these services were provided remotely by phone and people struggled to hear and understand each other; and

- difficulties ensuring that the necessary expertise, capacity and processes were in place on an intercepting vessel to meet the needs of asylum seekers with particular vulnerabilities and special needs, including children (whether unaccompanied or otherwise), pregnant women, people with disabilities, the elderly, trafficked people, and survivors of torture and trauma.

70. Taking note of these concerns, the Roundtable acknowledged the significant practical obstacles to implementing a fair and effective screening process at sea, especially when asylum seekers were unlikely to understand the process they were participating in and the evidence adduced was likely to be unsound as a basis for decision-making.

Protection and safety at sea

Search and rescue (SAR)

71. Following this close consideration of the lawfulness of Australian maritime interception practices, the focus of the session shifted to a broader discussion about safety at sea. The Roundtable took note of the large body of work that had already been done, and continued to be done, in this area, including to establish and strengthen legal frameworks and cooperative agreements, and to build capacity and political will. The Roundtable acknowledged the particular importance of this work in Southeast Asia in the wake of the situation in the Andaman Sea in May 2015.

72. Building on this work and earlier discussions, participants explored some of the specific issues arising at the intersection between a state's SAR obligations under the international law of the sea, and parallel norms of international human rights and refugee law. A number of participants drew the Roundtable's attention to guidelines on this topic prepared by the International Maritime Organization, UNHCR and the International Chamber of Shipping, entitled *Rescue at Sea: a guide to principles and practice as applied to refugees and migrants* ('Guidelines on Rescue at Sea').[21] Relevantly, the most recent version of these guidelines states that:

    - as a matter of longstanding maritime tradition, as well as international legal obligation, shipmasters have obligations to render assistance to those in distress

at sea without regard to their nationality, status or the circumstances in which they are found;

- several maritime conventions define the obligations of state parties to ensure adequate and effective SAR arrangements are in place in the areas of sea under their responsibility, and to ensure the rescue of people in distress at sea around their coasts (also without regard to their nationality, status or the circumstances in which they are found);

- the country responsible for the region in which people are in distress at sea must coordinate the rendering of assistance or rescue, and is primarily responsible for providing a place of safety or ensuring that a place of safety is provided;

- if people rescued at sea claim to be refugees or asylum seekers, or indicate in any way that they fear persecution or other serious harm if disembarked at a particular place, key principles prescribed by international human rights and refugee law need to be upheld. In particular, care should be taken to ensure that arrangements for the disembarkation of rescued people do not result in their return to a place where they risk persecution or other serious harm; and

- state rescue agencies and services, as well as state-controlled vessels (such as coastguard and navy vessels), have direct obligations under international refugee law – including the obligation not to engage in or otherwise allow *refoulement* – which have a bearing upon their obligations under international maritime law.

Places of safety

73. The Roundtable took note of the fact that a country's obligations to coordinate SAR in its designated zone do not necessarily require it to send its own authorities to rescue people directly, nor that people subsequently be allowed to disembark in its territory. Instead, the primary obligation is to ensure that people in need are provided with a 'place of safety'.

74. While the Guidelines on Rescue at Sea define a place of safety as 'a location where rescue operations are considered to terminate, and where: the rescued persons' safety of life is no longer threatened; basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the rescued persons' next or final destination', a number of participants queried how this concept was understood and applied in practice. A series of general questions were raised about the circumstances in which a vessel could potentially be considered a place of safety. Were seaworthiness and the absence of an immediate threat to life the only relevant criteria? If so, would a seaworthy vessel operated by a people smuggler, or an orange lifeboat previously used by Australian authorities to return people intercepted at sea to Indonesia, be considered a 'place of safety'? What if the vessel lacked a crew with the necessary skill and equipment to guarantee their passengers could safely reach land? What if there were a risk that the vessel would run out of fuel before reaching land? What if a state put people in a boat without a GPS, or destroyed the vessel's GPS, and provided them only with older navigational systems (such as paper maps)? Would seaworthiness alone render a vessel 'safe' for a pregnant woman, an

infant or child, a person in serious psychological distress, or any other person with a serious illness or disability?

75. Having noted the number and importance of these outstanding questions, participants turned to the details of Australian practices in this regard. The Roundtable took note of the Australian government's stated policy that boats had been (and would only be) turned back 'where it was safe to do so'.[22] Participants shared their views on what this test might mean, how it had been and could be applied in practice, and whether such a commitment on its own would be sufficient to fulfil Australia's obligations to intercepted people under international human rights law, refugee law and the law of the sea. The relationship between the notion of 'safety' in Australian authorities' position and that of a 'place of safety' under the law of the sea was identified as a point in need of particular clarification.

76. A number of participants believed that, when assessing whether it was 'safe' to turn back a boat, Australian authorities were likely to take a narrow view of safety as the absence of direct threats to life or serious physical harm, maintaining a limited focus on the physical safety of intercepted people at the moment their boat was turned around or when they were transferred to an alternative vessel for return to their point of departure. Previous reports of boats being turned around at sea by Australian authorities, and then running into difficulties before reaching Indonesia, were cited as evidence that the Australian authorities' consideration of asylum seekers' 'safety' might not extend to a rigorous analysis of the possible risks and likelihood that harm might be suffered during the return journey. In light of these cases, some participants questioned whether it was the safety of asylum seekers, or the safety of Australian officials engaged in maritime interceptions, that was the primary consideration when determining if it was 'safe' to turn back a boat.

77. No evidence was cited to support a conclusion that Australian authorities' assessments of safety in this regard extended to individual assessments of people's vulnerabilities and protection needs, mental health and general well-being, or any future harm to which they might be exposed upon return to their countries of departure. This point caused particular concern given the earlier discussion about the lack of effective screening to identify and assess claims for international protection made at sea.

Policy implications

78. In the final part of the session, participants began to reflect on the broader policy implications of their discussions.

The relationship between maritime interception and search and rescue

79. The Roundtable was asked to consider the relationship between turn-backs and take-backs, on the one hand, and SAR, on the other. In particular, participants were asked whether these two types of operations could co-exist (either in coordination or independently), and whether they would complement or conflict with each other.

80. Recognising that states have legally binding obligations to fulfil their SAR duties under international law, a number of participants took the view that practical difficulties would

arise from the co-existence of SAR and turn-backs. The reasons for this view included that:

- the two policies had conflicting objectives and outcomes. If safety at sea were improved, more asylum seekers might be prompted to travel by boat, whereas turn-backs aimed to deter people from moving in this way. Successful SAR was premised on a connected network of responsibility-sharing agreements, whereas turn-backs were seen to involve one state shifting responsibility to another. SAR could result in Australia being responsible for bringing people to its territory (albeit temporarily), whereas turn-backs sought to avoid this outcome to the greatest extent possible;

- turn-backs had the potential to cause diplomatic tensions between neighbouring countries, and undermine the mutual support and cooperation necessary for global SAR coordination. Issues could arise, for example, if Australia were to stray into Indonesian territorial waters in the course of turning back a boat (as had happened before), or if Indonesia were to refuse to take responsibility for a vessel in distress on the grounds that Australia had pushed it back there;

- putting the humanitarian imperative of SAR together with the enforcement and exclusionary objectives of turn-backs risked conflating the two, and lent support to the narrative that interception was a humanitarian action; and

- a turn-back policy without effective screening and a robust system to protect against *refoulement* would undermine the effectiveness of SAR from an overall protection perspective.

81. Some of these reasons also supported a finding that SAR was not a natural complement to take-backs, especially when they occurred at sea. However, to the extent that asylum seekers could be rescued at sea, brought to safety on land in Australia, and then taken back to their countries of origin by plane, this question was less relevant.

The consequences of ceasing maritime interception

82. In the event that Australia's maritime interception policies were found to be unlawful, participants were asked to consider a series of policy alternatives. In particular, they were asked: If Australia were to cease its practice of turn-backs and take-backs, and possibly refocus its efforts on SAR, would these changes lead to an increase in the number of people trying to reach Australia by boat? If so, what options would be open to Australia for addressing this increase, in both a practical and lawful way?

83. The question about what effect a change in policy might have on the number of people trying to reach Australia by boat gave rise to considerable debate. It remained a disputed matter, leading to a debate about 'pull factors' and the extent to which individual decision-making in the refugee context is motivated by the perceived attractiveness of a destination country, as opposed to the reasons that drive people on from countries of origin and transit, or a range of other personal reasons unique to an individual's situation. Participants acknowledged that decision-making is a multifactorial and individual matter, and that there are valid reasons why migration and refugee law

experts take issue with the concept and language of 'push' and 'pull' factors. Nevertheless, a number of participants also noted that these concepts are highly relevant from a government perspective, and that policy changes in destination countries can and do influence asylum seekers' decision-making about onward movement. Both in Australia and in Southeast Asia, concerns about encouraging more asylum seekers to try to enter the state's territory through irregular means had prompted a number of governments to resist making new commitments, or respecting those they already had, in relation to refugee protection.

84. Overall, participants reached different conclusions on this topic. Some expressed the view that higher numbers of people certainly would start to get on boats again – both across the Andaman Sea to Malaysia, as well as to Australia – if they knew they had a better chance of reaching their intended destinations. They drew the Roundtable's attention to the number of asylum seekers and refugees in Indonesia waiting for a durable solution, and argued that any apparent 'softening' of Australia's tough stance on asylum seekers coming by boat (such as withdrawal from Nauru or PNG, or an end to maritime interception) would likely trigger an increase in the number of boats setting out from Indonesia – at least for an initial period during which smugglers could 'sell' the possibility of a change in outcome. Drawing on comparable experiences in the Mediterranean Sea, participants also flagged the possibility that replacing turn-backs with a robust SAR policy could draw to the seas not just more vessels, but more unseaworthy vessels.

85. Other participants cautioned against making broad causal assertions that historical data did not necessarily support, and feeding into the fear and rhetoric prevalent in public and policy debates. They reminded the Roundtable that refugees in Southeast Asia were not a monolithic group, and that different people were moving for different reasons to difference places – with only a minority intending to go to Australia by boat. A number of participants maintained that a preoccupation with 'pull factors' as the drivers of irregular movement was misplaced and failed to take account of the reality of displacement. Participants also discussed the fact that refugees with strong connections in a certain country (familial or otherwise), were likely to continue to be motivated to reach that country regardless of its policies.

86. Having problematised the issue in this way, the Roundtable moved on to some general brainstorming about various alternative approaches to turn-backs and take-backs – some of them new, some of them tried to varying degrees before. Participants focused on identifying the relevant practical and legal issues, and the extent to which the alternatives might be viable as a matter of policy, and consistent with international law.

Discriminatory measures to discourage irregular migration

87. One approach that participants were invited to reflect upon involved Australia conducting appropriate SAR and bringing asylum seekers to Australian territory, but then enforcing a suite of discriminatory measures against people who arrived by sea, as distinct from those refugees who waited to be resettled or otherwise came to Australia by lawful means.

88. Participants approached the question whether there were any circumstances in which it would be lawful to treat asylum seekers differently on the basis of their method of

arrival, be it for the purpose of discouraging them from embarking on dangerous sea journeys or otherwise, in various ways.

89. Some participants challenged the premise of the question, arguing that the focus on methods of arrival was misplaced and distracted from what should be the central concern: finding ways to increase and improve protection for people in need, regardless of the countries to which they fled or how they got there. It was also noted that the question of discrimination on the basis of method of arrival would become irrelevant if a state were to adopt a uniform policy for all asylum seekers, regardless of how they arrived in its territory.

90. Other participants focused on the fact that international law, in very clear terms, prohibited discrimination of any kind and on any basis, including, but not limited to, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[23] Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, were recognised as basic and general principles underlying the protections guaranteed by human rights law.[24] For state parties to the Refugee Convention, these principles were bolstered by the prohibition on imposing penalties on refugees for entering or being present in a state's territory without authorisation (provided they came directly from a territory where their life or freedom was threatened, presented themselves without delay to the authorities and could show good cause for their unauthorised entry or presence).[25]

91. A further approach taken by some participants – consistent with but slightly different from the above – emphasised that international law does not require all people to receive identical treatment, and that not every instance of differential treatment will constitute discrimination. Differential treatment does not violate the fundamental principle of non-discrimination so long as it is reasonable and objective, with the aim of achieving a purpose that is legitimate under the International Covenant on Civil and Political Rights (that is, consistent with the full set of rights enshrined in that instrument).[26]

92. Overall there was general agreement, particularly amongst the legal experts, that international law prohibits policies that discriminate against certain groups of refugees by ascribing them different rights based on their method of arrival (effectively creating 'first class' and 'second class' refugees). There was a shared view that any policy that deprived asylum seekers arriving by boat of access to a fair and proper procedure for assessing their claims, and/or prevented them from accessing timely and appropriate durable solutions, would be neither lawful nor appropriate. Nor could a state refuse to fulfil its legal obligations to respect the principle of family unity and refugees' right to family reunification. These concerns could not be alleviated by a simple assertion that such a policy was necessary to prevent deaths at sea.

93. A number of participants affirmed that it could still be appropriate to provide different solutions for different refugees depending on their respective needs and circumstances, so long as the relevant solution was not determined on a discriminatory basis by reference to a refugee's method of arrival in the country of asylum (or on any other basis prohibited by law). States wishing to promote the use of safe and regular pathways to protection instead of maritime migration would need first to establish those

pathways, and then find ways to encourage refugees to use them in a manner that did not offend the principle of non-discrimination or otherwise violate international law.

Preventing or pre-empting irregular migration before embarkation

94. The Roundtable also considered the possibility of preventing asylum seekers from embarking on sea journeys in the first place. This option was raised several times throughout the session in a cautionary sense, rather than as a viable alternative to turn-backs. A number of participants noted that preventing asylum seekers from onward movement could result in people becoming trapped in unsafe circumstances. Such an outcome would undermine the asserted humanitarian purpose of turn-backs, being to discourage people from risking dangerous sea journeys.

95. By contrast, some participants noted the potential value of a system of 'early interception' designed to reduce the need for people to undertake maritime journeys and improve protection overall. Such a system could involve identifying and registering asylum seekers in a state's territory as soon as possible after their arrival, without necessarily requiring that state to bear full responsibility for processing their claims and finding durable solutions for those found to be refugees. In order to discourage onward movement by sea (or land), this option would need to link registered asylum seekers with pathways to protection – be they in the country of registration or elsewhere. These ideas were explored further in session three.

96. In relation to the Australian context in particular, it was proposed that an effective way to stop people from undertaking dangerous sea journeys, without violating international law, might be to use resettlement more strategically. While noting that not all displaced people in the Asia-Pacific wanted to reach Australia, certain individuals and groups were identified as being particularly likely to attempt the journey by any means available (including those with strong family and/or community connections in Australia). Some participants argued that an expansion of family reunification programs and targeted resettlement of these people, especially those already in Indonesia, could be a more effective alternative to maritime interception, in terms of improving overall protection and addressing displacement in the region. It was noted, however, that such a move would need to be integrated into a broader suite of measures, so as not to create an unsustainable precedent or draw into Indonesia larger numbers of people with family connections in Australia who might not otherwise leave their country of origin or place of residence.

Disembarkation and responsibility-sharing on a broader scale

97. At various times throughout this session, the Roundtable returned to the idea of establishing a regional system in which access to timely and safe disembarkation options was secured for people rescued at sea, and some form of responsibility-sharing mechanism was then established to ease the burden on countries that provided disembarked people with immediate humanitarian assistance. Participants noted that this approach would likely require Australia to be open to settling at least some refugees who travelled by boat, regardless of where they disembarked.

98. The Roundtable took note of a review that was underway within the framework of the Bali Process, looking at the way states in the region responded during and after the

situation in the Andaman Sea in May 2015 (which was explored further in session three). The Roundtable was also briefed on other ongoing efforts in Southeast Asia to identify possible disembarkation sites for the future, create buy-in from key states, promote predictable disembarkation, and establish mechanisms for equitable responsibility-sharing amongst affected states.

99. Participants identified this as an area that would benefit from further research – both comparative work drawing on experiences from other regions, and legal analysis bringing together relevant aspects of the international law of the sea and international human rights and refugee law. It was also noted, however, that the success or otherwise of disembarkation agreements would be as much a matter of political will as of legal development or practical capacity. Building the relevant legal frameworks was important, but the critical question was whether they would receive sufficient buy-in and support from relevant states.

100. The Roundtable also discussed the relationship between disembarkation and the processes that follow. It took note of the fact that, from an international law perspective, there was no legal obstacle to severing responsibility for disembarkation and immediate humanitarian assistance from the subsequent tasks of processing disembarked people and finding durable solutions for those found to be in need of international protection. Indeed, the separation of disembarkation from the provision of durable solutions had been a core element in previous regional cooperation arrangements (such as the Comprehensive Plan of Action). Some participants commented that such an arrangement would likely make the prospect of disembarking people arriving by sea more attractive to coastal states in the Asia-Pacific, and that it might improve the protection of life at sea, by removing any incentive for naval authorities to delay rescues until certain that vessels really were in distress, and that no one else was going to rescue them.

101. While accepting the potential attractiveness to states of a system that separated disembarkation from durable solutions, other participants cautioned against the risk of creating situations of protracted displacement, which could arise in the absence of strong, guaranteed and enforceable systems for linking disembarked or rescued people to solutions. Some participants proposed that previous systems of this nature warranted revisiting, including the 'Disembarkation Resettlement Offers' (DISERO) scheme and the 'Rescue at Sea Resettlement Offers' (RASRO) scheme, beginning in 1979 and 1985 respectively.[27] In seeking to learn from past experiences, however, it was noted that these systems could become increasingly inoperable if states reneged on their resettlement promises. There was also a view that any system in which third-country resettlement was the only durable solution offered could entrench an already unsustainable reliance on resettlement, and hinder efforts to encourage more countries to offer local solutions to refugees.

102. Overall, there was a shared view that if the separation of disembarkation from durable solutions were to succeed, it would likely need a workable responsibility-sharing framework to be in place, possibly based on a system of common but differentiated responsibilities depending on the position and capacity of each state involved (this proposal, and its possible limitations, were discussed further in session three, as recorded in paragraph 137 below). Without such a framework, there was a risk that the separation of disembarkation from durable solutions would lead to the same problems

currently seen in Nauru and PNG. Without the last element – guaranteed resettlement or other appropriate durable solutions for those in need – the rest of the system would fall down.

Concluding remarks

103. This session demonstrated that the issue of protection at sea was one on which there was an urgent need for further information and research, and that the lack of information about Australia's maritime interception policies hampered efforts to assess their legality. The Roundtable also identified a need for further work to bring together the various legal frameworks of the law of the sea, international human rights law and refugee law to answers the many outstanding questions that arose from the discussion.

104. Throughout the session, many participants maintained strong views about the need to improve the rhetoric and framing of key issues – both by the Roundtable and in broader public debate. In particular, participants:

- recalled that at the heart of the issue were people with the right to seek asylum, and that discussions should respect the sanctity of that principle by returning the focus to a protection framework based on what is lawful (as opposed to a conversation about the minimum that could be done to comply with international law);
- questioned the pre-occupation with sea journeys and maritime migration, when people also flee by plane and face harm while travelling on land;
- challenged the assumption that maritime mixed migration could ever be stopped entirely, suggesting instead that the issue be reframed around acceptance of the facts that people would continue to arrive spontaneously by boat, and that states needed to find appropriate ways to manage those arrivals;
- highlighted the value of focusing less on unsustainable measures to prevent boat arrivals, and more on guaranteeing access to full and fair RSD procedures, with links to durable solutions for those in need of international protection regardless of their method of arrival; and
- cautioned against sending the message that asylum seekers arriving by boat would have a negative impact on a country, as this would make it difficult to persuade other countries in the region to accept them, or to achieve any regional cooperation framework under which they might be required to disembark and provide support to asylum seekers.

105. Ultimately, there was a shared view that Australia and the region as a whole would benefit from a focus on modelling best practices, rather than on the circumstances in which it might be lawful to carry out policies that undermine refugee protection. By fostering a more protection-sensitive approach to asylum and maritime migration, Australia could set a good example within the region, thereby laying the groundwork for effective regional cooperation in the future.

Session three: Protection in the region

Introduction

106. On the second day, the focus of the Roundtable shifted from Australian refugee policy to the broader context of refugee protection, displacement and cooperation in the Asia-Pacific region.

107. In session three, participants considered what it meant to be a 'region', and took stock of where the Asia-Pacific was at in terms of cooperation on refugee protection. After a series of briefings on recent developments, the Roundtable began its discussion with an exploration of some broad, high-level questions (including whether regional cooperation was a useful goal, and if so what the general approach to building it should be), before moving to a more concrete consideration of what the best 'next steps' might be.

108. This session built upon, rather than replicated, the considerable work that had already been done in this area, including by academics, UNHCR, the Asia Pacific Refugee Rights Network and other organisations working in the region. It also drew on the specific country and subject-matter expertise of relevant participants. Despite the focus on refugees and asylum seekers, participants remained alert to the relevance of other groups in similarly vulnerable situations, including migrant workers and people who are internally displaced, stateless, trafficked and/or smuggled.

Briefings

109. The session opened with a conceptual introduction from Professor Penelope Mathew, who discussed the extensive research she had conducted in this area with Mr Tristan Harley. Professor Mathew provided an overview of the key findings in their recent book, *Refugees, Regionalism and Responsibility* (Edward Elgar Publishing, 2016), and an update on the outcomes from a colloquium of the same name which they had co-convened at the Australian National University in August 2013.[28] This briefing explained that there are different forms of 'regionalism', with responsibility for refugee protection feeding into each in different ways. The Roundtable took particular note of the importance of *inter*-regional cooperation, given that the majority of the world's refugees originate from and are hosted in developing countries, and may require support from states outside the region with the capacity to provide it.

110. The Roundtable was also briefed on developments relevant to refugee protection within the frameworks of the Asia Dialogue on Forced Migration and the Bali Process, notably at the Bali Process Senior Officials Meeting and Sixth Bali Process Ministerial Conference held in Bali, Indonesia on 22 and 23 March 2016 respectively. Participants discussed the pressure that the Co-Chairs (Australia and Indonesia) had faced to produce tangible outcomes, following the failure of the Bali Process mechanisms to act in a timely and effective way during the situation in the Andaman Sea in May 2015. The Roundtable took particular note of three key achievements from the March meetings:

- the Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Declaration), adopted by the Sixth Ministerial Conference;

- the decision of the ministerial conference for Bali Process members to 'review the region's response to Andaman Sea situation of May 2015 to share lessons and work to implement necessary improvements'. This review, which ministers agreed 'would consider options for improving national, regional and subregional contingency planning and preparedness for potential large influxes of irregular migrants in the future', was considered a relatively adventurous initiative for the Bali Process. The Roundtable was informed that the review was expected to be completed by November 2016;[29] and

- the agreement of the ministerial conference to create a voluntary and non-binding mechanism authorising the Co-Chairs to 'consult, and if necessary, convene future meetings to discuss urgent irregular migration issues with affected and interested countries in response to current regional issues or future emergency situations'.[30] The Roundtable was informed that the Bali Process had previously lacked any pre-authorised forum or mechanism by which senior officials from affected countries could communicate and coordinate responses to situations of mass displacement or mass influx at short notice. The Bali Process' failure to play a useful role during or immediately after the situation in the Andaman Sea in 2015 was attributed to this deficit, as well as to diplomatic tensions that had impeded inter-governmental cooperation at the relevant time. Participants were advised that, to be effective, the new mechanism would need to be established before the next situation in which it was required to act. However, it currently existed in name only, with Bali Process members working slowly and carefully to reach agreement on what it might look like, who would be involved, what resources it would have, and how it would be operationalised.

111. Participants with relevant country and subject-matter expertise then provided general briefings and comments on the state of refugee protection in the region. During these briefings it was noted that:

- before referring to 'regional cooperation', it was first necessary to identify the 'region' that was being discussed. Given the lack of a single, settled definition of the 'Asia-Pacific region', and the absence of a truly regional, all-inclusive political organisation (such as the European Union, African Union, or Organization of American States), participants highlighted the importance of clarifying which countries were being considered, and what fora or institutions might be relevant to their cooperative action;

- the countries in the Asia-Pacific comprise one of the most heterogeneous regions in the world – politically, socially and economically. As such, preliminary consideration needed to be given to the foundational questions of how to build capacity on rule of law and rights-based issues across government, civil society and academia in these countries, and how to bring these groups together – both at the national and regional levels. Without this capacity, it would be difficult to get traction on refugee protection at any level;

- forced and irregular migration were long-standing issues in the region, and there had been no shortage of initiatives to address them, yet the standard of refugee protection overall remained relatively low. There was a shared view that the greatest obstacle to regional cooperation on refugee protection was not a lack of

ideas about how to achieve it, but rather a lack of political will – in particular, the difficulty of getting states to buy in to proposals for protection and take ownership of them;

- any consideration of refugee protection in the region would need to be alert to the matters of greatest priority and concern to each state involved, with a focus on identifying possible areas of traction (such as migrant workers, labour mobility, human trafficking or national security). It would also need to acknowledge the different ways in which key concepts (such as citizenship, transience and local integration) were understood. While refugees and irregular maritime migration were major political issues for Australia, the same was not necessarily true for other countries in the region. Participants acknowledged that, just as Australian policies were influenced by internal politics, so too were the priorities of other states in the region determined by their own domestic concerns. Any viable form of regional cooperation would need to take due account of these differences and the tendency of domestic priorities to change over time;

- the challenge of refugee protection in the Asia-Pacific region was, in fact, relatively modest when compared to the levels and nature of displacement in other parts of the world. The majority of displaced people belonged to a few key groups, including the Rohingya and non-Rohingya from Myanmar. For the 105,000 people in this second group, mainly of Karen, Karenni, Burmese and Mon ethnicity and living in camps along the border of Thailand and Myanmar, a roadmap for return to Myanmar had already been developed.[31] For most of the rest, including the Rohingya, comprehensive and durable solutions to their displacement were yet to be secured, but immediate work could be done on registration and ensuring temporary protection in various countries; and

- the fact that relatively few countries in the region were parties to the Refugee Convention did not mean that it carried no normative weight. Core principles of international refugee and human rights law had been endorsed by state and non-state actors in the region in the lead-up to the UN High-Level Summit to Address Large Movements of Refugees and Migrants on 19 September 2016, and in the New York Declaration for Refugees and Migrants[32] (in draft form at the time of the Roundtable). Moreover, in previous years a number of states in the region had demonstrated some willingness either to consider accession to the Refugee Convention or otherwise to implement some of its provisions in domestic law or policy. As such, the Refugee Convention remained important for establishing a meaningful sense of what refugee protection should look like, especially in the context of regional cooperation.

112. Participants received a briefing on the recent work of the Australian Human Rights Commission of relevance to the session, and were informed that the Commission would be releasing a new report in the days following the Roundtable, entitled *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*. Participants considered the three 'building blocks' identified in the Commission's research as those that should shape Australia's foreign policies strategies on migration in the Asia-Pacific region, namely:

- building on existing initiatives – providing support to expand the scope and impact of current initiatives to address refugee protection needs in the region;
- building new capacity – increasing the capacity of countries in the region to respond to migration-related concerns, including refugee protection; and
- building bridges to further cooperation – pursuing measures to lay the foundations of a cooperative regional framework on migration and refugee protection.

113. In relation to Australia's place within the region, participants were invited to reflect upon both the opportunities for, and the limitations to, Australian-led initiatives to improve refugee protection. A large number of participants argued that Australia had done significant damage to its moral standing and relationships with certain neighbours in the region on this issue, and had played a key role in entrenching a deterrence or crime paradigm, rather than a protection-based approach to displacement. Taking note of these trends, and the fact that the region had continued its own discussions about displacement over the years without always involving Australia, there was a strong view that any initiative dominated or led by Australia was likely to be received with mistrust. Participants with country expertise in Southeast Asia also noted that, from these countries' perspectives, the 'region' comprised the ten ASEAN countries, with Australia seen more as a business partner than a political one.

114. Finally, the Roundtable began to explore the possible opportunities and limitations for regional cooperation on refugee protection within existing mechanisms, and what a new regional cooperation framework might look like – either as an alternative to or in parallel with these mechanisms.

Consideration of existing mechanisms and approaches

Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

115. The Roundtable discussed the benefits and limitations of the Bali Process as an existing forum through which it might be possible to build cooperation on refugee protection. This discussion included consideration of the Regional Cooperation Framework (RCF) adopted in 2011 at the fourth Regional Ministerial Conference of the Bali Process, and the Regional Support Office (RSO) established in Bangkok in 2012 to operationalise the RCF.[33] It was noted that the new initiatives announced in March 2016 were yet to be fully implemented. As such, their outcomes and impact on the functioning of the Bali Process would have to be assessed at a later stage.

116. A number of participants voiced longstanding scepticism about the ability of the Bali Process to drive the creation of an effective regional refugee protection framework. It was noted that the Bali Process was, and had been since its inception, focused on the challenges of people smuggling, trafficking in persons and related transnational crime (as opposed to protection), and that its founding purpose had been to foster better inter-governmental cooperation between national law enforcement bodies working on these crimes. While UNHCR and the International Organization for Migration (IOM) had been invited to participate as members of the Bali Process, many of its member states were not parties to the Refugee Convention, and/or did not have domestic legislation or

structures in place to perform RSD or otherwise distinguish those in need of international protection from 'illegal migrants'.

117. In turning to consider whether these past concerns would continue once the new March 2016 initiatives were implemented, some participants queried whether the Bali Process was using the 'right' human rights-sensitive language, but was in fact seeking to achieve something other than a protection outcome (such as greater capacity for, and cooperation on, the gathering and sharing of asylum seekers' biometric data). It was also noted that the new initiatives – in particular the Bali Declaration and adoption of a new consultation mechanism – appeared to have stepped away from the RCF, the focus of which had been on building asylum systems in the region.

118. By contrast, other participants with expert knowledge about the Bali Process expressed confidence in the potential of its mechanisms to play a useful role in improving refugee protection once the most recent initiatives were implemented. There was also a strong view that, whatever the impact of the 2016 developments, targeted and effective advocacy could assist in ensuring the new Bali Process mechanisms kept the focus on regional protection, rather than regressing to the management of displacement through a transnational crime paradigm.

119. On a more positive note, some participants observed that the RSO was continuing to grow and improve in its efforts to support and strengthen practical cooperation on refugee protection and other forms of migration management in the region. Over recent years, the RSO was said to have reinvigorated itself, and to have developed a work plan that was much more protection sensitive, with constructive input from UNHCR and IOM. While not necessarily doing what it was originally expected to do (facilitating the implementation of the RCF), the RSO was described as a useful office making an important contribution to this area of regional cooperation. The RSO was cited as a good example of how concrete protection outcomes could be achieved when a process focused on a targeted issue or group of states. However, it was also noted that the RSO lacked independence, its own legal identity (which was necessary for contracting), financial resources, and control over its own funding. Greater predictability, certainty and independence in its work were seen as vital elements to ensuring its ongoing value.

Association of Southeast Asian Nations

120. The Roundtable discussed the potential benefits and limitations of ASEAN in building cooperation on refugee protection. In terms of positive developments, it was noted that ASEAN had continued to increase its work on trafficking in persons,[34] and that the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) had added people smuggling as a new area under its purview.[35] In July 2015, the AMMTC had also resolved to support the establishment of a trust fund that would receive voluntary contributions from ASEAN states and the international community to 'support the humanitarian and relief efforts involved in dealing with the challenges resulting from irregular movement of people in Southeast Asia'.[36]

121. However, participants also noted the significant limitations of ASEAN as a forum through which to advance refugee protection. The ASEAN institutions, like the Bali Process, had been noticeably absent during the situation in the Andaman Sea in May 2015. While the trust fund had been established, it still lacked a formal operational

structure or means to disperse funds, and there had been little other evidence of progress on this issue. There was a view that it would take considerable effort to convince ASEAN institutions to become more involved in refugee protection, and that this effort would need to take account of the attitudes and interests of individual states. The relationships and tensions between ASEAN member states would also need to be considered.

122. In discussing how ASEAN might become more constructively engaged in this area, the Roundtable considered the respective possibilities for top-down or bottom-up action. The Roundtable took note of the fact that people smuggling and trafficking issues were dealt with primarily in the Political–Security pillar of ASEAN's work, reflecting ASEAN's security-centric approach to displacement. It was suggested that there could be some benefit in highlighting the areas of commonality between refugee protection, labour migration and other areas of displacement, and promoting greater cross-over into the work of ASEAN's Economic and Socio–Cultural pillars of work.

Broader irregular migration and general human rights initiatives

123. Moving away from formal institutions, the Roundtable was asked to consider the benefits and limitations of trying to enhance refugee protection by positioning the issue within the broader frame of irregular migration, and/or by tapping into existing initiatives to improve development and human rights generally in the region. These approaches, as distinct from regional cooperation on refugee protection specifically, could involve introducing protection issues into existing fora and discussions about human rights, and building capacity and awareness that would have a flow-on effect for refugee protection.

124. In favour of this approach, some participants observed that:

- there was some existing human rights architecture in the region (such as the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Human Rights Declaration) which, although limited, could serve as an entry point to build traction on refugee issues;
- a focus on promoting safe migration and disincentivising unsafe irregular migration generally would benefit a range of groups and be more attractive to governments;
- there could be advantages to viewing refugees and asylum seekers as migrant workers, such as the opportunity to build on existing efforts to improve migrant worker protection in the region, and ensure that refugees have work rights;
- while there was relatively little appetite amongst many Asia-Pacific states for acceding to the Refugee Convention, the Sustainable Development Goals (SDGs) and certain human rights instruments (such as the UN Convention on the Rights of the Child) had greater traction with governments in the region. Some participants submitted that promoting temporary protection, informed by the SDGs as minimum standards, could be a useful place to start. Within the framework of the SDGs, governments could perhaps then be encouraged to give priority consideration to refugees, stateless people and other particularly vulnerable groups; and
- given the existing developments in these areas (within the enabling environments of the Bali Process and ASEAN, as well as more broadly in the region) there could

be an opportunity for more immediate and concrete action, whereas an agreement on regional refugee protection was more likely to be a long-term objective.

125. Despite these positive elements, a number of participants also raised concerns about approaching the issue of refugee protection through alternative frameworks. The Roundtable was cautioned not to abandon the refugee framework too quickly, nor to overlook the important role that UNHCR had played in building relationships and protection-sensitive approaches to migration in the region over many decades. Some participants also flagged the risk of conflating 'humans' with 'citizens' in a development or human rights context, and warned against the assumption that when citizens benefit, so too do more marginalised groups (such as refugees).

Bilateral or tripartite approaches

126. Finally, the Roundtable considered whether a series of bilateral (or tripartite) agreements could cumulatively build regional cooperation on refugee protection.

127. In a region where political will on refugee protection was limited and variable, there was a shared view that if an opportunity presented itself, it should be taken and used as a basis for subsequent developments, even if it meant that cooperation began between just two states. Participants also noted that bilateral arrangements (usually in the form of a memorandum of understanding) were often the preferred form of agreement in the Asia-Pacific, and that states were already familiar with using a series of these agreements to achieve common objectives in related fields (such as to regulate labour migration).

128. Some participants proposed a series of interconnected tripartite agreements as a creative approach to the development of a broader framework for refugee protection. The parties to such an agreement could be two states and a more neutral implementing entity (such as UNHCR). If a series of such agreements could be concluded in an interconnected way, there would perhaps be opportunities to grow a regional arrangement organically from there. However, while acknowledging the attractiveness and opportunities of such an approach, some participants also cautioned that involving organisations such as UNHCR could create tensions and risk compromising the quality of protection, especially if the organisation was required to tread a difficult line between implementing government policies and advocating for improved protection standards.

129. Overall, the Roundtable took note of recent developments in Europe, and how larger regional arrangements there had failed to respond adequately to protection needs, despite the existence of strong institutional and legislative foundations. There was broad agreement that if opportunities for concrete, immediate and practical action were presented in the Asia-Pacific, they should be seized rather than sidelined in the search for a bigger arrangement.

Regional cooperation on refugee protection in the Asia-Pacific

The key questions and general approach

130. Having considered the above background issues at length, the Roundtable turned to address directly the prospect of building regional cooperation on refugee protection in the Asia-Pacific.

131. As a precursor to discussing how regional cooperation might be created, the Roundtable first considered what refugee protection should look like in the Asia-Pacific, and what would constitute success in terms of regional refugee protection over the next decade. While acknowledging that this was a project for governments, civil society and other organisations in the region to develop collectively over a longer period of time, participants highlighted some of the key features that effective refugee protection was likely to have, including:

- guaranteed safe entry to countries of asylum for those fleeing directly from persecution and other serious harm;
- stabilisation of people's situations in countries of first asylum or transit as quickly as possible, including by screening and registering new arrivals, and providing them with a recognised legal status and documentation;
- meeting the immediate humanitarian needs of asylum seekers and refugees in transit, or ensuring their 'basic survival rights' are met, including by negotiating access to certain minimum standards of stay (such as work rights, food, shelter, education and health services) – even if only on a temporary basis;
- providing durable solutions in the longer term for those in need of them (this issue was explored further in session four);
- establishing special support and procedures for particularly vulnerable groups, including unaccompanied minors, stateless people and victims of human trafficking; and
- establishing safeguards to ensure refugees are not vulnerable to exploitative labour practices.

132. Participants then identified the critical features of any regional cooperation framework intended to achieve this form of protection. In general terms, it was agreed that such a framework should:

- be founded on, and demonstrate in practice, a commitment to genuine responsibility-sharing (taking into account the respective capacities and situations of different states);
- contribute to the enhancement of the overall protection space, in individual countries and/or in the region generally;
- be sustainable and informed by what is politically, socially and economically realistic in the region;

- ensure RSD and temporary stay arrangements are linked with work rights and durable solutions for those in need;
- be subject to effective oversight and quality assurance mechanisms, including possibly by UNHCR; and
- strike an appropriate balance between predictable and established protection mechanisms, on the one hand, and flexibility to respond to emergency situations, on the other.

133. On the basis of these general ideas, the Roundtable began to identify and explore some of the big questions underlying the topic, including:

- which states comprise the Asia-Pacific 'region'? Can a regional approach to refugee protection start with a few states and then grow into something bigger, or does it need to include all relevant states from the outset?
- is regional cooperation on refugee protection realistic or possible in the Asia-Pacific in the foreseeable future? If so, is this something we should be working towards? Is it more likely to raise or lower standards of protection, as compared to an approach based on an interconnected series of bilateral or tripartite arrangements?
- if something more than bilateral or tripartite action is required, is a 'regional' approach the right one, given that displacement is a global issue requiring global solutions? What are the benefits and limitations of a regional as opposed to inter-regional approach, which would bring in contributions from interested states elsewhere?
- do regional frameworks grow out of bilateral relationships, or do they need to be deliberately constructed from the outset? Can they emerge by hooking into existing mechanisms and processes, or do they require something new?
- if there were an effective cooperation framework for refugee protection in the Asia-Pacific, would that act as a 'pull factor' into the region?
- how can we ensure a rights-based approach to refugee protection and cooperation, given the lack of formal legal frameworks governing this issue at the regional level?

134. There was a shared view that both regional (or inter-regional) approaches, and steps taken at a lower level (within a state, at the state level or between a few states), had their respective roles to play, and that the longer-term development of a regional framework should neither delay nor preclude other practical steps from being taken at a national or inter-governmental level in the meantime. However, there were outstanding questions about how these various approaches, operating in parallel, would fit together. Which should be given priority? Could an all-encompassing regional approach grow out of a patchwork of smaller bodies and initiatives, such that those efforts should be conceived from the outset as part of something bigger? Or, alternatively, do smaller, practical steps have a different role to play, perhaps as place-fillers until agreement can be reached on a more substantial and comprehensive regional approach? Would a

'cobbled together' approach of interconnected smaller measures assist in the development of a regional framework, or undermine it by diverting resources and political will?

135. Participants engaged in a rich discussion of these issues, without seeking to reach formal consensus on any one in particular. It was recognised that governments in the region, together with civil society, international organisations and other stakeholders, needed to engage as a matter of priority with the difficult questions of what the desired end would be, how to get the region there, and what trade-offs they would be willing or required to make along the way. Acknowledging that governments usually work to more immediate timeframes, dictated by domestic politics, the Roundtable discussed how it would probably fall to other entities to elongate the planning horizons and assist governments to stay on track towards a common, longer-term goal.

136. Participants also noted that while there were advantages to working towards a core regional agreement over the longer term, it was equally as important that the region maintain flexibility and develop capacity to respond to unexpected and serious displacement crises if and as they arise. In order to be effective, the core infrastructure for these flexible responses would need to be in place in advance of a crisis, but it would not be possible to plan a complete blueprint for all future protection needs that might arise. Moreover, states would likely be resistant to signing 'blank cheques' to process or resettle people without retaining the right to consider the domestic impact of such a commitment at the relevant time.

137. One theme that recurred throughout these discussions was that of 'common but differentiated responsibilities' for refugee protection. Drawing from other areas of law and practice, and in particular the work on this topic by Professor James Hathaway,[37] a number of participants noted the possible benefits of a regional system involving states with convergent interests but different commitments depending on their respective capacities. Such an arrangement could involve, for example, the separation out of disembarkation, entry, registration and temporary protection responsibilities (in countries of first asylum), from those of processing and providing durable solutions (in other countries in the region). Some participants considered a reimagining of protection in this way to be an ambitious project, and urged others to consider whether it would be practically viable or beneficial in the Asia-Pacific region. These proposals for common but differentiated responsibilities were not without criticism, with a number of participants noting that they could entrench the current system in which most refugees are hosted in the developing world, propagate the view of refugees as a 'burden', and allow developed countries to 'outsource' their responsibilities by funding (temporary) protection in countries of first asylum.

138. As a final theoretical point, the Roundtable was asked to consider the legality and viability of a regional system based on centralised refugee processing in the Asia-Pacific. Such a system could, for example, involve regional teams of officials (including authorities from various states in the region and perhaps UNHCR officers) undertaking RSD in countries of first asylum. This form of processing would be 'centralised' in the sense that claims would be assessed by reference to common criteria, and decisions about where people moved to next would be made at a regional level, rather than by reference to the country in which a person was processed. Such a system could include Australia, so that people who reached Australia by boat and were subsequently

processed and found to be refugees would be subject to the same centralised settlement arrangements as if they had been processed elsewhere in the region. While a number of participants considered this to be an interesting idea in theory, the Roundtable agreed that the critical issue remained the same as that which had been raised throughout the previous sessions: identifying and linking refugees to durable solutions at the end of the process. Without clear, predictable and enforceable links to durable solutions after centralised processing, the entire system would likely fail to meet its protection objectives.

Practical measures

139. Having explored the broader conceptual issues behind proposals for regional cooperation on refugee protection, the concluding part of this session turned to the concrete 'next steps' that could be taken in the Asia-Pacific in the short, mid, and longer terms. These steps took into consideration the merits and limitations of advancing cooperation on refugee protection through the various regional structures or models which had been discussed earlier in the session, including:

    - building it into various existing mechanisms (such as the Bali Process, ASEAN or Track II dialogues, such as the Asia Dialogue on Forced Migration);
    - pursuing refugee protection through a more general development or human rights approach;
    - negotiating a core region-wide agreement on refugee protection;
    - establishing a series of unilateral, bilateral or trilateral measures, to build multilateral cooperation on refugee protection gradually; or
    - creating a regional system of centralised refugee processing.

140. While noting that significant effort would be required at the political and diplomatic levels to build political will for regional cooperation on refugee protection, participants proposed a series of practical measures that could be taken to improve the region's capacity and preparedness to respond to displacement, including:

    - strengthening and building on the architecture and standards for human rights and refugee protection that were already in place, including:
        - states' *non-refoulement* obligations and other duties assumed under international treaties, such as the UN Convention on the Rights of the Child;
        - the 1966 Bangkok Principles on the Status and Treatment of Refugees, revised and adopted by the Asian-African Legal Consultative Organization in 2001;
        - the ASEAN Human Rights Declaration, adopted 18 November 2012;
        - the Proposals for Action prepared by UNHCR, IOM and the UN Office on Drugs and Crime (UNODC) in May 2015, in response to the situation in the Andaman Sea and Bay of Bengal;[38]

- the SDGs, which commenced from 1 January 2016, after being adopted by world leaders at a UN Summit in September 2015; and
- commitments made by states in the course of the UN High-Level Summit to Address Large Movements of Refugees and Migrants on 19 September 2016, the New York Declaration for Refugees and Migrants adopted at that summit, and US President Barack Obama's Leaders' Summit on the Global Refugee Crisis on 20 September 2016;

- fostering greater partnership with the refugee protection regime's 'natural allies', include individuals and organisations working in the fields of anti-trafficking and labour migration, and supporting existing initiatives to improve the protection of particularly vulnerable groups (such as unaccompanied minors and stateless people);
- providing greater support to the RSO and UNHCR operations in the region, with a focus on financial and other support that would increase the independence of those entities and help them secure more predictable sources of income;
- exploring opportunities to use the trust fund set up by ASEAN in 2015 and the UN Trust Fund for Human Security to encourage states in the region to do more in terms of refugee protection; and
- promoting the development of practical pilot programs that would support smaller groups of people in need of protection (rather than trying to persuade states to sign on to broad commitments for large-scale refugee protection). The Roundtable took note of some existing efforts to establish pilot programs, but concluded that this was, as yet, an under-developed area. There was a common view that an increased use of pilot programs, focusing on regularising status and allowing refugees to work and become self-sustaining, would be of great benefit, even if each program was not necessarily scalable to larger numbers of refugees.

141. In terms of practical measures that could be taken to improve the capacity of the region to respond to situations of mass influx:

- participants took note of the fact that the source of a mass influx would most likely be within the region (probably from Myanmar), and agreed that states needed to implement fully their commitments to address root causes of this type of displacement. The Roundtable was briefed on the current situation in Myanmar, and took note of warnings that the human rights situation there was deteriorating in such a way as to create serious concerns about ongoing and future displacement. Participants expressed the view that pressure on Myanmar, particularly from the ASEAN states, would be needed to address these issues and prevent a mass exodus or large-scale emergency. There were greater roles that development and international actors could play. Concrete steps to address the root causes of displacement in Myanmar could also include greater funding for health and education projects, and advocacy to ensure freedom of movement, political rights and recognition of citizenship for all;
- while recognising the importance of doing more to address the root causes of displacement, participants also acknowledged the need to ensure that people

were not prevented from fleeing persecution or other serious harm. Participants took particular note of the need for state borders to remain open to refugees fleeing persecution in neighbouring countries, especially in large-scale emergency situations; and

- in countries of first asylum or 'transit countries' (such as Bangladesh, Malaysia, Thailand and Indonesia), the priority was to guarantee safe entry to the state's territory, provide registration and reception services to meet people's immediate humanitarian needs, and ensure that incoming populations received an adequate level of temporary protection until their individual protection needs could be assessed. Over the longer term, states in the region would need to consider options for formal processing and durable solutions. While acknowledging that any practical measures would have to be crafted around the different stages of a particular mass influx, participants noted that the success of such a response would likely rest on whether the region had a legitimate mechanism that could be triggered in a relevant case, bringing states in the region together to share the burden of responding to the sudden influx.

142. In terms of practical measures that could be taken to improve protection at sea in the region, participants shared the view that further work and coordination was needed to support existing SAR initiatives, and to build the region's capacity to respond to emergencies at sea. This work could include:

- supporting efforts to build SAR capacity within the framework of ASEAN, and advocating for greater awareness of refugee and asylum seeker needs within these efforts;

- targeted advocacy to ensure that private individuals who render assistance at sea are not punished or subjected to penalties for doing so;

- promoting greater oversight and monitoring of what happens at sea, especially in cases that may involve asylum seekers or refugees;

- dedicating financial and diplomatic resources to securing pre-identified disembarkation sites throughout the region; and

- considering the viability of a joint regional rescue coordination centre, with all the resources at its disposal necessary to detect and assist vessels in distress (including, for example, access to satellite imagery and a hotline through which IOM, UNHCR and other agencies could communicate directly with rescue authorities).

143. In terms of practical measures that could be taken by Australia in particular, a number of participants endorsed the view that Australian priorities should be: (i) rebuilding goodwill and credibility; and (ii) ensuring it could have a positive impact on asylum policies and effective practices in the region. Participants debated the possible merits of a range of ways in which these outcomes could be achieved, including by:

- repealing any aspects of Australian immigration law and policy that did not comply with international law and/or undermined regional responsibility-sharing;

- expanding Australia's resettlement and aid programs and using them more effectively, for example by supporting work that reduced displacement but did not directly advance Australia's own specific interests in preventing irregular maritime migration (such as work to address trafficking, statelessness, and exploitative labour migration practices). Participants acknowledged that Australia already did positive work in this area, but also that there would be benefit in orienting greater resources and efforts towards activities that improved the country's reputation in the region;

- supporting states like Bangladesh and Thailand to move forward on the pledges they were expected to make at the Leaders' Summit on the Global Refugee Crisis in New York on 20 September 2016; and

- modelling best practice by showing how accepting and settling refugees can be of great social and economic benefit to a country, not only in the short term but also over successive generations. This message could be strengthened by Australia demonstrating greater willingness to resettle larger numbers of refugees from within the region.

144. The Roundtable also discussed the importance of identifying potential leaders to champion more effective regional cooperation on refugee protection. Participants noted the value of a broader cooperation process led by highly respected individuals from the region, or countries from the region or elsewhere that were seen as 'honest brokers'. The identification of strong leaders was viewed as an important priority moving forward.

145. Throughout their consideration of the above proposals, participants stressed the need to shift the way in which refugee protection was framed and described in the region. In order for constructive progress to be made, there was a view that irregular migration should be seen as a reality that could be managed, rather than a problem that must be solved, with refugee protection seen as something that could enhance security and economic progress, rather than undermine them.

Session four: Safe pathways to protection

Introduction

146. Throughout the first three sessions of the Roundtable, participants reaffirmed the importance of ensuring any refugee law, policy or framework involved a link to durable solutions. The existence or otherwise of predictable, long-term and effective solutions was seen as a key determinant of whether agreements and processes for rescue at sea, disembarkation, RSD and temporary protection would, in practice, be lawful and effective. Yet, such solutions – be they in countries of asylum in the region or traditional resettlement countries – were often the most difficult to establish and guarantee.

147. With this priority issue in mind, the fourth session turned to the question of how to expand opportunities for safe pathways to protection, in countries like Australia and elsewhere. Through a combination of briefings and discussions, participants sought to clarify the relevant legal principles, explore the strengths and weaknesses of various migration pathways, and identify specific measures to establish, expand and improve regular pathways to protection in settlement countries. While reflecting on the policies and practices of traditional resettlement countries, such as Australia, this session was informed by the reality of displacement in the Asia-Pacific, as explored in the previous session.

Briefings

148. The fourth session opened with briefings from legal practitioners in the public and private sectors, who offered participants an insight into the practical reality of migration experiences to Australia. These briefings focused predominantly on the case study of doctors fleeing persecution in Iraq – first in the 1990s under the regime of Saddam Hussein, on the basis of their refusal to perform amputations on military deserters, and more recently for other reasons. The doctors in this case study were described as belonging to the upper-middle class, and being generally familiar with one another, having mostly attended the same schools and medical colleges in Baghdad. A number had good English skills and had been educated abroad. The Roundtable was informed that since the fall of the Hussein regime, many doctors meeting this description had found themselves at risk of being targeted by criminal gangs and militia, either on the basis of their imputed political opinions or religion (as they were presumed to be anti-Islamic, a Sunni or Christian), or because they were seen to be wealthy. Others had already fled Iraq and were living and working elsewhere (such as the United Arab Emirates, Qatar or Oman), but remained in precarious situations without access to permanent protection.

149. While members of this group generally had good chances of being recognised as refugees (especially if they spoke English, had been educated abroad and were wealthy), many were said to share a misconception that the ‘refugee’ label was for the poor, and that seeking asylum was not the ‘proper’ way. The Roundtable was advised that if these doctors could avoid applying for a refugee visa, they would. Alternative pathways they preferred to take included applying directly for a permanent skilled migration visa, or coming to Australia on one of a range of temporary work or student visas and then getting their qualifications recognised, undertaking further advanced

study, or working for an approved sponsor such as a regional health service provider, with a view to moving on to a permanent visa. Most would only apply for a protection visa as a matter of last resort. Once settled, many would seek to bring their families to join them in Australia under the 'balance of family' test.

150. In addition to the case of these Iraqi doctors, the Roundtable was advised briefly of other groups who, over the previous decades, had been granted various temporary and permanent visas to enter Australia and then sought asylum after arrival. The Roundtable took note of the fact that once a person was in Australia on a valid visa there was no bar to applying for protection, and that this possibility had caused successive governments to establish exclusionary policies on the basis of a person's 'risk profile' (with the 'risk' being the likelihood of applying for protection once in Australia, determined by reference to nationality, gender, age, etc). Some participants observed that there appeared to be a philosophical preference within government for people to apply for protection *outside* Australia, and wait there for it to be granted. As a result, the Australian system was described as one of 'exceptions to exclusion'.

151. On the basis of these briefings, the Roundtable also noted that:

- a number of people might appear to meet the objective criteria for recognition as a refugee on the same grounds, but the particular visa they arrived on (as determined by various administrative tests, requirements and procedures) would determine their subsequent rights and treatment; and

- financial capacity could be a key determinant of what visa a person applied for, since the costs associated with a permanent skilled migration visa were significantly higher than those of a protection visa. These costs included not just the visa application fee for the main applicant, but also additional costs for each member of the main applicant's family, English language tests, skills assessments, and recognition of qualifications. These costs needed to be paid upfront, thereby excluding many who might otherwise qualify but did not have the cash available to pay all the charges at once.

Identifying the relevant legal principles

152. In the search for regional solutions to refugee displacement in the Asia-Pacific, many participants shared the view that permanent settlement in traditional resettlement countries could no longer be relied upon as the only or main solution to meet people's needs. At the same time, the scale of global displacement, combined with a diminishment of political will to commit to refugee protection, reinforced the need for new and creative solutions that would provide a minimum standard of protection to as many people as possible.

153. Before moving on to a more concrete discussion about the various pathways to protection that might achieve this outcome, the Roundtable took some time to identify and discuss the relevant international legal principles. The right to seek asylum and the principle of family unity had already been covered in previous sessions. Here, participants explored the legality of two other issues that tended to be controversial in discussions about resettlement and durable solutions: temporary protection, and geographic or other limitations attached as conditions to entry and residence permits.

Temporary protection

154. In the refugee context, 'temporary protection' or 'temporary stay arrangements' are usually pragmatic tools of international protection, in which states provide immediate protection from *refoulement* and basic minimum treatment as an emergency response to the large-scale movement of asylum-seekers, humanitarian crises and/or complex or mixed cross-border population movements. UNHCR describes these arrangements as 'complementary to the international refugee protection regime, being used at times to fill gaps in that regime as well as in national response systems and capacity, especially in non-Convention States'.[39]

155. Many participants, having been invited to comment on the legality of temporary protection for refugees, raised first a range of issues about how this concept had been applied in Australia. With particular reference to the Australian experience of Temporary Protection Visas (TPVs) (subclass 785) – first introduced in 1999, abolished in 2009, and re-established in late 2014 – many participants emphatically noted the following concerns:

- TPVs inflicted a 'second wave of suffering' on refugees by imposing a form of protection based on uncertainty and limbo. Some participants described TPVs as the 'most severe form of penalty and re-traumatisation possible', noting the destabilising effects of leaving vulnerable people in such precarious situations indefinitely;
- the logic underlying TPVs was based on flawed public policy and was counterproductive to Australian interests, since it prevented people from integrating properly and contributing to the community;
- TPVs were deliberately punitive, and deprived holders of many rights to which they were entitled as refugees. In particular, the condition attached to TPVs preventing family reunion was contrary to international law;
- the way in which TPV holders were required to reapply for protection on a rolling basis was contrary to international law, in that it put the onus on refugees to prove that they were still in need of protection after the expiry of each visa, rather than the obligation resting with the state to demonstrate that the reasons for the grant of refugee status had ceased, and that it was safe for the person to return to their country of origin;
- the system to manage TPVs was administratively unwieldy, since it required constant re-evaluation of individuals' refugee status; and
- TPVs were irrational from a country-rebuilding perspective, since refugees who fled war and civil unrest were more likely to return to their countries of origin when it was safe to do so, and try to rebuild their lives there, if they had the security of a right to return to Australia in the event that it did not work out.

156. In relation to the Safe Haven Enterprise Visas (SHEVs) (subclass 790), a new form of temporary visa introduced in late 2014, a number of participants submitted that for most people it was illusory to claim this visa would offer a genuine pathway to permanent protection, noting that the Australian government itself appeared to share this view. The

Roundtable noted that a SHEV could theoretically be converted into one of a series of other permanent visas if its holder met the relevant criteria, but that most refugees would struggle to do so – especially for visas based on innovation and high-level business skills. Granting concessions or exemptions from the usual criteria for such visas might help to overcome some obstacles, but only to a limited extent. Participants also noted the difficulties that many refugees would face in settling and accessing necessary services in regional and remote parts of Australia.

157. On the basis of the above observations, it was noted that the Australian version of temporary protection – based on penalties and deterrence – had served to delegitimise the concept in other parts of the region. Many participants submitted that there should be strong advocacy against these types of visas in Australia, and anywhere else where they might be adopted.

158. However, participants also noted that temporary protection, by another name and without the negative connotations of the Australian experience, could be a useful tool. As the cessation clauses in the Refugee Convention showed, refugee status was not necessarily permanent, and in countries without national legislation providing for permanent refugee status, some alternative status akin to temporary protection could represent a positive development. It was generally agreed that temporary status, involving legal residence and work rights in countries in the region, would be a significant improvement on situations in which refugees had no recognised status at all. It was also noted that temporary stay arrangements, including some based on the same logic as the SHEV (allowing refugees to live and work in designated areas for certain periods of time with relative freedom of movement) had previously been used successfully in various parts of the region (and beyond).

159. Overall, a majority of participants agreed that there was no place for a standalone temporary protection model that was punitive and contrary to international human rights and refugee law standards. However, the Australian experience should not preclude consideration of opportunities for temporary or alternative statuses where this would improve protection overall, and would add to the range of responses available for displaced people. Valuable lessons could be learned by looking at other contexts in which forms of temporary protection had been successful. Any such arrangements would need to comply with all relevant international standards, including UNHCR's Guidelines on Temporary Protection or Stay Arrangements,[40] and could be particularly useful if integrated into a larger regional refugee protection scheme.

Geographic or other limitations attached as conditions to entry

160. Moving to the related issue of whether it was lawful to attach conditions or restrictions to a refugee's entry or residence permit, the Roundtable took note of the fact that refugees lawfully in the territory of a state enjoy a general right to choose their place of residence and move freely within the territory.[41] While in practice this right was not always fully respected, including in states that were not parties to the Refugee Convention or were hosting particularly large refugee populations and had more pressing protection concerns, states like Australia were bound to comply with it.

161. In terms of how this right could be squared with the practice of imposing conditions on refugees' visas (such as requirements that they live in certain areas), there was a

shared view that refugees could be *encouraged* to move to certain areas, but they could not be *forced* to do so. Where there was a strong public policy rationale for a residence requirement (such as a government investing in settlement services in a particular place), an open arrangement that incentivised movement to designated areas would be acceptable. People could not, however, be forcibly transferred to or physically prevented from leaving those areas. In all cases refugees should continue to enjoy the full range of rights to which they were entitled under refugee and human rights law.

162. Participants expressed mixed views on whether a residence requirement could be imposed as a condition to the grant of a protection visa to a person resettled from outside Australia, who would not otherwise have any right to enter the country. Despite some differences of opinion on this point, there was broad agreement that as a matter of policy – if not also of international law – people should only be sent to places where proper settlement services had been planned for and provided. It was also noted that, practically, expanded resettlement opportunities for refugees prepared to reside in rural or remote areas would likely exclude people with more complex needs, and deter people with families living elsewhere in the country, even if their protection needs were greater and more urgent. A policy based on such a requirement would need to take due account of how it might thus impact the composition of resettlement programs.

Resettlement

163. After establishing the general principles above, the Roundtable turned to consider a series of possible pathways to protection that were (or could be) used in the Asia-Pacific region. First, participants explored the purposes and practice of resettlement, the main mechanism currently used to provide refugees with safe and lawful pathways to permanent stay. With a view to assessing both the strengths and weaknesses of this durable solution, the Roundtable first recalled that resettlement serves three important functions:

- it is a tool to provide international protection and meet the specific needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge;
- it is also a durable solution for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration; and
- it can be a tangible expression of international solidarity and a responsibility-sharing mechanism.[42]

164. Without detracting from these functions and the critical importance of resettlement in the international protection framework, participants drew attention to some of the drawbacks of focusing too heavily on resettlement in countries such as Australia. This disproportionate focus on resettlement as the ‘right’ way to travel, and on developed countries deciding which refugees to ‘invite’ to their territories, was an idea dating back to the legacy of the Comprehensive Plan of Action in the Asia-Pacific region. It had been picked up by other countries, and created an assumption that resettlement to more developed states was automatically attached to the recognition of refugee status. Some participants argued that, given the almost unprecedented rates of global displacement and the growing possibilities for protection in other countries in the region,

it was time to move away from the precedent of resettlement to Australia or elsewhere as the natural final stage of the displacement process. Instead, participants called for greater attention to alternatives, including local integration, resettlement to non-traditional resettlement countries, and other measures that would guarantee an adequate level of protection to refugees in those countries that have traditionally been viewed as ones of 'transit'.

165. Participants discussed how countries like Australia could benefit from allocating their resettlement places more strategically, for example by targeting individuals and groups that, without resettlement, would be most likely to risk the dangerous journey by sea; by targeting people in countries of first asylum that were finding it especially difficult to meet the needs of displaced people there; or by linking the number of resettlement places from a country of first asylum to the number of refugees for which that country itself offered a solution. Resettlement places should also be earmarked for particularly vulnerable individuals and groups, for whom alternatives to resettlement would not be appropriate, regardless of whether they were likely to attempt to reach Australia by boat.

166. The Roundtable took note of the fact that Australia generally does not resettle Rohingya, and will not resettle anyone who arrived in Indonesia after 1 July 2014. Some participants shared their impression that the Australian government's stated purpose for these positions (or at least for the decision to end resettlement from Indonesia) was ostensibly to discourage asylum seekers from travelling on to Indonesia in the hope of boarding a boat to Australia, when they could have stayed and sought protection or resettlement from another country earlier in their journey. A number of participants observed that this rationale was senseless without a significant increase in the number of resettlement places or appropriate alternatives at those earlier stages (for example in Pakistan, Bangladesh or Malaysia).

167. Overall, participants observed that resettlement programs would benefit from a deeper reflection on how people were chosen, and could be used more strategically and generously to alleviate the pressures of displacement at both the regional and global levels.

Private or community sponsorship

168. Having discussed resettlement in the traditional sense, the Roundtable turned to the topic of private or community sponsorship, and the opportunities such arrangements might create within or in addition to state-funded resettlement programs. The Roundtable took particular note of Canada's Private Sponsorship of Refugees Program, in operation since 1978.[43] The briefing papers for this session also outlined the two processes by which individuals and organisations in Australia could sponsor or propose refugees for resettlement: the Special Humanitarian Programme and the Community Proposal Pilot (CPP).[44]

169. Participants noted the many significant benefits that private sponsorship of resettlement could have – for people in humanitarian need overseas, for host communities, and for host governments. Private or community sponsorship could increase the number of resettlement places available globally, improve the likelihood of displaced families being reunited, facilitate integration, and ease the financial burden on governments. The

Roundtable took note of the fact that the Australian Productivity Commission had recently expressed its support for the CPP, concluding that it would have 'fiscal benefits' and was 'likely to be beneficial because it engages a part of the community who are willing to directly assist humanitarian migrants, freeing up taxpayer resources for other expenditures in the migration program or across government responsibilities generally'.[45]

170. However, participants also noted a number of serious concerns about the way private or community sponsorship programs could operate in practice, drawing on experiences from the Australian CPP in particular. Key concerns included:

- that in practice the CPP was only available to relatively wealthy applicants who could afford the visa application charges ($19,124 for the main applicant and $2680 for any secondary applicant),[46] and had the right connections with organisations in Australia authorised to propose people through the program;
- that a program operating effectively as a family reunification program may exclude many vulnerable people, and prevent the broader community, community organisations and church groups in host countries from sponsoring and supporting resettlement;
- that a program excluding or discouraging refugees who are highly vulnerable, have complex needs and/or are not already well connected could skew the focus of Australia's resettlement program away from those in greatest need and UNHCR priorities;
- the lack of transparency or accountability with regard to where the money paid by sponsored applicants to Approved Proposing Organisations was going (given that the legal practitioners preparing the applications were not receiving payment from these funds); and
- the fact that it was embedded within the offshore component of Australia's Refugee and Humanitarian Programme, meaning that the visas granted under the CPP were deducted from (rather than added to) the number of places available through the government resettlement program.

171. Overall, there was broad agreement that private or community sponsorship programs could provide valuable contributions to the global protection framework, but that their success or otherwise rested on the terms of their operation. At a minimum, successful community programs would need to ensure that wealthy and well-connected refugees were not privileged to the exclusion of the most vulnerable; be transparent and accountable in terms of expenditure and applicant selection; and, most importantly, supplement rather than deduct from government-funded resettlement places. Participants also agreed that such programs should be driven by the goal of expanding and improving refugee protection, rather than government cost-cutting or cost-shifting.

Protected entry procedures (PEP)

172. The Roundtable was briefed on the purposes and practice of protected entry procedures (PEPs), an umbrella term referring to various mechanisms that allow people

to seek protection while still in their country of origin or in a transit state. Examples of PEPs include:

- 'in-country processing', which enables people in refugee-like situations who have not yet fled across an international border to be processed within their country of origin and then resettled abroad.[47] In-country processing was used to secure orderly departure from Vietnam during the Indochinese refugee crisis, and has been used since by countries such as Australia, the United States and Canada; and

- special visas that allow people to travel to another country for the purpose of seeking asylum there. Participants took particular note of Brazil's humanitarian visas for Syrian refugees, applications for which could be made at Brazilian embassies in countries such as Lebanon, Jordan and Turkey. It was noted that this visa would allow people to travel through safe pathways to protection, and could require applicants to cover their own expenses, thereby diverting funds (that may otherwise have been paid to people smugglers) towards the communities that would be hosting them.[48]

173. Some participants noted that while procedures such as in-country processing could save lives, in practice they could also lend support to discriminatory practices and be used as a tool by authoritarian governments to get rid of unwanted populations. If states or UNHCR were to be involved in such procedures, they would need to take care that their activities were not contributing to ethnic cleansing. The limitations of these procedures were also noted with respect to persecuted groups who might have difficulty moving out of their town or immediate locality without the required documentation, let alone to a capital city to access a way out of the country.

174. It was noted that state practice on PEPs and efforts to increase opportunities for safe departure were not extensive or well-documented, and that previous mechanisms had involved a range of eligibility criteria and situational details. This area was identified as one on which further work was required to assess the potential strengths and limitations of PEPs, and how they could be used strategically to address displacement in the Asia-Pacific region.

Protection-sensitive migration: the fourth durable solution?

175. In the final part of this session, participants explored the concept of protection-sensitive migration, sometimes referred to as the 'fourth durable solution' (alongside the traditional solutions of resettlement, voluntary repatriation and local integration). To begin, the Roundtable received a general briefing from the Australian Human Rights Commission on its recent research into this topic (which would subsequently be published in its *Pathways to Protection* report in the days following the Roundtable). As that report subsequently explained:

> Protection-sensitive migration aims to facilitate refugees' access to non-humanitarian migration pathways as a means of enhancing protection or providing durable solutions. It involves addressing barriers which may inadvertently exclude people fleeing persecution from migration opportunities (such as documentation requirements, visa fees and carrier

sanctions); implementing proactive strategies to extend a wider range of migration options to forcibly displaced people; and providing additional safeguards (such as protection against *refoulement*) for refugees migrating through non-humanitarian pathways.[49]

176. Participants noted that the primary purpose of protection-sensitive migration was to make migration pathways available to displaced people who might otherwise have no (or very limited) opportunities to reach protection through safe and regular means. In countries like Australia, this approach could expand pathways for safe entry and create more space within resettlement programs by ensuring those programs were reserved for those in greatest need, and allowing those qualified to obtain other visas to apply for them. Protection-sensitive migration pathways that could be used as an alternative to resettlement included skilled labour migration schemes, family migration schemes (such as the Partner and Dependent Child visas in the Australian migration program), and international student programs.

177. These pathways could draw from existing and previous targeted work and education schemes, providing for either temporary or permanent movement in other areas. One example raised at the Roundtable was the Kiribati–Australia Nursing Initiative (KANI) that Australia ran with Kiribati between 2006 and 2014, enabling almost 90 students from Kiribati to train as nurses at Griffith University in Australia.[50] On graduation, they were eligible to apply for an 18-month temporary graduate visa (subclass 485), which increased their chances of subsequent employer sponsorship for a permanent visa. This programme simultaneously responded to Kiribati's rapid population growth and youth unemployment rates; a nursing skills shortage in Australia (and globally); and provided a livelihood diversification strategy. If graduates returned home, they took valuable skills with them.

178. Some participants noted that protection-sensitive migration opportunities would not necessarily require the creation of new visa categories or migration arrangements, but would instead require countries like Australia to take steps to address the practical and administrative barriers to existing visa categories for people in need of international protection. The most critical barriers were identified as:

- the high costs associated with visa applications and related charges;
- documentation and qualification requirements, which can be particularly onerous for displaced people;
- general eligibility requirements, which may limit access to certain visas on the basis of language ability, skills assessments, age limitations and health requirements; and
- other administrative barriers that impose blanket exclusions or deprioritise people deemed likely to apply for asylum once in Australia, or family members of people who reached Australia by boat.[51]

179. In light of these barriers, participants expressed considerable reservations about the practical and political limitations of introducing protection-sensitive migration pathways to Australia. It was noted that:

- guarantees against *refoulement* would need to be built into any visa granted to a refugee;

- if refugees were to come on temporary visas (such as temporary work or student visas), there would need to be adequate safeguards in place to ensure that they could access a clear pathway to a permanent visa if still in need of protection at the end of their temporary visa;

- there was a risk these pathways could remain out of reach for all but the most wealthy. In order to be more generally available, provisions would need to be in place for fee waivers and other concessions, not only for the visas themselves but also for associated costs (such as fees associated with the recognition of foreign professional qualifications, and university fees). It was noted that international student visas, in particular, are often used as a major source of revenue for the host country, and so there might be some political resistance to converting these visas into sponsored places;

- even with monetary concessions, many refugees – especially the most vulnerable – would still face great difficulties in meeting (or proving that they met) the academic and professional criteria necessary for student and skilled migration visas. Participants noted that the hurdles for these visas were very high, particularly for people who had faced protracted displacement and/or discrimination and persecution, which may have resulted in interrupted schooling and employment. English classes, bridging courses and assistance in getting foreign qualifications recognised by Australian authorities could go some way to alleviating these obstacles, but some participants stressed the need to be realistic about how many and which refugees would qualify; and

- given that these pathways were likely to be available only to the most able, educated, qualified or well-connected refugees, there could be practical and moral implications in allowing developed countries to cherry-pick from asylum countries, without regard to the associated 'brain drain'. At the same time, those who were especially talented in terms of academic and/or professional skills might not have any opportunities in the country of asylum, so there were questions about the extent to which selecting them for migration would in fact impact the community they were leaving, and why they should be excluded from opportunities that might be available elsewhere.

180. Having explored these concerns, a number of participants queried whether the search for alternative pathways was conducive to the goal of improving refugee protection. Would these ideas expand opportunities for safe entry, or instead provide governments with a tool to convert refugee resettlement into a project of economic migration, to the exclusion of the most vulnerable? Would displaced populations be better served by reinforcing the importance of refugee protection, or were these types of creative and pragmatic approaches necessary to ensure government support? The Roundtable grappled with the fundamental question of how protection-sensitive migration pathways could be introduced so as to complement and supplement existing protection mechanisms and quotas, rather than replace, undermine or detract from them.

181. While fully acknowledging the importance of these concerns, a large number of participants ultimately concluded that the risk of refugee protection being diluted by a lack of political will was, to a certain extent, already inherent in the refugee system. It was a risk that warranted attention and redress, but was not on its own deemed to be a sufficient reason not to pursue alternative pathways. Many refugees would be unlikely to qualify for skilled migration, student, or family visas – but others would. Overall, participants agreed that there was significant potential to explore alternative migration pathways to Australia as a natural complement to the resettlement program. Many submitted that the provision of settlement and employment opportunities – both in Australia and elsewhere – could provide enormous positive benefits for people in need of protection and for host communities. Recalling the discussion at the end of session three, participants noted that this approach, if properly designed and implemented, could serve as tangible evidence of Australia's willingness to share responsibility for displaced people in the region, thereby building goodwill with its neighbours, who might also be encouraged to offer alternative migration pathways and improve refugee protection in their territories.

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Endnotes

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