

# OUTSOURCING OBLIGATIONS TO DEVELOPING NATIONS: AUSTRALIA'S REFUGEE RESETTLEMENT AGREEMENT WITH CAMBODIA

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*Despite a proclaimed commitment of the 'developed West' to international cooperation in the formation of durable solutions for refugees, a pattern of defensive policy designed to outsource obligations under the 1951 Refugee Convention has emerged. In this context, on 26 September 2014, Australia and Cambodia signed a 'responsibility sharing' agreement for the relocation to Cambodia of recognised refugees who originally sought protection in Australia and were removed to Nauru for processing. Whilst the Cambodia Agreement is of particular relevance in the Australasian region, this paper will analyse its nature and effect against the backdrop of the global trend of burden shifting and the implications of such an agreement for international law. This paper will examine whether the Cambodia Agreement complies with the 1951 Refugee Convention through an analysis of the potential issues with fulfilment of the rights found therein. This requires the establishment of a continuum of jurisdiction pursuant to which it is concluded that transferees under the Cambodia Agreement remain under the effective jurisdiction of Australia. This paper concludes that while a developing country may have the capacity to provide the requisite standard of protection to refugees under the 1951 Refugee Convention, in practice Cambodia fails to do so.*

## I INTRODUCTION

The importance of international cooperation as a basis upon which the global refugee system functions was first recognised in the Preamble to the 1951 *Convention Relating to the Status of Refugees* ('1951 Refugee Convention').<sup>1</sup> Subsequent regional and international instruments, as well as United Nations High Commissioner for Refugees ('UNHCR') Executive Committee Conclusions and

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1 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Preamble para 4.

General Assembly Resolutions,<sup>2</sup> have consistently reiterated the importance of interstate solidarity, often manifested in the creation of bilateral and multilateral ‘burden sharing’ agreements.<sup>3</sup> Despite a stated commitment to this objective, developed states<sup>4</sup> have consistently employed various deterrence, interception, deflection and relocation policies<sup>5</sup> in an attempt to curtail and outsource their international refugee law obligations. As a result, developing states — hosting an estimated 86 per cent of the world’s refugees by the end of 2014<sup>6</sup> — have been forced to assume the burden.

Australia has the greatest number of ‘burden sharing’ agreements aimed at quelling people smuggling and resettling refugees while deflecting and outsourcing its obligations under the *1951 Refugee Convention*.<sup>7</sup> This is so despite the fact that, by international standards, unplanned migration to Australia is comparatively insignificant.<sup>8</sup> Asylum seeker discourse has thus increasingly focused on national security, ‘stopping the boats’ and reproaching ‘queue jumpers’, particularly following the ‘unfortunate confluence of events’<sup>9</sup> of 2001. This included the MV

- 2 See, eg, Executive Committee of the High Commissioner’s Programme, *Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner’s Programme*, 55<sup>th</sup> sess, UN Doc A/AC.96/1003 (12 October 2004) 12–18 [22]; Executive Committee of the High Commissioner’s Programme, *Report of the Sixty-First Session of the Executive Committee of the High Commissioner’s Programme: Report of the Executive Committee*, 61<sup>st</sup> sess, UN Doc A/AC.96/1095 (12 October 2010) 5–7 [13]; Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of Its Thirty-Eighth Session*, UN GAOR, 42<sup>nd</sup> sess, Supp No 12A, UN Doc A/42/12/Add.1 (22 January 1988) 40–2 [205]; Executive Committee of the High Commissioner’s Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 34<sup>th</sup> sess, Supp No 12A, UN Doc A/34/12/Add.1 (6 November 1979) 17–19 [72]; *Assistance to Refugees, Returnees and Displaced Persons in Africa*, GA Res 64/129, UN GAOR, 64<sup>th</sup> sess, 65<sup>th</sup> plen mtg, Agenda Item 41, UN Doc A/RES/64/129 (28 January 2010); *Office of the United Nations High Commissioner for Refugees*, GA Res 64/127, UN GAOR, 64<sup>th</sup> sess, 65<sup>th</sup> plen mtg, Agenda Item 41, UN Doc A/RES/64/127 (27 January 2010).
- 3 For example, EU leaders have stressed that a system of refugee protection ‘should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States’: Council of the European Union, *Presidency Conclusions of the Brussels European Council (4/5 November 2004)* 14292/1/04 Rev 1 (8 December 2004) 17.
- 4 It should be noted that the 2016 World Bank Development Indicators no longer draw a distinction between ‘developed’ and ‘developing’ states: World Bank, *World Development Indicators 2016* (2016) <<https://openknowledge.worldbank.org/bitstream/handle/10986/23969/9781464806834.pdf>>.
- 5 For example, the erection of fences to seal land borders: Amnesty International, *Frontier Europe: Human Rights Abuses on Greece’s Border with Turkey* (10 July 2013) <<http://www.amnestyusa.org/research/reports/frontier-europe-human-rights-abuses-on-greece-s-border-with-turkey-1->>; asylum seeker boat interceptions on the high seas: *Migration Act 1958* (Cth) s 245F(8).
- 6 ‘Main Findings’ [2014] *UNHCR Statistical Yearbook 2014* 8, 9.
- 7 Penelope Mathew, ‘Regionalism, Responsibility and Refugees’ (Speech delivered at the Arts, Education and Law Public Lecture, Griffith University, 17 July 2014) 14; Jennifer Hyndman and Alison Mountz, ‘Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43 *Government and Opposition* 249, 261.
- 8 Sasha Lowes, ‘The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the “Malaysian Solution” Case’ (2012) 12 *Human Rights Law Review* 168, 169, citing Department of Immigration and Citizenship, ‘Asylum Trends: Australia: 2010–11 — Annual Publication’ (Report, Australian Government, 2011) 3.
- 9 Jane McAdam, ‘Australia and Asylum Seekers’ (2013) 25 *International Journal of Refugee Law* 435, 436.

Tampa incident,<sup>10</sup> in which the Australian government refused permission to a Norwegian freight ship carrying 433 rescued asylum seekers to enter Australian waters, and the September 11 terror attacks, which were used to exploit public anxieties surrounding migration and border security.<sup>11</sup> This has fostered a demarcation between the ‘invited’ — refugees resettled through the offshore humanitarian programme<sup>12</sup> — and the ‘uninvited’ — asylum seekers who arrive spontaneously by boat or plane — and the introduction of increasingly punitive measures to deter and penalise the latter.<sup>13</sup>

In response to an increasing number of boat arrivals in 2001, the Howard government passed a suite of bills that cumulatively established the so-called ‘Pacific Solution’.<sup>14</sup> Under this policy asylum seekers who entered Australia by boat were intercepted and transferred to Nauru and Papua New Guinea (‘PNG’), which were treated as ‘declared countries’ for offshore detention and processing. This was intended to deter the influx of asylum seeker boats and to ensure that ‘irregular maritime arrivals’ did not obtain an advantage over ‘invited’ asylum seekers waiting in international camps — a principle labelled ‘the no advantage principle’ in the Report of the Expert Panel on Asylum Seekers.<sup>15</sup> In 2006, a government-dominated Senate committee recommended against the extension

10 On 29 August 2001, Norwegian cargo ship MV Tampa entered Australia territorial waters carrying 433 asylum seekers that had been rescued from a sinking boat heading from Indonesia to Australia three days earlier — thereby violating the Australian government request first to return the rescues to Indonesia and then to maintain its position some 13.5 nautical miles from Christmas Island. Within two hours of entering, Special Armed Services officers were sent to board the ship to render assistance and remove the ship from Australian territorial waters. Australia entered into an agreement with New Zealand and Nauru for the processing of the asylum seekers, during which time a lawsuit was initiated against the Australian Minister for Immigration and Multicultural Affairs on the basis that the rescues were being unlawfully held aboard the Tampa. On 18 September, three judges of the Federal Court of Australia overturned the earlier decision that the intended expulsion was illegal, allowing Australia to proceed to transport the asylum seekers to locations in New Zealand and Nauru for RSD processing: see Tara Magner, ‘A Less than “Pacific” Solution for Asylum Seekers in Australia’ (2004) 16 *International Journal of Refugee Law* 53.

11 McAdam, ‘Australia and Asylum Seekers’, above n 9, 436.

12 These are persons who are subject to persecution in their country of origin, who are typically outside their home country, and who have generally been identified as refugees and referred to Australia by the UNHCR for resettlement. In 2014–15, 11 009 visas were granted under the offshore component of the Humanitarian Programme: Department of Immigration and Border Protection, *Fact Sheet — Australia’s Refugee and Humanitarian Programme* <<https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee>>.

13 McAdam, ‘Australia and Asylum Seekers’, above n 9, 439.

14 The Pacific Solution largely consisted of three pieces of legislation. The first, the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), introduced new border protection powers and retrospectively validated the action taken during the MV Tampa incident. The second, the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), excised territories from the Australian ‘migration zone’ and defined an unauthorised arrival in these excised offshore areas as an ‘offshore entry person’ who was prohibited to apply for a protection visa: at sch 1 cl 3. Finally, the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) authorised Australian officials to detain offshore entry persons or take them to a ‘declared country’: at sch 1 cl 6. It also amended already existing visa categories to exclude applicants viewed as having forfeited protection possibilities in transit to Australia, as well as created new visa categories to provide for ‘offshore entry persons’ and intercepted asylum seekers: at sch 2.

15 Angus Houston, Paris Aristotle and Michael L’Estrange, ‘Report of the Expert Panel on Asylum Seekers’ (Report, Australian Government, August 2012) 48 [3.50] <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf>>.

of the scheme due to mounting criticisms it was an 'ineffective and wasteful' abrogation of Australia's international refugee obligations.<sup>16</sup> However, the legislative framework for the 'solution' remained intact and 'irregular maritime arrivals' were instead processed in the Christmas Island Immigration Reception and Processing Centre.

In July 2010 the Australian government attempted to establish a processing centre in East Timor as part of the Bali Process.<sup>17</sup> The proposal was highly criticised as yet another instance of Australia using a developing country as 'a dumping ground for people it had a responsibility to process and protect'<sup>18</sup> and was ultimately rejected by the East Timorese government. This led the Australian government to enter into negotiations with Malaysia, which culminated in the signing of the *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed and entered into force 25 July 2011) ('*Malaysian Solution*').

This 'groundbreaking'<sup>19</sup> political arrangement proposed the transfer of 800 'offshore entry persons' from Australia to Malaysia where they would be referred to the UNHCR to await refugee status determination ('RSD') with 90 000 other asylum seekers already in Malaysia.<sup>20</sup> In exchange, Australia offered 4000 resettlement places to UNHCR recognised refugees from Malaysia and was to assume greater responsibility for resettling refugees residing in Malaysia.<sup>21</sup> The Australian government maintained it was a 'true burden-sharing agreement, in line with the principles of collective responsibility and cooperation'.<sup>22</sup> However, the High Court of Australia ruled to prevent the transfer in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*<sup>23</sup> on the basis that the Minister had invalidly declared that Malaysia was a specified country to which

- 16 Chris Evans, 'Refugee Policy under the Rudd Government — The First Year' (Speech delivered at the Refugee Council of Australia AGM Forum, Parramatta Town Hall, 17 November 2008) <<https://www.refugeecouncil.org.au/r/spch/081117-AGM-CEvans.pdf>>; Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273, 297.
- 17 Julia Gillard, 'Moving Australia Forward' (Speech delivered at the Lowy Institute, Sydney, 6 July 2010) <[http://www.lowyinstitute.org/files/pubfiles/Moving-Australia-forward\\_Julia-Gillard-PM.pdf](http://www.lowyinstitute.org/files/pubfiles/Moving-Australia-forward_Julia-Gillard-PM.pdf)>.
- 18 Tamara Wood and Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia-Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274, 279.
- 19 Julia Gillard, 'Australia and Malaysia Sign Transfer Deal' (Media Release, 25 July 2011).
- 20 Ibid.
- 21 Julia Gillard and Najib Razak, 'Joint Statement with the Prime Minister of Malaysia' (Press Release, 7 May 2011).
- 22 Julia Gillard, 'Transcript of Press Conference, Canberra' (25 July 2011).
- 23 (2011) 244 CLR 144 ('*Malaysian Solution Case*'). The applicants in the case, citizens of Afghanistan who had arrived in Australian territorial waters by boat from Indonesia and detained pending their transfer to Malaysia, sought an injunction against their removal on the basis that the declaration made by the Minister under s 198A(3)(a) of the *Migration Act 1958* (Cth) was invalid. The Court found in favour of the applicants by a 6:1 majority; a decision described as 'a monumental one which emphasised the critical importance of legal protections for asylum seekers, even in circumstances where Australia is trying to expel them': Refugee Council of Australia, 'Refugee Council Welcomes High Court Ruling' (Media Release, 31 August 2011) <<https://www.refugeecouncil.org.au/mr/110831-HCourt-Malaysia.pdf>>.

asylum seekers could be transferred for processing under s 198A(3)(a) of the *Migration Act 1958* (Cth).<sup>24</sup>

By 2012 the Labor government had revived the Pacific Solution by reopening the processing centres, a year later declaring that all asylum seekers arriving by boat without a visa after 19 July 2013 would be transferred and ultimately resettled in PNG without the possibility of resettlement in Australia.<sup>25</sup> While justified by the humanitarian rhetoric of ‘saving lives at sea’, the delayed resettlement and inferior conditions in the centres, as well as the lack of legal advice and review mechanisms available, demonstrated the commitment to deter and penalise boat arrivals.<sup>26</sup> This ‘hard line’ approach to ‘stopping the boats’ was sustained by the introduction of Operation Sovereign Borders in September 2013, a military-led border security policy pursuant to which asylum seeker boats are intercepted and towed back to Indonesia by Australian military vessels.<sup>27</sup>

It is within this context that on 26 September 2014, Australia and Cambodia signed the *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia*, 54 ILM 350 (signed and entered into force 26 September 2014) (*Cambodia Agreement*) for the relocation to Cambodia of refugees who originally sought protection in Australia and were removed to Nauru for processing. This paper seeks to address the significant and timely legal issue of outsourcing international refugee law obligations through the mechanism of bilateral burden shifting agreements. This paper examines the compliance of the *Cambodia Agreement* with the *1951 Refugee Convention* and illustrates broader concerns with the international refugee protection system. This is particularly pertinent given the international focus and weight given to Australian refugee law and policy at present, amidst recommendations for its adoption and emulation

24 Section 198A(3)(a) provided that the Minister may declare in writing that a specified country:  
 (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and  
 (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and  
 (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and  
 (iv) meets relevant human rights standards in providing that protection ...

25 McAdam, ‘Australia and Asylum Seekers’, above n 9, 439–40; Kevin Rudd, Mark Dreyfus and Tony Burke, ‘Australia and Papua New Guinea Regional Settlement Arrangement’ (Press Release, 19 July 2013).

26 McAdam, ‘Australia and Asylum Seekers’, above n 9, 439. See also Rudd, Dreyfus and Burke, above n 25.

27 See generally Department of Immigration and Border Protection, *Operation Sovereign Borders* <<http://www.osb.border.gov.au>>; Kaldor Centre for International Refugee Law, ‘Factsheet: Turning Back Boats’ (Factsheet, Kaldor Centre for International Refugee Law, 26 February 2015) <[http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet\\_Turning\\_back\\_boats.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Turning_back_boats.pdf)>.

in Europe to resolve the Syrian refugee crisis.<sup>28</sup> Past research has examined the legality and ethicality of regional and international 'burden sharing' mechanisms, with a significant focus on the *Malaysian Solution* in the Australian context. This paper seeks to address the deficiency in current literature regarding the *Cambodia Agreement*, the use of a resettlement arrangement as part of an offshore processing scheme, and the consequent legal implications of both.

Part II of this paper will outline the key terms of the *Cambodia Agreement* before discussing the viability of Cambodia as a place of refuge. In Part III, this paper will examine whether the *Cambodia Agreement* complies with the *1951 Refugee Convention*, both in relation to the core principle of non-refoulement and other rights acquired by the transferees. This requires the establishment of a continuum of jurisdiction, pursuant to which it is concluded that transferees under the *Cambodia Agreement* remain under the effective jurisdiction of Australia. Part IV of this paper will then consider the *Cambodia Agreement* as a durable solution, with a key focus on integration.

## II THE CAMBODIA AGREEMENT AND CAMBODIA AS A PLACE OF REFUGE

### A *The Terms of the Cambodia Agreement*

The nature of the *Cambodia Agreement* is unprecedented in two key ways. Firstly, previous burden sharing agreements have largely concerned the transfer of *asylum seekers* for RSD and consequent resettlement. In contrast, the *Cambodia Agreement* provides for the transfer of *recognised refugees* following offshore processing and their resettlement in a third country. The UNHCR has asserted that this fundamental difference represents 'a worrying departure from international norms',<sup>29</sup> the implications of which will be explored in Part III of this paper. Secondly, despite its presentation as an arrangement for 'resettlement' and 'burden sharing', in practice the *Cambodia Agreement* does not meet any such classification. The UNHCR has asserted that resettlement is intended to represent a commitment of developed states with greater capacity to more equitable responsibility sharing with developing states which host the greatest

28 Former Australian Prime Minister, Tony Abbott, has urged Europe on several occasions to close its borders to migrants and to adopt strong interdiction and push-back policies to 'stop the boats', the people smuggling trade and deaths at sea: Gabrielle Chan, 'Tony Abbott Urges Europe to Adopt Australian Policies in Refugee Crisis', *The Guardian* (online), 28 October 2015 <<https://www.theguardian.com/world/2015/oct/28/tony-abbott-urges-europe-to-adopt-australian-border-policies>>. UK journalist Katie Hopkins stated it was time to get 'Australian' by employing the use of gunships to push back migrant boats 'to their own country': Katie Hopkins, 'Rescue Boats? I'd Use Gunships to Stop Migrants', *The Sun* (online), 17 April 2015 <<https://www.thesun.co.uk/news/1541491/rescue-boats-id-use-gunships-to-stop-migrants>>.

29 UNHCR, 'UNHCR Statement on Australia–Cambodia Agreement on Refugee Relocation' (Press Release, UNHCR, 26 September 2014) <<http://www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html>>.

proportion of refugees.<sup>30</sup> However, Cambodia ‘struggles with severe poverty, under-development, and insufficient infrastructure, services, and capacity to meet the needs of its own citizens’,<sup>31</sup> indicating that resettlement poses a far greater challenge than it would if undertaken by Australia. The implications of these deficiencies, in relation to their impact upon the guarantees to protection under the *1951 Refugee Convention*, will be discussed below at Part III.

The *Cambodia Agreement* is set out in two interdependent instruments:

- The *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia*, 54 ILM 350 (signed and entered into force 26 September 2014) (*‘MoU’*); and
- The *Operational Guidelines for the Implementation of the Memorandum of Understanding on Settlement of Refugees in Cambodia*, 54 ILM 353 (signed and entered into force 26 September 2014) (*‘Operational Guidelines’*).

Permanent settlement will be offered on a voluntary basis to persons who have been determined to be a refugee under the *1951 Refugee Convention* after having undergone RSD processing in Nauru and been provided with information regarding the ‘living conditions, customs, tradition, culture and religion’ of Cambodia.<sup>32</sup> Transferees are to be treated in accordance with the *1951 Refugee Convention* and granted permanent residence status, with all the rights and obligations enumerated by *Sub-Decree on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia* (Cambodia) No 224, 17 December 2009 (*‘Sub-Decree No 224’*).<sup>33</sup> The *MoU* thus includes the right to apply for Khmer nationality by naturalisation, to apply for jobs and run businesses, and to guarantee dependent family members reside in Cambodia as regular migrants.<sup>34</sup>

The *MoU* states that the ‘[r]efugees will be assisted to re-establish their lives so that they become self-sufficient’.<sup>35</sup> This will be achieved through the provision of documentation, ‘language and vocational training’, ‘materials and loans’ for small businesses, packages for ‘daily subsistence’ as well as access to health and other agreed upon services.<sup>36</sup> Cambodia is to determine the number of refugees resettled as well as the timing of their arrival.<sup>37</sup> Australia will bear the

30 ‘Rethinking Durable Solutions’ in Nada Merheb, Sean Loughna and Suresh Unny (eds), UNHCR, *The State of the World’s Refugees 2006: Human Displacement in the New Millennium* (Oxford University Press, 2006) 129, 143; Madeline Gleeson, ‘Factsheet: Agreement between Australia and Cambodia for the Relocation of Refugees from Nauru to Cambodia’ (Factsheet, Kaldor Centre for International Refugee Law, 11 April 2016) <[http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet\\_Cambodia\\_and\\_refugee\\_protection.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia_and_refugee_protection.pdf)>.

31 Gleeson, above n 30, 5.

32 *MoU* cl 4(b).

33 *Ibid* cl 8.

34 *Operational Guidelines* cl 24(a).

35 *MoU* cl 10(a).

36 *Operational Guidelines* cls 19, 21.

37 *MoU* cl 5.

direct resettlement costs and will provide assistance to Cambodia to establish resettlement arrangements as well as developmental and integration support for the resettled refugees and the receiving local communities.<sup>38</sup> This involves the provision of \$15.5 million to the International Organisation for Migration ('IOM') as well as a further \$40 million over four years in development assistance for other aid projects in Cambodia.<sup>39</sup>

## B Cambodia as a Place of Refuge

Despite previously being a refugee producing country, Cambodia has made 'significant progress towards peace, stability and economic growth'<sup>40</sup> over the past 20 years to move towards providing protection not only to its own citizens but further to other refugees fleeing persecution. Unlike Malaysia, Cambodia is a state party to the *1951 Refugee Convention* and its *1967 Protocol*,<sup>41</sup> as well as being party to various international human rights instruments.<sup>42</sup> In 2008, Cambodia established a Refugee Office within its Department of Immigration and in 2009 enacted *Sub-Decree No 224*, which established a procedure for RSD, protects the principle of non-refoulement and entitles recognised refugees those rights enjoyed by migrants within Cambodia and those enumerated in the *1951 Refugee Convention*.

However, grave concerns remain as to the respect of human rights in Cambodia and its willingness to protect refugees. The 2014 *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia* identified many lingering human rights concerns, including impunity regarding the use of military force,<sup>43</sup> the ban

38 Ibid cls 10–12.

39 Chris Uhlmann, Interview with Scott Morrison (Radio Interview, 25 September 2014).

40 Gleeson, above n 30, 1; UNHCR, 'UNHCR Statement on Australia–Cambodia Agreement on Refugee Relocation', above n 29.

41 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('1967 Protocol').

42 Cambodia is party to the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008) ('CRPD'); the *Constitution of the Kingdom of Cambodia* 'recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights': *Constitution of the Kingdom of Cambodia* (Cambodia) 21 September 1993, art 31.

43 Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, 27<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/27/70 (15 August 2014) 7 [19].



of peaceful assembly,<sup>44</sup> the lack of separation of powers<sup>45</sup> and transparency of Parliament,<sup>46</sup> and the continuing conflict over land rights.<sup>47</sup> The Special Rapporteur also identified several emerging issues of concern, including the existence of anti-Vietnamese racism causing violent clashes<sup>48</sup> and the establishment of the *Cambodia Agreement* itself, calling ‘upon Australia to abide by its obligations under the [1951 Refugee] Convention ... rather than export that responsibility to another country’.<sup>49</sup> Cambodia has also been heavily criticised for its treatment of asylum seekers from China, Vietnam and Myanmar,<sup>50</sup> to be further discussed in Part III(2)(a) of this paper.

In light of the current conditions in Cambodia several key human rights organisations — including Human Rights Watch<sup>51</sup> and Amnesty International<sup>52</sup> — have also expressed concerns as to the capacity of Cambodia to protect current and prospective transferees under the *Cambodia Agreement*. On 4 June 2015 the first four transferees, three Iranian refugees and one Rohingya refugee from Myanmar, were transferred to Phnom Penh for resettlement. A fifth refugee, a Rohingya male, was transferred from Nauru to Cambodia five months later in November 2015. By May 2016, four of the five transferees had returned to their countries of origin — where it has been established they have a well-founded fear of persecution — and the *Cambodia Agreement* itself had been labelled ‘a failure’ by Phay Siphon, spokesperson for both the Cambodian government and Council of Ministers.<sup>53</sup>

While poverty rates have fallen steadily in Cambodia, those who have escaped poverty have only done so by a small margin, creating a large portion of ‘near-poor’ and vulnerable<sup>54</sup> — with the loss of just 1200 riels per day (AUD 0.40)

44 Ibid 7 [21].

45 Ibid 10–11 [37].

46 Ibid 11 [42].

47 Ibid 13 [51].

48 Ibid 14 [52]–[53].

49 Ibid 15 [62].

50 Gleeson, above n 30.

51 Elaine Pearson, *Cambodia Is Not Safe for Refugees* (22 May 2014) Human Rights Watch <<https://www.hrw.org/news/2014/05/22/cambodia-not-safe-refugees>>; Human Rights Watch, *Australia: Stop Transfers to Cambodia* (29 April 2015) <<https://www.hrw.org/news/2015/04/29/australia-stop-transfers-cambodia>>; Bill Frelick, *Cambodia and Australia: Treating Refugees as Bargaining Chips* (5 March 2015) *The Diplomat* <<http://thediplomat.com/2015/03/cambodia-and-australia-treating-refugees-as-bargaining-chips>>.

52 Amnesty International, *Australia and Cambodia Should Scrap Asylum Seeker Deal* (1 May 2014) <<https://www.amnesty.org/en/latest/news/2014/05/australia-cambodia-scrap-asylum-seeker-deal>>; Amnesty International, *Cambodia: New Deal with Australia Signs Away Refugee Rights* (25 September 2014) <<https://www.amnesty.org/en/latest/news/2014/09/cambodia-new-deal-australia-signs-away-refugee-rights>>.

53 Lindsay Murdoch and Michael Koziol, ‘Australia’s Cambodia Refugee Resettlement Plan “a Failure”’, *The Sydney Morning Herald* (online), 3 April 2016 <<http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>>; Lauren Crothers, ‘Last Refugee among Group Australia Sent to Cambodia Returns to Home Country’, *The Guardian* (online), 28 May 2016 <<https://www.theguardian.com/australia-news/2016/may/28/last-refugee-among-group-australia-sent-to-cambodia-returns-to-home-country>>.

54 World Bank, *Cambodia: Overview* (September 2016) <<http://www.worldbank.org/en/country/cambodia/overview>>.

threatening to cause Cambodia's poverty rate to double to 40 per cent.<sup>55</sup> This raises the question as to whether countries still facing significant development challenges, such as Cambodia,<sup>56</sup> have the capacity to resettle refugees pursuant to bilateral 'burden sharing' arrangements. It must be acknowledged that there is academic support for the position that the socio-economic conditions and developing status of a country are irrelevant provided the state is a party to the *1951 Refugee Convention* and affords the requisite level of protection to refugees.<sup>57</sup> Indeed, the UNHCR has noted that developing states with political stability, generous asylum policy and respect for the terms of the *1951 Refugee Convention* 'have a role to play in the context of refugee resettlement'.<sup>58</sup> To this end, the UNHCR established a list of recommendations for the creation of such resettlement arrangements, including that programs must be based upon a detailed feasibility study,<sup>59</sup> must have strong institutional foundations<sup>60</sup> and UNHCR presence,<sup>61</sup> involve the concerned refugees in planning and implementation,<sup>62</sup> and ensure that integration is facilitated by adequate training and supervision of community service providers.<sup>63</sup> As will be further explored below in Part III, the *Cambodia Agreement* fails to meet such recommendations and is largely unable to offer the requisite standard of protection under the *1951 Refugee Convention*.

### **III THE CAMBODIA AGREEMENT AND THE 1951 REFUGEE CONVENTION**

As party to both the *1951 Refugee Convention* and its *1967 Protocol* with no current reservations, Australia has agreed to be bound by the terms of these instruments and perform the obligations therein. The following section will

55 Tiina Joosu-Palu, *Cambodian Agriculture in Transition: Opportunities and Risks* (19 August 2015) World Bank <<http://www.worldbank.org/en/news/feature/2015/08/19/cambodian-agriculture-in-transition-opportunities-and-risks>>, citing World Bank, 'Cambodian Agriculture in Transition: Opportunities and Risks' (Report, World Bank, 19 May 2015) 12.

56 World Bank, *Cambodia: Overview*, above n 54.

57 See, eg, Marina Sharpe, 'The *1951 Refugee Convention*'s Contingent Rights Framework and Article 26 of the *ICCPR*: A Fundamental Incompatibility?' (2014) 30(2) *Refugee* 5, 6. Note the Michigan Guidelines go so far as to suggest that while preferable, it is not necessary that a receiving country be a party to the *1951 Refugee Convention* for the protection elsewhere arrangement to respect international refugee law: James C Hathaway, 'The Michigan Guidelines on Protection Elsewhere' (2007) 28 *Michigan Journal of International Law* 207, 211 [2].

58 UNHCR Evaluation and Policy Analysis Unit, *Refugee Resettlement in Developing Countries: The Experience of Benin and Burkina Faso, 1997–2003: An Independent Evaluation*, UN Doc EPAU/2004/04-Rev.1 (April 2004) 4 [12].

59 This 'should aim to examine integration prospects, establish appropriate selection criteria for refugees as well as draw up relevant information and orientation materials for refugees and UNHCR staff involved in the resettlement process; refugees must be fully and accurately informed of conditions and declare themselves ready to proceed on that basis': *ibid* 7 [ix].

60 This is to be achieved 'through the establishment of a multi-year monitoring and evaluation procedure involving all key actors; regular consultations with interested NGO and civil society partners; [and] secondment of experts from other countries with similar experience': *ibid* 7 [xii].

61 *Ibid* 7 [xi].

62 *Ibid* 7 [xiii].

63 *Ibid* 7 [xiv].

assess the contents of these obligations owed by Australia to transferees of the *Cambodia Agreement*, in relation to both the core principle of non-refoulement and other key acquired rights under the *1951 Refugee Convention*. This will include consideration of the provisions, objects and purpose of the *1951 Refugee Convention*, as well as the relevant principles and standards articulated in other international instruments, which inform its interpretation and application.<sup>64</sup>

While it is not within the ambit of this paper to discuss the issue in great detail, it must be noted that obligations under international instruments can be ‘joint and several’. According to the International Law Commission (‘ILC’), each state is responsible for any internationally wrongful act committed by that state.<sup>65</sup> However, as internationally wrongful conduct can result from the concerted actions of several states or where one state acts on behalf of another, each state involved may be held responsible for their actions. Thus, as both Nauru and Cambodia are party to the *1951 Refugee Convention*, they will also be liable for any violations thereof, both jointly with Australia and severally alone.<sup>66</sup> This liability does not impact upon Australia’s liability for breaches of the *1951 Refugee Convention*, which is the focus of the following section.

## **A Article 33(1) Non-Refoulement and the Cambodia Agreement**

Article 33(1) of the *1951 Refugee Convention* provides that no contracting party ‘shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.<sup>67</sup> This principle is reflected in other international human rights instruments,<sup>68</sup> as well as on many accounts being considered to be customary

64 Alice Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *International Journal of Refugee Law* 192, 194.

65 ‘Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001)’ [2001] II(2) *Yearbook of the International Law Commission* 1, 239 (‘ILC Commentaries’).

66 See Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *Australian Yearbook of International Law* 87, 103; John E Noyes and Brian D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *Yale Journal of International Law* 225, 228–9; James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013); *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) annex (‘*Responsibility of States for Internationally Wrongful Acts*’) art 47; *ILC Commentaries*, above n 65, 47; *United Nations Legislative Series: Materials on the Responsibility of States for Internationally Wrongful Acts*, Book 25, UN Doc ST/LEG/SER.B/25 (2012) pt I ch IV.

67 *1951 Refugee Convention* art 33(1).

68 Including arts 6–7 of the *ICCPR*. A state party will be in violation of art 7 if it expels a person to another state and there are substantial grounds for believing that person would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. See also *CAT* art 3; *CROC* arts 6, 37; *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010) art 16.

international law.<sup>69</sup> The right of non-refoulement is also provided for under cl 24(b) of the *Operational Guidelines*, which states that '[r]efugees will not be expelled against their will to other countries'.<sup>70</sup> There are two aspects in relation to the scope of art 33(1) that must be addressed for these purposes, concerning firstly *ratione loci* — the territorial limits of the obligation — and secondly the nature and scope of actions prohibited.

## 1 Ratione Loci

The extraterritorial application of art 33(1) of the *1951 Refugee Convention* remains contested in Australian<sup>71</sup> and foreign domestic jurisprudence. In his commentary relating to the *1951 Refugee Convention*, Nehemiah Robinson concluded that 'if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck'.<sup>72</sup> Similarly, in the case of *Sale v Haitian Centers Council* the US Supreme Court found that art 33(1) of the *1951 Refugee Convention* could not limit presidential powers to direct the Coast Guard to repatriate asylum seekers intercepted on the high seas due to its lack of extraterritorial applicability.<sup>73</sup> In reaching this decision, the majority relied upon the *travaux préparatoires* of the *1951 Refugee Convention*, including assertions that the 'closure of borders was permissible' and the application of the *1951 Refugee Convention* is limited to persons within those borders.<sup>74</sup> This decision was heavily criticised in the dissenting judgment of Blackmun J,<sup>75</sup> as well as by the UNHCR, which

69 It is not within the ambit of this research to discuss in detail the nuances of this debate. In support of this contention, see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 248; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 163; *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 174–5. For the opposing position, see James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 363.

70 *Operational Guidelines* cl 24(b).

71 See, eg, Minister for Immigration and Border Protection and the Commonwealth of Australia, Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014. The Australian government submitted that 'Australia's obligations under the [1951] *Refugees Convention* were not enlivened ... because they arise only with respect to persons who enter Australia's territory': at [20]; Felicity Nelson, 'High Court Decision Leaves Question of International Law Compliance Unresolved', *Lawyers Weekly* (online), 10 February 2015 <<http://www.lawyersweekly.com.au/news/16143-question-of-australia-s-compliance-with-international-law-still-to-be-resolved>>. However, see also UNHCR, 'UNHCR Legal Position: Despite Court Ruling on Sri Lankans Detained at Sea, Australia Bound by International Obligations' (Press Release, 4 February 2015) in which the UNHCR confirmed that the purpose, intent and meaning of art 33(1) unambiguously establish its extraterritorial applicability.

72 Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation — A Commentary* (Institute for Jewish Affairs, 1953) 163.

73 *Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Inc*, 509 US 155 (1993).

74 Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 217.

75 *Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Inc*, 509 US 155 (1993) 188–208.

emphasised that the ‘majority opinion ... does not accurately reflect the scope of Article 33(1)’.<sup>76</sup>

In a 2007 Advisory Opinion, the UNHCR confirmed that the purpose, intent and meaning of art 33(1) is to unambiguously establish its extraterritorial applicability,<sup>77</sup> a view reflected by subsequent state practice as well as by most contemporary authors.<sup>78</sup> This interpretation aligns art 33(1) of the *1951 Refugee Convention* with other international human rights instruments, such as *ICCPR* and *CAT*, ‘under which States remain responsible for conduct in relation to persons “subject to or within their jurisdiction”’.<sup>79</sup> Thus, acknowledging the evolving interpretations of ‘jurisdiction’,<sup>80</sup> it is widely accepted that the relevant consideration is whether or not a refugee is subject to a state’s effective control, authority or jurisdiction.<sup>81</sup> Any alternative interpretation that would permit a state to expel refugees to a country where they are at risk of persecution ‘would be fundamentally inconsistent with the purpose of the *1951 [Refugee] Convention* and *1967 Protocol*’.<sup>82</sup>

Jurisdiction over the transferees under the *Cambodia Agreement* may thus be ascertained in two different ways; firstly as a continuation of the jurisdiction exercised over the transferees as detainees in Nauru, or secondly through the exercise of ‘effective control’ over transferees in Cambodia pursuant to the *Draft Articles of Responsibility of States for International Wrongful Acts* of the ILC.<sup>83</sup>

76 UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol*’ (Advisory Opinion, 26 January 2007) 12 n 54.

77 Ibid 12 [24].

78 See, eg, Thomas Gammeltoft-Hansen, ‘Extraterritorial Migration Control and the Reach of Human Rights’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 113, 114; Goodwin-Gill and McAdam, above n 69, 246; Lauterpacht and Bethlehem, above n 69, 110.

79 Gammeltoft-Hansen, above n 78, 116.

80 UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol*’, above n 76; Lauterpacht and Bethlehem, above n 69, 110–11; Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *Human Rights Law Review* 287, 293.

81 Lauterpacht and Bethlehem, above n 69, 110. See, eg, *ICCPR* art 2(1) which uses the phrase ‘within [a state’s] territory and subject to its jurisdiction the rights recognized in the present Covenant’. The United Nations Human Rights Committee also noted that ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’: Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10].

82 Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33, Para 1 (Prohibition of Expulsion or Return (‘Refoulement’)/Défense d’Expulsion et de Refoulement)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1327, 1362.

83 International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third session*, UN GAOR, 56<sup>th</sup> sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (‘Draft Articles’).

### (a) Continuum of Jurisdiction

In order to establish a continuum of jurisdiction exercised by Australia over the transferees, it is necessary to outline the complex fact scenario leading to their resettlement in Cambodia pursuant to the *MoU*, best separated into three separate yet critically interwoven exercises of jurisdiction.

#### (i) Interception at Sea

Under international law, the concept of territory includes territorial waters within which states exercise complete jurisdiction, usually 12 nautical miles from the shore, unless otherwise subject to exception.<sup>84</sup> Thus the interdiction — ‘the stopping, boarding and detention of a vessel and its passengers’<sup>85</sup> — of asylum seekers in Australian territorial waters amounts to an exercise of Australian jurisdiction.<sup>86</sup> According to the Memorandum of Understanding between the Republic of Nauru and Australia, asylum seekers transferred to Nauru are those who ‘have travelled irregularly by sea to Australia’ or ‘have been intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means’.<sup>87</sup> The transferees are thus refugees who originally sought protection in Australia and were intercepted in Australian territorial waters and removed to the Regional Processing Centre on Nauru (‘RPC’) for RSD.

Further, contemporary jurisprudence and legal commentary suggests that a state will have exercised its jurisdiction over asylum seekers interdicted on the high seas by exerting ‘effective control’. In the recent case of *CPFC v Minister for Immigration and Border Protection*,<sup>88</sup> the UNHCR submitted that an intercepting state ‘is exercising de jure as well as de facto jurisdiction and is subject to the

84 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts 2(1), 3.

85 Asher Hirsch, ‘Interception of Asylum Seekers at Sea: Extraterritorialisation and the Case of *CPFC v Minister for Immigration and Border Protection*’ on Asher Hirsch, *Refugee Law, Human Rights, Etc* (20 April 2015) <[http://asherhirsch.com/2015/04/20/interception-of-asylum-seekers-at-sea-extraterritorialisation-and-the-case-of-cpfc-v-minister-for-immigration-and-border-protection/#\\_ftn127](http://asherhirsch.com/2015/04/20/interception-of-asylum-seekers-at-sea-extraterritorialisation-and-the-case-of-cpfc-v-minister-for-immigration-and-border-protection/#_ftn127)>.

86 See, eg, Guy S Goodwin-Gill, ‘Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific’ (2003) 12 *Pacific Rim Law & Policy Journal* 23, 28–9; Chantal Marie-Jeanne Bostock, ‘The International Legal Obligations Owed to the Asylum Seekers on the *MV Tampa*’ (2002) 14 *International Journal of Refugee Law* 279, 285–6; Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) 28 *Michigan Journal of International Law* 223, 259–61; Papastavridis, above n 74; Maarten den Heijer, ‘Reflections on Refoulement and Collective Expulsion in the *Hirsi Case*’ (2013) 25 *International Journal of Refugee Law* 265, 269–71; Susan Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’ (2006) 18 *International Journal of Refugee Law* 696, 713.

87 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 3 August 2013, cl 9.

88 *CPFC v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

obligation of non-refoulement'.<sup>89</sup> Similarly, in the case of *MV Tampa*,<sup>90</sup> 'both the Federal Court and Full Federal Court of Australia found that the Afghan asylum seekers were under the effective control of the Australian Government'.<sup>91</sup> Foreign domestic jurisprudence has also reflected this principle. For example, in the case of *Hirsi Jamaa v Italy*, the European Court of Human Rights held that the interception of an asylum seeker boat 35 miles off Lampedusa and transfer of the migrants on board to Italian-flagged vessels amounted to 'full and exclusive control'.<sup>92</sup>

Thus, in exercising effective control over the asylum seeker vessels at sea, it is strongly argued that Australia's international obligations are engaged. In the case of the transferees under the *Cambodia Agreement*, this 'effective control' is established by the interception (in either Australian territorial waters or on the high seas) and towing of the asylum seeker boats, or by the boarding of such boats and transfer of the asylum seekers to military vessels or inflatable dinghies and subsequent towing, to Nauru. This amounts to the first exercise of jurisdiction on the continuum.

## (ii) Detainment on Nauru RPC

From the reopening of the Nauru RPC in 2012 until June 2015, a total of 2238 asylum seekers had been transferred for offshore processing, with a total of 637 asylum seekers detained at July 2015.<sup>93</sup> The UNHCR and international commentators agree that Australia has 'retained a high degree of control'<sup>94</sup> over these detainees within the Nauruan RPC, amounting to the second exercise of jurisdiction on the continuum. In its conclusions on *JHA v Spain*, the Committee against Torture affirmed that 'jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention'.<sup>95</sup> Similarly, Gammeltoft-Hansen argues that the ruling of the Grand Chamber of the European Court of Human Rights in *Al Skeini v United Kingdom*<sup>96</sup> can be extended such that an 'agreement allowing one State

89 UNHCR, 'Submissions of the Office of the United Nations High Commissioner for Refugees: Seeking Leave to Intervene as Amicus Curiae', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 15 September 2014, 4–5 [15].

90 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452; *Ruddock v Vadarlis* (2001) 110 FCR 491.

91 Bostock, above n 86, 286.

92 *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132 [73]. See also *Medvedyev v France* [2010] III Eur Court HR 61.

93 Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 6–7 [1.27]–[1.28].

94 Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just As Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669, 687, quoting UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru: 7 to 9 October 2013' (Report, 26 November 2013) 23 [128]. See also Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility?' (2010) 33 *University of New South Wales Law Journal* 337.

95 Committee against Torture, *Communication No 323/2007*, 41<sup>st</sup> sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) 8 [8.2] (*JHA v Spain*).

96 *Al Skeini v United Kingdom* [2011] IV Eur Court HR 99.

to exercise migration control within another State's territory or territorial waters may ... provide a basis upon which to establish extraterritorial jurisdiction'.<sup>97</sup>

The Department of Immigration and Border Protection ('the Department') contested the exercise of Australian jurisdiction on Nauru in its recent submission to the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru ('Select Committee'). The Department declared 'that Nauru "owns and administers" the RPC under Nauruan law, while Australia's role is one of funding, capacity building and support to Nauru in that endeavour'.<sup>98</sup> The secretary of the Department has further asserted that for Australia to be regarded as exercising jurisdiction over the RPC, Nauru must have abrogated its sovereignty and Australia must have acquired it.<sup>99</sup>

However, as highlighted by numerous non-governmental organisation ('NGO') submissions to the Select Committee,<sup>100</sup> several factors exist that establish Australia's 'effective control' over detainees in the RPC. Firstly, Australia arranged for and funded the establishment and construction of the RPC and is also 'solely responsible for the decision to place' all asylum seekers there.<sup>101</sup> Secondly, Australia is intimately involved in the training and mentoring of Nauruan officials undertaking RSD and engages contractors responsible for the provision of services to and daily operation of the RPC. Finally, the Department maintains a staff presence at the RPC and has the authority and capacity to initiate or inhibit any action or decision made there.<sup>102</sup> The Senate Legal and Constitutional Affairs References Committee therefore concluded that this 'degree of involvement ... clearly satisfies the test of effective control in international law'.<sup>103</sup> This

97 Gammeltoft-Hansen, above n 78, 125.

98 Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, above n 93, 11 [2.2], quoting Department of Immigration and Border Protection, Submission No 31 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, May 2015, 4.

99 Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, above n 93, 11–12 [2.4], quoting Evidence to Senate Select Committee on the Recent Allegations Relating to Condition and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra, 20 July 2015, 93 (Michael Pezzullo, Secretary of the Department of Immigration and Border Protection).

100 Andrew & Renata Kaldor Centre for International Refugee Law, Submission No 60 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 30 April 2015, 10; Law Council of Australia, Submission No 57 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 12 May 2015; Human Rights Law Centre and UNICEF Australia, Submission No 58 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 13 May 2015; Castan Centre for Human Rights Law, Submission No 18 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, April 2015, 3; UNHCR, Submission No 19 to Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, 27 April 2015, 4.

101 Law Council of Australia, above n 100, 9 [25].

102 Ibid.

103 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 151 [8.33].



was confirmed by the dissenting judgment of Gordon J in *Plaintiff M68*, who accepted that the detention of the asylum seeker plaintiff on Nauru was ‘funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth’.<sup>104</sup>

On 25 February 2015 an ‘open centre’ arrangement commenced at the RPC pursuant to which a select group of detainees was permitted to enter the Nauruan community within specified hours on specified days.<sup>105</sup> In October 2015 the Nauruan government further announced that the RPC would be a completely open centre, allowing for ‘freedom of movement of asylum seekers 24 hours per day, seven days per week’.<sup>106</sup> Notwithstanding this arrangement, it is still argued that the confinement of the asylum seekers in the RPC amounts to detention under international law.<sup>107</sup> The asylum seekers are not permitted to work or be visited by family members or others and must account for their whereabouts when outside the RPC.<sup>108</sup> Most significantly, asylum seekers are not permitted to leave Nauru, an isolated island occupying just 21 square kilometres.<sup>109</sup> While it is unsettled at international law whether such circumstances amount to detention, the severity of these restrictions suggest that such a conclusion may be reached.<sup>110</sup>

Thus, notwithstanding the ‘open centre’ conditions, in engaging in the above-mentioned conduct, Australia is strongly argued to be effectively controlling the detainment of the transferees in the Nauruan RPC and thus exercising its jurisdiction extraterritorially. This amounts to the second exercise of jurisdiction on the continuum.

### (iii) Resettlement in Cambodia

The relocation — that is, both the physical transfer and then resettlement — of the transferees from the RPC in Nauru to Cambodia is argued to amount to the third exercise of jurisdiction on the continuum. The Australian government has emphasised that while Australia will facilitate and fund the transfer and resettlement, the Nauruan government, Cambodian officials and the IOM, as an intermediary agency, retain jurisdiction over the transferees.<sup>111</sup> However, by analogy to asylum seeker boat interdiction on the high seas and the Nauruan RPC arrangements, Australia is likely to be found to be exercising its jurisdiction.

104 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 152 [352].

105 Government of the Republic of Nauru, ‘Nauru Commences Open Centre Arrangements’ (Media Release, 25 February 2015) <<http://www.naurugov.nr/government-information-office/media-release/nauru-commences-open-centre-arrangements.aspx>>.

106 Government of the Republic of Nauru, *Gazette Published by Authority Extraordinary: Department of Justice and Border Control: Regional Processing — Open Centre*, No 142, 2 October 2015; Peter Dutton, Minister for Immigration and Border Protection, ‘Australia Welcomes Nauru Open Centre’ (Media Release, 5 October 2015) <<http://www.minister.border.gov.au/peterdutton/2015/Pages/australia-welcomes-nauru-open-centre.aspx>>.

107 Dastyari, above n 94, 678–82.

108 Ibid 681.

109 Ibid 680.

110 Ibid.

111 Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 23 February 2015, 146 (Michael Pezzullo).

Transferees under the *MoU* 'voluntarily accept an offer of settlement',<sup>112</sup> however the voluntariness of acceptance in these circumstances must be questioned. In the context of voluntary repatriation of refugees from Nauru, the UNCHR has emphasised that to be voluntary a decision must not be prompted by onerous detention conditions, uncertainty around processes, and delays in accessing a permanent solution.<sup>113</sup> Determining true voluntariness in these conditions is particularly difficult as 'asylum-seekers are reduced to a psycho-social state of hopelessness and despondency'.<sup>114</sup>

Both the former and then current Immigration Ministers, Scott Morrison and Peter Dutton, warned detainees in Nauru by video message that settlement in Australia was not an option ever to be presented to them and emphasised that Cambodia was their 'only long term settlement option'.<sup>115</sup> The video references a letter from the Department distributed to detainees, which presents the opportunity to resettle in Cambodia, 'a safe country, free from persecution and violence' in which its diverse inhabitants 'enjoy all the freedoms of a democratic society'.<sup>116</sup> Minister Morrison had also previously cautioned that refugees refusing to relocate to Cambodia might have their protection claims reconsidered. These statements, in conjunction with pecuniary incentives and the prospect of family reunion in Cambodia, may indicate that decisions to accept settlement offers are not truly voluntary.<sup>117</sup>

While Cambodia must consent to '[t]he number of Refugees settled, and the timing of their arrival into Cambodia',<sup>118</sup> Australian officials present the offer to potential transferees and then facilitate their transfer to Cambodia. According to the *Operational Guidelines*, Australia is to cover the expenses for transferees to travel to Cambodia,<sup>119</sup> and from the airport in Cambodia to their temporary accommodation.<sup>120</sup> In relation to the transferees already transferred under the *MoU*, Australia chartered a flight from Nauru to Darwin, where they were held in the Darwin Airport lodge immigration facility<sup>121</sup> before being flown on an

112 *MoU* cl 4(c).

113 UNHCR, 'UNHCR Mission to the Republic of Nauru: 3–5 December 2012' (Report, 14 December 2012) 10 [41].

114 *Ibid.*

115 Paul Farrell, 'Peter Dutton in Video Plea to Nauru Refugees to Call "Cambodia Settlement Hotline"', *The Guardian* (online), 22 April 2015 <<https://www.theguardian.com/australia-news/2015/apr/22/peter-dutton-in-video-plea-to-nauru-refugees-to-call-cambodia-settlement-hotline>>; Daniel Pye, 'Cambodia and Australia Sign Refugee Deal', *Al Jazeera* (online), 27 September 2014 <<http://m.aljazeera.com/story/2014926124117550180>>.

116 Paul Farrell and Lauren Crothers, 'Australia Prepares to Send First Refugees from Nauru to Cambodia within Days', *The Guardian* (online), 15 April 2015 <<https://www.theguardian.com/australia-news/2015/apr/15/australia-prepares-to-send-first-refugees-from-nauru-to-cambodia-within-days>>.

117 Gleeson, above n 30.

118 *MoU* cl 5.

119 *Operational Guidelines* cl 7.

120 *Ibid* cl 15.

121 Dan Conifer, 'Four Nauru Refugees Flown to Darwin after Agreeing to Cambodia Transfer: Reports', *ABC News* (online), 13 May 2015 <<http://www.abc.net.au/news/2015-05-13/asylum-seekers-en-route-to-cambodia-flown-to-darwin/6467710>>.

Australian commercial flight to Cambodia<sup>122</sup> — a process supervised by Major General Andrew Bottrell, commander of the Joint Agency Task Force for Australia's Operation Sovereign Borders.<sup>123</sup> This may be analogised with the interdiction of asylum seeker boats on the high seas, as discussed above, pursuant to which the Royal Australian Navy exercises physical jurisdiction over asylum seekers by their transfer to Australian lifeboats and subsequent tow-back. The physical transfer of the transferees under the *Cambodia Agreement* is thus argued to amount to an exercise of Australian jurisdiction on the continuum.

By analogy to the RPC in Nauru, Australia is arguably exercising extraterritorial jurisdiction in the resettlement of the transferees in Cambodia. As was the case with the Nauruan RPC, Australia 'procured' and 'caused'<sup>124</sup> the formation of the *MoU* and *Operational Guidelines* in the conception of the *Cambodia Agreement*. Australia will also bear the direct costs related to temporary resettlement and permanent integration of the transferees, including accommodation, health and security services, language and vocational training, and basic subsistence.<sup>125</sup> Australia will further finance the training and support of Cambodian officials to implement the *MoU*, as well as finance support of the implementation by service providers and intermediary agencies, such as the IOM. Similar to the case concerning the Nauruan RPC, the Department will have a staff presence in Cambodia, as its immigration post in Phnom Penh will work with the Cambodian General Department of Immigration to effect resettlement and may further retain a staff presence based on contracts with local service providers.<sup>126</sup>

As noted by the Grand Chamber in *MSS v Belgium*<sup>127</sup> and confirmed in the 2013 UNHCR report on Manus Island, 'the physical transfer of asylum-seekers from Australia to [another state], as an arrangement agreed by two 1951 *Refugee Convention* States, does not extinguish the legal responsibility of Australia for the protection of the asylum-seekers affected by the transfer arrangements'.<sup>128</sup> It must be noted that the *Cambodia Agreement* relates to the transfer of *recognised refugees* for the purpose of *resettlement*, rather than to the transfer of *asylum seekers* for the purpose of *RSD*, as is the case of the Manus Island RPC. However, due to the above exercises of jurisdiction in the interception at sea and detainment of the transferees in Nauru, Australia is argued to have a responsibility to ensure

122 Liam Cochrane, 'First Refugees from Nauru Detention Centre Arrive in Cambodia', *ABC News* (online), 4 June 2015 <<http://www.abc.net.au/news/2015-06-04/refugees-from-nauru-detention-centre-arrive-in-cambodia/6521972>>.

123 Lindsay Murdoch, 'A Villa, Money and One-Way Ticket: Australia's Unwanted Refugees Arrive in Cambodia from Nauru', *The Sydney Morning Herald* (online), 4 June 2015 <<http://www.smh.com.au/world/a-villa-money-and-one-way-ticket-australias-unwanted-refugees-arrive-in-cambodia-from-nauru-20150604-ghglq0.html>>.

124 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 152 [352].

125 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Official Committee Hansard*, 20 October 2014, 60.

126 *Ibid* 61.

127 *MSS v Belgium* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) 83–4 [342].

128 UNHCR, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013' (Report, 26 November 2013) 6 [16].

transferees are treated in accordance with the *1951 Refugee Convention*. As will be discussed below at Part III(B)(2), this contention is arguably strengthened by these contextual differences related to the recognised status of the transferees and the purpose of their transfer. On this understanding, the already established jurisdiction exercised over the detainees in Nauru extends to the transferees relocated to Cambodia. This amounts to the final exercise of jurisdiction on the continuum, establishing Australia's jurisdiction over transferees under the *Cambodia Agreement* in Cambodia.

This paper will now consider whether Australian jurisdiction over the transferees can alternatively be established pursuant to the principle of 'effective control' under international law.

### (b) 'Effective Control' under International Law

While not binding as a body of international law, the ILC *Draft Articles* are widely relied upon to determine issues of international liability for unlawful conduct and have recently been applied to situations of potential breach under the *1951 Refugee Convention*.<sup>129</sup> As such, the *Draft Articles* — specifically arts 5, 8 and 16 — will be relied upon as the criteria according to which this paper considers the attribution of responsibility to Australia pursuant to the implementation of the *MoU*.

Article 5 of the *Draft Articles* states that:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>130</sup>

As noted by the ILC Commentary to the *Draft Articles*, art 5 is 'intended to take account of the increasingly common phenomenon of parastatal entities'.<sup>131</sup> Thus, the relevant 'person or entity' under the *Cambodia Agreement* includes the IOM officials and any other service providers engaged in Cambodia by Australia for the implementation of the *MoU*. While a narrow interpretation of art 5 of the *Draft Articles* would require domestic legislation to 'empower' an entity's exercise of governmental functions, thereby excluding the *Cambodia Agreement* from its ambit, a broader interpretation has been adopted to encompass the lawful delegation of a governmental function to an entity by contract or otherwise.<sup>132</sup> While it is clear that the Australian government has lawfully contracted Cambodian officials to carry out government functions under the *MoU*, the case of the IOM and other service providers engaged in Cambodia is less straightforward.

129 See, eg, Taylor, above n 94.

130 *Draft Articles*, UN Doc A/56/10, art 5.

131 *ILC Commentaries*, above n 65, 42 [1].

132 Taylor, above n 94, 345–6.

In relation to the IOM, if an analogous arrangement to that between Australia and the IOM concerning the PNG RPC were to exist — which includes the purchase of IOM services, ongoing meetings and reports regarding the implementation of the agreement, and site visits to the RPC — it may be sufficient for attribution.<sup>133</sup> However, the Australian government has noted that the IOM is to be contracted by Cambodia itself and Australia is only to pay the costs of that contract.<sup>134</sup> Whether the payment of the contract alone is sufficient to amount to empowerment under art 5 is unclear. In relation to other service providers engaged for the purpose of implementing the *MoU*, the Australian government has indicated that it will itself contract for the provision of services.<sup>135</sup> To ‘be regarded as an act of the State for purposes of international responsibility’<sup>136</sup> the relevant contracts must specifically authorise the conduct as involving the exercise of Australian authority and the conduct undertaken must concern governmental activity. According to the *Draft Articles*, immigration control has been identified as the exercise of a governmental function for the purpose of art 5.<sup>137</sup> Thus, if the service providers are contracted to conduct activity that can be so characterised, their conduct may be attributable to Australia under art 5.

Australia may alternatively be found to have ‘effective control’ of Cambodian and IOM officials as well as service providers engaged in Cambodia, under art 8 of the *Draft Articles*, which states that ‘[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’.

ILC Commentary on the *Draft Articles* suggests that art 8 embodies the ‘*Nicaragua* test’ for attribution of state responsibility,<sup>138</sup> pursuant to which ‘training ... financing ... or otherwise encouraging, supporting and aiding’ of a relevant actor will be sufficient for attribution.<sup>139</sup> The Court in *Nicaragua* noted that ‘a general situation of dependence and support would be insufficient to justify attribution of the conduct’ in question.<sup>140</sup> The Commentary also refers to the observation of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of *Tadić* that the ‘overall control’ required must go ‘beyond the mere financing and equipping’ of the relevant actor.<sup>141</sup>

133 Ibid 345–6.

134 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Official Committee Hansard*, 23 February 2015, 147.

135 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Official Committee Hansard*, 20 October 2014, 61.

136 *ILC Commentaries*, above n 65, 43 [5].

137 Ibid.

138 Ibid 47 [4].

139 Antonio Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *The European Journal of International Law* 649, 652, quoting *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 146 (‘*Nicaragua*’).

140 *ILC Commentaries*, above n 65, 47–8 [4].

141 Ibid 48 [5], quoting *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chambers, Case No IT-94-1-A, 15 July 1999) 1546 [145].

The Cambodian officials, acting under the instructions set out by the *MoU*, are to receive ongoing training, mentoring, financing and support from the Australian government. Under cl 10 of the *MoU*, Australia will directly assist Cambodia to establish suitable resettlement arrangements and assistance to the transferees. Further, under cl 15, the Department will communicate with the Minister of the Interior of the Kingdom of Cambodia in relation to the day-to-day operation of activities undertaken pursuant to the *MoU*, which are themselves to be reviewed as part of the Australia-Cambodia Immigration Forum.<sup>142</sup> Clauses 29–30 of the *Operational Guidelines* further provide that Australia will have direct participation in the determination of activities carried out by Cambodia as well as provide capacity building and assistance to support the implementation of the *MoU*. This assistance arguably goes much further than mere financing and equipping, but rather indicates the relevant ‘overall control’ necessary for attribution of the conduct undertaken by Cambodian officials to Australia under art 8.

It should be noted that the position of the IOM as an independent intergovernmental organisation is different.<sup>143</sup> The IOM constitution contemplates the ‘independent exercise’ of organisational functions,<sup>144</sup> and offices of the IOM are under the control of the Director General, who in performing his or her duties, ‘shall neither seek nor receive instructions from any State’.<sup>145</sup> However, as it is likely that the contract with the IOM contains terms as to the provision of services under the *MoU*, the ‘IOM’s performance of the[se] terms would therefore fit the description of “acting on the instructions of” Australia’.<sup>146</sup> Whether this is the case despite the fact that Australia is not a party to the contract between Cambodia and the IOM, as noted above, is unclear.

Alternatively, it may be argued that Australia is responsible for the treatment of the transferees in Cambodia pursuant to art 16 of the *Draft Articles*, which provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

According to the *ILC Commentaries*, this comprises three elements; the assisting state must have awareness of the circumstances of the conduct, the ‘aid or assistance must be given with a view to facilitating the commission of the act’, and the act must have been wrongful ‘had it been committed by the

142 *MoU* cl 15.

143 Taylor, above n 94, 347.

144 International Organisation for Migration, ‘Constitution and Basic Texts of the Governing Bodies’ (Constitution, IOM, 2014) 18 art 23(2) <[http://publications.iom.int/system/files/pdf/iomconstitution\\_en.pdf](http://publications.iom.int/system/files/pdf/iomconstitution_en.pdf)>.

145 *Ibid* 13 art 15.

146 Taylor, above n 94, 347.

assisting State itself'.<sup>147</sup> As Australia is financing the transfer and resettlement of transferees, this is sufficient to amount to aid and assistance under art 16.<sup>148</sup> Australia's knowledge in relation to the context and conditions of the resettlement in Cambodia, in addition to its significant financial assistance and operational influence, discussed above, may demonstrate knowledge of the circumstances of wrongful acts committed by Cambodia required by art 16(a).<sup>149</sup> Any potential breaches of the *1951 Refugee Convention* committed by Cambodia in relation to the transferees, discussed below, would also amount to an internationally wrongful act pursuant to art 16(b).

It should be noted that if Australia is not found to exercise the requisite control to amount to 'effective control' under the ILC *Draft Articles*, its joint responsibility with Cambodia, discussed above, remains unaffected.<sup>150</sup>

## 2 Nature and Scope of Prohibited Conduct

It is clear from the wording of the phrase 'in any manner whatsoever' that art 33(1) of the *1951 Refugee Convention* contains an absolute prohibition against refoulement, encompassing both direct and indirect, or chain and constructive, refoulement.<sup>151</sup> Thus not only is Australia restricted from forcibly repatriating refugees to their country of origin or another country where there is a well-founded fear of persecution on the grounds enumerated in art 1(A)(2) of the *1951 Refugee Convention*, but further from adopting any course of action that would result in this. There are thus three cases in which transfers executed pursuant to the *Cambodia Agreement* may result in a breach of Australia's non-refoulement obligations.<sup>152</sup>

It may be contended that the chain of refoulement is broken by the 'voluntary' nature of the *Cambodia Agreement* and the acceptance of an offer of transfer by the transferees. However, as discussed above at Part III (A)(1)(a)(iii), the true 'voluntariness' of a decision made in these circumstances is subject to debate. Thus, in relation to the below three cases, this article proceeds on the basis that the decision of transferees to accept the offer of transfer to Cambodia does not impact upon Australia's obligations under art 33(1) of the *1951 Refugee Convention*.

147 *ILC Commentaries*, above n 65, 66 [3].

148 *Ibid* 66 [1].

149 Nikolas Feith Tan, 'Who is Responsible for Asylum Seekers in Offshore Detention? The Death of Reza Barati and Responsibility under International Human Rights Law' (2016) 1 *Universal* 90, 101.

150 Tan, above n 149; see above pt III.

151 Including any form of forcible removal 'including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border' in certain circumstances: UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the *1951 Convention* Relating to the Status of Refugees and Its *1967 Protocol*' (Advisory Opinion, UNHCR, 26 January 2007) 3 [7].

152 A potential fourth case exists if Australia were to transfer ethnic Cambodian refugees back to Cambodia pursuant to the *MoU*.

(a) *Chain Refoulement: Cambodia Forcibly Returns Transferees to Frontiers or Territories where there is a Well-Founded Fear of Persecution on the Grounds Enumerated in Article 1(A)(2) of the 1951 Refugee Convention*

The Special Rapporteur on the Situation of Human Rights in Cambodia noted that Cambodia's past dealings with asylum seekers and refugees suggests transferees may be at risk of chain refoulement.<sup>153</sup>

In December 2009, Cambodia forcibly deported 20 ethnic Uighur asylum seekers back to China, prior to RSD, 'where they were either executed or subjected to lengthy prison sentences'.<sup>154</sup> Their return was carried out despite various reports that the minority group was at risk of persecution at the hands of the Chinese government, and was followed by the signing of 14 lucrative commercial deals between Cambodia and China.<sup>155</sup> Similarly, in March 2015 Amnesty International condemned Cambodia for breaching its non-refoulement obligations by forcibly expelling 45 Montagnards to Vietnam,<sup>156</sup> 36 of which were detained on return with reports that one was beaten by Vietnamese authorities.<sup>157</sup> This was the third group of Montagnard asylum seekers to have been forcibly returned to Vietnam by Cambodia since February 2015.<sup>158</sup>

At present, Cambodia has not expressed an intention to forcibly repatriate transferees under the *Cambodia Agreement*, rather reports suggest Cambodia intends to accept more refugees as a further two Nauruan detainees who have volunteered to be transferred to Cambodia will be interviewed by the Cambodian Interior Ministry's refugee unit in June 2016.<sup>159</sup>

153 Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, 27<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/27/70 (15 August 2014) 15 [58].

154 Cambodian Human Rights Action Committee, 'Press Statement on Cambodia's Refugee Resettlement Agreement with Australia' (Press Statement, 4 June 2014) 1 <[http://www.chrac.org/en/pdf/06\\_04\\_2014\\_case\\_refugees.pdf](http://www.chrac.org/en/pdf/06_04_2014_case_refugees.pdf)>.

155 Asia Pacific Refugee Rights Network, 'Joint Statement on the Principle of Non-Refoulement and the Recent Forced Deportations of the Uighurs from Cambodia and the Lao Hmong from Thailand' (Joint Statement, 14 January 2010) <<https://www.refugeecouncil.org.au/r/s&l/100114-JS-Refoulement.pdf>>.

156 Thousands of indigenous Montagnards have fled to Cambodia since 2001 after Vietnamese authorities violently suppressed protests 'against a litany of grievances including government confiscation of ancestral homelands, the loss of agricultural land to settlers from lowland Viet Nam, lack of freedom of worship, and the denial of other human rights': Amnesty International, 'Cambodia: End Refoulement of Montagnard Asylum Seekers' (Public Statement, ASA 23/1126/2015, 4 March 2015) 2.

157 Amnesty International, 'Cambodia: End Refoulement of Montagnard Asylum Seekers' (Public Statement, ASA 23/1126/2015, 4 March 2015) 1.

158 Ibid.

159 Prak Chan Thul, 'Cambodia Revives Australia Refugee Deal with Planned Nauru Visit', *Reuters* (online), 24 May 2016 <<http://uk.reuters.com/article/uk-australia-cambodia-idUKKCN0YF0PF>>.



*(b) Constructive Refoulement: The Conditions in Cambodia Are Such to Force Transferees to Return to Their Country of Origin*

As noted above, the interpretation of art 33(1) of the *1951 Refugee Convention* has evolved over time to encompass state action indirectly resulting in refoulement.<sup>160</sup> Cambodia's past treatment of asylum seekers raises concerns for the 'voluntary repatriation' of transferees and whether their eventual return, contemplated under cl 25 of the *Operational Guidelines*,<sup>161</sup> would truly be 'voluntary' or would amount to constructive refoulement under the *1951 Refugee Convention*.

In July 2015, as a result of 'difficulties' faced in Cambodia, a further 12 Montagnard asylum seekers returned to Vietnam with the assistance of the UNHCR.<sup>162</sup> Amnesty International has expressed doubt as to the 'voluntariness' of this return and the return of other asylum seekers in similar past instances.<sup>163</sup> The UNHCR Handbook on Voluntary Repatriation emphasises that the decision to return must not be compelled by 'push-factors' in the host country, such as a lack of a recognised legal status and the rights attached to this.<sup>164</sup> However, in the above case, the returned Montagnards had no legal status in Cambodia as their asylum claims were yet to be registered for RSD, which raised 'serious questions about the voluntariness of their return' and 'may have constituted constructive refoulement'.<sup>165</sup>

This is particularly pertinent given recent news reports that four of the five transferees under the *Cambodia Agreement* have already returned to their countries of origin.<sup>166</sup> Reports suggest that a Rohingya transferee was required to denounce his ethnic minority identity as a Rohingya and accept the state forced identification as Bengali on his request to return to Myanmar<sup>167</sup> (a state from which at least 47 000 Rohingya have fled by boat in the 18 months following the signing of the *Cambodia Agreement* alone).<sup>168</sup> The motivations for his return are

160 Penelope Mathew, *Reworking the Relationship Between Asylum and Employment* (Routledge, 2012) 98.

161 The *Operational Guidelines* contemplates voluntary repatriation of transferees 'to their country of nationality, or to another country where the Refugee has a right to enter and reside' within 12 months of departing from temporary accommodation: *Operational Guidelines* cl 25.

162 Amnesty International, 'Cambodia: Refoulement and the Question of "Voluntariness"' (Public Statement, ASA 23/2157/2015, 24 July 2015).

163 Ibid.

164 Ibid, quoting UNHCR, 'Handbook: Voluntary Repatriation: International Protection' (Handbook, UNHCR, 1996) ch 2.3.

165 Amnesty International, 'Cambodia: Refoulement and the Question of "Voluntariness"', above n 162.

166 Thul, above n 159; Dan Conifer, 'First Refugees Sent to Cambodia Under \$55m Deal Have Left', *ABC News* (online), 27 May 2016 <[http://www.abc.net.au/news/2016-05-27/first-refugees-sent-to-cambodia-under-\\$55m-deal-have-left/7452542](http://www.abc.net.au/news/2016-05-27/first-refugees-sent-to-cambodia-under-$55m-deal-have-left/7452542)>.

167 Mech Dara and Zsombor Peter, 'Burma Processing Refugee's Request to Return', *The Cambodia Daily* (online), 8 September 2015 <<https://www.cambodiadaily.com/news/burma-processing-refugees-request-to-return-93598>>.

168 The Rohingya are a predominantly Muslim stateless ethnic minority, who 'live under virtual apartheid with their movements strictly limited and little access to health care and education': Abby Seiff and David Boyle, 'Will a Rohingya Refugee Go Full Circle after Fleeing Myanmar?', *IRIN* (online), 10 September 2015 <<http://www.irinnews.org/report/101981/will-a-rohingya-refugee-go-full-circle-after-fleeing-myanmar>>.

unclear, however the Refugee Action Coalition has asserted that '[t]he fact that in the end he's become isolated and desperate enough to try and find another alternative, confirms that there is no viable resettlement arrangement with Cambodia'.<sup>169</sup> According to Sister Denise Coghlan, director of the Jesuit Refugee Service in Cambodia, the challenging conditions and quality of life in Cambodia for refugees and asylum seekers, discussed further below at Part III (A)(2)(b), is a factor relevant to their return to their country of origin or a third country.<sup>170</sup> Ian Rintoul, of the Refugee Action Coalition, has noted that an Iranian couple transferred under the *Cambodia Agreement* returned to Iran last year because '[t]hey were separated from the Cambodian community and felt that the promises that had been made to them about the conditions in Cambodia had not been kept'.<sup>171</sup> If it is found that these 'push factors' in Cambodia forced the return of the transferees to their country of origin, it cannot be regarded as voluntary and will thus amount to constructive refoulement under the *1951 Refugee Convention*.

*(c) Direct Refoulement: The Conditions in Cambodia Are Such to Amount to 'Persecution' under Article 33(1) of the 1951 Convention*

As reaffirmed in the *Malaysian Solution Case*,<sup>172</sup> the norm of non-refoulement can be violated where the conditions in a third country to which a refugee has been sent are such to amount to 'persecution' under art 33(1). Thus if it is found that the transferees under the *Cambodia Agreement* are exposed to this threshold of harm in Cambodia, Australia may have breached its non-refoulement obligation. Before assessing whether the conditions in Cambodia are such to meet this threshold, it must be first determined whether Australia can be regarded as the 'sending country' in order to be held responsible for refoulement of transferees. As established above under the continuum of jurisdiction at Part III (A)(1)(a), Australia is exercising its jurisdiction in the physical transfer and resettlement of transferees from the Nauruan RPC to Cambodia. Pursuant to this exercise of jurisdiction, it is argued that Australia is a 'sending country' for these purposes.

There is general acceptance at international law that a threat to life or freedom on grounds enumerated in art 1(A)(2) of the *1951 Refugee Convention* will amount to persecution.<sup>173</sup> Other commentators suggest that the deprivation of socio-economic rights, such as discrimination in employment opportunities and material sustenance, ought to be recognised as a form of persecution for the

169 Ibid.

170 Sylvia Varnham O'Regan, 'Advocates Criticise Cambodia Refugee Agreement after Couple Return to Iran', *SBS* (online), 9 March 2016 <<http://www.sbs.com.au/news/article/2016/03/09/advocates-criticise-cambodia-refugee-agreement-after-couple-return-iran>>.

171 Ibid.

172 The High Court confirmed that states are prohibited from returning asylum seekers or refugees 'to any other country where they would be exposed to the same harm': *Malaysian Solution Case* (2011) 244 CLR 144, 224 [214] (Kiefel J) (emphasis added).

173 UNHCR, 'Commentary on the Refugee Convention 1951: Articles 2–11, 13–37' (Commentary, UNHCR, October 1997) art 33 [4]; Goodwin-Gill and McAdam, above n 69.

purpose of art 33(1).<sup>174</sup> If the latter position is accepted, transferees may be at risk of persecution given the current socio-economic conditions in Cambodia and the experience of the 68 refugees presently residing in the country.

The 2009 Parallel Report submitted by the NGO Working Group to the United Nations Committee on Economic, Social and Cultural Rights, concluded that Cambodia is failing to respect the obligations imposed by ICESCR and ‘urge[d] the Government to adopt immediate and progressive measures to secure adequate living conditions for all Cambodians’.<sup>175</sup> While cl 10(a) of the *MoU* provides that transferees will be assisted to become self-sufficient in Cambodia, Australian funded support services will only be provided for 12 months following departure from temporary accommodation.<sup>176</sup> It is unclear whether transferees will be able to sustain themselves following this period.<sup>177</sup> Phay Siphon, spokesman for the Cambodian Government and Council of Ministers, has acknowledged that Cambodia cannot provide social services comparable to ‘ultra-modern governments’ nor sufficient funding to support the transferees.<sup>178</sup> According to Human Rights Watch, if transferees become destitute due to this lack of support they are at risk of arbitrary detention and even targeting due to their ethnicity or nationality.<sup>179</sup>

Human rights organisations have also noted that ‘everyday life is a struggle’ for the 68 refugees and asylum seekers currently residing in Cambodia, many of whom are unable to gain employment as the government has failed to issue them working permits and residency cards.<sup>180</sup> While the *MoU* provides that transferees will be furnished with the right to apply for jobs and run businesses, this failure ‘demonstrates the depth of the government’s lack of care for refugees it has agreed to protect’.<sup>181</sup> This will be discussed in greater detail below in reference to the acquired rights owed to transferees under the *1951 Refugee Convention*.

174 See, eg. Alice Edwards, ‘The Right to Work for Refugees and Asylum-Seekers: A Comparative View’ (Discussion Paper No 1, UNHCR, 2006) 6; Penelope Mathew, above n 160, 98; Michelle Foster, ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ [2009] *New Zealand Law Review* 257.

175 NGO Working Group, ‘Parallel Report on Cambodia’ (Report, NGO Working Group, April 2009) 66 <[http://www2.ohchr.org/english/bodies/cescr/docs/ngos/NGO\\_WG\\_Cambodia\\_CESCR42.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/NGO_WG_Cambodia_CESCR42.pdf)>.

176 Madeline Gleeson, ‘Factsheet: Agreement between Australia and Cambodia for the Relocation of Refugees from Nauru to Cambodia’ (Factsheet, Kaldor Centre for International Refugee Law, 11 April 2016) 4.

177 Maria O’Sullivan, ‘Explainer: Does the Cambodia Refugee Deal Comply with the Convention?’, *The Conversation* (online), 30 September 2014 <<https://theconversation.com/explainer-does-the-cambodia-refugee-deal-comply-with-the-convention-29639>>.

178 Lindsay Murdoch and Michael Koziol, ‘Australia’s Cambodia Refugee Resettlement Plan “A Failure”’, *The Sydney Morning Herald* (online), 3 April 2016 <<http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>>.

179 Human Rights Watch, ‘World Report 2014’ (Report, Human Rights Watch, 2014) <[https://www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/wr2014_web_0.pdf)>; O’Sullivan, above n 177.

180 Cambodian Human Rights Action Committee, above n 154.

181 Zsombor Peter, ‘Despite IOM Deal, Residency Eludes Refugees’, *The Cambodia Daily* (online), 17 June 2015 <<https://www.cambodiadaily.com/news/despite-iom-deal-residency-eludes-refugees-85689>>.

## B Acquired Rights Under the 1951 Refugee Convention

As the transferees are necessarily recognised refugees under the *1951 Refugee Convention*,<sup>182</sup> not only are they entitled to prohibition against non-refoulement, but they further acquire a set of associated rights to ensure a dignified subsistence in the state of asylum. This was confirmed by the High Court in the *Malaysian Solution Case*, which rejected the Australian government's submission that the asylum seeker transfers need only satisfy the obligation of non-refoulement, and concluded that the destination state must provide protection for all 'other rights which Australia is bound to accord to persons found to be refugees'.<sup>183</sup>

As noted by Legomsky and Nagel, and supported by the Michigan Guidelines on Protection Elsewhere ('Michigan Guidelines'),<sup>184</sup> '[d]ifferent subgroups of refugees enjoy different sets of rights'.<sup>185</sup> For example, while the right to non-refoulement is guaranteed to all refugees whether or not they are lawfully present in the state of refuge, the right to wage-earning employment is only to be enjoyed by those refugees 'lawfully staying' in the territory.<sup>186</sup> Thus, the entitlement to and level of enjoyment of these associated rights — commonly referred to as 'acquired rights' — differs depending on the right in question and the standard of protection applied. The following section will first consider the specific rights owed to transferees under the *1951 Refugee Convention* and the standard to be applied to determine the level at which these rights ought to be enjoyed. This paper will then discuss whether this is achievable in the context of the *Cambodia Agreement* in relation to several key acquired rights.

### 1 Subgroups of Entitlement

In order to determine which rights under the *1951 Refugee Convention* transferees are entitled to, this paper will consider the subgroups first demarcated by Hathaway,<sup>187</sup> which categorise individuals according to their class of presence in their host state. These subgroups include 'simple presence', 'lawful presence', 'lawful residence' and 'habitual residence'. This delineation is largely reflective

182 *MoU* cl 4(a).

183 *Malaysian Solution Case* (2011) 244 CLR 144, 197 [119].

184 Hathaway, 'The Michigan Guidelines on Protection Elsewhere', above n 57, 215 [8]–[9].

185 Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567, 639. See also Goodwin-Gill and McAdam, above n 69, 524–5.

186 *1951 Refugee Convention* arts 33(1), 17 respectively.

187 Hathaway, *The Rights of Refugees under International Law*, above n 69, 173–92. See also Goodwin-Gill and McAdam, above n 69, 524–5; Legomsky, above n 185, 639.

of the ‘levels of attachment’ to the state of asylum outlined in the Michigan Guidelines<sup>188</sup> and widely adopted in contemporary literature.<sup>189</sup>

The first subgroup (‘simple presence’), comprising those refugees physically within the territory of a state, is entitled to freedom from discrimination on the grounds of race, religion or country of origin, access to public education, the courts and identity papers, as well as freedom of religion and certain property rights.<sup>190</sup> Those within the second subgroup (‘lawful presence’), including refugees whose temporary presence in the state is regarded as ‘lawful’, are additionally entitled to freedom of movement, the right to be self-employed, and the right not to be expelled from the state of asylum, barring specific exceptions.<sup>191</sup>

The third subgroup (‘lawful residence’), including refugees who are lawfully resident in a state of asylum, is additionally entitled to freedom of association, wage-earning employment, support of liberal professions, housing, public relief, social security and labour law protection, and the insurance of travel documents.<sup>192</sup> The fourth and final subgroup (‘habitual residence’), comprising refugees who have security of status and entitlement to remain or return within the state, is additionally entitled to access to administrative assistance, legal assistance and exemption from the payment of security for legal costs, and protection of artistic rights and industrial property.<sup>193</sup> Where the period of residence is greater than three years, the fourth subgroup is further entitled to exemption from the requirements of legislative reciprocity and labour restrictions imposed on aliens.<sup>194</sup>

According to the *MoU*, ‘Cambodia will grant Refugees ... permanent residence status, with all of the rights and obligations of permanent residency’.<sup>195</sup> It is clear that this amounts to a level of attachment greater than ‘simple presence’. In order to determine whether the transferees under the *Cambodia Agreement* are ‘lawfully resident’, rather than simply ‘lawfully present’, Goodwin-Gill and McAdam have suggested that a relevant consideration includes the realisation of residency status and access to travel documents.<sup>196</sup> Thus as transferees are to be granted permanent residency status pursuant to cl 8 of the *MoU* and issued with the documents required for travel under cl 19 of the *Operational Guidelines*, they are at least entitled to the rights afforded to the first three levels of attachment.<sup>197</sup>

188 Hathaway, ‘The Michigan Guidelines on Protection Elsewhere’, above n 57, 215 [8].

189 See, eg, Hathaway, *The Rights of Refugees under International Law*, above n 69, 171–90; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 14; Alice Edwards, ‘Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the “International Protection” of Refugees’ in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers, 2008) 421, 428.

190 *1951 Refugee Convention* arts 3–4, 13, 16(1), 22, 27, 31, 33.

191 *Ibid* arts 18, 26, 32.

192 *Ibid* arts 15, 17, 19, 21, 23–4, 28.

193 *Ibid* arts 14, 16(2), 25.

194 *Ibid* arts 7(2), 17(2).

195 *MoU* cl 8.

196 Goodwin-Gill and McAdam, above n 69, 526.

197 Including rights enumerated in the *1951 Refugee Convention* arts 3, 4, 13, 15, 16(1), 17–19, 21, 22–4, 26–8, 32–3.

Transferees are likely to additionally be entitled to the rights afforded to the level of attachment of 'habitual residence'.<sup>198</sup> According to Hathaway, 'habitual residence' requires 'durable residence' — a level of attachment dependent upon whether the residence is 'continuous' and of adequate duration.<sup>199</sup> The exact minimum time period required for residence to be considered 'durable' is unsettled. However, it can be inferred from common state practice that a refugee must be a resident for a period that is at least more than three months, but can be less than three years.<sup>200</sup> The *MoU* states that 'Cambodia will provide ... *permanent* settlement opportunities for Refugees'<sup>201</sup> and the *Operational Guidelines* contemplate the provision of settlement services to transferees following the first 12 months of departure from temporary accommodation.<sup>202</sup> This suggests that the duration of the transferee's stay in Cambodia may be regarded as 'durable', which entitles transferees to the enjoyment of the full set of rights afforded to 'habitual residents' under the *1951 Refugee Convention*.

## 2 The Standard of Protection Owed to Transferees

The UNHCR has asserted that, in the case of third country transfers, the *1951 Refugee Convention* is 'more concerned to ensure a certain standard of protection' exists in the state of asylum, rather than to simply ensure that protection is theoretically available.<sup>203</sup> It is clear that Cambodia, 'while also a party to the [*1951 Refugee*] *Convention*, is not on equal footing with Australia in terms of rights, opportunities and international standards of integration'.<sup>204</sup> However, it is unclear whether this unequal footing impacts upon the fulfilment of both Cambodia's and Australia's protection obligations towards the transferees under the *Cambodia Agreement*. This ambiguity is largely owing to the uncertainty surrounding the standard of protection required in a destination state — as well

198 Ibid arts 14, 16(2), 25 as well as 7(2), 17(2) if the residency period is longer than three years.

199 Hathaway, *The Rights of Refugees under International Law*, above n 69, 190. It should be noted that calculating the duration, '[p]eriods of residence in an intermediate country are not to be credited to the satisfaction of a durable residence requirement': Stefanie Schmahl, 'Article 10 (Continuity of Residence/Continuité de Résidence)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 805, 814. Thus the period of time a transferee was detained in Nauru RPC will not be relevant to this determination.

200 Three months is the 'almost universally accepted' period beyond which an alien is required to have a visa to remain in a country, thus a stay of longer than three months may amount to residency: see discussion in Lieneke Slingenbergh, *The Reception of Asylum Seekers Under International Law: Between Sovereignty and Equality* (Hart Publishing, 2014) 127. As the *1951 Refugee Convention* contemplates additional rights to be granted to refugees whose habitual residency extends beyond three years, it seems logical to conclude that a duration falling short of this, yet still amounting to more than 'lawful residence', is sufficient given the suite of rights afforded to 'habitual residents' of less than three years.

201 *MoU* Preamble (emphasis added).

202 *Operational Guidelines* cl 21.

203 Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 585<sup>th</sup> Meeting*, UN GAOR, 585<sup>th</sup> mtg, UN Doc A/AC.96/SR.585 (15 October 2004) 7 [28].

204 Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, 27<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/27/70 (15 August 2014) 15 [58].

as the responsibilities owed by a sending state — in refugee and asylum seeker transfers, which differs according to the context of the transfer.

Contemporary literature has focused on this issue primarily in relation to *asylum seekers* within two key areas — ‘safe third country’ transfers (‘STC’) and the principle of ‘internal flight alternative’ (‘IFA’). Thus, while acknowledging that transferees are potentially entitled to a greater standard of protection pursuant to their recognised refugee status and the exercise of Australian jurisdiction under the continuum of jurisdiction established in Part III (A)(1)(a), this section will draw upon these contexts to consider the level of protection owed under the *Cambodia Agreement*. This paper will then consider the possibility of ‘equivalent protection’ as a standard of protection required for the transfer of recognised refugees to a third country for settlement and the standard imposed by the *1951 Refugee Convention*.

### (a) ‘Safe Third Country’ Transfers and the Internal Flight Alternative

There is no explicit authorisation contained in the *1951 Refugee Convention* for STC, that is, the removal of asylum seekers from the country in which they originally sought protection to a third country deemed ‘safe’ for offshore RSD. Rather, the STC concept arises from a responsibility-shifting interpretation of the *1951 Refugee Convention*, namely, the omission of a right to be granted asylum in the country of first asylum has been identified as the authority for the legality of the concept.<sup>205</sup> The notion of ‘effective protection’ is widely accepted and applied in international commentary as ‘the predicate for returning an asylum seeker to a third country’.<sup>206</sup> However, the standard of protection in a third country required to fulfil this notion remains ambiguous.<sup>207</sup>

In the *Malaysian Solution Case* the High Court considered the rights owed to transferred asylum seekers through deliberation of the meaning of the term ‘protection’ found in the *Migration Act 1958* (Cth) s 198A(3)(a). The judgments of French CJ and Kiefel J ‘drew an arbitrary hierarchy’ between the obligation of

205 Michelle Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25(2) *Refugee* 64, 65–6; Susan Kneebone, ‘The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The “Safe Third Country” Concept’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 129.

206 Legomsky, above n 185, 573. See also Hathaway, ‘The Michigan Guidelines on Protection Elsewhere’, above n 57, 211 [4]; UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ (Summary Conclusions, UNHCR, February 2003) 3–4 [15] <<http://www.refworld.org/docid/3fe9981e4.html>>; Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, above n 86, 226–7; Rosemary Byrne and Andrew Shacknove, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 *Harvard Human Rights Journal* 185, 186; Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’’, above n 86, 698.

207 See, eg, Legomsky, above n 185; Kate Ogg, ‘A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of “Effective Protection”’ (2013) 12 *Macquarie Law Journal* 109, 110; Susan Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’’, above n 86; UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’, above n 206; Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 585<sup>th</sup> Meeting*, UN GAOR, 585<sup>th</sup> mtg, UN Doc A/AC.96/SR.585 (15 October 2004) 7 [28].

non-refoulement and other rights established in the *1951 Refugee Convention*.<sup>208</sup> However, the lead majority of Gummow, Hayne, Crennan and Bell JJ concluded that the term 'protection' in s 198A(3)(a) required the 'provision of protections of all of the kinds which parties to the [1951] *Refugees Convention* ... are bound to provide to such persons'.<sup>209</sup> Despite failing to specify the protections required, the position forms a 'strong precedent' that asylum seekers transferred pursuant to such agreements are owed not only the right of non-refoulement but also other positive rights set out in the *1951 Refugee Convention*.<sup>210</sup>

Following the High Court decision in the *Malaysian Solution Case*, the Australian Government repealed s 198A of the *Migration Act 1958* (Cth) — effectively removing the domestic law requirement that a country designated as an 'off shore processing country' comply with international human rights standards.<sup>211</sup> Notwithstanding the effect of the repeal at domestic law, the High Court's interpretation of the substance of Australia's protection obligations under the *1951 Refugee Convention* at international law remains cogent.

This view is supported by the Michigan Guidelines, which adopt the position that 'effective protection' requires compliance with all of the obligations set out in the *1951 Refugee Convention*,<sup>212</sup> and further by international commentary and jurisprudence in the context of the IFA principle. The IFA principle involves an assessment of whether it would be 'reasonable' for an asylum seeker to pursue 'meaningful protection' by relocating to another region in his or her country of origin.<sup>213</sup> In order to satisfy the 'reasonableness test',<sup>214</sup> not only must an asylum seeker be protected from persecution, but further the conditions in the alternative location must 'be such that a relatively normal life, in the context of the country of origin, can be led'.<sup>215</sup> Similarly, the UNHCR has noted that 'protection' in this context goes beyond physical security but requires the respect of basic civil, political and socio-economic human rights, as stipulated by key human rights instruments.<sup>216</sup> Hathaway and Foster further refine this position,

208 Ogg, above n 207, 119; *Malaysian Solution Case* (2011) 244 CLR 144, 181–2 [63] (French CJ), 232 [240] (Kiefel J).

209 *Malaysian Solution Case* (2011) 244 CLR 144, 197 [119].

210 Ogg, above n 207, 118.

211 Gillian Triggs, *The Government, the High Court and the Migration Act* (10 April 2015) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/opinions/government-high-court-and-migration-act>>.

212 Hathaway, 'The Michigan Guidelines on Protection Elsewhere', above n 57, 211 [1].

213 UNHCR, 'The Internal Flight Alternative Practices: A UNHCR Research Study in Central European Countries' (Research Study, UNHCR, June 2012) 4 <<http://www.refworld.org/docid/4ffaabdf2.html>>; Rodger Haines, 'Gender-Related Persecution' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 319, 337.

214 See, eg, *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 42 [79]; Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 *International Journal of Refugee Law* 179, 191–4; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 342–60.

215 Marx, above n 214, 199.

216 UNHCR, 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR' (1995) 1(3) *European Series* 1, 64.



asserting that '[t]he required standard is not respect for *all* human rights, but rather provision of the rights codified ... in Articles 2–33' of the *1951 Refugee Convention*.<sup>217</sup>

It must be emphasised that the commentary regarding STC transfers and the IFA can only be used as guidance for this context as it is primarily concerned with the protection afforded to *asylum seekers*. Thus, as transferees under the *Cambodia Agreement* are *recognised refugees*, it is clear they are at least entitled to the enjoyment of all the rights enumerated in arts 2–33 of the *1951 Refugee Convention* according to their 'level of attachment' to Cambodia.

*(b) The Possibility of 'Equivalent Protection' and the Standard Imposed by the 1951 Refugee Convention*

Transferees under the *Cambodia Agreement* have a greater 'level of attachment' to Cambodia — and are thereby entitled to the enjoyment of a broader array of rights under the *1951 Refugee Convention* — than asylum seekers transferred pursuant to a STC agreement for RSD, or found to be able to relocate domestically according to the IFA. While it is necessary that asylum seekers transferred to a third country for RSD have access to 'effective protection', including adequate and fair RSD processes in addition to the standard discussed above, their presence in the third country is temporary and for the limited purpose of RSD. In contrast, transferees under the *Cambodia Agreement* are to be transferred for long-term settlement purposes with an ultimate goal of integration. It is thus arguable that as recognised refugees being transferred to a third country, transferees under the *Cambodian Agreement* are entitled to a higher standard of protection than required under IFA and STC principles.

As transferees were determined to be refugees pursuant to Australian jurisdiction exercised in Nauru, established above in Part III (A)(1)(a), there is some support for the view that they are entitled to an equivalent standard of protection, or level of fulfilment of acquired rights, to that which they would have received if they were to be resettled in Australia.<sup>218</sup> This position highlights the problematic nature of bilateral refugee transfer agreements that shift the responsibility of a developed state under the *1951 Refugee Convention* to a developing one. As will be further discussed below, Cambodia lacks the capacity to afford transferees the level of protection required by the *1951 Refugee Convention*, much less the capacity to afford the same level of fulfilment that could be expected in Australia.

217 James C Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 357, 408 (emphasis in original).

218 See, eg, the dissenting judgement of Lee J in the case of *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73, 89 [50] provided that 'equivalent protection to that required of a Contracting State under the [1951 Refugee Convention] must be secured to an applicant in a third country'; Foster has considered that state parties to a bilateral 'protection elsewhere' scheme, such as the *Cambodia Agreement*, should 'have reasonably comparable systems' of refugee protection: Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law', above n 205, 65.

Thus, while it is arguable that transferees are entitled to an equivalent standard of protection to that which would be offered in Australia, the result in practice would be incongruous. This is so because transferees would be furnished with greater rights fulfilment and quality of life than that experienced by Cambodian nationals due to the manifest disparity between the socio-economic conditions in Australia and Cambodia. The proposition further relies on the achievability of such a standard in Cambodia, which, as discussed at Part III (B)(3), is dubious.

Putting aside the implications of the continuum of jurisdiction established in Part III (A)(1)(a) and the possibility of 'equivalent protection' being afforded to transferees, a minimum standard of protection can be inferred from the wording of the *1951 Refugee Convention* itself. As noted by Hathaway and Foster, the highest standard of protection required by the *1951 Refugee Convention* is that which a state of asylum affords to its own citizens.<sup>219</sup> Thus, the standard of protection required varies according to the right in question, as defined by either a contingent (upon a transferee's level of attachment to or 'strength of the bond' with the state of asylum)<sup>220</sup> or absolute standard of attainment.

Several rights protected in the *1951 Refugee Convention* are expressed in absolute terms 'either because the drafters deemed them fundamental to the most basic definition of protection, or because a contingent standard of respect is unviable given their refugee-specific nature'.<sup>221</sup> These include the rights to non-discrimination, personal status, access to the courts, administrative assistance and identity papers, lack of restrictions imposed due to unlawful status, non-ouster, and naturalisation.<sup>222</sup> Rights that are defined with a contingent standard are separated according to the treatment to be afforded by the state of asylum. This includes that which is equivalent to treatment afforded to 'nationals of the destination country' in regards to the ability to undertake primary education, religious freedom, access to rationing systems, and fiscal equity,<sup>223</sup> and that which is afforded to 'aliens generally in the destination country' in regards to property rights and access to secondary education.<sup>224</sup> 'Most favoured nation' treatment is to be afforded with respect to the right to engage in wage-earning employment and freedom of association.<sup>225</sup>

This paper will now consider whether, in practice, Cambodia is likely to afford the relevant rights to the transferees according to the applicable standard, discussed above.

219 Hathaway and Foster, *The Law of Refugee Status*, above n 210, 47. This is reflected in *MoU* cl 10(c).

220 Sharpe, above n 57, 6.

221 Hathaway and Foster, above n 210, 47.

222 *1951 Refugee Convention* arts 3, 12, 16, 25, 27, 31, 33–4 respectively.

223 Hathaway and Foster, above n 210, 47; *1951 Refugee Convention* arts 22, 4, 20, 29 respectively.

224 Hathaway and Foster, above n 210, 47; *1951 Refugee Convention* arts 13, 22 respectively.

225 Hathaway and Foster, above n 210, 47; *1951 Refugee Convention* arts 17(1), 15 respectively.

### 3 Fulfilment of Relevant Rights to the Applicable Standard in Cambodia

Hathaway and Foster assert that where a state wishes to transfer its protective responsibilities under the *1951 Refugee Convention*, it has a ‘duty of “anxious scrutiny” to ensure that’ acquired rights are respected in the destination state.<sup>226</sup> Thus, as the state responsible for the refugee transfers under the *Cambodia Agreement*, Australia must engage in a high level of scrutiny of Cambodia’s record of respect for each of the rights acquired by the transferees.<sup>227</sup> To illustrate the deficiencies of the *Cambodia Agreement* in the fulfilment of the standard required under the *1951 Refugee Convention*, this paper will consider several of the rights most central to the subsistence and integration of transferees in Cambodia — including the rights to employment and issuance of required documentation. In doing so, this section will consider Cambodia’s past treatment of refugees and record of compliance with the *1951 Refugee Convention* which, while not conclusive as to future conduct, is ‘highly probative evidence’ of whether transferees will be afforded the appropriate protection.<sup>228</sup>

#### (a) Articles 17(1) and 18: The Right to Wage-Earning Employment and Self-Employment

Article 17(1) of the *1951 Refugee Convention* provides that a state of asylum must afford to refugees the right to engage in wage-earning employment according to ‘the most favourable treatment accorded to nationals of a foreign country in the same circumstances’.<sup>229</sup> While there is no definition set out in the *1951 Refugee Convention* for the term ‘wage-earning employment’, the Division of International Protection of the UNHCR has stated that ‘it must be understood in its broadest sense, so as to include all kinds of employment which cannot properly be described as self-employment, or falls within the scope of Article 19 (liberal professions)’.<sup>230</sup> Article 18 of the *1951 Refugee Convention* adopts a lower standard of protection, as transferees are entitled to the fulfilment of the right in accordance with treatment afforded to ‘aliens generally’ in the state ‘to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies’.

The *Operational Guidelines* provide that transferees under the *Cambodia Agreement* will enjoy the rights as enjoyed by other regular immigrants to apply for jobs and operate a business, pursuant to which Australia will finance the

226 Hathaway and Foster, above n 217, 40–1.

227 Ibid 49.

228 Legomsky, above n 185, 616.

229 Reference to ‘in the same circumstances’ is to be read in conjunction with art 6 of the *1951 Refugee Convention*, which requires that a refugee must fulfil any conditions for the enjoyment of the right in question which he/she would have to fulfil if he/she were not a refugee. Thus transferees are entitled to the right to engage in wage-earning employment, as limited by any associated conditions, in accordance with ‘the most favourable treatment’ accorded to foreign nationals.

230 UNHCR, ‘Commentary on the Refugee Convention 1951: Articles 2–11, 13–37’, above n 173, art 17 [4] (citations omitted).

provision of materials and loans.<sup>231</sup> However, the Cambodian opposition leader has expressed doubt as to the feasibility of this proposal, highlighting that Cambodian nationals themselves are unable to establish prosperous businesses.<sup>232</sup> Further, given recent local protests regarding the *Cambodia Agreement*,<sup>233</sup> if transferees are able to establish small businesses, it is likely they will face increased difficulties due to resentment and discrimination by the local community.

The International Labour Organisation has reported that while Cambodia has experienced strong economic growth,<sup>234</sup> the development of labour market institutions has been fragile, and 'the economy has not generated sufficient jobs to meet demand'.<sup>235</sup> Some 80 per cent of Cambodians work in informal employment — in occupations 'outside the legal framework which are not recognised, protected or regulated by public authorities'<sup>236</sup> — with low wages, long hours and limited respect for decent working conditions and basic rights.<sup>237</sup> Further, on 2 January 2014, the Cambodian military violently oppressed protestors demonstrating against poor wages, detaining 10 persons incommunicado — many of whom had suffered severe injuries — and later charging them with destruction of property and intentional violence. The following day, live ammunition was fired by military police to disperse a similar demonstration that had become violent, killing four and injuring several others.<sup>238</sup>

In order to work legally in Cambodia, refugees must hold a valid work permit, which is subject to revocation on the grounds the refugee is 'competing with Cambodian job-seekers'.<sup>239</sup> Current Cambodian legislation imposes restrictions upon the employment of foreign workers and requires employers to prioritise the employment of Cambodian citizens.<sup>240</sup> Foreign workers face even greater difficulties due to lack of local knowledge, language skills and inadequate legal protections, such as discrimination in employment, 'poor access to social protection', receipt of lower wages, exposure to more dangerous conditions and

231 *Operational Guidelines* cl 21(b).

232 Australian Broadcasting Corporation, 'Refugee Resettlement Concerns Outlined by Cambodia's Opposition Leader', 7.30, 26 August 2014 (Sam Rainsy) <<http://www.abc.net.au/7.30/content/2014/s4075016.htm>>.

233 Greg Dyett, 'Cambodians Protest Australia Refugee Deal', *SBS* (online), 17 October 2014 <<http://www.sbs.com.au/news/article/2014/10/17/cambodians-protest-australia-refugee-deal>>.

234 International Labour Organisation, 'Kingdom of Cambodia Decent Work Country Programme (DWCP) 2016–2018' (Report, International Labour Organisation, 27 October 2016) iv.

235 International Labour Organisation, 'Decent Work Country Programme Cambodia (2011–2015)' (Report, International Labour Organisation, 28 February 2012) 4.

236 Gleeson, above n 30, 11.

237 For example, the Refugee Action Coalition reported that in the textile industry, conditions were especially dangerous as heat levels are excessive, buildings are unsafe and 'fewer than 20 per cent of factories limit overtime to less than two hours' daily: Refugee Action Coalition Sydney, *Life in Cambodia: The Facts* (7 May 2015) <<http://www.refugeeaction.org.au/?p=4029>>.

238 Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, 27<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/27/70 (15 August 2014) 6 [15]–[16].

239 *Labor Law* (Cambodia) 13 March 1997, arts 261–2.

240 *Ibid* arts 263–4; *Prakas No. 196KB/Kr.K on Use of Foreign Workforce* (Kingdom of Cambodia) 20 August 2014, arts 1–2.

less ‘job and income security’.<sup>241</sup> While arts 17(1) and 18 of the *1951 Refugee Convention* do not require equal treatment of refugees and nationals, the conditions in Cambodia, particularly the difficulties faced by minority groups, suggest it is unlikely that transferees will be enabled to engage in employment that would allow them to subsist. If the conditions in Cambodia are indeed such that transferees are unable to engage in wage-earning employment, this may amount to a breach of arts 17(1) and 18 of the *1951 Refugee Convention*.

*(b) Articles 25, 27 and 28: Administrative Assistance and the Issue of Identity and Travel Documents*

Read together, arts 25, 27 and 28 of the *1951 Refugee Convention*, ‘form a single system of protection of the refugee’s entitlement to identity and documentation’<sup>242</sup> which ensures refugees are in practice able to enjoy the rights to which they are entitled under the *1951 Refugee Convention*.<sup>243</sup>

Pursuant to art 25, a state of asylum must render administrative assistance (by issuing documentation and engaging in correspondence, investigations and other such activities) to a refugee who does not have recourse to the authorities that would otherwise afford this assistance. Article 27 requires contracting states to ‘issue identity papers to any refugee in their territory who does not possess a valid travel document’. As noted by the Division of International Protection of the UNHCR, these are simple identity papers that would enable a refugee ‘to conform to laws and regulations requiring the inhabitants of a territory to carry identity cards, or to prove his identity whenever that might be requested’.<sup>244</sup> Under art 28, the state of asylum must issue ‘travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require’.<sup>245</sup>

The *Operational Guidelines* provide that ‘Cambodia will issue each Refugee with a Refugee Recognition Certificate (Prakas), Refugee resident card, and Refugee identity card’.<sup>246</sup> The right to be issued a resident card is also protected by Cambodian legislation under *Sub-Decree No 224*.<sup>247</sup> However, current practice in Cambodia suggests compliance with these provisions is unlikely. Refugees presently residing in Cambodia have not been issued with a resident card, but only a *prakas*, which is insufficient ‘for the many official purposes that require presentation of an ID card or travel document’, including opening a bank account,

241 International Labour Organisation, ‘Decent Work Country Programme Cambodia (2011–2015)’, above n 235, 10–11.

242 Goodwin-Gill and McAdam, above n 69, 512.

243 Eva Lester, ‘Article 25 (Administrative Assistance/Aide Administrative)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1129, 1131.

244 UNHCR, ‘Commentary on the Refugee Convention 1951: Articles 2–11, 13–37’, above n 173, art 27 [3].

245 *1951 Refugee Convention* art 28.

246 *Operational Guidelines* cl 11.

247 *Sub-Decree No 224 of 2009 on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia* (Cambodia) 17 December 2009, art 15.

obtaining a work permit, and acquiring a driver's license.<sup>248</sup> Further, as noted by the Kaldor Centre, there is an acute need for clarity regarding the terms of the 'Refugee resident card', including the timing of its issue to transferees, whether it will differ from an ordinary resident card and the circumstances that may lead to its revocation or cancellation. Clarification is also required as to the differences between the three documents purported to be provided to transferees under cl 11 of the *Operational Guidelines* and the practical implications of these differences.<sup>249</sup>

Cambodian state practice regarding the issue of travel documents to refugees also raises concerns as to the fulfilment of this acquired right under the *Cambodia Agreement*. The provision of travel documents is guaranteed under both the *MoU* and *Operational Guidelines*, as well as under *Sub-Decree No 224*.<sup>250</sup> However, as noted by the UNHCR, 'there is no procedure established for the routine processing of a request for Convention Travel Documents and there is no formal implementation of the respective provisions in the *Sub-Decree*'.<sup>251</sup> While travel documents are not refused on request, they have only been provided on two ad-hoc occasions at the specific request of the refugees when they required them for travel.<sup>252</sup> The UNHCR has noted that a failure to provide identity documents is a serious problem, especially considering at the time of its submission for the Universal Periodic Review of Cambodia, 75 of 77 refugees within Cambodia had not received travel documents.<sup>253</sup>

The difficulties faced by Cambodia to uphold its obligations under the *1951 Refugee Convention*, discussed above, demonstrate the inherent capacity issues burdening developing states — including poor socio-economic conditions and consequent lack of adequate settlement services and procedures — and demand reconsideration of whether such a bilateral agreement can be considered a durable solution. This will be further discussed below in Part IV.

#### IV THE CAMBODIA AGREEMENT AS A 'DURABLE SOLUTION'

As established by the statute of the UNHCR, the function of the UNHCR is to provide international protection for refugees and to seek 'permanent solutions',

248 Kevin Ponniah and Chhay Channyda, 'HRW to Aus: Refugees Need Proper Documents', *The Phnom Penh Post* (online), 22 November 2014 <<http://www.phnompenhpost.com/post-weekend/hrw-aus-refugees-need-proper-documents>>; Human Rights Watch, *Australia: Reconsider Nauru Refugee Transfers to Cambodia* (20 November 2014) <<https://www.hrw.org/news/2014/11/20/australia-reconsider-nauru-refugee-transfers-cambodia>>.

249 Gleeson, above n 30, 8.

250 *MoU* cl 8; *Operational Guidelines* cl 19.

251 UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report — Universal Periodic Review: Kingdom of Cambodia' (Submission, UNHCR, June 2013) 4–5 <<http://www.refworld.org/docid/51b820424.html>>.

252 *Ibid.*

253 *Ibid.*

commonly referred to as ‘durable solutions’.<sup>254</sup> The UNHCR promotes three such ‘permanent solutions’; voluntary repatriation, local integration and resettlement, which, ‘when applied together, can form a viable and comprehensive strategy for resolving a refugee situation’.<sup>255</sup> In achieving these durable solutions, a strong emphasis has been placed on international cooperation and burden sharing, particularly in relation to the support of developing states, which are currently hosting a disproportionately large percentage of refugees globally.

While the *MoU* affirms that regional cooperation is an effective means to find durable solutions for refugees and offers the provision of ‘safe and permanent settlement opportunities’ to transferees,<sup>256</sup> the UNHCR remains critical of the realisation of these objectives in practice.<sup>257</sup> The following section will consider the viability of the *Cambodia Agreement* as a durable solution in relation to integration and resettlement.<sup>258</sup>

## A Local Integration

Local integration is a ‘mutual, dynamic, multi-faceted and ongoing process’ through which refugees are granted access to the resources required for long-term settlement and subsistence in their state of asylum.<sup>259</sup> Article 34 of the *1951 Refugee Convention* urges states to ‘facilitate the assimilation’ of refugees where voluntary repatriation is not possible.<sup>260</sup> Further, despite the absence of an obligation to provide for local integration,<sup>261</sup> states have expressly agreed to be bound by arts 2–34 of the *1951 Refugee Convention*, which nonetheless impose duties affecting integration.<sup>262</sup> The *Operational Guidelines* explicitly contemplate ‘[s]ettlement and [i]ntegration’ of transferees by way of five clauses pertaining to the finance and provision of documentation, education, training, housing, health services and other daily subsistence needs.<sup>263</sup> The UNHCR has developed a process for local integration comprising an economic component, a social and cultural component, and a legal component.<sup>264</sup> The following section

254 *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UN GAOR, 5<sup>th</sup> sess, 325<sup>th</sup> plen mtg, Agenda Item 32, UN Doc A/RES/428 (V) (14 December 1950) annex ch 1 [1].

255 UNHCR, ‘Resettlement Handbook’ (Handbook, UNHCR, July 2011) 28.

256 *MoU* Preamble.

257 UNHCR, ‘UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation’, above n 29.

258 Please see pt III for a discussion on voluntary repatriation.

259 UNHCR, ‘Refugee Resettlement: An International Handbook to Guide Reception and Integration’ (Handbook, UNHCR) 12.

260 *1951 Refugee Convention* art 34.

261 Executive Committee of the High Commissioner’s Programme, UNHCR, *Report of the Fifth-Sixth Session of the Executive Committee of the High Commissioner’s Programme*, UN GAOR, 56<sup>th</sup> sess, UN Doc A/AC.96/1021 (7 October 2005) 14.

262 Goodwin-Gill and McAdam, above n 69, 491.

263 *Operational Guidelines* cls 18–22.

264 UNHCR, ‘Resettlement Handbook’, above n 255, 34–5.

will consider this process in relation to current state practice in Cambodia and the relevant undertakings within the *MoU* and *Operational Guidelines*.

## **1 The Economic Component: Housing, Employment and Education**

The economic dimension of integration aims to enable refugees to become self-sufficient and establish a sustainable livelihood equivalent to that which is enjoyed by nationals in the state of asylum.<sup>265</sup> As the issue of employment has already been addressed above in Part III (B)(3)(a), it will not be further discussed in this section.

The UNHCR has asserted that 'safe, secure and affordable housing' is a fundamental human right, critical to the process of integration.<sup>266</sup> Thus a state of asylum must establish procedures and provide apposite resources to enable access to such housing, which identify and redress the various disadvantages (including language difficulties, minimal income and lack of knowledge as to the housing market) experienced by refugees in a new country.<sup>267</sup> The *Operational Guidelines* outline that on arrival in Cambodia transferees will be accommodated in temporary accommodation in Phnom Penh for an unspecified amount of time.<sup>268</sup> Human rights advocates in Australia and Cambodia have expressed great concern as to both the duration and nature of the temporary accommodation for transferees.<sup>269</sup> Prior to the transfer, the Australian government expressed uncertainty as to the nature of the accommodation in Cambodia.<sup>270</sup> The conditions in the temporary facility are still largely unknown, and the *MoU* provides no clear limit on the amount of time transferees will remain in temporary accommodation.<sup>271</sup> Further, notwithstanding provision in the *Operational Guidelines* that transferees will enjoy freedom of movement during this period,<sup>272</sup> past Cambodian state practice related to institutionalised accommodation raises concerns in regards to the possibility of a police presence restricting the movement of the transferees in and out of the facility.<sup>273</sup>

Following the period of temporary settlement, Australia and Cambodia will 'collaborate in finding a location outside of Phnom Penh for the delivery of services for the settlement of Refugees'.<sup>274</sup> Australia will bear the financial costs related

265 UNHCR, 'The Benefits of Belonging: Local Integration Options and Opportunities for Host Countries, Communities and Refugees' (Brochure, UNHCR) 7.

266 UNHCR, 'Refugee Resettlement: An International Handbook to Guide Reception and Integration', above n 259, 162.

267 Ibid 170.

268 *MoU* cl 10(d).

269 Gleeson, above n 30.

270 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (Estimates), *Official Committee Hansard*, 20 October 2014, 60–1.

271 *Operational Guidelines* cl 16.

272 Ibid cl 17.

273 Gleeson, above n 30, 10.

274 *Operational Guidelines* cl 18.



to such settlement services, which ‘may’ include ‘private accommodation after integration’.<sup>275</sup> While there is no explicit limitation on the freedom of movement of transferees, ‘in practice [they] will have no choice but to live in particular places where essential services are available’.<sup>276</sup> Further, while yet to be imposed in relation to the transferees, art 17 of the Cambodian *Law on Immigration 1994* provides that the minister may ban all aliens from entering, residing in, or leaving a particular declared zone.<sup>277</sup> Human rights groups have also raised concerns regarding the ‘widespread and systematic’ land grabbing conflict in Cambodia, which has left thousands of Cambodians ‘either without adequate housing and land, and therefore unable to make a living, or at risk of forced eviction’.<sup>278</sup> These circumstances make it unclear that transferees will be able to access safe and secure housing following the temporary resettlement period.

Under the *Cambodia Agreement*, Cambodia will develop orientation programs that will deliver ‘preliminary relevant information on living conditions, important places, working conditions, and domestic laws’ while transferees are residing in temporary accommodation.<sup>279</sup> Transferees will also be provided with introductory Khmer language training during the temporary accommodation period, and following this Australia ‘may’ provide a package for language and vocational training.<sup>280</sup> The nature and content of this training is unspecified and it is questionable whether ‘introductory’ language training will be sufficient for long term self-reliant subsistence, particularly in view of the fact transferees will require these skills to gain and maintain employment.

Article 22 of the *1951 Refugee Convention* entails an obligation for states to ‘accord to refugees the same treatment as is accorded to nationals with respect to elementary education’.<sup>281</sup> This obliges states to ensure access to their national education system, including all levels of education from elementary to tertiary education.<sup>282</sup> Pursuant to cl 20 of the *Operational Guidelines*, Cambodia is required to provide only the documentation necessary for children to access public education.<sup>283</sup> The education system in Cambodia has been described as requiring

275 Ibid cl 21(d).

276 Gleeson, above n 30, 10.

277 *Law on Immigration 1994* (Cambodia) 22 September 1994, art 17.

278 *Operational Guidelines* cl 14; Amnesty International, ‘Amnesty International Report 2014/15 — The State of the World’s Human Rights’ (Report, Amnesty International, 2015) <[http://www.ecoi.net/local\\_link/297356/419712\\_en.html](http://www.ecoi.net/local_link/297356/419712_en.html)>. While Cambodian authorities have pledged to find a solution to the conflict, over 100 families that were compulsorily evicted in January 2012 from Phnom Penh remain homeless and living in poor conditions.

279 *Operational Guidelines* cl 13.

280 Ibid cl 21(b).

281 *1951 Refugee Convention* art 22. Note, the right to education is also reflected in other international human rights law instruments, including *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 26; *ICESCR* art 13.

282 Andreas Zimmermann and Jonas Dörschner, ‘Article 22 (Public Education/Education Publique)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1018, 1021–2.

283 *Operational Guidelines* cl 20.

'immediate and serious attention'<sup>284</sup> due to the persistent challenges presented by nominal teacher capacity, lack of adequate facilities, high repetition and drop-out rates, poor quality education and large discrepancies in access and opportunities for students in rural areas or of ethnic minorities.<sup>285</sup> These conditions make it dubious that eligible transferees will be afforded the opportunity to enjoy the entitlement to education under the *1951 Refugee Convention*.

## 2 The Social and Cultural Component

The social and cultural dimension to integration seeks to utilise 'social and cultural frameworks to enable refugees to access education and social services as well as to participate in the social fabric of the community'.<sup>286</sup> A strong emphasis has been placed on the availability of family reunification and the existence of 'meaningful links' to the state of asylum in the creation of such frameworks.

The principle and significance of family reunification is enshrined in several international human rights instruments<sup>287</sup> and has been asserted by the UNHCR to be 'crucial to refugee integration'.<sup>288</sup> The *Operational Guidelines* provide that transferees will be afforded the 'rights to guarantee dependent family members to reside in Cambodia as regular migrants'.<sup>289</sup> This is upheld by art 17 of *Sub-Decree No 224*, which states that 'a refugee has the right to sponsor for migration his or her dependent family members to the Kingdom of Cambodia'.<sup>290</sup> If upheld in practice, despite only allowing for dependent family members to migrate to Cambodia, family reunification will benefit the mental health and wellbeing of

284 Kenneth Wilson, 'Cambodia's Educational System is a System Utterly in Need', *The Cambodia Daily* (online), 2 July 2013 <<https://www.cambodiadaily.com/opinion/cambodias-educational-system-is-a-system-utterly-in-need-32937>>.

285 See, eg, Equal Access, *Improving Basic Education in Cambodia* <<http://www.equalaccess.org/country-programs/cambodia/cambodia-projects/project-education-cambodia>>; Australian Broadcasting Corporation, 'Cambodia Refugee Deal: UNHCR, Amnesty International Condemn Refugee Resettlement Arrangement', *ABC News* (online), 27 September 2014 <<http://www.abc.net.au/news/2014-09-27/unhcr-deeply-concerned-by-australia-cambodia-refugee-relocation/5773242>>.

286 UNHCR, 'The Benefits of Belonging: Local Integration Options and Opportunities for Host Countries, Communities and Refugees', above n 265, 7.

287 See, eg, *ICESCR* art 10; *ICCPR* arts 17, 23–4; *CROC* arts 9–10; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 10. While there is no provision in the *1951 Refugee Convention* on family reunification, the Conference of Plenipotentiaries recommend that states take measures to protect the family of refugees and aim to ensure family unity is maintained: *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN GAOR, UN Doc A/CONF.2/108/Rev 1 (26 November 1952) 8. See also UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 38<sup>th</sup> sess, Supp No 12A, UN Doc A/42/12/Add.1 (22 January 1988) 40; UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 36<sup>th</sup> sess, Supp No 12A, UN Doc A/36/12/Add.1 (9 November 1981) 17–18.

288 UNHCR, 'Resettlement Handbook', above n 255, 53.

289 *Operational Guidelines* cl 24(a).

290 *Sub-Decree No 224 of 2009 on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia* (Cambodia) 17 December 2009, art 17.

transferees, particularly in the early stages of integration, as well as support long-term economic and social stability.<sup>291</sup>

As noted by Legomsky and Nagel, ‘meaningful links’ to a state of asylum facilitate more effective and expeditious integration of refugees into the community.<sup>292</sup> The UNHCR has consistently stressed that asylum seekers should not be sent to a third country with which they lack sufficiently strong links or a meaningful connection.<sup>293</sup> Such links can be evidenced by ‘family connections, cultural ties, knowledge of the language, the possession of a residence permit and the applicant’s previous periods of residence’<sup>294</sup> in the proposed state of asylum. It is unclear whether transferees will possess any such links to Cambodia prior to their transfer or whether such links will be developed pursuant to orientation programs implemented by Cambodia. This raises the contested issue of whether an asylum seeker ought to be enabled to exercise choice as to the country in which they seek asylum, so as to pursue asylum in a state to which they possess meaningful links, in the form of ethnic ties or family connections within the state.<sup>295</sup>

### 3 The Legal Component: Naturalisation

The legal dimension of integration comprises the gradual broadening of entitlements to rights and obligations with an ultimate goal of permanent residency and the acquisition of citizenship in the state of asylum. Article 34 of the *1951 Refugee Convention* stipulates that ‘[s]tates shall as far as possible facilitate the ... naturalization of refugees’.<sup>296</sup> As already noted, under the *MoU* transferees will be granted ‘all of the rights and obligations of permanent residency in accordance with *Sub-Decree No. 224*’.<sup>297</sup> While this would enable a transferee to remain in Cambodia permanently without acquiring Cambodian nationality, the legal guarantee of many rights and freedoms in Cambodia relies upon the possession of citizenship. The *Operational Guidelines* provide that transferees

291 UNHCR, ‘Refugee Resettlement: An International Handbook to Guide Reception and Integration’, above n 259, 29.

292 Legomsky and Nagel, above n 185, 667.

293 See, eg, UNHCR, ‘UNHCR Observations on the European Commission’s Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals’ (Observations, UNHCR, December 2005) 4 art 3(c); UNHCR, *Global Consultations on International Protection: Regional Meeting: Budapest: 6–7 June 2001: Conclusions*, UN Doc EC/GC/01/14 (15 June 2001) 3; UNHCR, ‘Considerations on the “Safe Third Country” Concept’ (Paper, UNHCR, July 1996); UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 34<sup>th</sup> sess, Supp No 12A, UN Doc A/3412/Add.1 (6 November 1979) 18 [h(ii), (iv)].

294 UNHCR, ‘UNHCR’s Observations on the European Commission’s Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National’ (Observations, UNHCR, February 2002) 3.

295 While it is not within the ambit of this research to discuss this debate in detail, the importance of meaningful connections to a state of asylum, and perhaps the ability of a refugee to determine their location of asylum based on this, cannot be underestimated for the purpose of sustainable integration.

296 *1951 Refugee Convention* art 34.

297 *MoU* cl 8.

will also acquire the right to apply for Khmer nationality through naturalisation as experienced by 'other regular migrants'.<sup>298</sup>

However, there are concerns regarding the lack of practical details and requirements for the application process that a transferee must undergo to attain citizenship.<sup>299</sup> Further, under Cambodian law, naturalisation is 'not a right ... but only a favour of the Kingdom of Cambodia' and applications may be rejected at the discretion of the government.<sup>300</sup> The citizenship application process itself may be problematic for transferees in several respects.<sup>301</sup> Firstly, applicants must have lived continuously in Cambodia possessing a resident card for at least seven years.<sup>302</sup> While it is unclear whether the same treatment will be afforded to transferees, refugees currently residing in Cambodia are unable to apply for citizenship as Cambodia has failed to provide them with the requisite residence card. Secondly, applicants must not have a criminal record, thus transferees may be excluded from citizenship pursuant to persecution on the basis of political opinion experienced in their country of origin if they received a criminal record for political crimes.<sup>303</sup> Finally, applicants must be considered mentally and physically apt so as not to 'danger nor burden ... the nation'.<sup>304</sup> Thus transferees experiencing any incapacity, including trauma due to their past persecution or subsequent detention, may be excluded from citizenship if they are deemed to endanger or burden Cambodia.<sup>305</sup>

## V CONCLUSIONS

The UNHCR has emphasised the importance of resettlement as 'a tangible expression of international solidarity and a responsibility sharing mechanism'.<sup>306</sup> The use of bilateral and multilateral arrangements to shift the burden of refugee processing and resettlement onto other, often less developed, states is not exceptional. However, as noted in Part II, the *Cambodia Agreement* is unprecedented in two key ways. Firstly, the *Cambodia Agreement* involves the resettlement of *recognised refugees* who have undergone RSD under Australia's exercise of jurisdiction and remain so while in Cambodia pursuant to the continuum of jurisdiction established in Part III (A)(1)(a). Secondly, the arrangement cannot be classified as that for 'resettlement' and 'burden sharing'. Rather than seeking to uphold its commitment to more equitable responsibility

298 *Operational Guidelines* cl 24(a)

299 Gleeson, above n 30, 8.

300 *Law on Nationality* (Kingdom of Cambodia) Decree No NS/RKM/1096/31, 20 August 1996, art 7.

301 *Ibid* art 8.

302 *Ibid* art 8(3).

303 *Ibid* art 8(2).

304 *Ibid* art 8(6).

305 Gleeson, above n 30, 9.

306 UNHCR, 'Resettlement Handbook', above n 255, 3.

sharing based on its greater capacity to host refugees,<sup>307</sup> Australia has sought to outsource its obligations to Cambodia where transferees are at serious risk of isolation, destitution, discrimination, and expulsion, contrary to their recognised refugee status and ensuing guarantees to protection under the *1951 Refugee Convention*. This raises not only the issue of whether resettlement of transferees in Cambodia is appropriate, but also the broader issue of whether outsourcing resettlement obligations to nations that have significantly less capacity can be regarded as a durable solution.

Amidst speculation that the *Cambodia Agreement* had largely ‘collapsed’,<sup>308</sup> in late 2015 the Australian government continued the search for another developing country with which it could forge an agreement for the transfer and resettlement of asylum seekers and refugees from Nauru and Manus Island. In October 2015, Philippines President, Benigno Aquino, reportedly rejected a \$150 million agreement with Australia for the permanent relocation of an unknown number of refugees due to the lack of capacity and poverty existent in the Philippines at the time. In February 2016, reports suggested that the Australia government again entered into similar negotiations with countries such as Indonesia, Malaysia and Kyrgyzstan. While Kyrgyzstan is a party to the *1951 Refugee Convention*, over 30 per cent of the population lives below the world poverty line<sup>309</sup> and ‘[i]mpunity for violence and discrimination against women and lesbian, gay, bisexual, and transgender (LGBT) people remains pervasive’.<sup>310</sup> Indonesia is not a party to the *1951 Refugee Convention* and Human Rights Watch has reported on the proliferation of discriminatory regulations against women in Indonesia, as well attacks on religious minorities, suppression of peaceful freedom of expression and impunity of security forces responsible for serious human rights violations. According to the World Bank, ‘more than 28 million Indonesians still live below the poverty line’<sup>311</sup> and the government ‘often refuses to release even UNHCR-recognized refugees from detention centers, where conditions are poor and mistreatment is common’.<sup>312</sup>

As noted above, the socio-economic conditions and developing status of a country have been argued to be irrelevant provided the state is a party to the *1951 Refugee*

307 UNHCR, *The State of the World's Refugee's 2006: Human Displacement in the New Millennium* (Oxford University Press, 2006) 143; Gleeson, above n 30.

308 Lindsay Murdoch, ‘Plan to Resettle Refugees in Cambodia Collapses’, *The Sydney Morning Herald* (online), 30 August 2015 <<http://www.smh.com.au/world/plan-to-resettle-refugees-in-cambodia-collapses-20150830-gjavid.html>>. However, the Cambodian Ministry of Interior has confirmed it is willing to accept more than the five already transferred refugees from Nauru: Robert Carmichael, ‘Cambodia Agrees to Take More Refugees under Australian Deal’, *VOA* (online), 10 September 2015 <<http://www.voanews.com/a/cambodia-agrees-to-take-more-refugees-under-australia-deal/2955096.html>>.

309 The World Bank, *Kyrgyz Republic* (2016) <<http://data.worldbank.org/country/kyrgyz-republic>>.

310 Human Rights Watch, ‘World Report 2015: Events of 2014’ (Report, Human Rights Watch, 2015) 341 <[https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2015\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2015_web.pdf)>.

311 The World Bank, *Indonesia — Overview* (2016) <<https://www.worldbank.org/en/country/indonesia/overview>>.

312 Human Rights Watch, ‘World Report 2015: Events of 2014’, above n 310, 293.

*Convention* and affords the requisite level of protection.<sup>313</sup> Indeed, the UNHCR has promoted the establishment of a regional refugee framework in Southeast Asia — provided concerned states are party to the *1951 Refugee Convention*<sup>314</sup> — but has emphasised the importance of sustainable ‘capacity building’ in host nations.<sup>315</sup> The *Cambodia Agreement* purports that ‘Australia will provide capacity building and necessary assistance to Cambodian officials to support the successful implementation of the *MOU*’.<sup>316</sup> However, it fails to further elucidate the nature of the ‘capacity building’ and ‘assistance’ to be provided. There is no provision for the establishment of arrangements with other states or NGOs as implementing partners, for the undertaking of knowledge transfers and joint resettlement projects with such partners, for the improvement of support services and resource materials through specialised development training and funding, or for any other discernible mode of sustainable capacity building.<sup>317</sup> Further, while the *MoU* provides for cooperation with the UNHCR,<sup>318</sup> the UNHCR itself has condemned the agreement and urged Australia to reconsider its approach.<sup>319</sup>

The *Cambodia Agreement* has been described as a ‘regional burden-sharing solution’ with the stated objectives to ‘expand protection opportunities and durable solutions for Refugees in the Asia-Pacific region’<sup>320</sup> and to ‘demonstrate the importance of regional cooperation on Refugees’ settlement’.<sup>321</sup> However, in a press release concerning the *Cambodia Agreement*, the UNHCR recalled the current burden placed on developing countries and highlighted the importance ‘that countries do not shift their refugee responsibilities elsewhere’.<sup>322</sup> There is some debate as to the nature and form of a true burden sharing solution in

313 See, eg, Sharpe, above n 57, 6. Note the Michigan Guidelines go so far to suggest that while preferable, it is not necessary that a receiving country be a party to the *1951 Refugee Convention* for the protection elsewhere arrangement to respect international refugee law: Hathaway, ‘The Michigan Guidelines on Protection Elsewhere’, above n 57, 211 [2].

314 See, eg, UNHCR, *South-East Asia: UNHCR Welcomes ASEAN Proposals to Respond to Boat Crisis* (6 July 2015) <<http://www.unrefugees.org.au/news-and-media/news-headlines/south-east-asia-unhcr-welcomes-asean-proposals-to-respond-to-boat-crisis>>; Australian Broadcasting Corporation, ‘UNHCR Calls for Regional Solution to South East Asia’s Refugee Crisis’, *AM*, 21 May 2015 <<http://www.abc.net.au/news/2015-05-21/unhcr-calls-for-regional-solution-to-south-east/6485606>>. The UNHCR has also gone so far as to assert that refugee protection requires ‘accession to and compliance with the *1951 Convention* and/or *1967 Protocol* ... unless the destination country can demonstrate that the third State has developed a practice akin to the *1951 Convention* and/or its *1967 Protocol*’: UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’, above n 206, 2 [15(e)].

315 UNHCR, ‘Resettlement Handbook’, above n 255, 38.

316 *Operational Guidelines* cl 28.

317 UNHCR, ‘Resettlement Handbook’, above n 255, ch 1; Gleeson, above n 30, 6.

318 *MoU* cl 13.

319 UNHCR, ‘UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation’, above n 29.

320 *MoU* cl 2(a).

321 *Ibid* cl 2(c).

322 UNHCR, ‘UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation’, above n 29.

practice.<sup>323</sup> It is not within the ambit of this paper to discuss the various formulations, however it must be noted that international cooperation requires more than the provision of monetary compensation for the receipt of responsibility. Further, ‘great care needs to be taken to ensure that “co-operation” does not operate as a facade behind which violations of international law are permitted to take place’.<sup>324</sup>

Rather, true burden sharing requires the adoption of a multi-agent approach, including the involvement and cooperation of the sending state, the receiving state and other actors, such as NGOs and the UNHCR. There must also be an assurance that cooperation arrangements seek to support national asylum systems rather than to substitute for them and outsource responsibilities onto other states. Such an approach should enable the provision of ‘differentiated contributions’ of relevant agents, ‘according to needs and capacities’ so as to ‘incentivize cooperation and create political momentum’.<sup>325</sup> The establishment of adequate monitoring provisions and mechanisms for communication between the agents involved is also crucial to ensure sustainability of cooperative agreements.<sup>326</sup> It is critical that arrangements include protection safeguards to ensure that international standards for the treatment of asylum seekers and refugees are met and further ‘to harmonize access to and standards of protection between states, including through technical, financial and material assistance to develop capacity’.<sup>327</sup> Finally, the arrangement must find a ‘durable solution’ to resolving a refugee situation and be in the spirit of the *1951 Refugee Convention*. This paper concludes that the *Cambodia Agreement* fails to meet the above requirements, puts transferees at serious risk of harm and cannot be defended as a sustainable ‘burden-sharing’ arrangement for the resettlement of refugees.<sup>328</sup>

323 For example, Hathaway and Neve advocate a system of ‘common but differentiated responsibility’ in which participating states contribute by providing temporary protection to refugees, resettling refugees who are not able to repatriate after the term of temporary protection has ended, funding the protection system, or undertaking a combination of these roles. This would see asylum seekers sent to a safe country in their region of origin for RSD, a process financially supported by extra-regional countries, and either resettled or repatriated accordingly: James C Hathaway and R Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115, 145. See also Eiko R Thielemann and Torun Dewan, ‘The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing’ 29 *West European Politics* 351; Goodwin-Gill, above n 86; Keane Shum, ‘A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration’ (2011) 1(1) *Oxford Monitor of Forced Migration* 60; C Michael Lanphier, ‘Refugee Resettlement: Models in Action’ (1983) 17 *International Migration Review* 4.

324 Wood and McAdam, above n 18, 290, quoting Jane McAdam et al, Submission No 25 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Australia’s Arrangement with Malaysia in Relation to Asylum Seekers*, 15 September 2011, 5.

325 UNHCR, ‘Expert Meeting on International Cooperation to Share Burdens and Responsibilities’ (Summary Conclusions, UNHCR, 27–28 June 2011) 3 [6].

326 *Ibid*.

327 *Ibid* 11 [17].

328 Human Rights Watch, *Australia/Cambodia: Deal Puts Refugees at Risk* (25 September 2014) <<https://www.hrw.org/news/2014/09/25/australia/cambodia-deal-puts-refugees-risk>>.