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DEFLECTION AND DETERRENCE: EUROPE'S SHRINKING ASYLUM SPACE AND ITS PARALLELS WITH AUSTRALIAN POLICIES

GEMIMA HARVEY*

In 2015, as asylum seekers, refugees, and migrants began making their way to Europe in larger numbers, the European Union set about putting policies in place to shut them out and protect its external borders. In the process, the protection of borders has become primary to the protection needs of people, and policies have been designed to contain people in regions of origin, deter them from their desire to reach Europe and deflect responsibility for processing asylum claims to states elsewhere. The framing of resettlement as a reward for countries that cooperate, and people who wait, and the shifting of responsibility onto other states where refugees cannot enjoy full rights, are reminiscent of Australia's approach to asylum law and policy.

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I INTRODUCTION

This essay looks at how European Union asylum laws and policy rapidly evolved in 2015, when people from countries like Syria, Afghanistan and Iraq started arriving in unprecedented numbers on the shores of Greek islands. Previously there had been little emphasis on resettlement, but post-2015 this became increasingly important as a way of

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demonstrating solidarity with countries in turmoil, while limiting responsibility for people arriving spontaneously on the doorstep of the EU. In the face of these mass-arrivals, the EU-Turkey deal was crafted, with measures designed to close the main route across the Aegean Sea from Turkey to Greece. By labelling Turkey a “Safe Third Country”, the EU can declare asylum applications inadmissible and shift responsibility for processing onto Turkey. These developments in law and policy reflect two deflection prongs — using resettlement as migration management by punishing “bad”, spontaneous arrivals and rewarding “good” refugees who stay further afield and, secondly, externalising processing to buffer zones beyond the sea with the aim of asylum seekers finding protection elsewhere. These deterrence strategies mirror Australia’s approach of shrinking the protection space available to asylum seekers arriving spontaneously under the benevolent mask of showing concern for saving lives at sea; all while people languish without rights or solutions in countries they thought would be a temporary stop on the way to a life of dignity.

II A BRIEF CONTEXT

In 2014, almost 600 000 people applied for asylum in the EU.¹ In the following year, this number more than doubled. In 2015, a massive increase in migration, unseen in Europe since WWII, marked a turning point in EU asylum policy. German Chancellor Angela Merkel famously repeated the mantra ‘Wir schaffen das’, meaning, ‘We can do this’, in relation to suspending the Dublin Regulation,² to welcome and integrate Syrian refugees.³ At the same time, thousands of people were arriving every day on the Greek islands — a key arrival point along the eastern Mediterranean route — leaving a life of poverty, oppression, or conflict in the hope of finding security, dignity, and peace. In 2015, Germany alone received more than 440 000 asylum applications, up from about 170 000 in 2014 — a 155 per cent increase.⁴ While Germany was welcoming asylum seekers, Hungary set about building a 500 km long, four-metre high razor wire fence along its border with Serbia and Croatia to

¹ Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the region: A European Agenda on Migration [2015] COM 240.

² The Dublin Regulation is an EU multilateral agreement for determining the state responsible for assessing an application for asylum. This is generally the first EU state that asylum seekers enter (unless there are family factors or previous connections to a country to consider).

³ Janosch Delcker, ‘The Phrase That Haunts Angela Merkel’, *POLITICO* (online), 19 August 2016 <<http://www.politico.eu/article/the-phrase-that-haunts-angela-merkel/>>.

⁴ Eurostat, ‘Record number of over 1.2 million first time asylum seekers registered in 2015’ (News Release, 44/2016, 4 March 2016) <<http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/>>.

keep would-be asylum seekers out.⁵ In March 2016, Austria introduced a cap of 80 daily asylum claims, while at the other end of the Balkan migration route, Macedonia closed its border with Greece to all but a trickle of Syrians and Iraqis.⁶ That month, the Balkan route was officially closed, leaving Greece to cope with what would become 60 000 people seeking protection.⁷

Just prior to the border closing, the Visegrád countries — Czech Republic, Hungary, Poland and Slovakia — adopted a statement highlighting their support for increased border controls. As expressed in the nation's joint statement: 'With the very foundations of the European Union at stake ... the key strategic objective now is to preserve Schengen, which can only be achieved by regaining control over the European Union's external borders'.⁸

III RESETTLEMENT INITIATIVES

Resettlement, voluntary repatriation, and local integration are the three durable solutions available to refugees, which represent the end of protracted displacement, and offer a chance to begin anew, rebuild, or become a part of another society. A 2003 feasibility study on establishing a resettlement program in the EU included the specification that 'any resettlement scheme must be complementary to, and not alternative, to the processing of spontaneous asylum claims in EU Member States or at the borders.'⁹ Still, more than a decade later, without an agreed system, very few people were being resettled within the EU. In 2013, while the US resettled 66 200 refugees, Australia 13 200 and Canada 12 200, the EU resettled just 5 449.¹⁰ In 2014, certain individual EU member states pledged to

⁵ Aljazeera, 'Hungary Building Border Fence to Curb Immigration', *Aljazeera* (online), 1 August 2015 <<http://www.aljazeera.com/news/2015/08/hungary-building-border-fence-curb-immigration-150801051501749.html>>.

⁶ Gemima Harvey, 'Syrian Families Relive their Refugee Odyssey', *Deutsche Welle* (online), 9 March 2016 <<http://www.dw.com/en/syrian-families-relive-their-refugee-odyssey/a-19103578>>.

⁷ *Communication from the commission to the European Parliament, the Council: Eight Report on Relocation and Resettlement* [2016] COM 791.

⁸ The Visegrád Group: The Czech Republic, Hungary, Poland and Slovakia, 'Joint Statement on Migration' (Joint Statement, 15 February 2016) <<http://www.visegradgroup.eu/calendar/2016/joint-statement-on>>.

⁹ Migration Policy Institute, Tender No. DG.JAI-A2/2002/001 on behalf of the European Commission, *Study on The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure*, 2003 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/pdf/resettlement_study_full_2003_en_en.pdf>.

¹⁰ FRA, 'Legal entry to the EU' (Publication, FRA: European Union Agency for Fundamental Rights, February 2015) <http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf> 7; UNHCR, 'War's Human Cost: UNHCR Global Trends 2013' (Publication, UNHCR, 2013)

resettle a total of around 7 500 people.¹¹

However, in 2015, when one million people made their way to Europe, the situation was deemed a crisis and EU countries scrambled to implement measures that would safeguard the integrity of the EU's open borders and passport-free travel policy within the Schengen zone. Since then, EU asylum laws and policies have been developing rapidly to keep up with the pace of changes to migration flows in the region and to restore order and control at external borders. A number of schemes relating to resettlement were announced in 2015, including the European Resettlement Scheme and the EU-Turkey Action Plan (both discussed in more detail below).¹²

In July 2015, the European Commission adopted the proposal for a European Resettlement Scheme and member states agreed to resettle 22 504 people in need of international protection.¹³ The voluntary scheme covers a period of two years and uses a distribution key taking into consideration factors such as population, GDP, unemployment rates, spontaneous asylum applications, and previously resettled refugees.¹⁴ Also, member states are to resettle — on a voluntary basis — Syrian refugees from Turkey as part of the EU-Turkey Action Plan.¹⁵

As of February 2017, almost 14 000 refugees — mostly from Turkey, Jordan and Lebanon — were resettled within the EU under the European Resettlement scheme and the EU-Turkey Action Plan.¹⁶ This is clearly a big step up from the 5449 resettled within the EU in 2013.

In 2016, the European Commission released a proposal for a permanent Union

<www.unhcr.org/5399a14f9.pdf> 20-21; UNHCR, 'EU Resettlement Factsheet' (Factsheet, UNHCR), 1 <<http://bit.ly/2xKy6i0>>.

¹¹ Eurostat, *Resettled Persons Annual Data* (11 August 2016) <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1>>.

¹² See generally *Commission Recommendation of 8.6.2015 on a European resettlement scheme* [2015] COM 3560.

¹³ European Commission, 'Relocation and Resettlement: EU Member States urgently need to deliver' (Press Release, 16 March 2016) <http://europa.eu/rapid/press-release_IP-16-829_en.htm>.

¹⁴ *Commission Recommendation of 8.6.2015 on a European resettlement scheme* [2015] COM 3560.

¹⁵ European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' (Press Release, 15 December 2015) <http://europa.eu/rapid/press-release_IP-15-6330_en.htm>.

¹⁶ European Commission, 'Relocation and Resettlement: Member States need to build on encouraging results' (Press Release, 8 February 2017) <http://europa.eu/rapid/press-release_IP-17-218_en.htm>.

Resettlement Framework.¹⁷ The European Council on Refugees and Exiles (ECRE) has expressed concerns about the proposed framework. Rather than being about providing durable solutions to the most vulnerable, the Framework is constructed as a “partnership activity” and aims to ‘encourage certain countries to cooperate on migration control, deterrence, and readmission.’¹⁸ According to the ECRE, the Framework ignores protracted refugee situations and ‘risks instrumentalising resettlement to exert leverage on these “partner countries”’.¹⁹ Similarly, the European Economic and Social Committee has called for ‘the common criteria for resettlement to focus mainly on people’s need for protection and to be uncoupled from partnership agreements with third countries.’²⁰

Responding to the proposal in the Guardian, Amnesty International’s Europe director, John Dalhuisen, said:

The proposals the commission published today are not about improving refugee protection globally, but about reducing irregular arrivals to Europe. They take good tools, like resettlement, and put them to bad ends; they use fine words, but these mask some pretty cynical intentions.²¹

Where in the past EU states have overlooked resettlement as a durable solution,²² there is now a shift in EU asylum acquis,²³ toward using resettlement as a technique to restore controlled migration. While increased resettlement places are a positive step in providing protection to people in need, it’s also important to recognise the underlying political motivations, which reveal that, rather than being an act of pure benevolence, resettlement is being used to reward countries that cooperate with the EU ‘on irregular migration,

¹⁷ Proposal for a Regulation of the European Parliament and of the European Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council [2016] COM 468.

¹⁸ ECRE (European Council on Refugees and Exiles), ‘Untying the EU Resettlement Framework’ (Policy Note, ECRE, 2016) <<https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-01.pdf>>.

¹⁹ Ibid.

²⁰ European Parliament, *Legislative train schedule towards a new policy on migration*, (2016) EU Resettlement Framework <<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-resettlement-framework>>.

²¹ Patrick Kingsley, ‘EU officials finalise common asylum system to resettle refugees’, *The Guardian* (online), 13 July 2016 <<https://www.theguardian.com/world/2016/jul/13/eu-officials-finalise-common-asylum-system-resettle-refugees>>.

²² Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 86.

²³ This refers to the accumulated legislation, legal acts, and court decisions which constitute the total body of European Union law.

readmission and return.’²⁴

IV CASE STUDY: EU-TURKEY DEAL

In response to 800 000 people taking the Eastern Mediterranean route (across the Aegean Sea from Turkey to the Greek Islands) in 2015,²⁵ and to discourage future attempts, the EU-Turkey deal was created. Turkey is the main transit state out of the Middle East. At this time, 91 per cent of people arriving in Greece were from the top ten refugee-producing countries.²⁶ So while anti-immigration sentiment and right-wing extremism were rising, the vast majority of people arriving in Greece had legitimate protection needs and the right to seek that protection within the EU. This agreement means that asylum seekers who arrive in Greece after 20 March 2016 are to be returned, with their claims dubbed “inadmissible” given the declaration of Turkey as a ‘Safe Third Country’.²⁷

An application for protection in the EU can be deemed inadmissible on the basis that a person could have applied for asylum in a Safe Third Country (STC) they travelled through, or because they already had protection in a First Country of Asylum (FCA).²⁸ The STC and FCA concepts aim to ‘expel asylum seekers without having to necessarily examine their application for asylum on its merits with the consequence of removing them from the jurisdiction of legal protection’.²⁹

If a member state wishes to return a person seeking international protection to another (non-EU member) country, under the STC rule, a number of criteria must be met under the Asylum Procedures Directive.³⁰ This includes no risk of serious harm or *refoulement*, and

²⁴ European Commission, ‘Enhancing legal channels: Commission proposes to create common EU Resettlement Framework’ (Press Release, 13 July 2016) <http://europa.eu/rapid/press-release_IP-16-2434_en.htm>.

²⁵ Jonathan Clayton and Hereward Holland, ‘Over one million sea arrivals reach Europe in 2015’, *UNHCR* (online), 30 December 2016 <<http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>>.

²⁶ Harvey, above n 6.

²⁷ European Commission, ‘Implementing the EU-Turkey Statement – Questions and Answers’, (Fact Sheet, European Commission, 15 June 2016) <http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm>.

²⁸ Boldizar Nagy, ‘The Aftermath of an Invalid Referendum on Relocation of Asylum Seekers: a Constitutional amendment in Hungary’, *Asylum, EU Institutions, Relocation, Solidarity* (10 November 2016) <<http://eumigrationlawblog.eu/the-aftermath-of-an-invalid-referendum/>>.

²⁹ Vincent Chetail, ‘The Common European Asylum System: Bric-à-brac or system?’ in P De Brucker, V Chetail and F Maiani (eds), *Reforming the Common European Asylum System: the new European refugee law* (Research Paper, No 2564990, 16 February 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564990> 26-27>.

³⁰ *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common*

the possibility of claiming refugee status and receiving protection in accordance with the Refugee Convention.³¹ The United Nations High Commissioner for Refugees ('UNHCR') asserts that to be considered a STC, countries cannot maintain the geographical limitation on the Refugee Convention (they must ratify the 1967 Protocol) and fundamental rights must be provided in both law and practice.³² Turkey maintains a geographical limitation on the Refugee Convention, which means it only recognises refugees from Europe. This means that Syrians do not have access to the broad rights ensured by the Refugee Convention. Instead they are given a temporary protection status, treated as guests and denied the possibility of long-term integration.³³

The Norwegian Refugee Council is highly critical of the idea that Turkey could be considered a STC and notes this arrangement 'denies refugees the right to have their asylum applications processed in Europe.'³⁴

Under the agreement, for each Syrian returned to Turkey from the Greek islands, another will be resettled within the EU directly from Turkey.³⁵ Priority is given to refugees who have not previously tried to enter the EU irregularly.³⁶ This agreement was designed to restore order to migration routes, rewarding those who wait in Turkey with a legal, and safe, route to the EU and punishing those who risk their lives crossing the Aegean Sea to reach Greece. One year on, and 3565 Syrians have been resettled from Turkey to EU

procedures for granting and withdrawing international protection [2013] OJ L 56/60.

³¹ Ibid.

³² UNHCR, 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (Publication, UNHCR, 23 March 2016) <www.unhcr.org/56f3ec5a9.pdf>.

³³ Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?', *EU Law Analysis: Expert Insight into EU Law Developments* (5 February 2016) <<http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html>>.

³⁴ Eirik Christophersen, *What is a safe third country?* (9 March 2016) Norwegian Refugee Council <<https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/>>.

³⁵ European Council, 'EU-Turkey Statement' (Press Release, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>; European Parliament, *EU-Turkey Statement and Action Plan* (20 October 2017) Legislative Train Schedule towards a New Policy on Migration <<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>>.

³⁶ Ibid.

member states,³⁷ while Turkey continues to host almost 3 million Syrians.³⁸

In the same period, 1487 people were returned to Turkey under the action plan. These people had either: not submitted asylum applications, withdrawn their applications or had negative decisions on their claims.³⁹

As of early October 2017, no one had yet been forcibly returned on the basis that Turkey is a STC because a court ruling has been pending in Greece's highest court. In September the court paved the way for the first forcible returns of asylums seekers under the EU-Turkey deal, when it declared the asylum claims of two Syrian refugees inadmissible, deciding that Turkey is a STC and is therefore responsible for providing protection.⁴⁰

Amnesty International notes: 'These decisions breach a very clear principle: Greece and the EU should not be sending asylum-seekers and refugees back to a country in which they cannot get effective protection.'⁴¹

Another measure involving resettlement of Syrians from Turkey — the Voluntary Humanitarian Admission Scheme — is conditional on Turkey preventing people from leaving its shores to seek protection in the EU.⁴² An assessment of whether these conditions have now been met is still pending.⁴³

Resettlement from Turkey or 'humanitarian admission' is, therefore, a compromise to allow for increased migration control and externalisation of asylum processing. Countries like Jordan, Lebanon, and Turkey have struggled for years to host millions of refugees from

³⁷ European Commission, 'Questions and Answers: Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Migration' (Fact Sheet, European Commission, 2 March 2017) <http://europa.eu/rapid/press-release_MEMO-17-349_en.htm>.

³⁸ Mercy Corps, *Quick facts: What you need to know about the Syria crisis* (9 March 2017) <<https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>>.

³⁹ European Commission, 'Fifth Report on the Progress made in the implementation of the EU-Turkey Statement' (Press Release, 2 March 2017) <http://europa.eu/rapid/press-release_IP-17-3081_en.htm>.

⁴⁰ Amnesty International, 'Greece: Court decisions pave way for first forcible returns of asylum seekers under EU-Turkey deal', *Amnesty International* (online) 22 September 2017 <<https://www.amnesty.org/en/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/>>.

⁴¹ *Ibid.*

⁴² European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' (Press Release, 15 December 2015) <http://europa.eu/rapid/press-release_IP-15-6330_en.htm>.

⁴³ European Commission, *Sixth Report on the Progress made in the implementation of the EU-Turkey Statement*, Report from the Commission to the European Parliament, the European Council and the Council No 6 (2017).

countries like Syria, Iraq, and Afghanistan, yet it was only when these refugees began arriving in Europe, irregularly and *en masse*, that the EU got serious about resettlement. Initiatives such as this are pitched as preventing the loss of life on the Mediterranean, a noble goal no doubt, but they are also linked to 'restoring a fully functioning Schengen system' by pushing asylum seekers back to regions of origin.⁴⁴

Since the EU-Turkey deal came into effect, the number of people crossing the Aegean Sea to reach Greece has gone down from thousands every day to tens.⁴⁵ But just because people are now out of sight, does not mean their suffering has ceased or that they won't try other ways of seeking asylum within the EU. Part of the deal means Turkey is required to prevent people from leaving its shores to reach the doorstep of the EU — in other words, to create obstacles for those attempting to seek asylum. In response to Turkey's arrest of more than 1000 asylum seekers in 2015, the International Rescue Committee's Melanie Ward told the Guardian that the EU-Turkey agreement 'is deeply concerning because it is primarily designed to obstruct the movement of those seeking refuge in the EU, which runs contrary to the EU's basic founding principles.'⁴⁶

Similarly, François Crépeau, United Nations Special Rapporteur on the Human Rights of Migrants, said that while numbers of people drop in the short term, the deal will not have a meaningful impact in the long term, and the 'number of deaths at sea will likely rise, as more people will try their luck going around the barriers and new sea routes will be developed.'⁴⁷

Speaking about the sea crossing from Turkey to Greece, Syrian father of four, Imad Omar, told me at a refugee transit camp on Lesbos: 'The whole time I was thinking about what I

⁴⁴ European Commission, 'Back to Schengen: Commission proposes Roadmap for restoring fully functioning Schengen system' (Press Release, 4 March 2016) <http://europa.eu/rapid/press-release_IP-16-585_en.htm>.

⁴⁵ Ibid.

⁴⁶ Patrick Kingsley, 'Turkey arrests 1,300 asylum seekers after £2bn EU border control deal', *The Guardian* (online), 30 November 2015 <<https://www.theguardian.com/world/2015/nov/30/turkey-arrests-1300-asylum-seekers-after-2bn-eu-border-control-deal>>.

⁴⁷ François Crépeau, *Domino effect: Turkey's new visa rules violate the principle of non-refoulement*, (9 January 2016) <<http://francoiscrepeau.com/fr/domino-effect-turkeys-new-visa-rules-violate-the-principle-of-non-refoulement/>>.

would do if the boat started to sink. Who would I try to save, my children, my wife, my mother?'⁴⁸

No one risks the lives of themselves and their family members unless they feel they have no choice.

The reasons refugees feel compelled to travel onward through countries that others may consider safe are myriad and individual, like people. Some might have family already settled in northern Europe, others might see Turkey as already overburdened with almost 3 million Syrians and lacking job prospects and the possibility of integration, and others may have heard about more hospitable reception conditions, advanced support services and efficient asylum processes in countries like the Netherlands, Austria, Sweden, and Germany.

Mustafa, 24, who travelled in the same boat as Omar and his family from Turkey to Greece, said: 'If you try to cross the border from Syria to Turkey, the Turkish authorities will shoot you, it's up to your luck. If we stay in Syria we die, if we try to pass the border, if you are not lucky, you will die.'⁴⁹

Stories of Syrians getting shot at while trying to enter Turkey are not uncommon. In June 2016, Turkish border guards reportedly shot and killed a family of Syrian refugees, including women and children, who tried to cross the border.⁵⁰ In 2016 alone, the Britain-based Syrian Observatory for Human Rights reported that border guards shot 163 Syrians trying to reach safety.⁵¹ As recently as June 2017, a baby girl and her family were reportedly killed trying to cross into Turkey.⁵²

Mustafa walked hours through the mountains with his sisters and cousins and their kids to sneak into Turkey. If the very real risk of getting shot at while trying to reach safety was not reason enough to feel uneasy about starting a new life there, Mustafa said he did not want

⁴⁸ Interview with Imad Omar (Greece, 4 March 2016).

⁴⁹ Interview with Mustafa Alhamoud (Greece, 4 March 2016).

⁵⁰ Reuters Staff, 'Turkish troops kill 11 Syrians trying to cross border: monitor', *Reuters* (online), 19 June 2017 <<http://www.reuters.com/article/us-mideast-crisis-turkey-border-idUSKCN0Z50CY>>.

⁵¹ Jamie Dettmer, 'Monitoring Group Accuses Turkish Border Guards of Killing 163 Syrian Refugees', *VOA News* (online), 6 December 2016 <<https://www.voanews.com/a/sohr-turkish-border-guards-syria-refugees/3625086.html>>.

⁵² Business Standard, 'Baby girl among five Syrians shot dead at Turkish border', *Business Standard* (online), 16 June 2017 <http://www.business-standard.com/article/news-ians/baby-girl-among-five-syrians-shot-dead-at-turkish-border-117061600019_1.html>.

to stay in Turkey because 'there are no jobs and no place to study.'⁵³

V FOLLOWING IN AUSTRALIA'S FOOTSTEPS

AA DANGEROUS PARADIGM: THE DESERVING VERSUS THE UNDESERVING

The notion of using resettlement as a tool for migration management is not new. Governments do this when they say something to the effect of "we are doing our part by resettling people, and therefore the ones who are arriving on our shores spontaneously have greedily come out of turn and should be excluded from the sphere of our protection."

The above construction is how the Australian Government has framed its asylum policies and political debate — perpetuating the myth there is a queue. This design uses resettlement as a reward for those who *wait in line until their "number" is called*. It represents a dangerous and false "deserving" versus "undeserving" paradigm that is used as a means of driving support for draconian policies by promoting the notion that there is a line that refugees are supposed to wait in, and that if they come before they are called they are "jumping the queue" and are, therefore, undeserving of effective protection. In this way, the person who languishes for five years in a dusty camp is more deserving than the one who decides the conditions in the camps are unbearable and that getting on a boat is the only option.

This sentiment is reflected in the proposed Union Resettlement Framework, which would penalise refugees by denying them resettlement if they have entered, or attempted to enter, the EU irregularly in the previous five years.⁵⁴

OXFAM's British chapter counsels that orderly entry measures must complement and not replace a fair system for assessing applications from asylum seekers arriving spontaneously within the EU.⁵⁵ In this way, resettlement should be seen as the durable solution it is rather than a tool for managing migration and, critically, '[a]ny distinctions between "good" resettled refugees and "bad" spontaneous arrivals must be avoided in

⁵³ Kingsley, above n 46.

⁵⁴ Above n 17.

⁵⁵ MIGREUROPE, Resettling Refugees, the European Instrument for the Externalisation of Asylum Procedures (2016) <<http://www.migreurope.org/article978.html?lang=fr>>.

rhetoric and in practice'.⁵⁶

The damaging consequences of such a distinction, inflicted by the punishment of people seeking protection, can be seen in Australia's asylum policy and practice. In Australia, Operation Sovereign Borders puts military forces in charge of intercepting and towing or turning boats back to where they came from, often Indonesia (which has not signed the Refugee Convention). Since 2013, 30 boats carrying 765 asylum seekers have been intercepted and returned.⁵⁷ These operations have involved asylum seekers being held at sea for more than a month, the Australian Government building lifeboats to forcibly return people on,⁵⁸ and, according to Amnesty International, the government paying boat crew members to return its passengers to Indonesia.⁵⁹

When turn-backs to countries of departure are not possible, asylum seekers are shipped to, and warehoused on, impoverished Pacific islands. In June 2017, a class action was settled, with the Australian Government, and the contractors operating its offshore camps, agreeing to pay almost 2000 asylum seekers and refugees on Manus Island, Papua New Guinea, AUD70 million in damages for mental and physical injuries suffered in detention.⁶⁰

In relation to this case, Guardian journalist Ben Doherty incisively writes: 'It is legal to seek asylum and to arrive by any means to do so. And it is unprincipled, immoral and indefensible to punish one group of people who have committed no crime in the name of deterring others from doing the same.'⁶¹

⁵⁶ Ibid.

⁵⁷ Janet Phillips, 'Boat 'turnbacks' in Australia: a quick guide to the statistics since 2001' (Fact Sheet, 22 June 2017) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacksSince2001>.

⁵⁸ Ben Doherty, 'Asylum seeker boat turnbacks illegal and don't deter people, report finds', *The Guardian* (online), 2 May 2017 <<https://www.theguardian.com/world/2017/may/03/asylum-seeker-boat-turnbacks-illegal-and-dont-deter-people-report-finds>>.

⁵⁹ Amnesty International, 'Australia: By Hook or by Crook – Australia's Abuse of Asylum-Seekers at Sea', *Amnesty International* (online), 28 October 2015 <<https://www.amnesty.org/en/documents/ASA12/2576/2015/en/>>.

⁶⁰ Ben Doherty and Calla Wahlquist, 'Government to pay \$70m damages to 1,905 Manus detainees in class action', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>>.

⁶¹ Ben Doherty, 'Brutal truth of Australia's detention regime can't be written off. Not even for \$70m', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/15/brutal-truth-of-australias-detention-regime-cant-be-written-off-not-even-for-70m>>.

B PROTECTION SOMEWHERE, ELSEWHERE, ANYWHERE BUT HERE

The EU-Turkey deal reduces the pull factor to Europe, by returning people seeking asylum to Turkey and also by obstructing the ability of people to reach Greece through increased patrols, while at the same time reducing the push factor by funnelling 6 billion euros into Turkey to boost refugee reception and protection initiatives.⁶² This deal shares deterrence and responsibility shifting parallels with Australia and its regional cooperation arrangement with Indonesia, where asylum seekers are intercepted and returned, despite the fact there is no durable solution available to them in the “transit country” they tried to leave. While the Indonesian Government takes a largely tolerant approach toward asylum seekers and refugees,⁶³ it has not acceded to the 1951 Refugee Convention or its 1967 protocol. Refugees are therefore not afforded legal rights, such as the right to a livelihood. Without work rights, and because getting an interview after initial registration with UNHCR can take between eight months and almost two years,⁶⁴ and securing a resettlement place can take another five years,⁶⁵ thousands of asylum seekers and refugees are surrendering themselves to detention centres in order to access food and shelter.⁶⁶

The Australian Government has an arrangement with the Indonesian Government and the International Organisation for Migration (‘IOM’), which means that asylum seekers intercepted *en route* to Australia and taken back to Indonesia are given material assistance by the IOM.⁶⁷ Australia also paid to increase Indonesia’s immigration detention capacity, with the Global Detention Project pointing out: ‘Like transit countries in other regions of

⁶² European Council, ‘EU-Turkey Statement’ (Press Release, 18 March 2016)

<<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

⁶³ Linda Ruth Briskman and Lucy Imogen Fiske, ‘Asylum seekers and refugees in Indonesia: problems and potentials’ 8(2) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 22

<<https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/4883>>.

⁶⁴ UNHCR, ‘Indonesia factsheet’ (Fact Sheet, UNHCR, February 2016)

<<http://www.unhcr.org/50001bda9.pdf>>.

⁶⁵ Fortify Rights and Burmese Rohingya Organisation UK, ‘Everywhere is Trouble: An Update on the Situation of Rohingya Refugees in Thailand, Malaysia, and Indonesia’, (Report, March 2016), 18

<<http://www.fortifyrights.org/downloads/EverywhereisTrouble.pdf>>.

⁶⁶ Asia Pacific Refugee Rights Network, ‘Indonesia Country Briefing’ (Brief, September 2015)

<http://www.aprrn.info/1/pdf/Combined_AUS_Final.pdf>.

⁶⁷ Savitri Taylor and Brynna Rafferty-Brown, ‘African refugees in Indonesia: An uncertain future’, *Pambazuka News* (online), 3 June 2010 <<http://www.pambazuka.org/human-security/african-refugees-indonesia-uncertain-future>>.

the world, the growth of Indonesia's detention capacities has been largely driven by the policies and practices of nearby destination countries, namely Australia.⁶⁸

The fact that countries like Turkey and Indonesia offer relative safety is seen as reason enough for governments not to be in breach of international law when returning people there. This is despite the fact these countries do not offer durable solutions to refugees and, instead, people are forced to live in limbo, stuck in a protracted state of transit, unable to go forward or back and often scraping by without access to fundamental rights or the ability to meet basic needs.

Hurwitz argues that the rationale behind the STC concept is 'the existence of effective protection somewhere.'⁶⁹ By shifting responsibility onto other states closer to the region where asylum seekers are fleeing from, protection needs are out of sight and whether these needs are being met becomes obscure, no longer the burden of western nations. Durieux is astute in his analysis that so-called "destination countries" are prudent in their efforts to 'evade responsibilities at the admission/recognition level, lest they are saddled with the 'burden' of granting durable asylum.'⁷⁰ He notes that deflection strategies typically involve shifting responsibility onto 'first asylum' and 'transit states' and that 'this unilateralism may be tempered by the practical necessity of signing readmission agreements with states "elsewhere"'.⁷¹

Readmission deals are vital in the implementation of the STC concept.⁷² Scholars have argued that readmission deals reflect 'unequal power relationships' and that they are 'tantamount to burden shifting'.⁷³

The EC Partnership Framework communication notes:

Increasing coherence between migration and development policy is important to ensure that development assistance helps partner countries manage migration more effectively, and also incentivizes them to effectively cooperate on readmission

⁶⁸ Global Detention Project, *Indonesia Immigration Detention Profile* (January 2016) <https://www.globaldetentionproject.org/countries/asia-pacific/indonesia#_ftn3>.

⁶⁹ Hurwitz, above n 19, 57.

⁷⁰ Jean-François Durieux, 'Protection - Where - or When - First Asylum, Deflection Policies and the Significance of Time Opinion' (2009) 21 *International Journal of Refugee Law* 75.

⁷¹ Ibid, 76-77.

⁷² Hurwitz, above n 22, 45.

⁷³ Ibid.

of irregular migrants.⁷⁴

It continues that 'positive and negative incentives should be integrated in the EU's development policy' rewarding countries that comply with readmission requests, manage the flow of migrants from other countries and host people in need of protection.⁷⁵ Trade policy is also raised as a way of punishing those who do not cooperate on readmission and return.⁷⁶ This highlights the *quid pro quo* approach of responding to the protection needs of vulnerable people seeking asylum. Rather than being about providing durable solutions, third countries are given development assistance in return for containing would-be asylum seekers within their borders.

Durieux highlights that no state can guarantee the protection performance of another state and so where responsibilities are shifted onto another country, the issue of whether effective protection is being provided becomes abstract. He encapsulates this by saying that the question of 'protection where?' remains as elusive as ever.⁷⁷

VI CONCLUSION

The EU appears to be following Australia's approach to asylum and refugee protection — deflecting and deterring rather than granting the rights and protections that developed nations can afford to provide. Resettlement has become a carrot and stick of reward and punishment, dangled in front of those "good" refugees who wait and removed from the grasp of those who make their own way to the EU. This durable solution has become a migration management measure. At the same time, transit countries are called safe, regardless of whether effective protection can be found there, for the purpose of deflecting responsibility away from the frontier and "protecting" borders.

⁷⁴ Communication from the commission to the European Parliament, the Council: Action Plan on the integration of third country nationals [2016] COM 240.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Durieux, above 67, 76-78.

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