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**THE SIGNIFICANCE OF THE BALI PROCESS  
IN FOSTERING AWARENESS OF IRREGULAR MIGRATION  
IN ASIA PACIFIC REGION**

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## **ABSTRACT**

The purpose of this research project is to understand the significance of the Bali Process as a forum in the Asia Pacific region to address the issue of irregular migration. The Bali Process was initiated by Australia as a transnational diplomacy to engage with other nations equally in Australia's national interest. Its primary focus is fostering awareness of irregular migration in the Asia Pacific Region. In particular, the Bali Process represents a turning point in the Australia-Indonesia relationship which deteriorated due to issues such as the Tampa Affair (2001) and the East Timor Independence Process (1999).

This research project explores the effectiveness of the Bali Process to address issues of irregular migration and the compliance with refugee protection protocols within the forum. This thesis explores the phenomenon of irregular maritime arrival in Australia, securitisation of irregular migration relative to people smuggling and human trafficking, the significance of Indonesia as a transit country, the involvement of international organisations in the Bali Process and the mechanism of the Bali Process.

This research argues that irregular migration was not adequately addressed through the Bali Process because the number of boat people has not decreased since the inception of the Bali Process. It is also argued that the Bali Process does not incorporate sufficient measures for refugee protection. The notion of refugee protection within the forum is tokenistic and has not been translated into practice. With this in mind, this research project notes the importance of refugee protection within the forum and provides recommendations accordingly.

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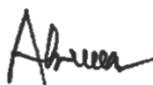
## LIST OF ACRONYMS

<b>ACP-EU</b>	African Caribbean and Pacific Group of States-European Union
<b>AHG</b>	Ad Hoc Group
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BCM</b>	Border Control Management
<b>CELAC</b>	Community of Latin American and Caribbean States
<b>EU</b>	European Union
<b>ILO</b>	International Labour Organization
<b>IMAs</b>	Irregular Maritime Arrivals
<b>IOM</b>	International Organisation for Migration
<b>NTS</b>	Non-Traditional Security
<b>OSB</b>	Operation Sovereign Borders
<b>RCF</b>	Regional Cooperation Framework
<b>RSO</b>	Regional Support Office
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNODC</b>	United Nations Office on Drugs and Crimes
<b>US</b>	United States

## DECLARATION

I, Anita Herlina, certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text or footnotes.

Signed

A handwritten signature in black ink, appearing to read 'Anita Herlina', written in a cursive style.

Date 24 May 2019

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# 1 INTRODUCTION

## 1.1 Problems and Research Questions

This thesis explores the significance of the Bali Process<sup>1</sup> as a forum between North and South to tackle irregular migration. The terminology of north-south is used to divide developed countries and developing countries. North represents developed countries, while south represents developing countries.<sup>2</sup> Kneebone argued that the Bali Process is a state-led regional response to connect north and south interests as well as intra-regional interests.<sup>3</sup> Australia's soft diplomacy in the region has successfully created awareness about combatting people smuggling. It has impacted domestic legislation in some countries which regulates people smuggling and human trafficking as a transnational crime.

The questions addressed by this thesis are: Firstly, can irregular migration in the Asia Pacific region be solved through the Bali Process? Secondly, to what extent does the Bali Process provide protection for asylum seekers?

I will argue that irregular migration cannot be solved through the Bali Process. The argument will draw on the perspectives of both sides of the Bali Process, the numbers of irregular migrants heading to Australia and the human security framework in the forum. That said, the forum has brought some benefits for Asia Pacific region. First, it has successfully created awareness of people smuggling and human trafficking in the region. In terms of deterring boat people heading to Australia, it has been successful as forum members have addressed people smuggling and human trafficking in national legislation. Secondly, it has provided an advantage in maintaining the relationship between its co-

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<sup>1</sup> The Bali Process is a regional forum in Asia Pacific designed to address issues of people smuggling and trafficking in persons through bilateral and regional efforts. The membership consists of forty-five countries and four international organisations.

<sup>2</sup> Jean P. Terien, "Beyond the North-South Divide: The Two Tales of World Poverty," *Third World Quarterly*, 20 (4), pp. 723-42, 1999, p. 723.

<sup>3</sup> Susan Kneebone, "The Bali Process and Global Refugee Policy in The Asia Pacific Region," *Journal of Refugee Studies*, 27(4), pp. 596-618, 2014, p.599.

chairs, Australia and Indonesia. In addition, I will argue that the Bali Process does not provide real protection for asylum seekers. The framework around refugee protection is purely a formality that lacks real implementation. The forum's focus is more on criminalisation of illegal migrants rather than protection.

There are important aspects of the Bali Process that will be examined here, namely, the mutual advantage for Australia and Indonesia as co-chairs of the forum. Looking at the Australian perspective, the Bali Process has deterred illegal migrants from entering Australia. It has served as a successful exercise in soft power to protect Australia's interests, which is confirmed by Kneebone who asserted that the Bali Process facilitates hierarchical steering within the nation-state model in order to protect state interests. The Bali Process served the interests of some member states in addressing irregular migration in the region, but the agreements with other nations are designed primarily to protect Australia's national policy. Meanwhile, Indonesia also gains benefit by way of financial aid from Australia. Kneebone argued that being the wealthiest state in the region, Australia is looking to influence other countries with its excellent bargaining power. Australia uses foreign aid and other capacity-building aid incentives to negotiate arrangements under the Bali Process.<sup>4</sup>

Furthermore, this thesis also explores the value of the Bali Process as a turning point for the Indonesia-Australia relationship. After some tension between the two countries due to issues such as the independence of East Timor and the Tampa Affair, the Bali Process became a forum where Indonesia and Australia can sit together to discuss similar issues. Although Australia and Indonesia are close neighbours, the relationship is one of complexity. According to Sulistiyanto, although they are close geographically, they feel that they do not know each other well enough which creates misunderstanding between them. However, the two countries need a good relationship since Indonesia is Australia's closest neighbour. Therefore, both countries have to cooperate with each

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<sup>4</sup> Susan Kneebone, "The Bali Process," p.613-614.

other, whether they like it or not.<sup>5</sup> The Bali Process has successfully become a conduit between Australia and countries in Southeast Asia, in particular Indonesia, to discuss irregular migration.

There are some critics of the Bali Process who assert that it has been established to serve Australian interests of deterring boat people heading to Australia. Due to the focus on deterrence, the framework lacks protection for refugees. For example, Schloenhardt argued that the Bali Process has served Australian interests and the inception of the forum does not feature significantly in international affairs and cooperation in the region.<sup>6</sup> As a result, he stated that the Bali Process has been dominated by border security interests, thus the focus also incorporates issues of people smuggling and human trafficking.<sup>7</sup>

Grewcock argued that Australia's significant and highly successful priority is to standardise regional legislation of people smuggling through the Bali Process.<sup>8</sup> Consequently, the Bali Process is viewed as a forum to securitise asylum seekers as perpetrators or participants in people smuggling and human trafficking. Curley and Vandyk argued that there is an ongoing tension within the Bali Process members due to the securitisation of Australian policy along with regional disagreement over humanitarian obligation.<sup>9</sup> Asylum seekers can be perceived to disregard sovereignty, supporting the notion that the country is threatened by 'them'. Boat people now is often described as illegal immigrants, queue jumpers who do not respect Australian law and seek to benefit from international refugee protection.<sup>10</sup>

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<sup>5</sup> Priyambudi Sulistiyanto, "Indonesia-Australia Relations in the Era of Democracy: The View from the Indonesian Side," *Australian Journal of Political Science*, 45(1), pp. 117-132, 2010, p.119-120.

<sup>6</sup> Joseph H. Douglas and Andreas Schloenhardt, "Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process," *University of Queensland Migrant Smuggling Working Group research paper, Brisbane*, pp.1-25, 2012, p. 24.

<sup>7</sup> Joseph H. Douglas and Andreas Schloenhardt, "Combating Migrant Smuggling." p. 2.

<sup>8</sup> Michael Grewcock, *Shooting the Passenger: Australia's War on Illegal Migrants*, Cullompton: Willan Publishing, 2007, p. 194.

<sup>9</sup> Melissa Curley and Kahlia Vandyk, "The securitisation of migrant smuggling in Australia and its consequences for the Bali Process", *Australian Journal of International Affairs*, 71(1), pp. 42-62. 2017, p. 42.

<sup>10</sup> Anne Mcnevin, "The Liberal Paradox and the Politics of Asylum in Australia", *Australian Journal of Political Science*, 42(4), pp. 611-30, 2007, p.622.

To analyse the extent to which the Bali Process provides protection for asylum seekers, this thesis will explore the framework of asylum seeker protection within the forum and the involvement of global governance such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) as members of the Bali Process. These two organisations are seen as the major non-state actors relevant to the management of refugees. However, UNHCR does not play a significant role in refugees' protection, as argued by Krever that, as a global actor, the involvement of UNHCR in The Bali Process is overlaps between migration policies and humanitarian policies.<sup>11</sup>

## **1.2 The Background of Irregular Migration in Australia and Southeast Asia**

Irregular migration is a significant issue in Australia. Based on findings in 2012, the issue of asylum seekers ranked third out of the top five issues of concern to Australian citizens. The Australian Government has struggled with border management and refugee protection for years, particularly in terms of Irregular Maritime Arrivals (IMAs).<sup>12</sup> Irregular migration was not a significant phenomenon in Australia until the 1970s. Australia was not considered a common destination point for asylum seekers because it is geographically isolated and difficult to reach.<sup>13</sup> The first wave of irregular migration to Australia happened during Malcolm Fraser's administration from 1975 to 1983 when a small number of boats arrived in Australia carrying Vietnamese passengers seeking asylum from conflict in Indochina.<sup>14</sup> Numbers of boat people for the period 1976-2016 can be seen in Figure 1.1 below.

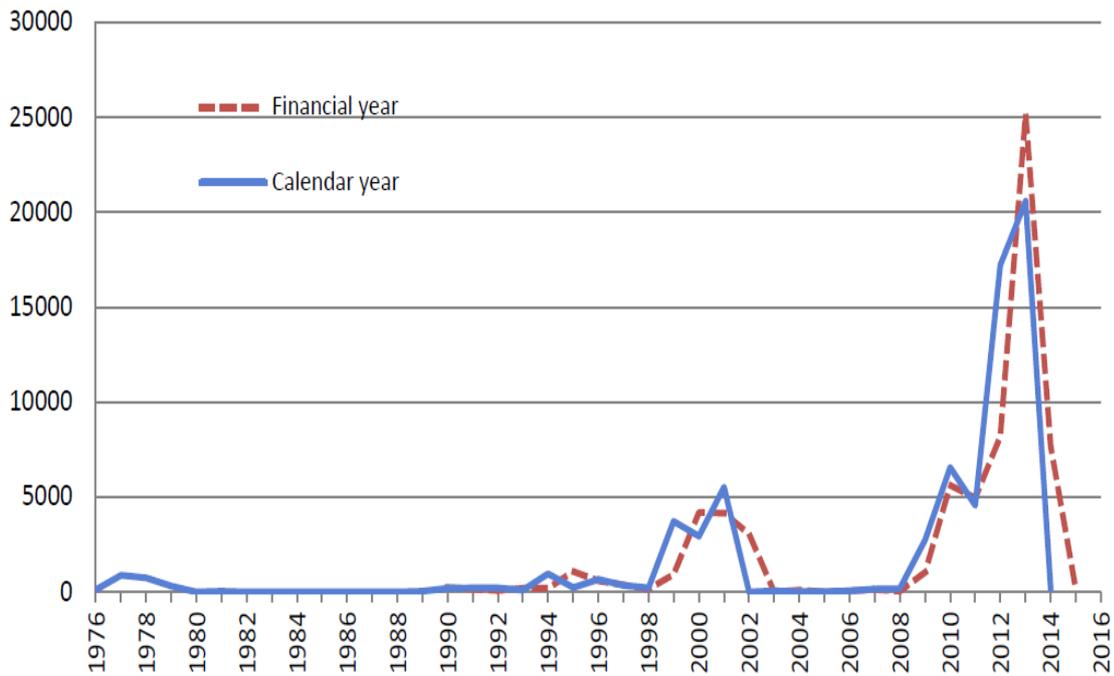
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<sup>11</sup> Tor Krever, "Mopping-up: UNHCR, Neutrality and Non-Refoulement since the Cold War", *Chinese Journal of International Law*, 10(3), pp. 587-608, 2011, p. 600.

<sup>12</sup> Khalid Koser and Marie McAuliffe, "Establishing an evidence-base for future policy development on irregular migration to Australia". *Irregular Migration Research Program Occasional Paper Series*, 2013, p.5.

<sup>13</sup> Andrew Carr, "The Engagement Pendulum: Australia's Alternating Approach to Irregular Migration". *Journal of Australian Studies*, 40(3), pp.319-336, 2016, p. 321.

<sup>14</sup> Katharine Betts, "Boat people and Public Opinion in Australia". *People and Place*, 9(4), pp. 34-48, 2001, p.34-35.



**Figure 1.1: Number of boat people by calendar and financial year 1976-2016<sup>15</sup>**

Based on calendar year, the numbers of asylum seekers began to increase from 111 people in 1976 to 868 people in 1977 and 746 in 1978. From 1976-1998 there were not significant numbers of people arriving by boat. In 1999, the number of IMAs increased significantly, with 3,721 arrivals in 1999 followed by 2,939 in 2000. The highest peak of IMAs in Australian history was in 2012 and 2013 where it was recorded that 17,204 and 20,587 boat people arrived in Australia for those years respectively.<sup>16</sup>

There have been different approaches used by the Australian Government to tackle issues of irregular migration. Under the Fraser administration (1975-1983), the focus was on domestic policy mechanisms such as changing the procedure for handling asylum seekers. However, he also participated in some international and regional events established by the United Nations (UN), the United States (US) and the Association of Southeast Asian Nations (ASEAN) related to improvement

<sup>15</sup> Janet Phillips, "Boat arrivals and Boat 'Turnbacks' in Australia since 1976." *Research Paper Series*, Parliament of Australia, Department of Parliamentary Services, 2017, p.4 [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/BoatTurnbacks](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks) (accessed 3 May 2019).

<sup>16</sup> Janet Phillips, "Boat arrivals," p.4.

in the resettlement of refugees. The following government, Prime Minister Bob Hawke (1983-1991) also pushed for better engagement and cooperation with Asia.<sup>17</sup> During Paul Keating's administration (1991-1996), he continued to build regional cooperation and stated that "the best guarantee of our national sovereignty will not be any walls we build around us...(but) will depend on our worldliness and integration with the world".<sup>18</sup> The successor Prime Minister, John Howard (1996-2007) took more of a domestic policy approach rather than regional cooperation. New policies were introduced, such as the temporary protection visa and Pacific Solution. These policies became more directed towards regional cooperation when numbers of illegal migrants increased with 3,721 migrants in 1999 followed by 2,939 in 2000. In late 2001, while the Pacific Solution was being established, Howard's government sought a new approach of engaging with South East Asian countries equally on irregular migration issue. As a result, he cooperated with Indonesia by asking for support for a new policy.<sup>19</sup> In 2001, after obtaining support from Indonesia, the two nations co-hosted multilateral talks in Bali. This marked the beginning of the Bali Process as a regional forum on people smuggling, trafficking in persons and related transnational crime.<sup>20</sup>

Most of the migrants wanting to enter Australia originated from West Asia and South Asia. A large proportion of them participated in people smuggling, and were either refugees or intended to claim status as asylum seekers after reaching their destination. They were smuggled through Southeast Asia to enter Australia or Canada by sea.<sup>21</sup> In 2011, according to UNHCR, the top five origin countries of asylum applicants in Australia and New Zealand were Iran (2,185), Afghanistan (1,732), China (1,208), Pakistan (839), and India (766).<sup>22</sup> In 2011, one third of asylum seekers in Australia were

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<sup>17</sup> Andrew Carr, "The Engagement Pendulum," p.322.

<sup>18</sup> Andrew Carr, "The Engagement Pendulum," p.322.

<sup>19</sup> Andrew Carr, "The Engagement Pendulum," p.321-324.

<sup>20</sup> Savitri Taylor, "Australia's Border Control and Refugee Protection Capacity Building Activities in the Asia-Pacific Region." *Asylum Seekers: International Perspective on Interdiction and Deterrence*, ed. Babacan Alperhan and Linda Briskman, Cambridge: Cambridge Scholars Publishing, 2008, p. 67.

<sup>21</sup> UNODC United Nations office on Drugs and Crime, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment*, April 2013, [http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf) (accessed at 20 August 2018), p.v.

<sup>22</sup> UNHCR, *Asylum Levels and Trends in Industrialized Countries 2011: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*, 2011, p.37. <http://www.unhcr.org/4e9beaa19.html> (accessed 20 August 2018).

from Afghanistan or Iran.<sup>23</sup> The other major origin countries of asylum seekers were Iraq and Sri Lanka. In 2011-2012, an increasingly large number of asylum seekers were Sri Lankan Tamils, with more than 1,500 people arriving in 2012. This number was seven times higher than the previous year.<sup>24</sup>

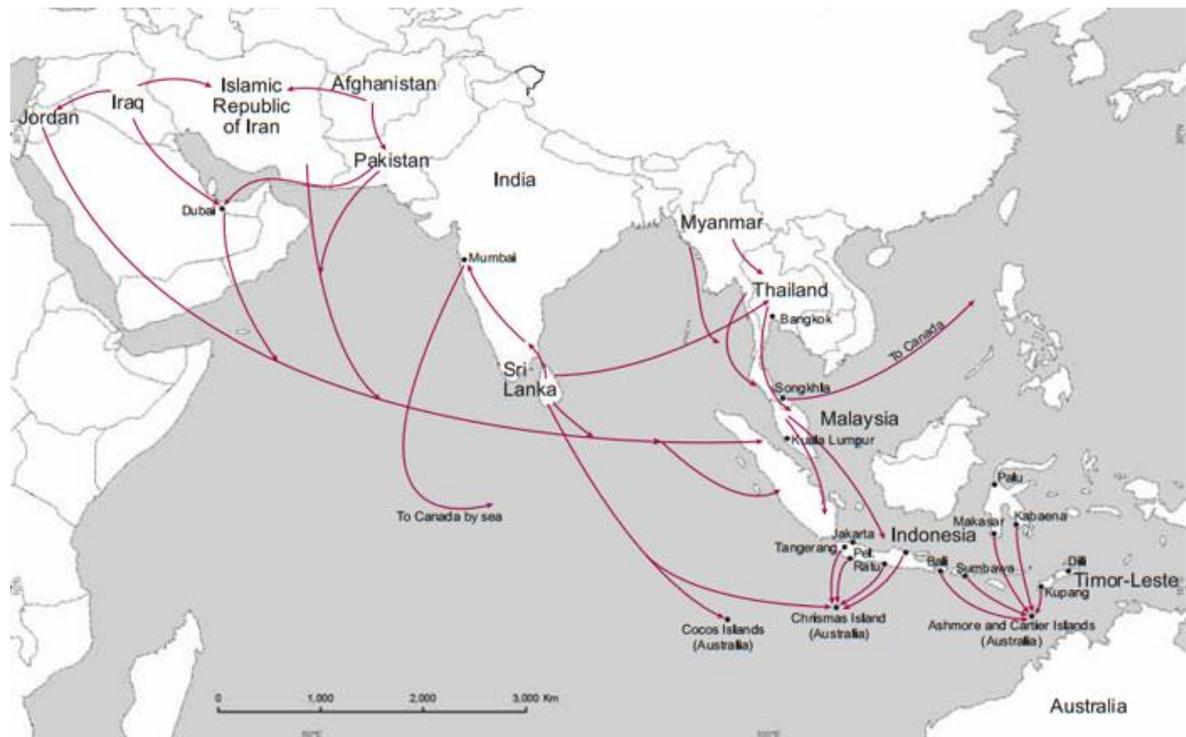
Countries in South East Asia, such as Indonesia and Malaysia, have been commonly used as transit countries. Indonesia, in particular, has been a host country for asylum seekers since 1975 when Indochinese refugees fled from Vietnam. According to Missbach, in 1975, due to the fall of Saigon, hundreds of thousands of Vietnamese and, later, Cambodian asylum seekers fled by boat to Indonesia. The last wave of Vietnamese asylum seekers left Pulau Galang, Riau, Indonesia in 1996. Subsequently, the first wave of asylum seekers from the Middle East—mainly from Iraq, Afghanistan, and Iran—started to arrive in Indonesia. Malaysia and Thailand also experienced increasing number of asylum seekers from Middle East as a result of an extended period of violence in their origin countries.<sup>25</sup> The importance of Indonesia as a transit country for illegal migrants can be seen in the map below:

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<sup>23</sup> UNHCR, *Asylum Levels and Trends*.

<sup>24</sup> Graeme Hugo, George Tan, and Caven J. Napitupulu, “Indonesia as a Transit Country in Irregular Migration to Australia.” *Irregular Migration Research Programme Occasional Paper Series*, Australian Government Department of Immigration and Border Protection, 2014, p.7.

<sup>25</sup> Antje Missbach, “Waiting on the Islands of 'Stuckedness'. Managing Asylum Seekers in Island Detention Camps in Indonesia: From the Late 1970s to the Early 2000s.” *Australian Journal of South - East Asian Studies*, 6(2), pp. 281-306. 2013, p.284.



**Figure 1.2: Map of Migrant Smuggling Routes to Australia and Canada by Sea<sup>26</sup>**

From the map above, it can be seen that Thailand, Malaysia and Indonesia act as transit countries in irregular migration. Indonesia, in particular, is the most significant transit country for asylum seekers because it is geographically the closest neighbour to Australia.

Based on a study of 40 Iraqi asylum seekers by the Indonesian Directorate of Immigration in 2008, there is a pattern of movement to Australia. They often fly to Kuala Lumpur (Malaysia) then continue their trip through Indonesia via a number of ways. Based on the Transit Migration Survey in 2010 and 2012 from the Department of Immigration and Border Protection of Australia, the asylum seekers flew to Malaysia and entered as tourists by obtaining a Visa on Arrival. The surveys also recorded the citizenship or birthplace of respondents who were from Afghanistan, Sri Lanka, Myanmar, Iraq, Sudan, Iran, Palestine and Somalia. From Malaysia, they then flew to Indonesia to continue their trip to Australia by boat. Some asylum seekers bypassed Malaysia and flew directly to Indonesia, for

<sup>26</sup>United Nations Office of Drugs and Crime, Migrant Smuggling Routes, ABC News website [www.abc.net.au/news/2013-05-13/map-migrant-smuggling-to-australia-and-canada-by-sea/4685670](http://www.abc.net.au/news/2013-05-13/map-migrant-smuggling-to-australia-and-canada-by-sea/4685670), 13 May 2013 (accessed 24 April 2019)

example, Iranian nationals who could access a 30-day tourist Visa on Arrival in Indonesia. However, after Indonesia removed Iran from the list of countries whose citizens could access Visa on Arrival, Iranian asylum seekers began to enter via Malaysia. Some asylum seekers flew to Thailand because of trafficking networks in Thailand.<sup>27</sup>

## 1.2 Thesis Organisation

This thesis comprises five chapters. The first chapter has explained the background of irregular migration in South East Asia and Australia, the Bali Process background, the significance of the issues explored in this thesis, and the thesis structure. Chapter Two is a literature review which explores the theoretical framework of irregular migration, securitization of irregular migration, refugee protection as human security compliance and models of regional forum to manage irregular migration. Chapter Three discusses the Bali Process as a regional framework to combat people smuggling and human trafficking. Some issues will be discussed in this chapter include the phenomenon of boat people in Australia, the significance of Indonesia as a transit country, the establishment of the Bali Process, the structure of the Bali Process, and the implications of the Bali Process for the Asia Pacific region, particularly with Indonesia. Chapter Four explains the impact of the Bali Process, particularly for member nations, and concerns around protection of asylum seekers and refugees. National legislation on people smuggling and human trafficking in Indonesia, Malaysia, Iran and Sri Lanka will also be explored. In addition, it discusses the failure of the Bali Process in terms of protection of asylum seekers and refugees using the case study of the Sea Andaman Crisis. Finally, Chapter Four will also discuss the involvement of international organisations in the Bali Process. The final chapter, Chapter Five, will provide a conclusion.

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<sup>27</sup>Graeme Hugo, George Tan, and Caven J. Napitupulu, "Indonesia as a Transit Country." p.8-10

## **2 LITERATURE REVIEW: IRREGULAR MIGRATION, SECURITISATION AND REGIONAL FORUM TO MANAGE IRREGULAR MIGRATION**

This chapter reviews the concept of irregular migration relevant to people smuggling and human trafficking, the significance of refugee protection as human security compliance and how the regional forum was developed to manage irregular migration.

### **2.1 Irregular Migration and the Terminology of People Smuggling and Human Trafficking Terminology**

Irregular migration is a relatively new phenomenon, the concept of which was unthinkable two centuries ago. The classification of international migration as legal or illegal is less than a hundred years old. The notion of this specific aspect of migration emerged for the first time in the nineteenth century. However, it was simply an administrative term to represent an insignificant problem. For decades, irregular migration has been described by researchers as being ambiguous; a “thick fog” and “dialogues among the deaf”.<sup>28</sup> The term ‘irregular’ is more appropriate than other terms such as ‘illegal’ for a number of reasons. Firstly, illegal carries a connotation of criminality. In the final report of the UN special rapporteur on the rights of non-citizens, it was emphasised that immigrants should not be treated as criminals although they are in a country illegally and their claims are not considered valid by the authorities. Secondly, describing persons as ‘illegal’ can be viewed as denying humanity. Thirdly, it has become a strong concern of UNHCR that the label of ‘illegal’ might invalidate asylum claims of asylum seekers who find themselves in an irregular situation.<sup>29</sup>

In principle, irregular migration can be defined into five categories:(1) migrants who enter a country illegally without immigration examination or by presenting counterfeit documents;(2) migrants who enter a country legally for certain period of time but overstay their visa or permit; (3)migrants who hold a relevant permit but breach their visa conditions by undertaking activities such as working;(4)

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<sup>28</sup> Martina Cvajner and Guiseppe Sciortino, “Theorizing Irregular Migration: The Control of Spatial Mobility in Differentiated Societies.” *European Journal of Social Theory*, 13(3), pp.389-404, 2010, p. 390.

<sup>29</sup> Khalid Koser, “Irregular Migration, State Security and Human Security.” Geneva: GCIM, 2005, p.6.

asylum seekers who enter a country legally to apply for refugee status but remain after their application is rejected; and (5) children of illegal migrants who also do not have the right to stay in the country despite being born there after their parents' arrival.<sup>30</sup> Duvell argued that the definitions of irregular migration are generally based on combinations of illegal crossing of borders, irregular stay or entry, absence of stay or work permits, obligations to leave the country or eviction orders due to violation of law. Therefore, there is no definitive meaning of irregular migration, but rather it is an antonym of what is defined as regular.<sup>31</sup> Perruchoud concurred that there is a tendency to limit the use of the term 'illegal migration' to people smuggling and human trafficking.<sup>32</sup>

Governments place importance on solving 'unwanted immigration' in order to safeguard social peace. As a result, there have been a series of agreements, such as in Western Europe which are designed to stop illegal entries and speed up the process of asylum application. Other measures taken include improving border control, mass expulsions of foreign workers, building fences and walls along borders and severe punishment for illegal entrants.<sup>33</sup> The journey of irregular migration is broadly recognised as dangerous, often costly and life-threatening for migrants.<sup>34</sup> There is growing concern that some kinds of international movement are increasing. Those areas of growth in irregular migration include people smuggling and human trafficking, the restricted immigration policies of receiving countries, the notion that the sense of national identity is being threatened, increasing exploitation of migrants on their way to destination country, and increasing risk to migrants including risk of death during their journeys. Such strict policies have forced migrants to turn to smugglers as a shortcut past the strict entry policies. Furthermore, the journeys undertaken are often extremely

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<sup>30</sup> Marie McAuliffe and Victoria Mence, "Irregular Migration as a Global Phenomenon." *A long way to go : Irregular migration patterns, processes, drivers and decision-making*, ANU Press, pp.11-48, 2017, p.21.

<sup>31</sup> Franck Duvell, "Paths into Irregularity: The Legal and Political Construction of Irregular Migration." *European Journal of Migration and Law*, 13(3), pp. 275-295, 2011, p.286.

<sup>32</sup> Richard Perruchoud and Jillyanne Redpath-Cross. "Glossary on Migration–International." second edition, *International Migration Law*, International Organization Migration, p.54, [https://publications.iom.int/system/files/pdf/iml25\\_1.pdf](https://publications.iom.int/system/files/pdf/iml25_1.pdf), 2011 (accessed 07 October 2018)

<sup>33</sup> Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*. 4th Ed., Rev. & Updated. ed. New York: Guilford, 2009, p.306.

<sup>34</sup> Marie McAuliffe and Khalid Koser, *A long way to go: Irregular migration patterns, processes, drivers and decision-making*, ANU Press, 2017, p.4.

hazardous and carry the risk of death.<sup>35</sup> In 2000-2014 more than 22,000 migrants lost their lives attempting to reach Europe. Between 1996 and 2013, at least 1,790 migrants died in their efforts to cross the Sahara and, in 1998-2014, more than 6,000 migrants lost their lives attempting to cross the United States (US)-Mexico border. Meanwhile, nearly 1,500 migrants died on their journeys to Australia between 2000 and 2014.<sup>36</sup> According to Boulby and Christie, there is an interesting correlation between migration restrictions in receiving countries with increased numbers of irregular migration. Fewer legal job opportunities in receiving countries is likely to increase the frequency of trafficking and illegal migrants.<sup>37</sup> As a result of the increase in people smuggling and human trafficking, there were two protocols produced by the United Nations in 2000 to address these issues. There was little distinction between migrant smuggling and human trafficking prior to this and the United Nations Protocol defined clear distinctions between the two terms.<sup>38</sup> Smuggling of migrants (people smuggling) was defined as follows:

Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.<sup>39</sup>

Meanwhile, the definition of trafficking in persons (human trafficking) was described as follows:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>40</sup>

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<sup>35</sup> Tara Brian and Frank Laczko, "Fatal Journeys: Tracking lives lost during migration." *International Organization for Migration*, 2014, p. 16.

<sup>36</sup> Tara Brian and Frank Laczko, "Fatal Journeys." p.12.

<sup>37</sup> Marion Boulby and Kenneth Christie, *Migration, Refugees and Human Security in the Mediterranean and MENA*, Cham: Springer International, 2018, p.14.

<sup>38</sup> Khalid Koser, *Irregular migration, State security and Human Security*, p.6.

<sup>39</sup> The UN Protocol Against the Smuggling of Migrants By Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, article 3(a), [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf) (accessed 11 October 2018)

<sup>40</sup> The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime 2000, article 3(a), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (accessed on 11 October 2018)

The definition of terminology around people smuggling and human trafficking can be seen as a result of strict policies by developed countries to protect their borders. In order to restrict illegal migration, there was an attempt to create containment policies such as specific people smuggling and human trafficking policies. According to Crock and Ghezelbash, anti-people smuggling measures are one of the broadest containment policies and are aimed to prevent people from travelling in the first place, either by preventing them from leaving their origin country or by stopping them at the destination country's border.<sup>41</sup>

## **2.2 Non-Traditional Security Impacts on Securitisation of Irregular Migration**

Due to the dangerous aspects of irregular migration such as people smuggling and human trafficking, irregular migration falls under the classification of non-traditional security. Non-traditional security is some issues which are considered as threats to national security. Jones and Hameiri referred to elements of human security as 'non-traditional security' (NTS), and argued that while traditional security focusses on national security and state territory, non-traditional security focuses on other matters considered as threats to a country and its people such as poverty, infectious disease, environmental degradation, civil war, the threat of weapons of mass destruction, terrorism, and transnational organised crime. These 'transnational' threats often come from non-state actors and are associated not only with state security but also human security.<sup>42</sup>

The shift of perspective on national security started in the 1990s. As argued by Khong, before the 1980s, the notion of national security was about the defence of states. It referred to a state's ability to defend itself from interference in its territorial integrity and political sovereignty. It also encompassed broader issues related to military power, strategy, and deterrence. By the 1990s, scholars had successfully expanded the concept of security to include human security. Thereafter, scholars and

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<sup>41</sup> Mary Crock and Daniel Ghezelbash, "Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals." *Griffith Law Review* 19(2), pp. 238-287, 2010, p. 253.

<sup>42</sup> Shahar Hameiri and Lee Jones, *Governing Borderless Threats : Non-Traditional Security and the Politics of State Transformation*. Cambridge: Cambridge University Press, 2015, p.1.

policymakers have added to the issues which have become securitised. The aim of securitising certain issues is to increase importance within the hierarchy of policy because it becomes an urgent issue requiring particular attention, resources and prompt resolution, even by military means.<sup>43</sup>

Migration has been categorised as NTS. According to Weaver, in the academic literature, international migration has been identified as a non-traditional security issue in the post-Cold War era, together with other issues such as food and energy access, global terrorism, drug trafficking and transnational crime. The Copenhagen school defined securitisation as the characterisation of danger and threat of certain issues which shifted the focus of security concepts from a military nature to incorporate other matters such as migration.<sup>44</sup> Irregular migration is often viewed as a threat to state sovereignty. The argument is that countries have the sovereignty to control their borders and, as such, stopping irregular migrants is vital to retaining full enforcement of sovereignty. In more extreme interpretations, irregular migration is seen as a threat to state security<sup>45</sup> which has led to the securitisation of irregular migration. As a consequence, irregular migration is classified as a crime.

The securitisation of migration became more crucial after the terrorist attack on 11 September, 2001 when the western world became more focused on issues of migration. It was argued by Faist that the September 11 had effects on migration securitisation, where states such as those in Western Europe and North America strengthened their internal and external borders.<sup>46</sup> However, the securitisation of irregular migration has been criticised by Koser. He argued that the perspective of irregular migration as a threat to state needs to be analysed based on objective analysis and sufficient evidence and dialogue between governments, media, and civil society. There are some factors which need to be considered in order to determine irregular migration as a threat. Among these is, firstly, the argument of state sovereignty being threatened by overwhelming numbers of irregular migrants. Although the

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<sup>43</sup> Yuen Foon Khong, "Human security: A shotgun approach to alleviating human misery?", *Global Governance*, 7(3), pp. 231-236, 2001, p.231-232.

<sup>44</sup> Marie McAuliffe and Khalid Koser, *A Long Way to Go*, p. 14

<sup>45</sup> Khalid Koser, *Irregular migration*, p.10

<sup>46</sup> Thomas Faist, *The migration-security nexus: International migration and security before and after 9/11*, *Migration, citizenship, ethnos*, pp. 103-117, 2006, p.105.

numbers appear to be significant, the proportion of irregular migrants in most countries is relatively small compared to total migration. Secondly, it is frequently assumed that irregular migrants contribute to illegal activities and could spread malignant diseases, particularly HIV/AIDS. However, these assumptions lack evidence. While some irregular migrants might be criminals or have malignant diseases, they would number very few indeed.<sup>47</sup>

Noll also criticises securitisation as being indiscriminate because it does not separate between forced migration and other types of migration. It links assistance to asylum seekers with human trafficking and illegal drugs trading. He cited the growing number of documents addressing issues of smuggling and trafficking, such as the UN Convention Against Transnational Organised Crime as the most current example. Furthermore, criminalisation of irregular migration has impact on public perspectives of refugees. Because the legal channel to territories are blocked, asylum seekers are criminalised when they attempt to flee their countries of origin, often due to violence and unrest.<sup>48</sup> Furthermore, Hammerstad argued that although forced migration might have security impacts, it has become over-securitised to the dangerous point where it creates threats where before there were none, while at the same time threatening the international regime of refugee protection under the guise of security needs.<sup>49</sup> Therefore, this chapter argues the importance of a human security approach in addressing issue of asylum seekers and refugees as discussed in the subsection below.

### **2.3 The Significance of Refugee Protection as Human Security Compliance**

According to Paris, there is no precise definition of human security. Human security is like sustainable development, where everyone supports it, but few people have a clear idea about its definition.<sup>50</sup> The Japanese government defines human security as encompassing all measures that threaten people's

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<sup>47</sup> Khalid Koser, "Irregular migration, p.10-11.

<sup>48</sup> Gregor Noll, "Securitizing Sovereignty? States, Refugees, and the Regionalization of International Law," *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, 2003, p. 300.

<sup>49</sup> Anne Hammerstad, "Securitization as a Self-fulfilling Prophecy: Refugee Movements and the North-South Security Divide," *Draft paper for the Political Science Association annual conference, Swansea*, 2008, p. 2-3.

<sup>50</sup> Roland Paris. "Human Security: Paradigm Shift or Hot Air?," *International Security*, 26(2), 2001, pp. 87–102. p.88.

survival, daily life and dignity. Some issues covered by human security include environmental degradation, human rights violation, transnational organised crime, illegal drugs, refugees, poverty, anti-personnel land mines and malignant diseases such as AIDS. Canada on the other hand, defines human security as freedom from extensive threats to people's rights, safety or life.<sup>51</sup> It includes safety from physical threats, quality of life, a guarantee of basic human rights, the rule of law, good governance, social justice, civilian protection from conflicts, and sustainable development.<sup>52</sup> Furthermore, the UN defines human security as protecting the fundamental core of all human lives in ways that increase human freedom and human compliance. Human security means to protect basic freedoms, for example, freedom from want, freedom from fear and freedom to take action on one's own behalf. Furthermore, it means to protect humans from serious and prevalent threats and situations. Therefore, human security needs a process which is built on people's strengths and aspirations. Political, social, environmental, economic, military and cultural systems must be established in order to provide people with the fundamental building blocks of survival, livelihood, and dignity.<sup>53</sup> Although the definition of human security is broad and ambiguous, it supports efforts to have sustained impact on the global community's human rights.<sup>54</sup>

Based on some of the definitions of human security outlined above, it is clear that refugees are considered subjects of human security. According to definition in the 1951 Refugee Convention, a refugee is an individual who has fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality, and is unable or, owing to such fear, unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to

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<sup>51</sup> Roland Paris, "Human Security", p.90.

<sup>52</sup> Llyod Axworthy. "Human Security and Global Governance: Putting People First." *Global Governance*, 7(1), pp.19-23, 2001, p.184.

<sup>53</sup> Odutayo Aramide, "Human security and the international refugee crisis." *Journal of Global Ethics*, 12(3), pp. 365-379, 2016, p.370.

<sup>54</sup> Rhoda E. Howard and Hassmann. "Human Security: Undermining Human Rights?" *Human Rights Quarterly* 34(1), pp. 88-112, 2012, p. 99.

it.<sup>55</sup> Human security is highly relevant to refugees because they flee from origin countries seeking asylum in host countries in order to gain freedom from fear and improve their dignity of life.

The securitisation of national borders can undermine refugee protection. Considering the human security aspects of asylum seekers and refugees, it is highly important that states do not only enforce state security or securitisation of illegal migrants, but also adopt protection of refugees as a human security measure. Moreover, given the strict immigration policies of destination countries which lead people who seek asylum to use channels of smuggling or trafficking, refugee protection is vitally important. In particular, the Bali Process needs to provide a framework of refugee protection. There are some factors which need to be considered to provide an effective refugee protection framework in the forum. Firstly, the illegal migrants are vulnerable people who often risk their lives to reach the destination countries. Despite the possibility that some of them might not be asylum seekers but rather economic migrants, they are vulnerable to serious harm or death during their journey. In addition, asylum seekers and refugees depend on the protection of international organisations since they are non-citizens of the receiving countries.

Edwards argued, the interests of asylum seekers are viewed as separate from domestic interests, except where they are seen as a threat to state security. Since asylum seekers are not citizens, they therefore rely on international and national legal regimes for their protection, which are implemented based only on humanitarian goodwill.<sup>56</sup> Secondly, it can be assumed that people smuggling and human trafficking is an impact of securitisation itself. As argued by Noll, due to the difficulties of formal migration procedures in many countries, asylum seekers face a decision of whether legal application is worthwhile. Therefore, they frequently rely on informal networks to facilitate their passage and to avoid all contact with authorities, including the application for asylum. They are

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<sup>55</sup> The 1951 Refugee Convention, The Travaux Préparatoires Analysed with A Commentary By Dr Paul Weis, 1990, p.6, <https://www.unhcr.org/en-au/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> (accessed 11 April 2019)

<sup>56</sup> Alice Edwards, "Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders." *Michigan Journal of International Law* 30 (3), 2009, pp.763–807, p. 764.

disadvantaged because they forego the formal benefits of legal application, but they gain advantages such as avoidance of detention and forced transfer.<sup>57</sup> Indeed, smuggling is often the only option for refugees to leave their countries and reach a safe country without being discovered and risking deportation and other persecution.<sup>58</sup> For example, George Zedan, a refugee from Syria. Due to conflict in Syria, he had to deal with terrorists in his village and bombs in the street, he then decided to flee to a safe country. In February 2005, he paid \$25,000 to people smuggler for a dreadful trip. He travelled by boat from Turkey to Greece and continued to fly to Sweden. After his resettlement program as refugees, now he becomes a pharmacist in Stockholm, Sweden, together with his wife and three small children.<sup>59</sup> This is in line with Dowty and Loescher's argument that a world which is angry and excluded from the west will mostly inevitably create conditions in which extremists and governments will appear to present new security threats. In countries in desperate conditions, people will find ways to flee.<sup>60</sup>

The Bali Process should provide a strong framework of refugee protection and, as a forum, there should be consensus about refugee protection. As argued by Boulby and Christie, with the consensus of political will, the vulnerability of asylum seekers and refugees can be prevented and addressed.<sup>61</sup> In addition, according to Aramide, as a response to increasing barriers faced by refugees as mentioned above, there is declining respect for international human rights, therefore supporters of refugees have been attracted to the human security concept, arguing that this concept offers an agreeable method by which to facilitate the protection of asylum seekers.<sup>62</sup> Therefore, when industrialised countries use securitisation to reinforce state security, they should also then provide refugee protection in the interests of human security. This is a balanced approach of addressing issues of irregular migration.

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<sup>57</sup> Gregor Noll, "Securitizing Sovereignty?." p. 300

<sup>58</sup> Declaration of The Hague on the Future of Refugee and Migration Policy, The Commentary, 2002, <https://www.refworld.org/docid/3f13c9af4.html> (accessed 4 April 2019).

<sup>59</sup> Phillipe Legrain, "Refugees Work: A Humanitarian Investment That Yields Economic Dividends." *Tent Foundation and Open Network*, 2016, p.51

<sup>60</sup> Alan Dowty and Gil Loescher. "Refugee Flows as Grounds for International Action." *International Security*, 21(1), 1996, p. 50.

<sup>61</sup> Marion Boulby and Kenneth Christie, *Migration, Refugees and Human Security*, p.11

<sup>62</sup> Oduyayo Aramide, *Human security*, p. 369

## 2.4 Regional Forum as a Means to Manage Irregular Migration

Given the complexity of irregular migration, particularly people smuggling and human trafficking, destination countries cannot solve these issues alone. Regional cooperation is necessary to address the issues of people smuggling and human trafficking. There are some precedents of countries cooperating in managing irregular migration. For example, burden sharing of the migration problem is suggested by the UN.

Countries now share a fundamental set of migration goals that include: enhancing the development impact of international migration; ensuring that migration occurs primarily through legal channels; ensuring the protection of migrants' rights; preventing migrants exploitation especially those in vulnerable situations; and combating the crimes of smuggling of migrants and trafficking in persons.<sup>63</sup>

Furthermore, based on The Declaration of the Hague on the Future of Refugee and Migration Policy, these shared goals support what is known as the 'triple-win objective'. Countries not only find themselves in 'the same boat' with similar issues and challenges, but they can also benefit from migration. In addition, while the main responsibility of asylum and migration policy lies on the state, no state can act alone.<sup>64</sup> Therefore, regional and international cooperation is necessary to manage migration problem.

Models of regional cooperation to address issues of irregular migration have been developed not only in Australia but also in other regions such as the European Union (EU). To understand the inception of an inter-regional forum such as the Bali Process and other forums in other regions, it can be analysed through the theory of constructivism. Constructivism is one of main theories in international relations. According to Ralston, in contrast with two other main theories—realism and liberalism—which focus on geopolitical power, security or cultural and economic factors, constructivism emphasises the value of ideas in building relationships, norms and institutions on a global level. Those ideas are derived from threats, phobias, objectives, discourses, identities and other views. Although

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<sup>63</sup> Antoine Pécoud, *Depoliticising Migration : Global Governance and International Migration Narratives*, Palgrave Macmillan UK, 2015, p.68.

<sup>64</sup> Society for International Development - Netherlands Chapter, *Declaration of The Hague on the Future of Refugee and Migration Policy*, 22 November 2002, <https://www.refworld.org/docid/3f13c9af4.html> (accessed 20 March 2019).

the ideas are often times only perceived, they affect the behaviour of states and non-state actors.<sup>65</sup> According to Robert Jervis, the constructivist has an obvious normative agenda; a desire to see the spread of appropriate norms, identities and concepts of global politics.<sup>66</sup> Furthermore, Adler argued that the common ground of constructivism is that material is not classified, therefore, the objects of our knowledge are not independent based on our own interpretations or languages.<sup>67</sup>

Based on this argument, it can be interpreted that the idea of creating a regional forum as a means of cooperation is based on constructivism. Australia views boat people as threat to national security because they are 'queue jumpers' who do not respect Australian law and they also bring risks such as infectious disease and terrorism. Without considering the fact that boat people might legitimately seek asylum, Australia generally identifies them as a threat. As a consequence, Australia has a desire to spread the concept of irregular migration as a threat to national security to the other countries. The inception of the Bali Process is aimed to secure Australia's national interest through securitising irregular migration as people smuggling and human trafficking.

The EU has been cooperating with transit countries and countries of origin to deter irregular migrants from crossing their borders. According to Djajic and Michael, the EU has the ability to deter irregular migrants from entering its territory by cooperating with transit countries in North Africa to prevent undocumented migrants.<sup>68</sup> Besides cooperating with transit countries, the involvement of international organisations is very significant in policing the issue of irregular migration in the EU. According to Duvell, the International Organisation for Migration (IOM) has a crucial role in bringing irregular migration into the international policy agenda. IOM is a major actor of international migration movements because it provides data of illegal migrants in transit and destination countries. For example, in 1993, IOM claimed that 100,000 to 140,000 transit migrants had entered the Czech

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<sup>65</sup> Shane J. Ralston, "Pragmatism in International Relations Theory and Research." *Eidos: Revista De Filosofía De La Universidad Del Norte* 14, pp. 72-105, 2011, p.81.

<sup>66</sup> Robert Jervis, "Realism in the Study of World Politics." *International Organization*, 52(4), pp. 971-991. 1998, p.974.

<sup>67</sup> Emanuel Adler, "Handbook of International Relations." London : Thousand Oaks, Calif.: SAGE Publications, pp. 95-118, 2002, p. 95.

<sup>68</sup> Slobodan Djajic and Michael S. Michael, "Controlling Illegal Immigration: On the Scope for Cooperation with a Transit Country." *Review Of International Economics*, 22(4), pp.808-824, 2014, p.808.

Republic, 100,000 had entered Poland and another 60,000 entered Romania. The following year, the IOM claimed that a “wave of Afghan migrants was heading for western Europe”.<sup>69</sup> Based on the Council of Europe in 2008, the estimated number of migrants passing through Libya, Tunisia, Morocco and Mauritania on their way to the European Union has increased annually by at least 100,000 people. To address this problem, cooperation with countries of origin and transit countries is very important to deter irregular migrants. The IOM’s contribution as a data collector can help governments to control and manage migration processes.<sup>70</sup>

There are some inter-regional forums on migration which have been established by the EU with origin and transit countries of irregular migrants. The forums are state-led, informal and facilitate non-binding dialogues between two or more regions. They address various areas of migration management such as labour migration, migration and development, irregular migration, migrant rights, human trafficking and migrants smuggling.<sup>71</sup> The EU is engaged in eight regional dialogues: the Eastern Partnership, the Prague Process, the Budapest Process, the Silk Routes Partnership, the African Caribbean and Pacific Group of States-European Union (ACP-EU) Dialogue on migration; the Rabat Process, the Khartoum Process and the Community of Latin American and Caribbean States (CELAC).<sup>72</sup>

The EU approach of presenting asylum and migration policies as part of an external agenda is considered to be a comprehensive approach because the migration issue cannot be managed efficiently within the EU states. This is in line with ideas around global initiatives that migration cannot be tackled efficiently at a national or regional level, but also needs to be developed within a “global framework for multilateral cooperation”.<sup>73</sup> Furthermore, regional or multilateral cooperation

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<sup>69</sup> Frank Duvell, “Transit migration: A blurred and politicised concept.” *Population, Space and Place*, 18(4), pp. 415-427, 2012, p.419.

<sup>70</sup> Frank Duvell, “Transit Migration.” p.419.

<sup>71</sup> IOM, Inter Regional EU Horn, 2019, <https://www.iom.int/inter-regional-forums-migration>, (accessed 19 April 2019).

<sup>72</sup> Corrine Balleix, “Strengthening Co-operation with Countries of Origin”, *OECD Social, Employment and Migration Working Papers*, No. 183, OECD Publishing, Paris, 2016, p.7.

<sup>73</sup> Frédérique Channac, "Global or International Governance for Migration? Building up Co-operation and Enhancing Multilateralism from Regional to Global Level." Garnet Working Paper no. 19/07, 13 2007, p.18, <http://www2.warwick.ac.uk/fac/soc/garnet/workingpapers/1907.pdf>, (accessed 20 November 2018)

is undertaken in an effort to achieve a state's objectives. Since the EU's states are destination countries for migrants, it needs to engage with the origin and transit countries of irregular migrants. As argued by Carr, in era of globalisation, nation states do not only use national mechanisms to achieve their objectives, but they also use regional or global mechanisms such as agreements, treaties, forums, and institutions. The forms of mechanisms vary from bilateral cooperation to informal one-off events with long-term regional or global governance cooperation which transferring sovereignty and responsibility.<sup>74</sup>

The establishment of the Bali process has similar frameworks to some of the EU regional cooperation initiatives. The Bali Process is an inter-regional forum on migration which is characterised by informal dialogue, is non-binding, comprises origin, transit, and destination countries of migration, and consists of more than two regions and international organisations within its membership. Given the number of the members and the permanent chair of the forum, the Bali Process can be compared with the Budapest Process. The Budapest Process was established in 1993 and is one of the longest-standing cooperation frameworks on migration for Europe and its eastern neighbours<sup>75</sup>. It covers 53 states in Asia and Europe<sup>76</sup>, while the Bali Process consists of 45 countries of origin, transit, and destination for irregular migrants in Europe, Asia, America and the Middle East<sup>77</sup>. Furthermore, the Budapest Process and the Bali Process have a permanent chair. The Budapest Process is chaired by

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<sup>74</sup> Andrew Carr, *The Engagement Pendulum*, p.319

<sup>75</sup> About The Budapest Process, <https://www.budapestprocess.org/about> (accessed 20 November 2018).

<sup>76</sup> The participating states of the Budapest Process are: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iraq, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan, <https://www.budapestprocess.org/budapest-process/143-participating-states>, (accessed 20 November 2018).

<sup>77</sup> The nations are Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic Republic of Korea (North Korea), Fiji, France (New Caledonia), HongKong (SAR), India, Indonesia, Iran, Iraq, Japan, Jordan, Kiribati, Lao PDR, Macau SAR, Malaysia, Maldives, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea (South Korea), Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Turkey, Timor Leste, Tonga, Vanuatu, Vietnam, United States and The United Arab Emirates, <https://www.baliprocess.net/membership/>, (accessed 26 October 2018).

Turkey and co-chaired by Hungary, whereas the Bali Process is co-chaired by Australia and Indonesia.

However, in contrast to the Bali Process, which primarily focuses on people smuggling and human trafficking, the Budapest Process has broader objectives around migration issues. The main objectives of the Budapest Process are to promote dialogue and mutual cooperation in managing migration flows taking place along the Silk Routes.<sup>78</sup> Therefore, it does not only address issues of people smuggling and human trafficking, but also covers a wide range of issues such as supporting migrants' integration and counteracting issues of discrimination, racism and xenophobia; strengthening the benefits of migration on development, as well as preventing and counteracting irregular migration, facilitating return and readmission of irregular migrants.<sup>79</sup> Another difference between the two forums is the involvement of international organisations. In the Bali Process, four international organisations have become members of forum, namely, IOM, UNHCR, United Nations Office on Drugs and Crime (UNODC) and the International Labour Organization (ILO).<sup>80</sup> Meanwhile, sixteen international organisations participate in the Budapest Process.<sup>81</sup>

Given the objectives of the forum, the most similar model of regional cooperation in the EU to the Bali Process is the Khartoum Process. Similar to the Bali Process, the Khartoum Process is primarily focused on preventing and fighting migrant smuggling and trafficking in human beings. It was established in 2014, with 41 members of origin, transit and destination countries in the Horn of Africa and EU.<sup>82</sup> However, unlike the Bali Process in which the international organisations become members of the forum, international organisations in the Khartoum Process such as IOM, UNHCR, UNODC,

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<sup>78</sup> Covering region of Afghanistan, Bangladesh, Iran, Iraq, and Pakistan, *Migration in the Silk Routes Region*, <https://www.budapestprocess.org/migration-in-the-silk-routes/147-migration-in-the-silk-routes-region>, (accessed 17 April 2019).

<sup>79</sup> IOM, Budapest Process, 2019, <https://www.iom.int/budapest-process> (accessed 19 April 2019).

<sup>80</sup> About The Bali Process, <https://www.baliprocess.net/>, 2019 (accessed 26 October 2018).

<sup>81</sup> IOM, Budapest Process, <https://www.iom.int/budapest-process>, 2019 (accessed 19 April 2019).

<sup>82</sup> These countries are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Eritrea, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Kenya, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Somalia, South Sudan, Spain, Sudan, Sweden, Tunisia, United Kingdom, Libya, Norway, Switzerland and Uganda, <https://www.khartoumprocess.net/about/actors-and-governance>, 2019 (accessed 19 April 2019).

and European External Action Service act only as observers. Also, different to the Bali Process, the chair of the Khartoum Process is rotated every year. In 2015, the chair of the Khartoum Process was Egypt, followed by the United Kingdom (2016), Ethiopia (2017) and Italy in 2018.<sup>83</sup>

## 2.5 Conclusion

This chapter concludes that, although there is not specific definition of irregular migration, in general, irregular migration refers to the movement of people who enter the territory of a state without authorisation, including those seeking asylum. States frequently view irregular migrants as a threat to national security because they bring risks such as infectious disease, terrorism and illegal activities such as illicit drug trading. As a consequence, irregular migration falls under the classification of non-traditional security; non-military issues which present a real or perceived threat to states. In order to protect their territory, industrialised countries, which have become destination countries for irregular migrants, apply strict border policies and securitise irregular migration into people smuggling and human trafficking. In addition, destination countries of irregular migrants also build cooperation with origin and transit countries. This kind of cooperation manifests as inter-regional forums on migration which are state-led, non-binding and informal dialogue.

Australia, which deals with problems of Irregular Migration Arrivals (IMAs), also takes an approach of criminalisation towards irregular migration. As a destination country of illegal migrants, Australia initiated the Bali Process. The concept of engaging with other nations through a regional forum is based on the theory of constructivism which frames irregular migration as a threat to national security. Irregular migration is classified into people smuggling and human trafficking. As a result, the Bali Process was built as a regional forum to address issues of irregular migration in Asia Pacific. This cooperation has a similar model to some forums in EU such as The Budapest Process and the Khartoum Process. Through this regional model, the destination country of illegal migrants

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<sup>83</sup> IOM, EU-Horn of Africa Migration Route Initiative (Khartoum Process), <https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process>, 2019 (accessed 20 April 2019).

cooperates with transit and origin countries, as well as international organisations, to address issues of irregular migration. The dilemma of irregular migration is the dichotomy of state security and human security. State security impacts policies of securitisation of irregular migrations. On the other hand, human security emphasises the importance of enforcing human rights in order to support dignity of life. This opposing dichotomy is problematic because the existence of smugglers and traffickers is the result of strict immigration policies. Given the fundamental meaning of human security, it is necessary to incorporate a refugee protection framework in such a process as a balanced approach.

### **3 THE BALI PROCESS AS AN INITIATIVE OF REGIONAL COOPERATION TO COMBAT PEOPLE SMUGGLING AND HUMAN TRAFFICKING**

This chapter will explore the phenomenon of irregular migration in Australia which is associated with boat people, Indonesia as a transit country of boat people, the establishment of the Bali Process, the structure of The Bali Process, the impacts of the Bali Process for the Asia Pacific, and the impacts of the Bali Process for the Australia-Indonesia bilateral relationship.

#### **3.1 Boat People as Threat to National Security in Australia**

Australia has a number of ‘pull factors’ for boat people. According to Koser, Australia is a more attractive country compared to other resettlement countries a number of reasons. It is not because of its friendly policy towards asylum seekers, but due to its economy. Australia is a wealthy country which was largely unaffected by the global economic crisis and has relatively low unemployment. Moreover, it has a “strong and generous welfare system”.<sup>84</sup> It also has a reputation as a fair, safe and democratic nation. In addition, it commits to refugee resettlement since it is a party of the 1951 UN Convention.<sup>85</sup> Due to its pull factors for asylum seekers, Australia faces a problem of increased numbers of irregular migrants who travel by boat, known as ‘boat people’. According to Phillips and Spinks, the term ‘boat people’ has been a part of the Australian lexicon since the 1970s due to the arrival of the first wave of boats carrying asylum seekers from Vietnam who fled because of the Vietnam War. In 1976, the first boat arrived in Darwin carrying five Indochinese people. Five years later, the number increased into 2,059 Vietnamese boat people with the last boat arriving in August 1981. In November 1989, the arrival of 27 Indochinese asylum seekers was regarded as the second wave of boat people. Over the following nine years, Australia saw the arrival of boat people at approximately 300 people per year, predominantly from Cambodia, Vietnam and Southern China. The arrival of boat people from the Middle East started in 1999, and was considered to be the third

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<sup>84</sup> Khalid Koser, “Responding to Boat Arrivals in Australia: Time for a Reality Check” Sydney:Lowy Institute, 2010, p.9.

<sup>85</sup> Khalid Koser, “Responding to Boat Arrivals.”, p.9

wave of asylum seekers. These asylum seekers often came in larger number than previous asylum seekers and, in most cases, with the help of people smugglers.<sup>86</sup>

The problem of boat people, which is also referred to as irregular maritime arrivals (IMAs), has become a government concern. However, many argue that the numbers of boat arrivals in Australia is very small compared to waves of unauthorised arrivals in other countries over the last few decades.<sup>87</sup> For example, in the US, it was estimated that 3.5 million unauthorised migrants were living in the US in 1990. This number increased to 8.5 million by 2000, suggesting that the number of illegal migrants increased by 500,000 per year in the period of 1990-2000.<sup>88</sup> In March 2018, in the US alone there were 50,308 illegal migrants from Mexico at the southwest border. This number increased by 37% compared with March 2017 when there were 16,588 illegal migrants.<sup>89</sup> Similarly, Europe also faces the problem of controlling and monitoring large numbers of illegal migrants arriving from Africa and the Middle East every year. During January-October 2014, in Italy alone, over 112,000 irregular migrants were detected by the Italian government.<sup>90</sup> Meanwhile, the numbers of boat people in Australia from 1976 to 2012 was only 1,021 people per year on average. The highest peak of boat people was only 17,202 people in 2012 (see appendix 1 and 2).<sup>91</sup> Looking at the differences of breadth of territory between Australia and Italy, the numbers of irregular migrants in Australia is very small.

Although the Australian numbers of irregular arrivals by sea is very small compared to other parts of the world, the Australian government applies strict policies regarding boat people. The boat arrival of irregular migrants in Australia has been a significant and controversial issue in Australian politics and public discourse for years. According to Douglas and Schloenhardt, one of the controversial

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<sup>86</sup> Janet Phillips and Harriet Spinks, "Boat arrivals in Australia since 1976." Background Note, Department of Parliamentary Services, 2011, p.1.

<sup>87</sup> Don McMaster, *Asylum seekers: Australia's response to refugees*, Melbourne University Press, Melbourne, 2001, p. 125.

<sup>88</sup> Jennifer Van Hook, Frank D. Bean and Jeffrey Passel, "Unauthorized migrants living in the United States: a mid-decade portrait." *Migration Information Source*, 2005, <http://www.migrationinformation.org/article/unauthorized-migrants-living-united-states-mid-decade-portrait> (accessed 20 October 2018)

<sup>89</sup> Jeff Daniels, "'Illegal' Crossing Attempts at The US Southwest Border Triple in March From a Year Ago." *Politics*, 5 April 2018, <https://www.cnn.com/2018/04/05/crossing-attempts-at-us-southwest-border-triple-in-march-from-year-ago.html> (accessed 5 October 2018).

<sup>90</sup> Tara Brian and Frank Laczko, "Fatal journeys." p. 12

<sup>91</sup> Katharine Betts, "Boat People." p. 34

policies regarding boat people in Australia is the Pacific Solution implemented under the Howard administration in 2001. This policy involves transferring asylum seekers to off-shore detention in island nations in the Pacific Ocean such as Nauru and Papua New Guinea (the Papua New Guinea detention centre was closed in 2017). One aspect of the policy was Operation Relex whereby the Australian Navy intervened and ‘turned back the boats’ outside Australian or Australian waters. According to Schloenhardt and Craig, this policy came about due to the Tampa Affair where 433 asylum seekers were rescued by the Norwegian cargo ship, the MV Tampa, in 2001. Those asylum seekers were rescued because their boat sank on its way from Indonesia to Australia. However, the government of Australia refused to allow the asylum seekers to enter Christmas Island and the MV Tampa was seized by the Australian Special Air Service because the captain refused to divert their course from Christmas Island. However, Operation Relex did not last long. After its first operation in 28 August 2001, it ended in early 2002.<sup>92</sup>

Although Operation Relex was terminated, Australia has maintained a similar policy regarding IMAs. On September 2013, a new immigration policy was implemented, known as Operation Sovereign Borders (OSB). This is a policy designed to deter boat people from reaching the Australian coast, where by they will be sent to off-shore camps in Nauru and Manus (Papua New Guinea), returned their origin countries, or to Indonesia as their last point of departure. The government’s aim of this policy was to ‘break the people smugglers business model’.<sup>93</sup> While OSB continues to operate, Australia also sought the approach of engaging with other nations in the Asia Pacific through the Bali Process in order to address problems of IMAs.

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<sup>92</sup> Andreas Schloenhardt and Colin Craig, “Turning Back the Boats: Australia’s Interdiction of Irregular Migrants at Sea.” *International Journal of Refugee Law*, 27(4), pp. 536–572, 2015, p. 538.

<sup>93</sup> Antje Missbach, People Smugglers in Indonesia; Definitely Not Out of Business, 2015, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/11/people-smugglers> (accessed 15 October 2018)

### 3.2 Indonesia as The Most Significant Transit Country of Boat People

Indonesia is known as a transit country for irregular migrants heading to Australia. According to Kimball in her study of transit states where she compared the transit states of Mexico and Morocco, there are four factors that define a country as a typical transit state: Firstly, it must share a border with a developed country; secondly, the emigration rates must be higher than immigration rates; thirdly, it must function as a main staging ground for migrants who want to enter a destination country with border protection; and, fourthly, countries considered as transit countries apply limited immigration policies and activities, mostly with support and financial aid from the neighbouring destination countries of transit migrants.<sup>94</sup> Indonesia fits Kimball's characterisation as a transit country, except for the criteria of emigration rates. In terms of emigration rates, Indonesian nationals rarely migrate to Australia for economic reasons. Instead, millions of Indonesian people migrate for temporary work to other countries such as Malaysia, Saudi Arabia, Taiwan, Singapore, Korea and the Middle East. In 2007, it was recorded that 2.7 million people migrated to those countries to work.<sup>95</sup> With regard to sharing a border with developed country, Indonesia and Australia do not share a land border, yet they are close neighbours separated by sea. Furthermore, for the third criteria of acting as a staging ground, Indonesia meets the criteria where it becomes a primary staging ground for transit migrants heading to Australia by maritime vessel. As mentioned in Chapter One, Indonesia has become the most significant staging ground since 1975 due to the Indochinese refugees who fled from Vietnam. Lastly, Indonesia does not have an asylum system. Similar to other states, Indonesia does not improve the protection for asylum seekers, but prefers to discourage migrants and limit their entry.<sup>96</sup> In addition, in terms of management of asylum seekers, Indonesia receives financial aid from Australia. For instance, Indonesia gains financial aid for improving immigration infrastructure. Indonesia received Australian funding through IOM to operate forty-two community housing facilities in six provinces

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<sup>94</sup> Ann Kimball, "The Transit State: A Comparative Analysis of Mexican and Moroccan, Immigration Policies", *working paper no. 150*, San Diego: Center for Comparative Immigration Studies, University of California, 2007, p.12.

<sup>95</sup> IOM International Organization for Migration, Indonesia, "Labour Migration from Indonesia: An Overview of Indonesian Migration to Selected Destinations in Asia and the Middle East." Jakarta, 2010, p.4.

<sup>96</sup> Antje Missbach. *Troubled Transit : Asylum Seekers Stuck in Indonesia*, SG: ISEAS - Yusof Ishak Institute, 2015, p.154.

in Indonesia. This facilitates housing for 4,225 asylum seekers and refugees who live in community housing which is mostly concentrated in Makassar, Medan and Jakarta. There are also a limited number of shelters for unaccompanied children operated by a local implementation partner of the UNHCR.<sup>97</sup> Owing to these factors, Indonesia meets the criteria to be considered a transit country, except for the criteria of emigration rates being higher than immigration rates.

Besides sailing from transit countries like Indonesia, boat people also sail from other countries including Malaysia, Sri Lanka and even China.<sup>98</sup> However, Indonesia has become the most important transit point. Its significance as a transit country is due to a number of factors including its geography, proximity to Australia, its position on the path between origin countries of asylum seekers in the Middle East and Asia, and also its archipelagic nature. Other factors, such as the levels of corruption among government officials such as the police and military among others, and the low level of law enforcement and security forces, also are contributing factors. Moreover, although boat people also transit in Malaysia, they prefer to move to Indonesia due to more affordable costs of living.<sup>99</sup> In 2016, Indonesia became a host country for more than 13,000 refugees and asylum seekers who had been in Indonesia for years waiting for resettlement.<sup>100</sup>

### **3.3 The Australian People Smuggling Act is Ineffective in Deterring Boat People**

Anti-people smuggling measures in Australia were introduced for the first time in 1999 by criminalising the facilitation of irregular asylum flows into the country. People smuggling offences were incorporated into the Commonwealth *Criminal Code Act 1995* and amendments to the

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<sup>97</sup> Thomas Brown and Antje Missbach, "Refugee Detention in Indonesia", *Indonesia-Migration*, 2017, <https://www.lowyinstitute.org/the-interpretor/refugee-detention-indonesia> (accessed 12 April 2019)

<sup>98</sup> Angus Houston, Paris Aristotle and Michael L'Estrange, "Report of the Expert Panel on Asylum Seekers", Australian Government, August 2012, p. 76, <https://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf> (accessed 13 April 2019)

<sup>99</sup> Cat Barker, "The People Smugglers' Business Model", research paper no. 2, Canberra: Parliamentary, Library, 2013, [http://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1213/13rp02](http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1213/13rp02), (accessed 25 April 2019)

<sup>100</sup> Jewel Topsfield, "Indonesian Foreign Minister Hopes Countries Will Assist to Resettle Refugees." 19 March 2016 <https://www.smh.com.au/world/indonesian-foreign-minister-hopes-countries-will-assist-to-resettle-refugees-20160319-gnmajq.html>, (accessed 25 April 2019).

*Migration Act 1958*. People who organise the illegal entry of five or more non-citizens in a group face a maximum 20-year prison sentence and fines of up to \$220,000. For smuggling an individual, the sentence is a maximum ten-year imprisonment and fines of up to \$110,000. In 2010, Australia enacted the *Anti People Smuggling and Other Measures Act 2010*.<sup>101</sup> Under this Act, a person who organises or facilitates people being brought or coming to Australia, or the entry or proposed entry into Australia of another person who is a non-citizen and has no lawful right to come to Australia, will be subject to a maximum penalty of imprisonment for 10 years, 1,000 penalty units or both.<sup>102</sup> Someone who organises or facilitates the bringing of at least five non-citizens into Australia will be subject to imprisonment of up to 20 years or 2,000 penalty units, or both.<sup>103</sup>

After the act was enacted, the Australian government attempted to sentence people smugglers. For example, during 2008 to 2011, 493 people were arrested for people smuggling related offences. Amongst them, only ten people were the organisers or facilitators; the remainder were crew, many of whom were local fishermen recruited from poor Indonesian villages by the organisers.<sup>104</sup> The Act has been criticised as unfair and unproductive. It is unfair because the law is applied to random crew members and not just the organisers of the smuggling operations. Many of the crew members are themselves victims of the organisers. Many of these people were told by the organisers that they would only transport cargo and were unaware that asylum seekers would be onboard at sea. In most cases, the organisers depart on a different boat before entering Australia waters. Meanwhile, the crew are ordered to head to Australia once they are already at sea with little option to return. The law is unproductive because the trialling and sentencing of crew members is costly. For example, based on Western Australian figures, each trial costs around \$20,000. In 2010-2011, the allocation for legal

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<sup>101</sup> Mary Crock and Daniel Ghezelbash, *Do Loose Lips Bring Ships?*, p.272

<sup>102</sup> Australian Anti People Smuggling and Other Measures Act 2010 sections 233A,

<sup>103</sup> Australian Anti People Smuggling and Other Measures Act 2010 section 233C

<sup>104</sup> Bassina Farbenblum, "Smuggling Prosecutions: Unfair and Costly." 12 Dec 2011, <https://www.abc.net.au/news/2011-12-12/farbenblum-smuggling-prosecutions-unfair-and-costly/3725214> (accessed 21 April 2019).

assistance in people smuggling cases was \$17.6 million. In addition, it costs half a million dollars to imprison someone for people smuggling for five years.<sup>105</sup>

Although relevant laws have been enacted, Australia still faces difficulties in handling the problem of people smuggling. As a result, Australia implements its OSB policy by sending back the boats to their last departure point which, in most cases, is Indonesia. Surprisingly, not only is the boat sent back, but the Australian authorities sometimes also pay crew members not to enter Australian territory. According to Phipps, in May 2015, a boat carrying 65 asylum seekers from Bangladesh, Burma and Sri Lanka attempting to reach New Zealand was intercepted by Australian authorities and forced to turn back. One of the passengers, Nazmul Hassan from Bangladesh, confessed that the Australian officials paid the captain and crew to turn the boat back to Indonesia. A police chief from Nusa Tenggara Timur, Indonesia, stated that \$31,000 in cash was given to six crew by an Australian official. This claim came from Indonesian intelligence.<sup>106</sup> Australian authorities denied that the payment was related to people smuggling.

The former Prime Minister, Tony Abbott, stated that the government will stop the boats “by hook or by crook”<sup>107</sup>, asserting that the government will undertake any measures necessary to protect Australia from people smuggling.<sup>108</sup> He disputed claims of crew members being paid off, stating that Australian officials had acted within the law. He also accused the media of exaggerating the dispute with Indonesia.<sup>109</sup> Once again, issue of boat people brought tension to Indonesia-Australia relations. It has become an overwhelming issue between the two countries, and has also caused concern for international movements for human rights. The action of paying smugglers and turning back the boats

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<sup>105</sup> Bassina Farbenblum, “Smuggling Prosecutions.”

<sup>106</sup> Claire Phipps, “Did Australia Pay People Smugglers to Turn Back Asylum Seekers?.” 17 June 2015, <https://www.theguardian.com/world/2015/jun/17/did-australia-pay-people-smugglers-to-turn-back-boats> (accessed 21 April 2019).

<sup>107</sup> Dan Conifer, “Asylum Seekers: Tony Abbot Refuses to deny Australia Paid Thousands to People Smugglers”, 12 June 2015, <https://www.abc.net.au/news/2015-06-12/abbott-refuses-to-deny-people-smugglers-paid-to-turn-back/6540866> (accessed 21 April 2019).

<sup>108</sup> Dan Conifer, “Asylum Seekers: Tony Abbot”

<sup>109</sup> Shalailah Medhora, “Tony Abbot Accuses Media of ‘Promoting Discord’ with Indonesia.” 16 June 2015, <https://www.theguardian.com/australia-news/2015/jun/16/tony-abbott-accuses-media-of-promoting-discord-with-indonesia> (accessed 21 April 2019).

was criticised by Thomas Vargas, the UNHCR Representative in Indonesia. He stated that any countries that pay people smugglers should be brought before a national or international court and such actions could be viewed as illegal.<sup>110</sup>

### **3.4 The Bali Process Benefiting to Australia, Indonesia and Asia Pacific Region**

The Bali Process was established in 2002 to tackle issues of people smuggling, trafficking in persons and related transnational crime. It is a policy dialogue forum, sharing information and practical cooperation at a regional level to combat such issues. The Bali Process is co-chaired by Indonesia and Australia with 48 members comprising 45 countries and four international organisations (UNHCR, IOM, UNODC and ILO).<sup>111</sup> It is the first regional forum in the Asia Pacific to address the issue of irregular migration. According to Douglas and Schloenhardt, the establishment of the Bali Process was for Australian interests, due to the increasing numbers of boat people. The sharp increase of boat people in Australia during 1999 and 2001 brought increased focus to the issue of people smuggling and became the major impetus for the creation of the Bali Process. Furthermore, they argue that the Tampa Affair can be considered as the turning point for the establishment of the Bali Process. The Tampa Affair resulted in broad amendments to the *Migration Act 1958* and rethinking Australia's strategy to combat migrant smuggling.<sup>112</sup> The Tampa Affair had a significant impact for Australia. Firstly, it provided impetus for Australian national policy, such as Operation Relex and OSB. Secondly, it led Australia to engage with other nations in the Asia Pacific region in an effort to deter boat people from entering Australia.

The Bali Process served as a turning point for the Indonesia-Australia relationship following a number of incidents between the two countries. Firstly, the Tampa crisis had a detrimental effect on the

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<sup>110</sup> Samantha Hawley, "Governments that Pay people Smugglers Should Face Legal Action, Indonesia's UNHCR Rep Says." 24 August 2017, <https://www.abc.net.au/news/2017-08-24/unhcr-says-illegal-for-governments-to-pay-people-smugglers/8836592> (accessed 21 April 2019).

<sup>111</sup> About The Bali Process, The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, <https://www.baliprocess.net/>, (accessed 27 August 2018)

<sup>112</sup> Joseph H. Douglas and Andreas Schloenhardt, *Combating Migrant Smuggling*, p.4

Indonesia-Australia relationship. After the Tampa Affair, Indonesia's former president, Megawati, refused to take a phone call from John Howard's and declined to meet him at the APEC summit in Shanghai. In 2001, an attempt by Australian Foreign, Defence and Immigration Ministers to propose financial aid for a refugee processing centre in Indonesia failed completely. The Indonesian attitude towards illegal immigration was that Indonesia would not act as a security guard to protect Australian interests.<sup>113</sup> Secondly, Indonesia also accused Australia of interfering with Indonesian domestic affairs in the case of East Timor. During the process of East Timor's independence in 1999, Indonesian President, Abdurrahman Wahid, accused Australia of "pissing in Indonesia's face over East Timor, as a consequence, together with Malaysia, Indonesia blocked moves to join the Australia-New Zealand and ASEAN trade arenas."<sup>114</sup> Due to those political issues, Australia looked for another approach to engage with Indonesia in particular and other South East Asian countries. John Howard as the prime minister tried to engage with other nations in the region through the Bali Process as a regional forum.

Another reason for Howard's different approach is likely to be because Indonesia has different attitudes towards asylum seekers compared to other countries which serve as buffer zones or transit countries for asylum seekers heading to the EU. Unlike those countries, Indonesia does not fully share Australia's views or policies about the issue. As Argued by Green, other countries such as central and eastern Europe which act as buffer zones for illegal migrants heading to the European Union, despite negative impacts of implementing asylum system in their countries, still comply with demands of the EU to synchronise border control and visa requirements for asylum seekers due to their expectations to be accepted as EU member.<sup>115</sup> The bilateral relationship is also of a lower priority to Indonesia, as argued by McRae that Australian financial assistance does not guarantee that Indonesia will be more cooperative where both countries have fewer resources to 'incentivise cooperation', and

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<sup>113</sup> Michael Wesley and Australian Broadcasting Corporation, *The Howard Paradox: Australian Diplomacy in Asia, 1996-2006*. Sydney: ABC for the Australian Broadcasting Corporation, 2007, p.182-183.

<sup>114</sup> Michael Wesley and Australian Broadcasting Corporation, *The Howard Paradox*, p. 179

<sup>115</sup> Penny Green, "State Crime Beyond Borders." *Borders, Mobility and Technologies of Control*, edited by Sharon Pickering and Leanne Weber. Dordrecht: Springer, 2006, p.150.

Indonesia's focus is on more imperative issues in Asia which means that its relationship with Australia is not the main priority.<sup>116</sup> In addition, despite Indonesia's acceptance of Australian aid to its law enforcement institutions, Indonesia has only partially met Australia's demand to be a buffer zone. Looking at Indonesia's significant position in the region and its economic purchasing power<sup>117</sup> along with its role as a transit point for asylum seekers, it is obvious that Australia needs Indonesia more than Indonesia needs Australia.<sup>118</sup> Consequently, Australia seeks to engage with South East Asia on an equal level.

### 3.5 The Structure of the Bali Process

The first ministerial meeting of the Bali Process was held on 26-28 February 2002 in Bali, Indonesia. The aim of the meeting was to address issues of the complexity and increase of irregular migration in the Asia Pacific region. It was attended by thirty-eight nations and representatives of IOM, UNHCR, and a further fifteen countries and international and regional organisations acted as observers. It was led by a steering group which consisted of Australia, Indonesia, New Zealand and Thailand, together with UNHCR and IOM. Indonesia and Australia continue to be the co-chairs of the steering group.<sup>119</sup>

Besides the Steering Group, another mechanism of the Bali Process is the Ad Hoc Group (AHG) which aims to comprehensively address situations on a case-by-case basis upon the request of the most affected countries, and to report developments to the wider membership of the Bali Process on an as-needs basis. The AHG comprises Afghanistan, Australia, Bangladesh, India, Indonesia, Malaysia, Maldives, Myanmar, New Zealand, Pakistan, The Philippines, Sri Lanka, United Arab

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<sup>116</sup> Dave McRae, "More Talk Than Walk: Indonesia as a Foreign Policy Actor." Sydney: Lowy Institute for International Policy, 2014, <https://www.lowyinstitute.org/publications/more-talk-walk-indonesia-foreign-policy-actor> (accessed 18 November 2018).

<sup>117</sup> Hugh White "What Indonesia's Rise Means for Australia: Northern Exposure", *The Monthly* 90, June 2013, <http://www.themonthly.com.au/issue/2013/june/1370181600/hugh-white/what-indonesia-s-rise-means-australia> (accessed 20 October 2018).

<sup>118</sup> Sam Roggeveen, "Diplomatic Fallout from the Latest Snowden Revelations." *The Interpreter*, 18 November 2013, <http://www.lowyinterpreter.org/the-interpreter/diplomatic-fallout-latest-snowden-revelations> (accessed 18 November 2013).

<sup>119</sup> Joseph H. Douglas and Andreas Schloenhardt, "Combating Migrant Smuggling", p. 5-7.

Emirates, Thailand, The United States and Vietnam. International organisation members of the AHG are IOM, UNHCR and UNODC.<sup>120</sup> Another mechanism of the Bali Process is Regional Support Office (RSO), established in 2012. The RSO is the regional focal point for coordination, engagement, capacity building and sharing best practice for countering people smuggling, trafficking in persons and related transnational crime.<sup>121</sup>

Since its inception, the Bali Process has held seven Ministerial Conferences. The seventh conference was held on 6-7 August 2018 in Bali, Indonesia. The meeting acknowledged the significant challenges of irregular migration, both globally and regionally. It noted, with concern, the situation involving displaced persons in the region and the risk of irregular maritime movement. It supported the early sustainable and voluntary return of displaced persons. It underlined that the transnational nature of irregular migration requires a comprehensive regional approach.<sup>122</sup>

Human trafficking is often linked to labour exploitation. Besides government to government cooperation, the Bali Process also engage with the private sector constructively to address issues of labour migration in order to eradicate human trafficking and related exploitation. This new initiative brought together influential business leaders and ministers from the Indo-Pacific region to consider ways to prevent and combat human trafficking, forced labour and modern slavery. As a result, the Bali Process government and business forum was incorporated into the new structure of the Bali Process.<sup>123</sup>

Looking at its mechanisms and organisational structure, the Bali Process holds a series of meetings and also implements training. For example, meetings of senior officials are held every year to discuss issues of people smuggling, human trafficking and related transnational crime, and to discuss progress

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<sup>120</sup> The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, <https://www.baliprocess.net/ad-hoc-group/>, (accessed 6 November 2018)

<sup>121</sup> Regional <https://www.baliprocess.net/ad-hoc-group/>, (accessed 6 November 2018) Support office, [https://www.baliprocess.net/UserFiles/baliprocess/File/V2%20Information%20Sheet\\_RSO%20Feb%2018\(2\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/V2%20Information%20Sheet_RSO%20Feb%2018(2).pdf)

<sup>122</sup> Ministerial conferences, and senior official meetings, Ad Hoc Group Senior official Meeting Co-Chairs statement, <https://www.baliprocess.net/ministerial-conferences-and-senior-officials-meetings/>, accessed on 20 November 2018

<sup>123</sup> Bali Process Government and Business Forum, <https://www.baliprocess.net/bali-process-government-and-business-forum/> (accessed 20 November 2018)

which has been made within the forum based on previous meetings. In the twelfth meeting of the Ad Hoc Group senior officials in 2017, the progress of the 2015 meeting consensus was discussed.<sup>124</sup>

### 3.6 The Implication of the Bali Process for Asia Pacific Region

The Asia Pacific region is an important region in terms of refugee handling. According to the UNHCR, there are 10.6 million people of UNHCR concern in the region, representing approximately 30% of the global refugee population.<sup>125</sup> Thus, the Bali Process makes a significant contribution to the region. There has been criticism of the Bali process such as Bachelard's statement that the Bali Process is a "kind of grinding, hot-air fest of politics and international affairs, which is aimed to only to show that politicians do something when in fact they do not do anything".<sup>126</sup> However, it is inevitable that the Bali process has also significant meaning for Asia Pacific region. Although members of the Bali Process experience people smuggling in very different ways and at different levels, however, the Bali Process has successfully fostered a sense of cooperation.<sup>127</sup> According to Wesley, the Bali Process is a transnational diplomacy under John Howard administration. The key to transnational diplomacy lies on some states formulating a problem, the solution and the process of developing the solution in a common manner. It is about process which designed to harmonise nation interests, rather than enforcing or attempting to harmonise nation's preferences.<sup>128</sup>

The Asia Pacific region is one with significant geopolitical, as well as structural, social, economic and legal differences. To this end, the Bali Process represents a remarkable diplomatic achievement in terms of building solidarity among a disparate group of nations around a topic that is inherently political and divisive.<sup>129</sup> According to Curley and Vandyk, despite criticism of the lack of human

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<sup>124</sup> Ad Hoc Group Progress Report: October 2017, <https://www.baliprocess.net/UserFiles/baliprocess/File/AHG%20progress%20report%20%20update%20for%20AHG%20Oct%202017%20-%20final.pdf>, 2019 (accessed 25 April 2019).

<sup>125</sup> UNHCR, 'Asia and the Pacific: 2012 Regional Operations Profile', Geneva: UNHCR., (<http://www.unhcr.org/4ec230f20.pdf>), (accessed 6 October 2018).

<sup>126</sup> Michael Bachelard, "Bali Process Grinds on with No Sign of Results." <https://www.smh.com.au/politics/federal/bali-process-grinds-on-with-no-sign-of-results-20130404-2h7yz.html>, (Accessed 22 October 2018).

<sup>127</sup> Joseph H. Douglas and Andreas Schloenhardt, *Combating Migrant Smuggling*, p. 13

<sup>128</sup> Michael Wesley and Australian Broadcasting Corporation, *The Howard Paradox*, p.190.

<sup>129</sup> Joseph H. Douglas and Andreas Schloenhardt, "Combating Migrant Smuggling.", p. 13.

rights protection, the Bali Process has a significant role as a regional effort to combat people smuggling by creating regional awareness and encouraging regional dialogue and discussion together with important international organisations to promote a collaborative regional response.<sup>130</sup> According to Iman Santoso, the former Director General of Immigration Indonesia, the Bali Process has a significant role in increasing awareness and coordination between origin, transit and destination countries of irregular migration. Hence, the Bali Process is about managing irregular migration from a broader international perspective.<sup>131</sup>

As a turning point in the Indonesia-Australia relationship, the Bali Process has improved the relationship which had deteriorated due to a number of issues, as mentioned in the previous section. The former Australian Foreign Minister, Julie Bishop stated that the relationship between the two countries will endure at all levels, from government-to-government, business-to-business and people-to-people.<sup>132</sup> Meanwhile, Indonesia's Foreign Minister, Retno Marsudi, also stated that Australia and Indonesia have a strong commitment to the Bali Process and the resulting bilateral discussions have been positive and promoted progress.<sup>133</sup> As the Bali Process was an Australia initiative, the Australian government views it as the most important diplomatic measure in Australia's regional engagement to tackle people smuggling. It promotes the deterrence, detection, apprehension and prosecution of people smugglers.<sup>134</sup>

Indonesia's leadership as co-chair of the Bali Process, and as host of relevant conferences, has demonstrated a willingness to work cooperatively to address people smuggling.<sup>135</sup> Australia chose an

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<sup>130</sup> Melissa Curley and Kahlia Vandyk, *The securitisation of migrant smuggling*, p. 58

<sup>131</sup> Andry Indrady, "Beyond Belconnen and Kuningan a Study of Bilateral Immigration Cooperation between the Australian Department of Immigration and Citizenship Australia and the Indonesian Directorate General of Immigration 2001-2009." PhD thesis, Flinders University, Adelaide, 2008, p.303.

<sup>132</sup> Liza Yosephine, "Indonesia Australia Strengthen ties over Bali Process." *The Jakarta Post*, 22 March 2016, <http://www.thejakartapost.com/news/2016/03/22/indonesia-australia-strengthen-ties-over-bali-process.html>, (accessed 5 October 2018).

<sup>133</sup> Liza Yosephine, "Indonesia Australia Strengthen Ties"

<sup>134</sup> Bali Process-Building Regional Cooperation to Combat People Smuggling and Trafficking in Persons, speech by Caroline Millar Ambassador for People Smuggling Issues, 2004, <https://dfat.gov.au/news/speeches/Pages/bali-process-building-regional-cooperation-to-combat-people-smuggling-and-trafficking-in-persons.aspx> (accessed 20 November 2018).

<sup>135</sup> Melissa Curley and Kahlia Vandyk, "The securitisation of migrant smuggling." p.58

appropriate and timely approach in initiating the Bali Process. As argued by Wesley, when Australia approached Indonesia with the concept of the Bali Process, Indonesia desperately wanted to show its regional leadership after domestic turmoil such as the Asian Financial Crisis, corruption, brutality in East Timor and internal extremism.<sup>136</sup> With Indonesia as the co-chair of the Bali Process, it has taken steps to show its obligation and leadership on the issue of irregular migration. For example, in 2013, Indonesia held a special conference on irregular movement of people. As a result, Indonesia produced the Jakarta Declaration on Addressing Irregular Movement of People.<sup>137</sup> According to UNHCR, this event was a “pact of solidarity”<sup>138</sup> and produced a regional road map to navigate the complex problem of movement in the Asia Pacific such as differences of protection, family and community dispersal, labour needs, lack of access of legal migration opportunities and smuggling networks.<sup>139</sup> Its position as co-chair has helped Indonesia to improve its credibility in the region as leader in tackling the issue of irregular movement.

Although some scholars criticise the Bali Process as serving only Australian national interests, as mentioned in chapter one (see Grewcock; Curley and Vandyk; McNevin; and Bachelard), it is inevitable that Indonesia gains many benefits from the Bali Process. Firstly, Indonesia receives financial aid to run detention centres, as mentioned in chapter one, and also to improve law enforcement. In 2013-2014, Indonesia was the main recipient of Australian foreign assistance, including important funding for law enforcement improvement such as the Jakarta Centre for Law Enforcement Cooperation in which aimed to build regional capacity to address people smuggling.<sup>140</sup> Secondly, another benefit for Indonesia is the opportunity to develop its immigration system. For example, in 2008 Australia provided aid of AU\$7.9 million to develop Indonesia’s border movement alert system (CEKAL) to prevent people smuggling and irregular migration. The following year,

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<sup>136</sup>Michael Wesley, “The Howard Paradox.” p. 194

<sup>137</sup>Susan Kneebone, *The Bali Process and Global Refugee Policy*, p.599

<sup>138</sup> Vivian Tan, UNHCR welcomes Jakarta Declaration to Address Irregular Movements in Asia Pacific, 21 August 2013, <http://www.unhcr.org/news/latest/2013/8/5214acff9/unhcr-welcomes-jakarta-declaration-address-irregular-movements-asia-pacific.html> (accessed 20 November 2019)

<sup>139</sup> Vivian Tan, “UNHCR welcomes Jakarta Declaration”.

<sup>140</sup> Melissa Curley and Kahlia Vandyk, *The securitisation of migrant smuggling*, p. 49

Australia spent more than AU\$10 million to implement the computerisation of the main border crossing warning system in five of Indonesia's primary ports.<sup>141</sup> Indonesia has also benefitted from a new Indonesian immigration alert system due to commitment from both countries to improve management of border control. In addition, Australia has also committed to develop the Indonesian detention management system, since Indonesia lacks facilities that are compliant with international standards.<sup>142</sup>

Indonesia also receives aid to improve skills and human resources. According to Indrady, in order to increase skills and knowledge of immigration officials, Australia provides a number of training courses, organised and funded by the Australian Department of Immigration and Citizenship, such as an English language course, and intelligence and document fraud training. Another important program involves postgraduate scholarships in Australia to improve human resources skills of Indonesian immigration officials. Indonesia's acceptance of Australian aid programs can be viewed as a strong willingness of the Indonesian government to engage in collaborative learning with Australia in order to develop the capacity of Indonesian immigration officials.<sup>143</sup> However, the Indonesian National Commission on Human Rights (KOMNAS HAM) warned that Indonesia should be cautious of Australia's efforts and policies to avoid turning Indonesia into a fortress which holds refugees and asylum seekers to prevent them from entering Australia. Consequently, Indonesia continues to face the problem of influx of refugees and asylum seekers.<sup>144</sup>

### 3.7 Conclusions

Australia has been dealing with boat people since the first wave of Indochinese refugees in the 1970s. Similarly, Indonesia has also been the most significant buffer zone for refugees since that time. These refugees are defined as IMAs. Although the number of refugees entering Australia is very small

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<sup>141</sup> Antje Missbach, *Troubled Transit Asylum Seekers*, p. 180

<sup>142</sup> Andry Indrady, "Beyond Belconnen and Kuningan." p. 307-308

<sup>143</sup> Andry Indrady, "Beyond Belconnen and Kuningan." p. 307-308

<sup>144</sup> Antje Missbach, *Troubled Transit Asylum Seekers*, p. 177.

compared to other countries such as the US and Italy, due to sovereignty and national security reasons, Australia has been implementing hard line policies towards refugees such as Operation Relex which was replaced by OSB. Under this policy, any boat of IMAs trying to reach Australia will be sent back to its port of origin. As a result, it caused tension with Indonesia, particularly following the Tampa Affair when 433 refugees were returned to Indonesia, which hampered Indonesian cooperation to deter boat people heading to Australia. In addition to OSB as a measure to intercept asylum seekers, Australia also implemented anti-people smuggling measures in 1999 by criminalising any parties who facilitate irregular asylum flows into Australia.

The Tampa affair had brought about change in the Australian approach with its Asian neighbours, particularly with Indonesia. After the Tampa Affair crisis, Australia sought to engage equally with Asian countries. Consequently, Australia established the Bali Process as a regional forum in the Asia Pacific to address issues of irregular migration, packaged as a forum to discuss people smuggling, human trafficking and transnational organised crime. Despite being criticised for only serving Australian interests, the Bali Process is a remarkable example of cooperation on irregular migration management in the Asia Pacific region. Its establishment was a turning point in the relationship between Australia and Indonesia. Together, as co-chairs of the forum, the two closest neighbouring countries share mutual benefit. The Bali Process has successfully become an outstanding example of transnational diplomacy to secure one country's interest. Indonesia alone lacks capacity to hinder the movement of boat people, therefore, via the Bali Process, Australia assists by promoting awareness of people smuggling and human trafficking in the Asia Pacific region.

## **4 THE BALI PROCESS IMPACTS AND ITS CONCERN ON PROTECTION OF ASYLUM SEEKERS AND REFUGEES**

This chapter will discuss to what extent the Bali Process has successfully brought irregular migration into a criminalisation framework in its members' national legislation. Four countries will be used as examples, namely, Indonesia and Malaysia as the main transit countries of illegal migrants, along with Iran and Sri Lanka as two main origin countries of illegal migrants heading to Australia. However, critics assert that the Bali Process lacks protection measures for asylum seekers. This chapter will also discuss the Sea Andaman refugee crisis as an example of how the Bali Process failed to address the issue of protection. Finally, it will discuss the involvement of international organisations in the Bali Process and to what extent they play a role in the protection of refugees.

### **4.1 The Bali Process Impacts of People Smuggling and Human Trafficking on National Legislation of Its Members**

The Bali Process has successfully introduced concepts of people smuggling and human trafficking as forms of irregular migration. Many countries have ratified UN conventions, such as the UN Convention on People Smuggling and Human Trafficking, and the UN Convention on Transnational Organised Crime. As a result, those countries, including Indonesia, Malaysia, Iran, and Sri Lanka, have adopted people smuggling and human trafficking into their national legislation.

#### **4.1.1 Indonesia**

Indonesia is a country in Southeast Asia, located between the Indian and Pacific oceans. It is the world's largest archipelagic country, with more than 17,000 islands.<sup>145</sup> As discussed in Chapter Three, Indonesia is the most important transit country for boat people due to its close geographic position to Australia. It is often the final stepping stone for illegal migrants heading to Australia. According to UNHCR, Indonesia is not a party of the *Refugee Convention 1951* or its 1967 Protocol. In addition, it

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<sup>145</sup> The Jakarta Post, "16,000 Indonesian Islands Registered at UN." 2017, <https://www.thejakartapost.com/news/2017/08/21/16000-indonesian-islands-registered-at-un.html> (accessed 27 March 2017).

also does not have a national system to determine refugee status.<sup>146</sup> Before the inception of the Bali Process in 2002, Indonesia did not officially recognise people smuggling or human trafficking. However, after the Bali Process establishment, Indonesia has adopted people smuggling and human trafficking into its national legislation.

Indonesia enacted and ratified aspects of the UN Convention regarding transnational organised crime. Firstly, Indonesia adopted human trafficking into its national act No. 21 of 2007 concerning Eradication of Crime of Human Trafficking. This legislation concentrates not only on preventing and criminalising offences of trafficking in persons, but also on supporting and protecting victims of human trafficking. As a result, trafficking offences increased from 83 convictions in 2004 to 291 convictions in 2008. Secondly, Indonesia ratified the UN Convention against Transnational Organised Crime which resulted in the national law No. 5 of 2009 concerning the Endorsement of the UN Convention against Transnational Organised Crime.<sup>147</sup> Thirdly, people smuggling and human trafficking are also regulated under the Immigration Act No. 6 of 2011. This law amended the previous Act No. 9 of 1992 concerning Immigration.

The previous immigration act did not regulate or recognise people smuggling and human trafficking. However, the new immigration act provides a more progressive approach to irregular migration issues. Under Article 1, Number 32, people smuggling is defined as any act which aims to seek advantage by individuals or groups of people illegally entering Indonesian territory using valid or non-valid documents. People smuggling is also considered a criminal offence under Article 120, Sub-article 1. People smugglers shall be punished by imprisonment for a minimum of five years with a maximum of 15 years, and a fine of IDR500 million to IDR1.5 billion.<sup>148</sup>

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<sup>146</sup> UNHCR, UNHCR in Indonesia, <https://www.unhcr.org/id/en/unhcr-in-indonesia> (accessed 27 March 2019).

<sup>147</sup> Statement by the Indonesian Delegation on Agenda Item 3: Review of Domestic and Bilateral Responses, [https://www.baliprocess.net/UserFiles/baliprocess/File/Indonesia\(1\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/Indonesia(1).pdf) (accessed 25 February 2019).

<sup>148</sup> Indonesia Immigration Act No. 6 of 2011.

Indonesia appears to take the problem of people smuggling seriously and has since successfully prosecuted people smuggling cases. From May 2011 to October 2015, there were 99 people prosecuted for people smuggling under Act No. 6 of 2011. It is sharp increase compared to only 15 prosecutions from 2007 to 2011. The offenders included 91 Indonesian citizens and eight foreign nationals from Pakistan, Afghanistan, Kuwait, Australia, Burma, Iraq, Sri Lanka and Iran. The eight foreigners were organisers or recruiters, while the Indonesian offenders were involved as transporters (drivers and crew), facilitators and security providers.<sup>149</sup>

The securitisation of people smuggling under the Immigration Act is likely to successfully address the issue of people smuggling in Indonesia. In 2016, Indonesia apprehended one of the main actors in organised people smuggling, known as Captain Bram. According to the Australian government, Captain Bram was one of the most notorious people smugglers in South East Asia.<sup>150</sup> Before the adoption of people smuggling in Indonesia's Immigration Act, in 2010, Captain Bram did not face prosecution even though he was caught bringing 250 Sri Lankan nationals to Australia. At that time, Indonesia did not recognise people smuggling in its national law and Captain Bram was only prosecuted for maritime law offences. He was punished with one-year sentence, with 18 months' probation, and fined less than \$AUD3,000.<sup>151</sup> Australian Immigration Minister, Peter Dutton, stated that Captain Bram had been involved in smuggling people to Australia since 1999. Captain Bram provided and captained vessels which smuggled people into and out of Indonesia.<sup>152</sup> In 2017, under the new Immigration Act, he was sentenced to six years and fined IDR500 million.<sup>153</sup>

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<sup>149</sup> Antje Missbach, "Sentencing People-Smuggling Offenders in Indonesia." *Policy Paper Centre for Indonesian Law, Islam and Society*, 2016, pp.8-10.

<sup>150</sup> Matthew Doran, "Indonesia Arrests South-East Asia's Notorious People Smuggler 'Captain Bram'." <https://www.abc.net.au/news/2016-09-24/indonesia-arrests-south-east-asias-notorious-people-smuggler/7874608>, 2016 (accessed 27 March 2019).

<sup>151</sup> Tony Jones, "People Smuggler Walks Free," 2010 <https://www.abc.net.au/lateline/people-smuggler-walks-free/379620> (accessed 27 March 2019).

<sup>152</sup> Matthew Doran, "Indonesia Arrests"

<sup>153</sup> Jewel Topsfield and Amilia Rosa, "Notorious People Smuggler Captain Bram Jailed for Six Years in Indonesia." <https://www.smh.com.au/world/notorious-people-smuggler-captain-bram-jailed-for-six-years-in-indonesia-20170316-guzywl.html>, 2017 (accessed 27 March 2019).

#### 4.1.2 Malaysia

Malaysia is located in South East Asia, sharing land and sea borders with Thailand, Singapore, Vietnam, Brunei Darussalam, the Philippines and Indonesia. Similar to Indonesia, Malaysia is not a party of the 1951 Refugee Convention nor its protocol. It does not have a system to regulate asylum seekers or rights of refugees.<sup>154</sup> However, Malaysia did enact a national law concerning people smuggling and human trafficking as a result of the Bali Process. Malaysia has a comprehensive Anti-Trafficking in Persons Act 2007 which came into effect on 28 February, 2008. Moreover, Malaysia also formed a special unit to address trafficking in its law enforcement institutions such as its Immigration Department, Royal Malaysia Customs and the Maritime Enforcement Agency. In addition, Malaysia also established shelters for human trafficking victims.<sup>155</sup> This act was subsequently amended in 2010 to regulate crimes related to migrant smuggling; the Anti-Trafficking in Persons and Anti-Migrant Smuggling Act.<sup>156</sup>

Migrant smuggling defines any action of foreigners or non-permanent residents of Malaysia to arrange, facilitate or organise illegal entry or exit of a person from any country, either knowing or having reason to believe that the person's entry or exit is unlawful. In addition, people smuggling also includes any actions of recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the aforementioned act of entry or exit. Meanwhile, human trafficking under this act is defined as actions of acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for such purposes based on act of Anti-

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<sup>154</sup>Malaysia, <https://www.unhcr.org/4ec23106b.pdf>, (accessed 25 April 2019).

<sup>155</sup>Malaysia statement on Review of Domestic and Bilateral Response at the First Ad Hoc Group meeting of the Bali Process, [https://www.baliprocess.net/UserFiles/baliprocess/File/Malaysia\(1\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/Malaysia(1).pdf), (accessed 21 March 2019)

<sup>156</sup>Lenore Lyons and Michele Ford, "Trafficking Versus Smuggling: Malaysia's Anti-Trafficking in Persons Act." *Human Trafficking in Asia: Forcing Issues*, London and New York: Routledge, pp. 35-48, 2014.

Trafficking in Persons and Anti-Migrant Smuggling Act.<sup>157</sup> This act also regulates offences of trafficking in persons and migrant smuggling.

Since the endorsement of this act, Malaysia has also successfully thwarted maritime people smuggling. For example, on May 1, 2018, Malaysia brought down a people smuggling operation undergoing maritime passage in Johor, Malaysia. More than 130 Sri Lankan citizens heading to Australia and New Zealand were caught by the Royal Malaysian Police cooperating with Malaysian Maritime Enforcement.<sup>158</sup> Recently, in January 2019, Malaysia also prevented a people smuggling operation departing Malaysia and heading to Australia with 34 men and women from Sri Lanka and India.<sup>159</sup>

#### **4.1.3 Islamic Republic of Iran**

The Islamic Republic of Iran (Iran) is a country in Western Asia which shares borders with Armenia, Azerbaijan, Turkmenistan, Afghanistan, Pakistan, Turkey and Iraq. Iran is a party to the 1951 Refugee Convention with reservations<sup>160</sup> and the 1967 Protocol. It ratified the refugee convention and its protocol in 1976.<sup>161</sup> As a result, it is a significant country, not only as source of asylum seekers, but also as a host country of refugees. For example, in 2016, there were 1.4 to 2 million undocumented Afghan refugees in addition to the nearly one million registered refugees.<sup>162</sup> Conversely, Iran also plays a major role as an origin country of asylum seekers. According to the UNODC report of 2013,

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<sup>157</sup> Laws of Malaysia Act 670 Anti Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (As at 1 November 2014).

<sup>158</sup> James Massola and Amilia Rosa, "Malaysia Stops People Smuggling Tanker with 130 Heading to Australia." <https://www.smh.com.au/world/oceania/malaysia-stops-people-smuggling-tanker-with-130-heading-to-australia20180506-p4zdn5.html>, 2018 (accessed 21 March 2019).

<sup>159</sup> Malaysia Disrupts maritime People Smuggling Venture, The Hon Peter Dutton MP, Minister for Home Affairs, 2019, <https://minister.homeaffairs.gov.au/peterdutton/Pages/Malaysia-disrupts-maritime-people-smuggling-venture.aspx> (accessed 22 March 2019).

<sup>160</sup> The 1951 Refugee Convention and its protocol allow party states to make reservations to certain provisions. However, there are several fundamental provisions which must be adhered to. Source: Procedures for Becoming a Party to the 1951 Convention and The 1967 protocol Relating to The Status of Refugees, <https://www.unhcr.org/3bbdaed04.pdf> (accessed 31 March 2019).

<sup>161</sup> UNHCR, "States Parties to the 1951 Convention relating to the 1951 Convention relating to The Status of Refugees and the 1967 Protocol." <https://www.unhcr.org/en-au/3b73b0d63.pdf>, p.3 (accessed 25 April 2019).

<sup>162</sup> Roger Zetter and Héloïse Ruaudel, "Refugees' right to work and access to labor markets—An assessment." *Global Knowledge Partnership on Migration and Development Working Paper and Study Series*, 2016, p. 11-12.

in 2010-2011, Iran was among the top four origin countries of asylum seekers. These countries are Afghanistan (31%), Iran (30%), Iraq (11%) and Sri Lanka (7%). There was a significant rise in smuggled migrants from Iran, from only 4% in 2009-2010 increasing to 30% in 2010-2011.<sup>163</sup>

Due to the Bali Process, Iran has made significant step towards ratifying people smuggling and human trafficking legislation. Iran has signed MOUs with IOM and ILO to strengthen the institutional capacity to combat human trafficking. In 2004, Iran enacted a law prohibiting trafficking of persons and another law concerning migrant smugglers. As result of this act, Iran has arrested offenders of people smuggling and human trafficking. In 2004, Iran arrested more than 253 Pakistani people who were smuggled into Iran, some of whom were trafficking victims. In September 2005, Tehran police broke networks of people smuggling from Bangladesh, Afghanistan and Pakistan with a number of people arrested. In 2007, the Iran government arrested 15 Uzbekistani women and 10 Iranian men who trafficked women for purposes of sexual exploitation from Central Asian countries to Arabian countries like UAE and Qatar via Iran.<sup>164</sup>

#### 4.1.4 Sri Lanka

Another main origin country of irregular migration is Sri Lanka, an island nation located in the Indian Ocean, southwest of the Bay Bengal.<sup>165</sup> Sri Lanka is not a party of the UN Refugee Convention or its protocol. In terms of providing a framework for irregular migration, the Bali Process has also successfully supported Sri Lanka to recognise human trafficking in its national legislation. As a result, Sri Lanka has made amendments to Act No.16 of 2006 concerning Human Trafficking, whereby human trafficking is considered an offence. According to this act, the offence of human trafficking is punishable by a minimum of two years' imprisonment and a maximum twenty years or a fine. If the

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<sup>163</sup> UNODC, Transnational Organized Crime in East Asia and the Pacific : a Threat Assessment, 2013, p.40 [http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf). (Accessed 10 April 2019).

<sup>164</sup> Nasim S.Hosseini and Divkolaye Nasim. "Iran: Migrant Smuggling and Trafficking in Persons." *Forced Migration Review* 32, pp.66-67, 2009, p.66.

<sup>165</sup> Dinuk Jayasuriya and Marie McAuliffe, "Placing Recent Sri Lankan Maritime Arrivals in a Broader Migration Context." *Irregular Migration Research Program Occasional Paper Series*, Australian Government Department of Immigration and Border Protection, 2013, p.5.

crime is related to a child, the imprisonment is a minimum of three years and a maximum of twenty years and also may carry a fine.<sup>166</sup>

Australia and Sri Lanka cooperated to synchronise migrant smuggling legislation in legal frameworks via a Memorandum of Understanding (MOU) concerning Legal Cooperation Against the Smuggling of Migrants between Australia and Sri Lanka in December 2009.<sup>167</sup> However, although the MOU had been signed, numbers of Sri Lanka IMAs increased in 2012. According to Jayasuriya and McAuliffe, there was a peak in Sri Lankan IMAs to Australia in 2012. On the other hand, numbers of Sri Lankan asylum seekers in other destination countries decreased. There are various reasons for the increase in Sri Lankan IMAs to Australia such as Australia protection and economic prospects, especially for ethnic Sinhalese who arrived in Australia in significant numbers during that time. In 2011, there were more than 200 Sri Lankan IMAs to Australia and that number increased dramatically in 2012 to more than 6,400.<sup>168</sup> The Sri Lankan government undertook some efforts regarding people smugglers attempting to leave Sri Lanka during this time. For example, in 2012, there were 65 boats, carrying approximately 2,900 Sri Lankan nationals, detained by the Sri Lankan navy. Further, in 2013 twelve smuggling vessels carrying Sri Lankan migrants heading to Australia were intercepted.<sup>169</sup>

## 4.2 The Bali Process and Protection of Asylum Seekers and Refugees

The Bali Process did not initially demonstrate concern for refugee protection, although the Fourth Bali Process Regional Ministerial Conference in 2011 was a significant step towards a protection framework. There were some core principles of the meeting which emphasised refugee protection. Firstly, it was not only border control and law enforcement initiatives that would be the main concerns of the forum, but also humanitarian issues and protection must be incorporated to address issues of

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<sup>166</sup> Sri Lankan Position Paper-2 Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime-Senior Official Meeting, <https://www.baliprocess.net>

<sup>167</sup> Australian High Commission Colombo, Press Release, <https://srilanka.embassy.gov.au/clmb/07062013AHCpressrelease.html>

<sup>168</sup> Dinuk Jayasuriya and Marie McAuliffe, "Placing Recent Sri Lankan." p.18-19

<sup>169</sup> Emily Howie, "Can't Flee, Can't Stay: Australia's interception and return of Sri Lankan asylum seekers Report." *Human Rights Law Centre*, 2014, p. 21-22.

irregular migratory flows. Secondly, the protection of asylum seekers and refugees were acknowledged through the UNHCR paper regarding regional cooperation to address refugees, asylum seekers and irregular movement. To implement relevant measures, a workshop was held. Thirdly, consistent assessment processes needed to be implemented for asylum seekers through regional assessment arrangements. Fourthly, refugees should be provided with a sustainable solutions, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible ‘in-country’ solutions. Finally, persons found to not be subject to protection should be returned, on a voluntary basis where possible, to their countries of origin.<sup>170</sup>

The implementation of protection principles in the Bali Process were a significant step towards refugee protection as the majority of members are not parties to the UN’s refugee convention. As argued by Taylor, the majority of countries in the Asia Pacific region are not parties to the Refugee Convention or Protocol, are very diverse legally and culturally, and defend their national sovereignty strongly. Nevertheless, the efforts of the UNHCR and Australia became a small step towards refugee protection in those countries which is an impressive accomplishment.<sup>171</sup>

#### **4.2.1 The Bali Process Protection Measures in Action: The Andaman Sea crisis**

It can be viewed that the principles of asylum seeker protection in the Bali Process’s frameworks are a token effort and, despite its declaration, it has not been translated into real action. In 2015, there was the Andaman Sea refugee crisis which tested the Bali Process’s measures to protect refugees. The Andaman Sea crisis happened in May 2015 when more than 25,000 people fled Myanmar and Bangladesh by boat. Approximately 8,000 people were stranded at sea and 370 people perished. Most of them are Rohingya refugees fleeing persecution in Myanmar.<sup>172</sup> Instead of providing protection

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<sup>170</sup> Fourth Meeting of Ad Hoc Group Senior Officials, Co-Chair Statement, <https://www.baliprocess.net/UserFiles/baliprocess/File/110310%20AHG%20SOM%20Co-chairs%20Statement%20FINAL.pdf>, 2011.

<sup>171</sup> Savitri Taylor, “Regional Cooperation and the Malaysian Solution.” *Inside Story*, 9 May 2011, <http://inside.org.au/regional-cooperation-and-the-malaysian-solution/> (accessed at 19 March 2019).

<sup>172</sup> Travis Mcleod et al, “The Andaman Sea Refugee Crisis a year on: What happened and how did the Region Respond?.” <https://theconversation.com/the-andaman-sea-refugee-crisis-a-year-on-what-happened-and-how-did-the-region-respond-59686>, May 26 2016 (accessed 12 March 2019).

for the refugees, Thailand, Malaysia and Indonesia pushed back the boats of asylum seekers. After turning back the boats, around 3,000 people were rescued by Indonesian and Malaysian officials or fishermen. On 20 May, 2015, the foreign ministers of Thailand, Indonesia and Malaysia met in Malaysia. Indonesia and Malaysia announced that they would not push boats back to the sea and agreed to provide temporary shelter.<sup>173</sup> In response to the problem, Indonesia agreed to accept 1,800 refugees with the proviso that they would be resettled within one year,<sup>174</sup> unlike Thailand, which did not sign the agreement, and deployed a navy vessel as floating assistance.<sup>175</sup>

Regional institutions and forums related to migration remained silent during the Andaman Crisis. ASEAN, the Bali Process and the Jakarta Declaration took no efforts to address the crisis, nor did senior officials of the Bali Process respond. Similarly, ASEAN did not respond to the crisis due to its consensus and non-interference principle.<sup>176</sup> The Bali Process failed to maintain its declaration to protect asylum seekers. Indonesian Foreign Minister, Retno Marsudi, stated that the regional forum had failed to address the refugee crisis in South East Asia in 2015 and it must not happen again. Moreover, she stated that the Bali Process was unable to tackle sudden movements of irregular migration in the Andaman Sea and the Bay of Bengal.<sup>177</sup>

Further criticism also came from former Indonesian Foreign Minister, Hassan Wirajuda, who stated that the co-chair of the Bali Process might need to be rotated, since the co-chair position has been static since 2002. According to Wirajuda, the Bali Process did not respond to the Rohingya issue adequately due to differing interests among its members including the co-chairs. Moreover, he stated

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<sup>173</sup> Travis McLeod et al., "The Andaman Sea"

<sup>174</sup> Jewel Topsfield, "Indonesia Says Bali Process Failure on refugee crisis 'must not happen again.'" <https://www.smh.com.au/world/indonesia-says-bali-process-failure-on-refugee-crisis-must-not-happen-again-20160323-gnbnb6.html>, (accessed 12 March 2019).

<sup>175</sup> Travis McLeod et al., "The Andaman Sea"

<sup>176</sup> Travis McLeod, et al., "The Andaman Sea"

<sup>177</sup> Jewel Topsfield, "Indonesia Says Bali Process Failure"

that the Rohingya issue was not within the scope of the Bali Process. He stated that the Bali Process and ASEAN needs to strengthen its processes and mechanisms on migration.<sup>178</sup>

As a response to address this issue, the Sixth Ministerial Meeting was held in Bali in March 2016, the first such meeting since 2013.<sup>179</sup> The meeting produced some important outcomes to respond to similar issues in the future. The meeting recommended the members review the region's response to the Andaman Sea Crisis as a lesson learnt and to work towards improvements. The review would cover a range of issues including improvements to national, regional and subregional planning for potential high flows of irregular migration in the future. The Bali Process should have mechanisms which would authorise 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. However, participation in the mechanism would be voluntary and non-binding. Therefore, the forum needs contribution from the UN and IOM to help members address the issue of irregular migration. The Bali Process also declared the importance of non-refoulement<sup>180</sup> principles. It recognised the need to provide protection for those entitled to it under relevant international legal instruments. In addition, it also declared that the principle of non-refoulement should be strictly adhered to.<sup>181</sup> Since not all members of the Bali Process are parties to the Refugee Convention 1951, the declaration of the non-refoulement principle represents significant progress towards refugee protection.

Responding to the sea Andaman crisis, UNHCR, IOM and UNODC undertook planning and preparedness measures to handle the irregular migration crisis in the Mediterranean and Andaman

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<sup>178</sup> Michael Gordon, "People smuggling: 'Step up or step aside,' Australia and Indonesia warned." <https://www.smh.com.au/world/people-smuggling-step-up-or-step-aside-australia-and-indonesia-warned-20160131-gmi1g0.html>, 2016 (accessed 12 March 2019).

<sup>179</sup> Travis McLeod, et.al, "The Andaman Sea"

<sup>180</sup> The non-refoulement principle is a principle by which no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, article 33 (1) the Refugee Convention 1951.

<sup>181</sup> Sixth Ministerial Conference Of The Bali Process On People Smuggling, Trafficking In Persons And Related Transnational Crime, Co-Chairs' Statement, <https://www.baliprocess.net>.

Seas. Their recommendations cover regional efforts to address the issue:(1)international cooperation should incorporate issues of transnational crimes and ensure full protection of human rights; (2)a plan for migration movements should be developed;(3)a data collection mechanism and procedures should be developed at national levels;(4) states should respond to humanitarian crises by enhancing national and local management systems and establishing international cooperation at the operational level; and (5) countries should build capacity manage irregular flows, including investigating and intercepting transnational organised crime.<sup>182</sup>

As an effort in leadership, Indonesia also contributes to build peace in Myanmar by building schools in Rakhine State.<sup>183</sup> In 2017, Indonesia built two schools in Rakhine State Myanmar. Indonesian Foreign Minister, Retno Marsudi, stated that Indonesia is committed to support inclusive development in Myanmar. She hoped that children in Rakhine state will have not only formal education, but will also learn about diversity and tolerance to create peace and pluralism. Previously, in 2014, Indonesia built four schools in Rakhine State.<sup>184</sup>

The Andaman Sea Crisis is evidence that the Bali Process places little concern on the protections of asylum seekers and refugees. However, the crisis has been a lesson for the forum to incorporate protection of human dignity into its framework. The forum now has principles of human protection cooperation and, more importantly, it declared a non-refoulement principle. However, it needs to be questioned to what extent the forum will work to enforce this non-refoulement principle, since its main co-chair, Australia, has a policy of turning back boat people.

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<sup>182</sup> Planning and Preparedness - Lessons Learned, Handling of the irregular migration crisis in the Mediterranean Sea and Andaman Sea crisis, [https://www.baliprocess.net/UserFiles/baliprocess/File/IOM\\_UNHCR\\_UNODC\\_Consolidated%20Notes\\_Bali%20Process%20Task%20Force\\_FINAL%20\(2\)\(2\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/IOM_UNHCR_UNODC_Consolidated%20Notes_Bali%20Process%20Task%20Force_FINAL%20(2)(2).pdf),

<sup>183</sup> Travis Mcleod, "The Andaman Sea".

<sup>184</sup> Lutfy Mairizal Putra, "Indonesia Bangun Dua Sekolah di Rakhine Myanmar." (Indonesia Built Two Schools in Rakhine Myanmar) 2017, <https://nasional.kompas.com/read/2017/01/22/22412041/indonesia.bangun.dua.sekolah.di.rhakinemyanmar>, (accessed 12 March 2019).

### 4.3 The UNHCR and IOM Role in Refugee Protection within the Bali Process

There are four international organisations that are members of the Bali Process, namely, UNHCR, IOM, UNODC and ILO. UNHCR is the biggest agency for refugee protection in the world. According to their official website, UNHCR is a UN refugee agency which has the core responsibility of refugee protection. This includes sustained efforts of promoting and extending international legal frameworks, developing and strengthening asylum systems, improving standards of protection, seeking durable solutions and other activities which are aimed to ensure the safety and prosperity of refugees. Some subjects of UNHCR concern include refugees, asylum seekers, stateless people, internally displaced people and returnees.<sup>185</sup> However, the UNHCR's role in refugee protection within the Bali Process is very limited, as demonstrated by the Bali Process response to the Andaman Sea Crisis.

As mentioned in Chapter Two, unlike similar regional forums in the EU, such as the Khartoum Process in which the international organisations are only observers of the forum, the global organisations in the Bali Process are members of the forum. As members, they are involved in the Ad Hoc Group (AHG)<sup>186</sup> which was established in 2009. The AHG countries and other interested countries operationalise the Regional Cooperation Framework in conjunction with the UNHCR and IOM.<sup>187</sup> The aims of AHG are: (1) to develop practical outcomes at the operational level to assist countries to mitigate increased irregular population movements; (2) to enhance information sharing arrangements between most-affected countries; and (3) to report to co-chairs through the Steering Group with concrete recommendations to inform future regional cooperation on people smuggling and trafficking in persons.

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<sup>185</sup> Protecting Refugees and the Role of UNHCR, <https://www.unhcr.org/about-us/background/509a836e9/protecting-refugees-role-unhcr.html>, 2014, p.6, p. 17.

<sup>186</sup> The members of AHG are Afghanistan, Australia, Bangladesh, India, Indonesia, Malaysia, Maldives, Myanmar, New Zealand, Pakistan, Philippines, Sri Lanka, UAE, Thailand, USA and Vietnam, and three international organisations namely IOM, UNHCR, and UNODC.

<sup>187</sup> The Bali Process, Ad Hoc Group, <https://www.baliprocess.net/ad-hoc-group/> (accessed 20 April 2019)

The progress around refugee protection in the region continued in 2010 with UNHCR's statement that they are promoting a regional approach to the protection of refugees, such as addressing the root causes of displacement in origin countries, improving conditions of asylum in countries where they stay and finding sustainable solutions. In 2010, the meeting of the Bali Process provided an opportunity for UNHCR to suggest that issues of refugee protection be incorporated as a significant part of the regional consultative process. Cooperation with representatives from civil society and ASEAN led to consultations about access to asylum seeker and refugee protection and basic services, particularly in the context of broader migration movements.<sup>188</sup> In 2011, at the Fourth Bali Regional Ministerial Conference, Erika Feller, Assistant High Commissioner of UNHCR, stated that there had been a shift in thinking regarding asylum seekers.<sup>189</sup>

Another mechanism in the Bali Process is the Regional Support Office (RSO). On 12 October, 2011, the Fifth Meeting of the Bali Process Ad Hoc Group Senior Officials agreed to establish a Regional Support Office (RSO) in the Asia Pacific region. The RSO would operate under the oversight and direction of the co-chairs of the Bali Process (Australia and Indonesia) and in consultation with UNHCR and IOM. The RSO co-managers should report on a biannual basis to the Bali Process co-chairs in consultation with UNHCR and IOM in accordance with their mandate.<sup>190</sup> This measure was established to support and strengthen practical cooperation on refugee protection and international movement, including human trafficking and smuggling, and other elements of migration management in the region. The RSO of the Bali Process was established to facilitate the operationalisation of the Regional Cooperation Framework (RCF) to reduce irregular migration in the Asia Pacific region.<sup>191</sup>

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<sup>188</sup> UNHCR 'Regional Update: Asia and the Pacific', Geneva: UNHCR, [http://reliefweb.int/sites/reliefweb.int/files/resources/0205ABB667E71435492577B2001DC802-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/0205ABB667E71435492577B2001DC802-Full_Report.pdf), 2010 (accessed 12 March 2019).

<sup>189</sup> Fourth Bali Regional Ministerial Conference. Bali, Indonesia. 30 March 2011, <http://www.refworld.org/pdfid/4dd51d152.pdf> (accessed 12 March 2019).

<sup>190</sup> Regional Support Office, Bali Process Conclusions on Establishment of the RSO, <https://www.baliprocess.net/UserFiles/baliprocess/File/RSO%20Information%20Sheet%20-%20Bali%20Process%20Conclusions.pdf> (accessed 12 March 2019)

<sup>191</sup> Regional Support Office, <https://www.baliprocess.net/regional-support-office/> (accessed 12 March 2019)

Based on examples above, it can be concluded that international organisations, such as UNHCR and IOM, have limitations in their capacity to advocate for refugee protection. It is likely that their function within the forum is more to support members to address irregular migration rather than providing refugee protection. Therefore, they function as data collectors and organise training and workshops. In addition, the organisations have a significant role in providing data about irregular migrants. As mentioned in Chapter One, IOM functions as a data collector within the EU regional forum on irregular migration. Similarly to the EU, the significance of the IOM within the Bali Process functions is to provide data about irregular migrants in order to prevent and create solutions in response to such movement. For example, in 2018, The IOM and UNHCR presented on recent mass movements and responses, recording data of the rapid irregular migration of 671,000 persons from Myanmar to Bangladesh which began in August 2017. It outlined regional approaches to response coordination, search and rescue, disembarkation and shelter management in some regional countries, focusing on the challenges faced by Bangladesh in coordinating assistance, and noting Sri Lanka's standard operating procedures in health services.<sup>192</sup>

The international organisations within the Bali Process also have conducted a series of workshops. For instance, in 2010, UNHCR and The Philippines co-hosted a workshop on Regional Cooperation on Refugees and Irregular Movements in Manila as a follow up to the recommendation of the Bali Process Third Meeting of Ad Hoc Group Senior Officials held in Bali, Indonesia in 2010. The workshop was attended by 46 delegates and was intended to address irregular movement, refugees, and asylum seekers.<sup>193</sup> Another series of workshops and conferences were held. For example, in July 2017, UNODC held a series of workshops on the smuggling of migrants in Indonesia. The workshop was intended for senior members of Indonesian law enforcement agencies.<sup>194</sup>

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<sup>192</sup> Task Force on Planning and Preparedness Bangkok, Thailand, Co-Chair, Statements 21-22 March 2018, <https://www.baliprocess.net/workshops/>, 2018, (accessed 25 April 2019)

<sup>193</sup> Regional Cooperation on Refugees and Irregular Movements Workshop , Co-Hosts Summary, [https://www.baliprocess.net/UserFiles/baliprocess/File/Manila%20Workshop%20On%20Regional%20Cooperation%20Co-Hosts%20Summary%20\(Final\)\(1\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/Manila%20Workshop%20On%20Regional%20Cooperation%20Co-Hosts%20Summary%20(Final)(1).pdf)

<sup>194</sup> United Nations Office on Drugs and Crime, Indonesia Strengthens Responses to Migrant Smuggling, <https://www.unodc.org/southeastasiaandpacific/en/indonesia/2017/07/migrant-smuggling-workshop/story.html>, 2017

#### 4.4 Conclusion

It is inevitable that the Bali Process has successfully fostered securitisation of irregular migration in the Asia Pacific region. The members of the Bali Process have adopted people smuggling and human trafficking into their national legislation. As evidence, its members which are transit and origin countries of irregular migrants, such as Indonesia, Malaysia, Iran and Sri Lanka, have adopted people smuggling and human trafficking in their national legislation. The forum has had impact at policy level but, in terms of refugee protection, it is still far from optimal. Although the role of international organisations in terms of protection remains limited, there has been progress on this matter since the first inception of the Bali Process. The existence of RSO of the Bali Process shows that the Bali Process has put more concern on refugee protection. However, Sea Andaman Crisis becomes a lesson to the forum that refugee protection is more a talk than an action within the forum.

Although, there is involvement of international refugee organisations, such as UNHCR and IOM, as members of the forum, their role is more about promoting refugee protection rather than implementation in real action. UNHCR and IOM have the primary role of data collectors and workshop organisers in order to strengthen border management and law enforcement cooperation within the Asia Pacific region. The following chapter will analyse the Bali Process outcomes and answer the question of the thesis. Firstly, it will analyse the effectiveness of the Bali Process as a forum to address issues of irregular migration and, secondly, to what extent the Bali Process provides effective protection of asylum seekers and refugees.

## 5 CONCLUSION

This thesis has examined the Bali Process as a forum in the Asia Pacific to address the issue of irregular migration. This thesis has attempted to answer two questions: firstly, can irregular migration in the Asia Pacific region be solved through the Bali Process? and, secondly, to what extent does the Bali process provide protection for asylum seekers? It can be argued that irregular migration cannot be solved through the Bali Process alone. This conclusion can be analysed from two perspectives. First, numbers of IMAs heading to Australia can be used as an indicator. As shown in graphs in Chapter One, and based on Appendix 1 (the numbers of boat arrivals for the period 1976-2016), it can be seen that there was a sharp decline in numbers of IMAs after the Bali Process's inception. For the period of 2002-2008, the numbers remain very low which can indicate that the Bali Process is effective to address the issue of irregular migration. However, in 2009-2013, particularly in 2012 and 2013, the numbers increase sharply, with the highest number of boat people arriving in Australian history, with 17,204 and 20,587 boat people recorded in 2012 and 2013 respectively. Therefore, it can be concluded that the Bali Process is not consistently effective to decrease irregular migration. Second, looking at the complexity of irregular migration, there are two key aspects of irregular migration, namely, state security and human security. In terms of state security, it can be concluded that The Bali Process is successful. As has been mentioned, people smuggling and human trafficking have been adopted into national legislation by Bali Process members such as Indonesia, Malaysia, Sri Lanka and Iran. However, from the human security perspective, the forum fails to address this issue, as shown by the Andaman Sea Crisis. Therefore, it can be argued that neither the quantity nor the human security of irregular migration cannot be solved through the Bali Process.

The second question of to what extent the Bali process provides protection for asylum seekers can be analysed from the asylum seekers protection framework and the involvement of UNHCR and IOM in the Bali Process. Firstly, the Bali Process framework of asylum seekers' protection is rhetoric rather than real action. Although the forum recognised the principle of non-refoulement due to the

Andaman Sea Crisis, there exists contradictions between the principle and its implementation. For example, Australia, as the main actor of the forum, retains the OSB policy of turning back boat people. Furthermore, there is no clear framework of refugee protection within the forum. In particular, the participation of members to address issues of refugee protection is voluntary and non-binding. Secondly, as mentioned in Chapter Four, although there is involvement of refugee agencies such as UNHCR and IOM in the Bali Process, the role of the organisations is more focused on data collection about irregular migration and facilitation of workshops to strengthen border management and law enforcement cooperation, rather than to enforce protection measures for asylum seekers. Based on these analyses, it can be argued that the Bali Process does not provide optimal protection of asylum seekers.

The Bali Process can be seen as a successful and significant measure of transnational diplomacy for Australia which can be analysed from two perspectives. Firstly, from perspective of its co-chair, the Bali Process is a turning point of the Indonesia-Australia relationship. Due to issues such as the Tampa Affair and East Timor independence process in 1999, the relationship between the two countries had deteriorated. John Howard's initiative to propose Indonesia as the co-chair of the Bali Process subsequently improved the relationship. The two countries also benefit from the forum. Indonesia, due to its position as co-chair of the Bali Process has shown leadership in the region and received assistance from Australia, such as financial aid to improve immigration border control management, improvement of officials' capacity, funding to build immigration detention centres and improvement of national legislation. Australia also benefits from Indonesia, since Indonesia is the most significant transit country of IMAs. The problem of boat people problem can be stemmed in Indonesia before they head to Australia through Indonesian laws on people smuggling and human trafficking. Secondly, the Bali Process has successfully united the region to securitise issues of irregular migration into people smuggling, human trafficking and transnational organised crime. The Asia Pacific region now has a united understanding of irregular migration. For instance, members of the Bali Process, such as Indonesia, Malaysia, Iran and Sri Lanka, have adopted people smuggling

and human trafficking in national legislation. The forum also shows that Australia can engage on equal terms with other nations.

To sum up, in terms of policy level, the Bali Process has successfully encouraged the Asia Pacific region to securitise irregular migration into people smuggling, human trafficking and transnational organised crime. While it has successfully addressed issues of irregular migration at policy level, it has not been successful in creating legal frameworks for refugee protection, thus, the Bali Process addresses only half of the problem of irregular migration. If the Bali Process is willing to put real protection into its framework, it will have the potential to achieve much greater success as a forum of burden sharing in terms of irregular migration. Similarly, the responsibility of managing refugees must also be shared amongst countries.

## **5.1 Recommendations of the Thesis**

This thesis provides a number of recommendations for the Bali Process.

### **5.1.1 Pre-resettlement policy for refugees and asylum seekers**

First, the forum should strive for consensus on refugee protection which can be implemented at national and regional levels. Not all members are parties of the 1951 Refugee Convention, and the forum cannot force countries to become so. Therefore, it is suggested that the Bali Process create a policy of pre-resettlement of refugees which can be adopted into respective domestic policies. Given the fact that asylum seekers frequently wait years before being resettled in host countries, it is necessary to have refugee management systems at national levels. The pre-resettlement policy should ensure access to basic needs of refugees such as education, jobs and equal opportunity. Such a policy will empower refugees. Thus, once they are resettled in destination countries, they will be better equipped to thrive in the new society. It is suggested that each member of the forum should adopt a policy of pre-resettlement of refugees. By creating asylum seeker management systems at national levels, the forum will become more comprehensive and effective in the region to address issues of

irregular migration. This is also important to demonstrate that the refugee framework in the forum neither lip service, nor simply exporting Australia's domestic policy, but a forum in its own right pursuing real action.

### **5.1.2 Australia's Operation Sovereign Borders Policy**

Second, it can be argued that the Australian policy of Operation Sovereign Borders in turning back the boats has created tension not only with Indonesia, but also on an international level since it breaches the international principle of non-refoulement of refugee. It is suggested that Australia review this policy. Moreover, as the co-chair of the Bali Process, it should lead by example by fostering good leadership and respecting human rights.

### **5.1.3 Governance of the Bali Process**

Third, it is suggested that the position of chair needs to be rotated. By rotating the co-chair, it will regularly renew the forum, and new perspectives and solutions for irregular migration might arise. The rotation of the chair position will demonstrate Australia's desire to truly engage equally with other nations by giving other nations the same opportunity to become leaders of the forum. This measure will bring greater objectivity to solving problems in the forum.

### **5.1.4 Ensuring the Australia-Indonesia relationship**

Finally, since Indonesia receives aid from Australia, it is recommended that certain protocol to secure Indonesian data should be instituted within the agreement between the two countries. Furthermore, Indonesia should be aware that financial aid from Australia can risk its domestic immigration situation. For example, as mentioned in Chapter Three, Indonesian immigration systems such as the border movement alert system (CEKAL) and border control management systems (BCM) are funded by Australia. As such, there is a high risk that Indonesian immigration data can be accessed by Australia. Immigration data should be secured from any foreign access and involvement. Since

immigration is a political issue and closely related to national security, Indonesia should rethink the conditions under which it receives Australian financial aid for immigration systems.

## **5.2 Concluding Remarks**

Further research is needed to explore to what extent the members of the Bali Process have provided protection for refugees. In addition, further exploration is required as to the roles of international organisations, such as UNHCR and IOM, in the Bali Process in terms of their capacity to promote refugee protection within the current framework.

This thesis has provided a comprehensive overview of the background and the role of the Bali Process in address issues of irregular migration in the Asia Pacific region. While collaborative efforts are to be commended, further steps must be taken to incorporate greater engagement with human security within the current framework.

# APPENDIX 1

## Boat Arrivals in Australia 1976-2016 by calendar year

Year	Number of boats	Number of people	
1976		111	
1977		868	
1978		746	
1979		304	
1980		0	
1981		30	
1982–88		0	
Year	Number of boats	Number of people (excludes crew)	
1989	1	26	
1990	2	198	
1991	6	214	
1992	6	216	
1993	3	81	
1994	18	953	
1995	7	237	
1996	19	660	
1997	11	339	
1998	17	200	
1999	86	3721	
2000	51	2939	
2001	43	5516	
2002	1	1	
2003	1	53	
2004	1	15	
2005	4	11	
2006	6	60	
2007	5	148	
2008	7	161	
Year	Number of boats	Crew	Number of people (excludes crew)
2009	60	141	2726
2010	134	345	6555
2011	69	168	4565
2012	278	392	17 204
2013	300	644	20 587
2014	1	N/A	160
2015	0	0	0
2016	0	0	0

### Sources:

**1976-1988:** Katherine Betts, 'Boatpeople and public opinion in Australia', *People and place*, vol. 9, no. 4, 2001, p. 34. Numbers of boats and crew members not specified.

**1989-2008:** DIAC advice provided to the Parliamentary Library on 22 June 2009 (excludes numbers of crew members excluded).

**2009-2014:** Customs and Border Protection advice provided to the Parliamentary Library on 22 August 2014.

As cited in Janet Phillips, *Boat arrivals and Boat 'Turnbacks' in Australia since 1976*. Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Research Paper Series, 2017, p.2 [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/BoatTurnbacks](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks) (accessed 3 May 2019)

## APPENDIX 2

### Number of boat people 1976-2016 by financial year

Year	Number of boats	Number of people
1975-76	1	5
1976-77	7	204
1977-78	43	1423
1978-79	6	351
1979-80	2	56
1980-81	1	30
1981-82 to 1988-89	0	0
1989-90	3	224
1990-91	5	158
1991-92	3	78
1992-93	4	194
1993-94	6	194
1994-95	21	1071
1995-96	14	589
1996-97	13	365
1997-98	13	157
1998-99	42	921
1999-00	75	4175
2000-01	54	4137
2001-02	19	3039
2002-03	0	0
2003-04	3	82
2004-05	0	0
2005-06	8	61
2006-07	4	133
2007-08	3	25

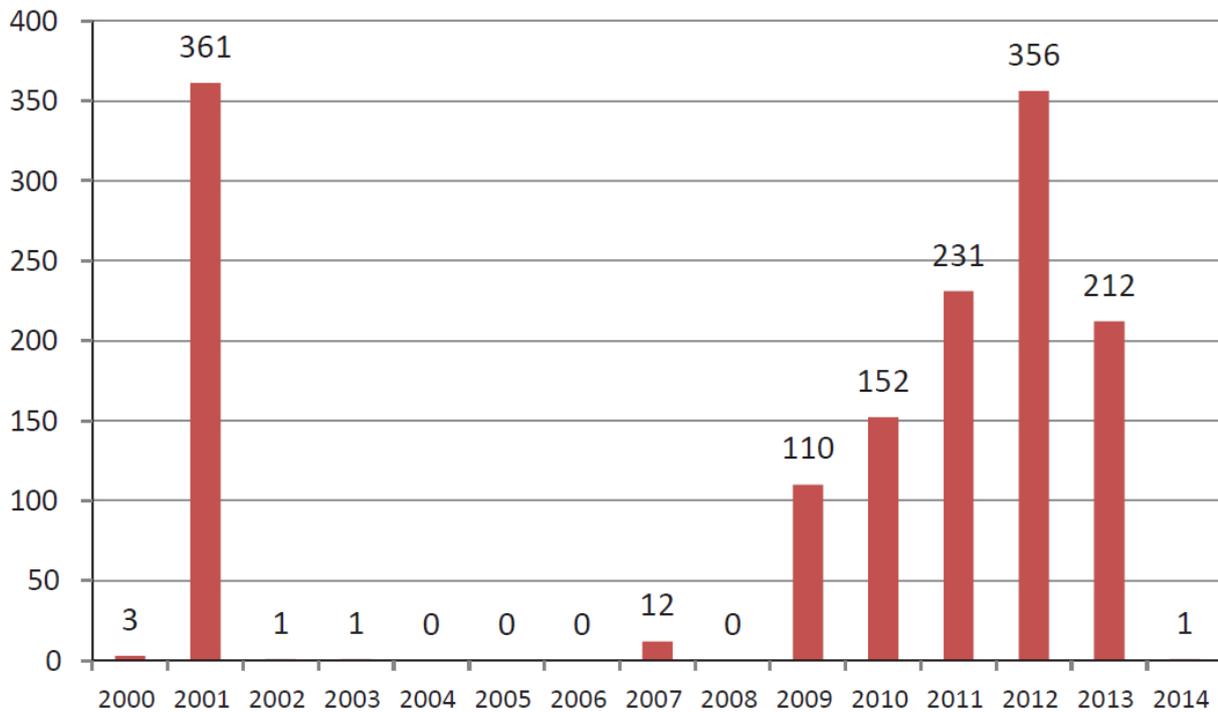
Year	Number of boats*	Number of people (excludes crew)*	Number of people (includes crew)**
2008-09	23	985	1033
2009-10	117	5327	5609
2010-11	89	4730	4940
Year	Number of boats	Crew	Number of people
2011-12	110	190	7983
2012-13	403	423	25 173
2013-14	104	198	7674
2014-15	1	N/A	158
2015-16	0	0	0

#### Source :

Janet Phillips, *Boat arrivals and Boat 'Turnbacks' in Australia since 1976*. Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Research Paper Series, 2017, p.3  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/BoatTurnbacks](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks) (accessed 3 May 2019)

## APPENDIX 3

### Deaths of irregular migration to Australia January 2000-July 2014



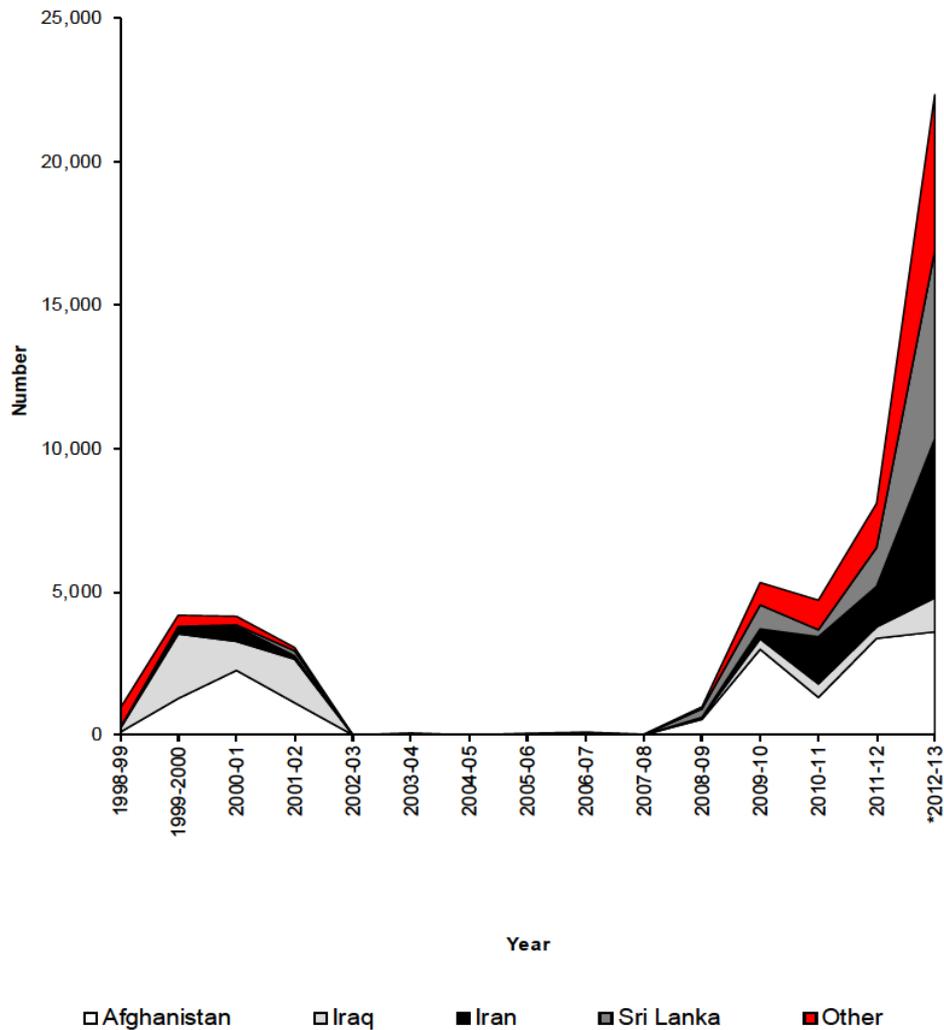
#### Source:

Australian Border Deaths Database

As cited in Tara Brian and Frank Laczko, Fatal journeys: Tracking lives lost during migration, *International Organization for Migration*, 2014, p.187

## APPENDIX 4

### Irregular Maritime Arrivals by Origin 1998-2013



\*2012-13 refers to the period up to 31<sup>st</sup> May 2013

#### Source:

Australian Government, Report of the Expert Panel on Asylum Seekers. Australian Government, August 2012, p.89  
 Department of Immigration and Border Protection (DIBP), 2013b. *Australia's Migration Trends 2011-12*, Canberra, 2013.

As cited in Graeme Hugo, George Tan, and Caven Jonathan Napitupulu, Indonesia as a Transit Country in Irregular Migration to Australia, *Irregular Migration Research Programme Occasional Paper Series*, Australian Government Department of Immigration and Border Protection, 2014, p. 8.

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