Reforming the international protection regime: Responsibilities, roles and policy options for Australia

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EXECUTIVE SUMMARY

The international protection regime is failing states and refugees alike. It may be too soon to reform its fundamentals, but the regime needs to be implemented more effectively, and straight away. It is in Australia's national interest to drive reform, in order to prepare for future asylum flows, take advantage of the success of Operation Sovereign Borders, and fulfil its long-standing commitment to helping people in need. At the domestic level, Australia should set standards for responding fairly but effectively to asylum seekers, and prepare for environmental migration. At the regional level Australia needs to establish leadership credentials to promote protecting people closer to home. At the global level Australia should champion new approaches to refugees and migration, challenging an increasingly complacent regime.

The international protection regime has never worked perfectly, but today it is under extraordinary pressure. According to the United Nations High Commissioner for Refugees (UNHCR), the number of displaced has reached an all-time high of over 65 million, the most since the end of the Second World War.[1] Europe is in the throes of an historic refugee crisis, while Southeast Asia is still dealing with the aftermath of the 2015 Andaman Sea crisis. The international protection regime is chronically underfunded and solutions to global refugee problems remain elusive. The international protection regime today is failing to serve the interests of states as well as refugees and other displaced persons themselves.

Against this backdrop, the purpose of this Analysis is to propose concrete options for Australia to help improve an underperforming regime. Why should Australia bother? Now that the illegal boat arrivals have been stopped, Australia is hardly affected by the failings of the regime. Last year Australia processed less than 1 per cent of the world's asylum applications. It clearly fulfils its international obligations through a generous refugee resettlement program, the third largest in the world, and has one of the world's best managed migration programs.

There are, however, at least three reasons why Australia still has a responsibility to act: first, to pre-empt future shocks that may result in an increase in asylum applications in Australia; second, because in comparison to many other industrialised nations, especially in Europe, Australia has an historic opportunity to be proactive; and third, because as a prominent advocate of the international protection regime since 1951, Australia has a vested interest to make the system work. Ultimately, reforming the international protection regime is in the national interest of Australia.

After briefly rehearsing the case for reform, and outlining in more detail Australia's responsibilities, this Analysis considers specific roles and policy options for Australia. At the national level Australia can develop laws and policies that anticipate and fill gaps in the international protection regime, while adhering to international laws and norms. This is especially necessary given the prospect of significant displacement in the South Pacific region as a result of the effects of environmental change. In this regard at least, Australia's role should be as a standard-setter.

At the regional level Australia can innovate policies to help protect refugees closer to their homes and reduce onward movement, while also encouraging other affected states in the region to assume their responsibilities. Its role should be as a leading advocate for regional reform. At the global level, the forthcoming Summit for Refugees and Migrants at the UN General Assembly on 19 September provides an opportunity for Australia to exercise its traditional role as a champion of

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the international protection regime and as a state that challenges existing approaches (a norm entrepreneur). It should use this opportunity to make specific proposals for effective reform of the regime.

This Analysis draws on feedback to an earlier draft discussed at an expert workshop co-hosted by the Australian Department of Immigration and Border Protection (DIBP) and the Lowy Institute in Canberra on 27 June 2016. It also builds on an earlier Lowy Analysis, *Australia and the 1951 Refugee Convention.*[2]

THE NEED FOR REFORM

The 2015 Lowy Analysis on which this paper builds argued that while the international protection regime has, by and large, stood the test of time, and continues to protect many millions, its implementation is beginning to fail Australian national interests, the interests of the wider international community, and the interests of refugees and others in need of international protection. Since that Analysis was written the case for reform has only strengthened, as illustrated by the challenges Europe has faced recently in coping with a large influx of asylum seekers and refugees.

A MALFUNCTIONING SYSTEM

The most compelling reason to reform the international protection regime is that it no longer provides protection for a sizeable proportion of those in need. Instead, it has become increasingly about who can pay, and one of its greatest beneficiaries has become the people smuggling industry.

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The regime is also failing states; most importantly poorer states where the majority of asylum seekers and refugees are hosted. From the perspective of industrialised states such as Australia, the international protection regime is also failing in several fundamental ways. It places an obligation on states to consider any application for asylum on their territory, however ill-founded the application may be and even if the applicants enter without authorisation. The lack of any provisions or mechanism for sharing responsibility for asylum seekers is an additional concern for many states — and will continue to be now that it has been decided not to agree a Global Compact on Responsibility Sharing for Refugees at the 19 September summit on large movements of migrants and refugees. As a result, there is the risk of a 'race to the bottom' to deter asylum seekers. It also means that it is asylum seekers (and the smugglers they often pay), rather than destination countries, who determine where the asylum burden falls.

For states there is one more glaring gap in the implementation of the 1951 Convention, which is its 'exilic bias'. That is, it places obligations on destination states that are increasingly onerous to fulfil; but none on the states that refugees are fleeing. The Convention does refer to durable solutions for refugees, one of which is voluntary repatriation, and, indeed,

seeking solutions is part of the core mandate of UNHCR. But there are no obligations on countries of origin concerning the rights of returnees, or the right of former asylum seekers to return.

WHAT TO REFORM…AND WHAT NOT…

The international protection regime comprises a series of laws, norms, and an international organisation. The primary legal framework is the UN 1951 Convention relating to the Status of Refugees, underpinned by the 1948 Universal Declaration of Human Rights (UDHR), which combined with subsequent protocols and regional instruments defines obligations such as asylum and responsibility sharing. The international organisation is UNHCR, which has supervisory responsibility for ensuring that states meet these obligations towards refugees.

Some refugee advocates believe that there is a growing case to reform the international refugee regime, and there are ongoing debates about the relevance of the legal and normative framework to current and future displacement realities,[3] its scope,[4] the performance of UNHCR,[5] and the role of partner organisations such as the International Organization for Migration (IOM).[6] Other advocates are concerned that, in particular, to open up the 1951 Convention to negotiation would risk lowering, not raising, protection standards; and besides there is very little political appetite for reform. Instead, this Analysis proceeds from the basis that the focus for reform today should not be the international protection regime itself, but rather how it is implemented.

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The future of international protection needs answers to questions such as how to adapt national laws and policies to changing realities; how to build on the existing institutional order; how states can better meet the needs of refugees; what should be provided to refugees and where should it be provided; and who is responsible?[7] Clearly, such questions potentially encompass a wide array of possible reforms. This Analysis focuses on those aspects of this reform agenda that are particularly relevant for Australia, whether because of its national interest, or because it has the experience and expertise to add particular value.

THE REFORM COROLLARY

The Analysis also proceeds from the basis that reforming the implementation of the international protection regime should not undermine those laws and norms. This is important to state as some of the proposals considered in this Analysis (and currently being considered and enacted by some states) are controversial, and if applied indiscriminately or inappropriately may jeopardise the protection regime itself. Proposals for accelerated return, for example, should not trespass on the fundamental norm of *non-refoulement*. Procedures to return refugees to safe third countries should not undermine the right to asylum enshrined in the UDHR. Seeking alternatives to flight through safe havens should not deny the UDHR right to leave and return to one's own country.

Failure to adhere to this corollary risks the international protection regime being dismantled in a piecemeal and ad hoc manner, as an unintended consequence. If there is a consensus that the regime itself needs reforming, then this reform should be direct and systematic, and an appropriate replacement proposed and introduced.

REFORM IS IN THE NATIONAL INTEREST OF AUSTRALIA

One of the defining features of Europe's response to its current refugee crisis, and indeed of the international community's response to displacement over the last 60 years or so, has been that it has generally been reactive. Horizon-scanning, predicting displacement consequences, and contingency planning have rarely occurred.

The most important reason that Australia should support the reform is to guard against future shocks. Some commentators have argued that the success of Operation Sovereign Borders (OSB) is unsustainable, for example because turnbacks may not be possible in response to a greater volume; there are limits to the capacity of Papua New Guinea[8] and Nauru; legal challenges to the policy continue; and its financial costs are disproportionate.[9] Future conflict in South Asia or Southeast Asia would likely result in increased asylum applications in Australia, the wealthiest nation in the neighbourhood and one of the few signatories to the UN 1951 Convention relating the Status of Refugees. In the foreseeable future, the effects of environmental change and natural disasters in Southeast Asia and Pacific Island countries may also result in growing migratory pressures on Australia.[10]

The very fact that Australia is currently not overburdened by boat arrivals or asylum seekers is indeed a second reason to participate — if not take the lead. As Australia learned a few years ago, there is no political appetite to focus on long-term reform in the throes of a short-term asylum crisis. This is exactly why Europe needs Australia (and North America) to conceptualise, propose, and where appropriate support reform now. Promoting reform of the international protection regime may also be one way for Australia to allay some of the international criticism it has attracted because of its asylum policy over the last few years, which critics have regularly described as unethical and some even consider illegal.

Third, advocating to improve the performance of the international protection regime is a logical progression of Australia's historic commitment towards the regime. It was Australia's signature in 1954 that brought the 1951 Convention into force. Australia has always been a prominent supporter of the regime and its underlying principles. One of these principles is shared responsibility. Proximity should not define responsibility, and Australia has a responsibility to help improve the response to the global refugee crisis, even if it is not directly affected by it to any great extent at the moment.

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More specifically, Australia has a track record, internationally and domestically, that provides a particular credibility in implementing the reform that is required. Australia has been at the forefront of the debate on the 'Responsibility to Protect' — a global political commitment to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity.[11] Albeit controversially, Australia has pushed the idea of regional processing, enlisting other countries in the region to fulfil their own obligations to protect and assist asylum seekers. Australia also remains a champion of refugee resettlement, having recently announced its annual quota of 13 750, the third most generous worldwide (the government has also announced a one-off resettlement program for an additional 12 000 Syrian refugees). Protecting people at home so they do not need to flee, promoting protection close to home so people do not need to pay people smugglers to reach safety, and unlocking durable solutions for refugees are all key components of a better international protection system where Australia can add particular value.

STANDARD SETTING IN NATIONAL RESPONSES

A particular frustration for industrialised states is the obligation to consider all asylum applications on their territory, however unfounded. One consequence is the uneven allocation of resources. In 2000, for example, the United Kingdom spent more on processing asylum applications than the entire budget of UNHCR, and while data on national asylum expenditure are hard to find, there is no doubt that costs have increased in Europe over the last year or two, with demonstrably lower commitments to UNHCR. While Australia is not currently overburdened by asylum applications, it makes good sense to continue to review experience elsewhere and ensure that asylum policy settings in Australia can be readily adjusted according to the scale of the burden. More boldly, Australia can set the standard in developing national laws and policies in response to the prospect of significant environmental displacement in the coming years.

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SETTING STANDARDS ON ENVIRONMENTAL MIGRANTS

One of the most glaring gaps in the international protection regime is the lack of preparedness for significant displacement as a result of the effects of environmental change, resulting in what are often (incorrectly) referred to as 'climate refugees'. Australia is more likely to be directly affected, and sooner, than any other industrialised nation, especially as a result of environmental impacts in South Pacific countries, and should therefore be at the forefront of developing a response.[12] Australia can set the standards for others to follow.

There is a general consensus that the prospects for a new international treaty or a protocol to the 1951 Convention to deal with this issue are slim and also have significant shortcomings.[13] Attention has therefore focused

on adaptation in origin countries and capacity building in transit countries, and on developing national legislation on environmental migrants.

In terms of national legislation in Australia, three main models can be considered. One is to develop a new humanitarian category for environmental migrants. In 2007 the Australian Greens proposed legislation to create a 'climate refugee' visa category. The proposal attracted considerable criticism in the Senate and did not proceed to a vote. A second model is to amend existing legislation to provide refugee-like protection to environmental migrants. Variants on such legislative protection responses have already been adopted by other industrialised states (Finland, Sweden, the United States), but none of the existing examples of national policies and legislation provides a comprehensive solution to the problem.[14]

A third model that probably provides the most realistic and pragmatic approach for Australia is to use existing labour migration programs to extend migration opportunities to people vulnerable to or affected by environmental change. Australia's Seasonal Worker Programme may provide a starting point for responding to migration arising from the effects of environmental change in the Pacific Islands. Started as a pilot scheme in 2009 for people from Kiribati, Tonga, Vanuatu, and Papua New Guinea, the scheme has now become permanent and has been extended to include Fiji, Nauru, Samoa, Solomon Islands, Timor-Leste, and Tuvalu.[15]

This model of responding to environmental migration through existing labour migration programs is likely to be palatable for public consumption. It could be achieved without significant new legislation or additional expenditure or changing institutional arrangements, to an extent simply formalising existing procedures. It targets a limited number of countries only, defined by Australia's national interest, and thus should not become a global magnet for environmental migration. But it would simultaneously set standards for national legislation elsewhere. It combines options for pre-empting and responding to the effects of environmental change. It resolves national interests with international norms and laws. Most importantly, it provides migration-based solutions for refugee-like situations.

ADDRESSING ASYLUM PRESSURES

As a member of global consultative groups such as the Intergovernmental Consultations on Migration, Asylum and Refugees and relevant IOM and UNHCR working groups, Australia is well-placed to divine lessons from the responses of industrialised countries currently more directly affected by asylum pressures. The government should consider developing a menu of options for responding to any future increase in asylum applications, based on experiences elsewhere, and maintain the capacity to respond accordingly.

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European states, either individually or collectively, have over the last decade tested a series of methods to reduce their asylum burden. One approach has been to try to reduce the time it takes to reach a decision on an asylum application, which in many European states still takes years. Not only is this a financial burden, it also lessens flexibility to admit new asylum seekers. It probably also serves as an incentive for asylum seekers whose claims are not valid to try to reach these countries, where they know they can expect to be able to stay for years while their applications are considered. Especially where return policies are not enacted, admission to an industrialised state as an asylum seeker even without a legitimate claim can become a pathway to staying permanently, albeit often in an irregular situation.

In some analyses, the problem is a lack of capacity, and so investment has been made in employing and training new staff across the asylum system. This is currently taking place in Germany, for example, to try to reduce a growing backlog of asylum applications. It has also taken place intermittently in the United Kingdom and other European countries, again in response to growing backlogs. Another common response has been to accelerate the entire asylum process, in particular by distinguishing between categories of asylum seeker. This can help expedite granting refugee status to those most obviously deserving; however, it is most often applied to deal with unfounded applications.[16] The UNHCR recognises the need to address the issue of manifestly unfounded or abusive applications, but also stresses the need for appropriate precautions to guard against erroneous decision-making. Another common method for implementing accelerated procedures is the 'safe country of origin' concept, which is based on the assumption that there are certain countries in the world from which asylum claims are manifestly unfounded, and to which asylum applicants can be safely and promptly returned.

Where asylum systems have become overwhelmed, as was the case in Europe during the 1990s Balkans crisis, alternatives to refugee status have been developed to provide immediate protection. The concept of temporary protection is one example. It has been argued that a new temporary protection directive should be issued for Syrians to provide a legal route into Europe.[17] For host states, one of the advantages of this response is that the rights it entails can be designated unilaterally and not determined by the international protection regime. For those seeking protection, the risk is that temporary protection regimes may effectively deny them the rights to which they are actually entitled as refugees.[18] It has also been argued that temporary protection may be one way to promote return once it is viable, in contrast to the permanence associated with refugee status.

In the Australian context, however, the reintroduction of Temporary Protection Visas (TPVs) has been criticised as potentially being inconsistent with international human rights law.[19] Advocates have called for Australia's temporary protection regime to be reformed to address

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exceptional circumstances where protection cannot immediately be provided, rather than discriminate against asylum seekers by their method of entry in an attempt to deter irregular arrivals.

Return represents a third significant thrust for asylum policy in Europe. Where possible voluntary return is encouraged, and there is ongoing policy research concerning how best to encourage voluntary return, and how to define and promote its sustainability. At the same time, it is widely acknowledged that voluntary return is unlikely to be effective without the possibility to resort to forced return, which can be politically sensitive, very expensive relative to the numbers returned, and generally difficult to implement.

REGIONAL LEADERSHIP IN PROTECTING REFUGEES CLOSER TO HOME

While Australia may legitimately be described as a regional leader in fields such as aid, trade, and defence, it may be premature to declare its 'leadership' in the realm of asylum and refugees, given strained relationships with Indonesia in particular.

One opportunity for Australia to exercise genuine leadership is by strengthening the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) which it co-chairs with Indonesia. The Bali Process has helped raise regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime; provides a forum for policy dialogue, information sharing and cooperation; and has established a Regional Support Office to strengthen practical cooperation. Still, the Bali Process has been criticised, including recently by its former Indonesia co-chair, Foreign Minister Retno Marsudi, for failing to pre-empt and respond more effectively to the Andaman Sea crisis in 2015.[20] More generally, the Bali Process, like other Regional Consultative Processes (RCPs), has been criticised for its informal character, its focus on national security, and its lack of coordination with other RCPs.

Responding to such criticisms to strengthen the Bali Process would be important in the context of reforming the implementation of the international protection regime. Smuggling and trafficking are especially significant because they facilitate — often forcibly — the onward movement of asylum seekers and refugees from a first country of asylum where they should have received protection and assistance. For industrialised states, reducing these onward flows is not just a matter of self-interest, but would also reduce the risks to asylum seekers and refugees, and their exposure to migrant smugglers and people traffickers. Improving regional protection and assistance should go hand in hand with stemming smuggling and trafficking, and offers an opportunity for Australia to adopt a more comprehensive leadership role within its region. The recent proposal to establish a Bali Process Business Forum in order

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to engage the private sector is one step in the right direction to widen the membership and scope of the Process.

In the longer term, and for more far-reaching reform, it may be that Australia should focus on the potential of the Association of Southeast Asian Nations (ASEAN). So far ASEAN has mainly dealt with labour migration issues, but it is more likely to generate genuine political commitment — for example, to establish a regional refugee framework, a more realistic goal than a new global framework — than the Bali Process.[21]

ADDRESSING THE CAUSES OF ONWARD MOVEMENT BY REFUGEES

A first step towards reducing onward movements by asylum seekers and refugees is to understand why they move. There is very limited research on decision-making by refugees (and migrants) in transit. Australia is taking the lead in trying to fill this research gap, although far more research is required.

A recent study commissioned by the DIBP provides some insights from interviews with over one thousand people from Afghanistan, Iran, Iraq, Pakistan, and Syria residing in Greece and Turkey and with various legal statuses.[22] The study found that about two-thirds of respondents planned to migrate onwards to other European countries, about one-third planned to remain, and very few planned to return to their country of origin.

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The results showed that conditions in the transit countries were critical in the decision whether or not to move onwards. First, respondents who considered their current living situations as 'bad' or 'very bad' were more likely to seek to migrate onwards (83 per cent) than respondents who considered their living conditions as 'average', 'good', or 'very good' (46 per cent). Second, those who had experienced verbal or physical abuse were more likely to seek to migrate onwards (67 per cent) than stay. Third, those who were unemployed were more likely to seek to migrate onwards (76 per cent) than those who were employed (45 per cent). Respondents compared conditions in their current countries of residence with the perception of better living conditions in the intended destination, that it was a safe country, good treatment of asylum seekers there, good social welfare policies there, and individual migration aspirations. The latter variable in particular demonstrates that some of the factors that may influence the decision to move onwards are largely beyond the reach of direct policy intervention.

IMPROVING REGIONAL PROTECTION AND ASSISTANCE

What these initial findings indicate is that many people move onwards because their basic rights (safety, employment, decent standard of living) are not properly respected in their current locations. Non-applicability of

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international protection instruments, where a state has either not acceded to them, or maintains reservations to its provisions, remains a major challenge to the implementation of the international protection system. In 2011 it was estimated that 40 per cent of refugees under the UNHCR's mandate were hosted by states that had not acceded to either the 1951 Convention or its 1967 Protocol.[23] In East Asia and the Pacific, 16 of 26 states have acceded, in Southeast Asia 3 of 13, and in South Asia none of five.[24]

There is a particular gap among states in South and Southeast Asia, many of which are already, or are likely to be, transit countries for asylum seekers heading to Australia. It is therefore clearly in Australia's interests to find ways to fill this 'applicability gap'. Many states in the region remain unwilling to ratify the 1951 Convention, and so consideration now needs to be given to alternative frameworks for protection. One option that has attracted increasing attention is to integrate asylum and migration policies. In principle, this could allow for legal routes for entry for asylum seekers, access to the labour market and social welfare, an avenue to integration, or managed return options. Equally it would be important to safeguard the specific rights of refugees, especially against forced return.

Even in signatory countries, however, there is often a significant lack of capacity to implement the provisions of the international protection system. In response, Australia has supported a range of initiatives to develop asylum and refugee systems in its region. These have included research and analysis on mixed migratory flows and public responses to them; enhancing the operational capacity of UNHCR offices; legal and policy training for local officials; supporting civil society efforts to assist refugees and asylum seekers; promoting objective media coverage on refugee issues; and strengthening inter-state cooperation in responding to the humanitarian and protection dimensions of rescue and interception at sea.

A series of project evaluations has demonstrated that such efforts have had only limited success, whether gauged by the establishment of a functioning Refugee Status Determination system, the reduction of outflows of asylum seekers to Australia, or the promotion of solutions for refugees.[25] Besides ongoing challenges related to security and overall state capacity, three obstacles in particular were identified at the DIBP–Lowy Institute expert workshop. One has been a lack of consensus between countries in the region regarding their roles and responsibilities. A second obstacle is that asylum has become inextricably linked with irregular migration, smuggling, and trafficking. While it is important to retain a differentiated approach, this still means that an asylum and refugee system needs to be developed in the context of a wider migration management system. Third, there has been significant unwillingness by local non-governmental organisations to cooperate, as they do not wish to engage in activities aimed at the long-term stay of refugees which they

consider to be a result of Australia 'externalising' their asylum process to other countries.

On the other hand, it has to be acknowledged that hundreds of thousands of asylum seekers who might otherwise have undertaken risky onward journeys to Australia have been retained in other countries in the region. The policy challenge is to ensure that they are assisted and protected to international standards; and the implication is that this requires a wider political effort than simply supporting capacity building. Specifically, the roles and responsibilities of countries in the region need to be clearly defined and agreed. The Bali Process has already helped define roles and responsibilities on the issues of people smuggling and human trafficking, and should now consider extending its remit to wider asylum management issues. Key to success would be to include civil society in the process.

PROVIDING VIABLE ALTERNATIVES

Another reason for onward movement is that for many refugees there are no viable alternatives. In an era of protracted and recycling conflicts, not many refugees are willing to return home. While states such as Australia offer resettlement, the total number of places on offer worldwide is very limited and the process for applying akin to a lottery for many people. Neither are states where most refugees currently reside, in the developing world, willing to countenance integrating refugees permanently, for reasons including security implications, labour market impacts, and environmental considerations. In this context a significant criticism of the international protection regime is its fixation on conventional solutions that are no longer working.

Among the most interesting proposals for viable alternatives is a shift away from understanding all solutions simply in terms of 'fixing' people in places, whether back at home, in their host country, or in a third country. It has been suggested that instead, migration and mobility may help secure rights for the displaced in the long term;[26] for example, by entitling refugees to enter the local labour market with the same rights as migrants, or issuing them time-limited labour visas so they have the right to come back to work should their return prove unsustainable. In this sense, perhaps, the idea of 'durable' solutions is now outmoded, and might be replaced with 'enduring' solutions.[27]

It is proposed, for example, that a mobility approach may help overcome the underlying obstacle to repatriation, namely the chronic weakness of states recovering from conflict.[28] Why not realise the potential of refugees to contribute to post-conflict reconstruction, by facilitating cross-border strategies that allow them to participate without initially risking returning permanently, providing of course that minimal conditions of safety and stability have been established in the country of origin?

Similarly, one of the main obstacles to local integration is a reluctance to grant refugees citizenship and the rights that this entails. Integrating them

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temporarily instead as migrants may help overcome these concerns, and provide a longer-term pathway to citizenship. Likewise, one of the reasons there are not significantly larger resettlement quotas for refugees is because for the vast majority it implies permanence. Opening up temporary migration pathways to countries of resettlement might resolve such concerns while also offering positive alternatives for refugees, although as with the provision of 'temporary protection' discussed above, care would be needed to identify an appropriate period during which a refugee could only be resettled temporarily, before a permanent solution is guaranteed.

In practice such proposals have rarely been tested, and where they have with mixed results. The European Union and Economic Community of West African States are two examples of regional citizenship structures that extend freedom of movement for labour to refugees and may become a model for other regional organisations. A cross-border 'solution' has been piloted for Afghan refugees in Pakistan, to permit them to re-enter Pakistan as temporary labour migrants after returning home, but it has not been implemented largely because of security concerns within the Pakistan Government.

In the specific context of asylum seekers, providing more legal options for labour migration may help reduce the incentive to abuse the asylum system; and although there is little empirical evidence yet, it seems intuitive that it may also help undermine the market for migrant smugglers. At the same time there is currently a reduced demand for low-skilled labour in many industrialised states, and there would be a need to guard against any accusation of 'cherry-picking' more skilled asylum seekers.

A NORM ENTREPRENEUR IN THE GLOBAL DEBATE

Some reforms to the implementation of the international protection regime are best conceived and launched at the multilateral level, because they require broad international consensus to become politically palatable. Some are simply too expensive or impractical for any single state effectively to promote. The forthcoming Summit for Refugees and Migrants at the UN General Assembly on 19 September provides an opportunity for Australia to promote such global solutions, either where they serve its national interest, or where Australia has particular experience or expertise to contribute.

Australia is especially well-positioned to promote three areas for global reform. The first relates to providing alternatives to refugee flight and draws on its normative leadership on the principle of the Responsibility to Protect. The second, promoting responsibility sharing, takes advantage of its authoritative position as a major resettler of refugees. The third, engaging the private sector, draws on its partnership-building experience.

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PROVIDING ALTERNATIVES TO FLIGHT

The root causes of refugee flight may often be intractable,[29] and the decision to flee beyond direct policy interventions. Nevertheless, there are ways that the international community can begin to redress the exilic bias of the international protection regime.

Perhaps the most controversial is to provide 'safe havens' for civilians within their own country or on the border with neighbouring countries. A working definition of a 'safe haven' is:

> "A strictly designated area where civilians and civilian objects are protected from harm resulting from ground, air, or other attacks by any armed group. The safe area should be protected by a neutral, specially mandated, and trained international force, not otherwise engaged in military action for or against any side involved in the conflict."[30]

Safe havens have been used in the past, for example during the 1991 Iraq war and Balkans conflicts, but with mixed success. The 1995 Srebrenica massacre took place within a so-called safe haven. Yet the idea is now being discussed again in the context of the Syrian crisis.[31] Safe havens are expensive to establish, maintain and protect. It is important to emphasise their humanitarian purpose, and not let them become a political or military option, nor a proposal solely to promote the return of refugees. Care is also required in considering the option of internal flight or relocation to safe havens in the context of refugee status determination. In other words, the existence of a safe haven should not become a pretext for denial of refugee claims by a destination country.[32]

Another way potentially to reduce displacement is to focus on building resilience among vulnerable communities. This approach has emerged in particular in the context of environmental migration. The Nansen Initiative[33] has highlighted how adaptation actions such as strengthening preparedness and building resilience to disasters can help communities better adapt to the adverse effects of climate change and avoid displacement at a later stage. Australia is a member of the Steering Group of the Nansen Initiative. Building resilience is clearly more challenging in the context of conflict and widespread violence, although it is gaining traction as a means to prevent violent extremism.[34]

While such initiatives may help reduce the likelihood of displacement, it probably remains inevitable in certain situations. The majority of the world's displaced people are within their own country — according to the Internal Displacement Monitoring Centre, at the end of 2014 there were at least 38 million internally displaced persons (IDPs) worldwide,[35] and this number is only for those displaced by the effects of conflict and violence; many millions more have been displaced by natural disasters.

The protection and assistance of IDPs remains a gap in the international protection regime. There are at least three practical policy interventions

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that can be suggested to begin to plug this gap more systematically. The first is to promote the Guiding Principles on Internal Displacement, which restate and compile applicable human rights and international humanitarian law. The second is for states both to enact themselves and also encourage other states to develop national laws and policies on internal displacement based on the Guiding Principles. As important, third, is to support the implementation of national laws and policies.[36]

RESPONSIBILITY SHARING

Responsibility sharing is one of the obligations of the international protection regime. The norms related to responsibility sharing are, however, weak and largely discretionary.[37]

The most advanced example of responsibility sharing is the Dublin II Regulation (DR II) in the European Union. Adopted in 2003, its main aim was to provide a set of criteria for determining the member state responsible for the examination of an asylum application in Europe, in order to eliminate 'asylum shopping', 'multiple asylum applications' and 'refugees in orbit'.

While DR II did succeed in making European asylum mechanisms swifter and more effective, it has also been heavily criticised.[38] First, by allowing asylum seekers to be returned to the first European country where they arrived, the system has placed disproportionate responsibility on states at the external borders of the European Union, in particular Greece and Italy. As a result, it has been depicted as a system of 'responsibility shifting' rather than 'responsibility sharing'. Second, member states that are returning asylum seekers to European countries in which they first arrived are under no obligation to verify the asylum procedures there. In 2015 Germany suspended the return of asylum seekers to Greece in response to concerns about their rights there. A related third concern is that DR II has had no impact on harmonising asylum systems across Europe. As a result of such shortcomings, the DR II has now largely ceased to function in the face of Europe's current refugee crisis.

Some new and quite innovative proposals for reinvigorating responsibility sharing are emerging. One is to burden share by task and not just numbers. Thus while certain states may be responsible for resettling refugees, others may take responsibility for addressing root causes, or capacity building in transit.[39] Australia clearly has already assumed its responsibility through resettlement. As proposed in this Analysis, it might also fulfill its global responsibilities by standard setting on national legislation, and regional leadership on protecting and assisting asylum seekers and refugees closer to their homes.

The UN Secretary-General has released his report in preparation for the UN General Assembly's summit on large movements of refugees and migrants,[40] and among other recommendations has called for a more predictable and equitable way of responding to large movements of

The norms related to responsibility sharing are…weak and largely discretionary.

refugees, through the adoption of a Global Compact on Responsibility Sharing for Refugees. It is unclear whether states will endorse this proposal, and even if they do they will not commit to an agreement before 2018. As a resettlement exemplar Australia should urge endorsement, and use its experience and influence to shape the eventual outcome over the next two years.

PUBLIC-PRIVATE PARTNERSHIPS IN FRAGILE ENVIRONMENTS

Australia has been an active proponent of partnering with the private sector in migration management, for example through its private sponsorship program for refugee resettlement. Promoting the engagement of the private sector is a third way in which Australia can add value to the global agenda for reforming the international protection regime; and as noted Australia is currently developing a proposal for a Bali Process Business Forum.

In the context of Europe's ongoing refugee crisis, the private sector has played an important role, financing humanitarian organisations, providing jobs, apprenticeships and training, and launching social media campaigns for support. These efforts have extended across Europe and also to Jordan, Lebanon, and Turkey where the bulk of Syria's refugees continue to reside. Attention is now turning to how public-private partnerships might also be implemented in refugees' countries of origin, to reduce fragility, violence, and conflict.

A recent report by the World Economic Forum (WEF) demonstrates the potential to reduce state fragility by promoting investment, stimulating economic growth and job creation, expanding tax collection and empowering local populations. For example, unemployment undermines society's ability to manage shocks, so creating job opportunities will strengthen resilience in the face of heightened destabilisation and perhaps reduce the incentive to leave.[41] The authors of the report promote public-private partnerships as an important vehicle to strengthen resilience in fragile environments, and propose a series of guidelines.

First, to reduce fragility in a long-term, sustainable way, state institutions must be strengthened, and businesses should work hand in hand with the public sector and civil society to support capacity building. Second, local businesses and communities must be included from the very start in developing solutions to fragility, violence, and conflict. Third, beyond traditional business-to-business (B2B) sales and procurement, companies operating in fragile environments should be integrating B2B support or partnership into their core operations. Fourth, stimulating positive impacts from the private sector in contexts of fragility, violence, and conflict will require integrating responsible investment into core business practices. Companies must see the clear business case for investing in fragile settings. Fifth, businesses must work with governments to ensure the transparent and equitable management of revenues from

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the export of natural resources, which will benefit all actors in the long term.

Such innovation is exactly what is required to make a success of the forthcoming Summit for Refugees and Migrants. Australia is well-positioned to be a prominent proponent.

CONCLUSION

This Analysis starts from the assertion that reform of the international protection regime should focus on its implementation, and as a corollary should not undermine its basic legal, normative, and institutional tenets. It has focused on responsibilities, roles, and policy options for Australia to contribute to this reform process at the national, regional and global levels.

Australia should have the political courage to assume these responsibilities and take on these roles. The current lull in asylum flows to Australia cannot be taken for granted, and Australia is likely to be more directly and quickly affected by environmental migration than most other industrialised nations. It is the only state that can realistically take the lead within its region. There is an historical imperative for Australia to uphold the principles of the international protection regime of which it has been architect and protector, one of which is responsibility sharing.

Ultimately, reforming the international protection regime is in the national interest of Australia.

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