

**Combating Migrant Smuggling
with Regional Diplomacy: An
Examination of the Bali Process**

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COMBATting MIGRANT SMUGGLING WITH REGIONAL DIPLOMACY: AN EXAMINATION OF THE BALI PROCESS

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Ten years after the inception of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in February 2002, a review of the activities and achievements of the Bali Process is timely and necessary. This research paper provides an analysis of the formation, function, and fertility of this forum and, specifically its efforts to combat the smuggling of migrants in the Asia Pacific Region. The analysis shows that while the policy focus of the Bali Process has been dominated by border security imperatives, and the forum's 'hard' policy outcomes to date have been limited, while the 'soft diplomacy' embodied in the Bali Process has produced some benefits for the region.

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I INTRODUCTION

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime serves as the Australia's chief diplomatic forum for developing immediate and long-term regional solutions aimed at tackling the phenomenon of migrant smuggling (or 'people smuggling' as it is referred to in Australian law).¹ Ten years since the inception of this forum, and with the numbers of smuggled migrants and migrant smugglers in the region unabated, it is timely and necessary to review the purpose, operation, outcomes, and effectiveness of the Bali Process, and reflect on the future direction of this regional forum.

This research paper is comprised of five parts. After this introduction, Part II offers a historical account of the genesis of the Bali Process, identifying local, regional, and international factors that led to its creation. An analysis of the forum's organisational architecture, *modi operandi*, and objectives is set out in Part III. Part IV examines whether the Bali Process' objectives have been achieved, especially in light of the Australian Government's determination to 'break the people smuggler's business model'² and calls by the Opposition to 'stop the boats'.³ The focus here is on the forum's work relating to migrant smuggling; its limited deliberations in relation to trafficking in persons and other forms of transnational organised crime are not further explored.

Successive Australian Governments from both sides of politics have invested substantial financial resource, and political capital, in the Bali Process. Not surprisingly, representatives from both major political parties have been quick to praise the work of the Bali Process, and some have attributed the relative decline in migrant smuggling activities in Southeast Asia and Australia between 2002 and 2008 to the work of the Bali Process. A closer examination, however, reveals that while the Bali Process has been a useful forum for facilitating dialogue on policy formulation, it has achieved few concrete outcomes. This observation leads to ask whether the Bali Process should continue and what, if any, alternative regional policies exist. These issues are further explored in Part V of this research paper. The argument developed here is that while the Bali Process has demonstrably failed to provide a regional 'solution' to migrant smuggling, it has served Australia's political interests well. Moreover, while the informal, non-binding format of the Bali Process has been a frequent point of criticism, this model of regional diplomacy may today be more palatable than the institutionalised multilateral approaches of old.

¹ Caroline Millar, 'Combating trafficking in persons through the Bali Process' (2004) 66 *Development Bulletin: People Trafficking, Human Security and Development*, 32, 34. The terms 'smuggling of migrants', 'migrant smuggling', and 'people smuggling' are used interchangeably. The preferred terminology in international law is 'smuggling of migrants' as defined by Article 3 of the United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air*.

² See, for example, Chris Bowen, Minister for Immigration and Citizenship, 'High Court decision' (Media Statement, 31 August 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb171159.htm>>; Chris Bowen, Minister for Immigration and Citizenship, 'Malaysia transfer agreement' (Media Statement, 8 May 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb166283.htm>>

³ Tony Abbott, 'If Julia Gillard was serious about stopping the boats she would support the Coalition's amendment' (Press Release, 19 September 2011) <<http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/8335/If-Julia-Gillard-was-serious-about-stopping-the-boats-she-would-support-the-Coalitions-amendments.aspx>>; Tony Abbott, Leader of the Opposition, 'Julia Gillard's failed Malaysian people swap' (Press Release, 12 September 2011) <<http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/8312/Julia-Gillards-Failed-Malaysian-People-Swap.aspx>>.

II BACKGROUND AND DEVELOPMENT OF THE BALI PROCESS

A *The Australian Context*

Starting in the late 1990s, Australia witnessed a sudden and sizeable increase in irregular migrants travelling to Australia by boat, especially from Indonesia to the coast of the Northern Territory, Western Australia, and the offshore territories of Christmas Island, Ashmore Reef, and, in more limited numbers, to Cocos (Keeling) Islands. This ‘sharp increase’⁴ in so-called ‘illegal maritime arrivals’ intercepted in Australian waters during 1999 and 2001 first catapulted the issue of migrant smuggling to prominence, and served as the main catalyst for the creation of the Bali Process. In 1999, 86 boats carrying a total of 3,721 irregular migrants arrived in Australia. Between 2000 and 2001 a further 94 boats carrying 8,845 persons followed.⁵ While these figures are very low in international comparison,⁶ these arrivals caught the Government under Prime Minister John Howard by surprise. He responded to this sudden surge in migrant smuggling activity with a flurry of political and legislative measures ranging from the introduction of new ‘people smuggling’ offences, mandatory sentences, tougher immigration detention arrangements, attempts to turn around vessels carrying smuggled migrants, offshore detention and procession of asylum seekers, a re-organisation of border and naval control arrangements, to the pursuit of new international and regional responses, including the Bali Process.

The frenzy to find a solution to this emerging issue by preventing and deterring all future boat arrivals peaked in August and September 2001, following an incident which became widely known as the Tampa affair. The incident concerned the rescue of 433 Afghan and Sri Lankan asylum seekers en route to Australia, who had been rescued from their sinking vessel by a Norwegian freighter, the *MV Tampa*. After the rescue, the *Tampa* approached Christmas Island to transfer the asylum seekers, among them many women and children, to the care and custody of Australian authorities. Acting under directions from the highest level of government, the vessel was refused entry to Australia by the Royal Australian Navy. When the captain of the *Tampa* defied this order and (briefly) entered Australian territorial water, Special Air Service (SAS) personnel was deployed to order the *Tampa* out to sea. This stand-off continued for over a week. During this time, the Australian Government made arrangements to transfer the 433 people to another country in the region, and ultimately sent them to the small Pacific island of Nauru where most of them were placed in immigration detention, while the family units among the passengers were flown to New Zealand for resettlement.⁷

The events and aftermath of the *Tampa* affair prompted the introduction of a raft of legislative amendments to the *Migration Act 1958* (Cth)⁸ and a rethinking of Australia’s strategy to combat migrant smuggling.

Coinciding with the events of September 11, 2001 in the United States, the Australian Government equated the phenomenon of migrant smuggling with fears over global terrorism, depicting smuggled

⁴ Global Commission on International Migration (GCIM), *Migration in an Interconnected World: New Directions for Action* (GCIM, 2005) 2.

⁵ Janet Phillips and Harriet Spinks, *Boat arrivals in Australia since 1976*, Background Note (Department of Parliamentary Services, 2011) 18.

⁶ See further, International Council of Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (ICHRP, 2010) 12-14.

⁷ See further, Susan Metcalfe, *The Pacific Solution* (Australian Scholarly Publishing, 2010) 27-62; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 201; Janet Phillips and Harriet Spinks, *Boat arrivals in Australia since 1976*, Background Note (Department of Parliamentary Services, 2011) 14.

⁸ See, for example, *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth).

migrants as a serious threat to Australia's national security.⁹ Thereafter, migrant smuggling was widely portrayed as a danger to Australia's borders, and — by extension — the Australian lifestyle and culture.¹⁰ Thus, the Australian Government linked the rising number of illegal boat arrivals to a looming 'national emergency'.¹¹ The events of August and September 2001 caused a 're-evaluation of the nation's relationship with neighbouring countries and the realisation that improving the security, stability and well-being of those nations is fundamental to Australia's future security'.¹² Within 48 hours of the attacks in the United States, then Australian Defence Minister Mr Peter Reith publicly warned that the unauthorised arrival of boats on Australian territory 'can be a pipeline for terrorists to come in and use [the] country as a staging post for terrorist activities'.¹³

At the same time, the Australian Government came to realise that in order to combat migrant smuggling and prevent the arrival of irregular migrants, it would need to cooperate with other countries in the region, especially Indonesia, the principal transit point for smuggled migrants en route to Australia. It became clear that Australia had to take leadership on the issue of migrant smuggling in a region where many countries failed to see urgency to act. The first necessary step for Australia was to create a regional forum to share its concerns and facilitate regional cooperation to combat the smuggling of migrants.

B *The Bali Process is Formed*

Between February 26 and 28, 2002, the Governments of Australia and Indonesia hosted a regional ministerial conference in Bali, Indonesia to address the growing scale and complexity of irregular migration in the Asia Pacific region. This first ministerial meeting marks the beginning of what has become known as the Bali Process. The initial meeting was co-chaired by the Australian and Indonesian Foreign Ministers and was attended by delegates from 38 nations,¹⁴ the Director-General of the International Organisation for Migration (IOM), and a representative of the United Nations

⁹ See, for example, Michael Humphrey, 'Refugees: An Endangered Species?' (2003) 39(1) *Journal of Sociology* 39(1) 31, 32; Kerry Carrington, 'Law and Order on the Border in the Neo-Colonial Antipodes' in Sharon Pickering & Leanne Weber (eds), *Borders, Mobility and Technologies of Control* (Springer, 2006) 179–206.

¹⁰ This has been a worldwide phenomenon in the 'post-9/11' political theatre, see: International Council of Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (ICHRP, 2010) 22.

¹¹ Alan Collins, *Contemporary Security Studies* (Oxford University Press, 2nd ed 2009) 118–119; Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17(1) *Journal of Refugee Studies* 50, 65.

¹² Graeme Hugo, 'Globalization and changes in Australian international migration' (2006) 23(2) *Journal of Population Research*, 107, 125–126 [emphasis removed].

¹³ Cited in Peter Mares 'A Pacific Solution: Reflections on the Tampa Affair and September 11' (2001) 11(9) *Eureka Street* 122, 123. In a similar vein, Immigration Minister Phillip Ruddock said on 23 February 2002 that, 'whole [Middle East] villages are packing up to come to Australia'; quoted in David Marr, 'Politicians claims about boat arrivals have little buoyancy' *The Sydney Morning Herald* (online), 24 October 2011 <<http://www.smh.com.au/opinion/politics/politicians-claims-about-boat-arrivals-have-little-buoyancy-20111023-1mekg.html>>.

¹⁴ Including Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic Republic of Korea (North Korea), Fiji, France, India, Indonesia, Iran, Japan, Jordan, Kiribati, Laos, Malaysia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea (South Korea), Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Turkey, UNTAET/East Timor, Vanuatu, and Vietnam, see Australia and Indonesia (Co-Chairs), 'Co-Chairs' Statement' (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [1] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

High Commissioner for Refugees (UNHCR). A further fifteen countries, and a range of international and regional organisations participated in observer roles.¹⁵

The consensus and outcomes of this conference, which paved the way for the Bali Process, focused on three main points. First, the meeting expressed a formal acknowledgment of the worsening problem of irregular migration, especially migrant smuggling by boat, in the Asia Pacific region, with Ministers underlining that ‘illegal movements were growing in scale and complexity, including in the Asia Pacific region’ creating ‘significant political, economic, social and security challenges’. In this regard, ‘deep concern’ was also expressed about ‘possible links between terrorist elements and people smuggling and trafficking operations’.¹⁶

Second, the meeting expressed the participants’ collective denunciation of migrant smuggling as well as trafficking in persons, describing these phenomena as

reprehensible criminal activities that fed on the hopes and aspirations of people and frequently infringed basic human rights and freedoms [...] lucrative activities [that] involved little risk for the smugglers or traffickers, but which endangered peoples’ lives.¹⁷

Third, the meeting expressed a voluntary commitment on behalf of all states to, ‘within the framework of their international obligations’ and ‘respective national circumstances’ cooperate as a region to combat migrant smuggling and trafficking in persons.¹⁸ Ministers declared their ‘strong shared regional interest and common purpose in cooperating to combat these criminal activities’¹⁹ but, importantly, insisted that ‘cooperation should be based on an acknowledgment that each State had a sovereign right and legitimate interest to develop and implement its own laws to address people smuggling and trafficking in persons.’²⁰

¹⁵ Including Austria, Belgium, Canada, Denmark, Finland, Germany, Italy, Netherlands, Norway, Russian Federation, Spain, Sweden, Switzerland, United Kingdom, United States, Association of South-East Asian Nations (ASEAN), Pacific Islands Forum (PIF), European Union (EU), United Nations Development Program (UNDP), World Bank, Asian Development Bank (ADB), Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), INTERPOL, International Committee of the Red Cross, International Federation of the Red Cross, International Labour Organisation ILO, United Nations Office on Drug Control and Crime Prevention (UNODCCP; now United Nations Office on Drugs and Crime (UNODC)), see Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [2] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

¹⁶ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [3]-[4] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

¹⁷ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [7] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

¹⁸ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [8]-[13] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

¹⁹ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [11] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

²⁰ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [19] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

The inaugural Bali Process Regional Ministerial Conference in February 2002 (referred to as ‘Bali I’)²¹ recommended the establishment of a ‘follow-up mechanism involving ad hoc meetings of experts’ to take ‘concrete steps to implement the recommendations of the meeting’.²² It was agreed that the expert group(s) would report back to the Ministers one year later, and that any further follow-up required after this 12-month period would be passed on to existing regional and international mechanisms. At that time, it was envisaged that other existing regional and international forums, namely the Inter-Governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC) and the Association of South East Asian Nations (ASEAN), would absorb the work instigated by the Bali I meeting in the future. Soon after the Bali I meeting, two Ad hoc Expert Groups were established. The first group, Ad hoc Expert Group 1 (AHEG-1) was established to ‘coordinate regional and international cooperation’ and was chaired by New Zealand. The second group (AHEG-2), chaired by Thailand, was established to ‘assist states to strengthen policy making, legislative arrangements and law enforcement practices’.

The second regional ministerial conference (Bali II) was scheduled for April 29-30, 2003. One month before the Bali II conference, on March 27, 2003, a preparatory meeting was held in Jakarta, Indonesia during which Ministers debated at some length the merits of continuing the Bali Process.²³ Minutes from this meeting reveal considerable uncertainty and division within the group as to whether the Bali Process should continue in its own right or whether the APC should subsume the work and mandate of the Bali Process.²⁴ Notably, the Australian Government, the principal instigator of the Bali Process, was ‘stubbornly committed’ to the work of the Bali Process being dissolved into the APC.²⁵ Ultimately, however, the group resolved to take a recommendation to the Bali II conference that the Bali Process should continue independently.

III OUTLINE OF THE BALI PROCESS

A Structure and Organisation

The organisational structure of the Bali Process, which was developed at the Bali I and Bali II meetings, has largely been left unaltered over the past ten years. The Bali Process is led by a Steering Group of four countries (Australia, Indonesia, New Zealand, and Thailand) as well as UNHCR and IOM. Australia and Indonesia, represented by their respective Foreign Ministers, also act as co-chairs of the Steering Group. Today, the Bali Process is comprised of 43 countries, mostly from the Asia Pacific region. In addition, several European and North American countries²⁶ and a range of

²¹ There have been four Bali Process ministerial conferences held since the forum’s creation: February 26-28, 2002 (Bali I); April 29-30, 2003 (Bali II); 14-15 February, 2009 (Bali III); and 29-30 March, 2011 (Bali IV).

²² Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [23] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

²³ Australia and Indonesia (Co-Chairs) ‘Summary of the Bali Conference Preparatory Meeting’ (Ministerial Conference Preparatory Meeting, Jakarta, 27 March 2003) <<http://www.baliprocess.net/files/ConferenceDocumentation/SnrPrepReport.pdf>>.

²⁴ Australia and Indonesia (Co-Chairs) ‘Summary of the Bali Conference Preparatory Meeting’ (Ministerial Conference Preparatory Meeting, Jakarta, 27 March 2003) <<http://www.baliprocess.net/files/ConferenceDocumentation/SnrPrepReport.pdf>> 1-2.

²⁵ Australia and Indonesia (Co-Chairs) ‘Summary of the Bali Conference Preparatory Meeting’ (Ministerial Conference Preparatory Meeting, Jakarta, 27 March 2003) 2.

²⁶ The observer countries to the Bali Process are Austria, Belgium, Canada, Denmark, European Commission, Finland, Germany, Italy, The Netherlands, Norway, Poland, Romania, Russian Federation, South Africa, Spain, Sweden, Switzerland, United Kingdom and the United States of America. See *About the Bali Process*, Bali Process Website <<http://www.baliprocess.net/index.asp?pageID=2145831401>>.

international organisations have observers status.²⁷ The meetings (and the limited other activities) of the Bali Process are funded by the Governments of Australia, New Zealand, Japan, and the United States.²⁸

The relative decline of migrant smuggling activity in the region from about 2002, led to a downscaling of the Bali Process between 2004 and 2009. At a Senior Officers Meeting held in Brisbane in 2004, the work of the Ad hoc Expert Group was suspended and replaced by 'country coordinators' and no further ministerial meeting was scheduled to take place after April 2003.

The increase of unauthorised boat arrivals in Australia from 2008 onwards, led to renewed interest in the Bali Process and to a third Regional Ministerial Conference held in Bali on February 14 and 15, 2009. This Bali III meeting re-tasked the Ad hoc Expert Groups with a mandate:

- a) to develop practical outcomes at the operational level to assist countries to mitigate increased irregular population movements;
- b) to enhance information-sharing arrangements between most affected countries; and
- c) to report to Co-chairs through the Steering group with the concrete recommendations to inform future regional cooperation on people smuggling and human trafficking in persons.²⁹

B Objectives of the Bali Process

The stated objectives of the Bali Process are:

to raise awareness of, encourage cooperative action and develop practical regional measures to prevent, intercept and disrupt people smuggling, human trafficking and transnational crime.³⁰

At the Bali I meeting in February 2002, participants agreed on five specific goals, namely:

- 1) Developing more effective information and intelligence sharing arrangements within the region to obtain a more complete picture of smuggling and trafficking activities and other forms of illegal migration.
- 2) Improving the cooperation of law-enforcement agencies to enhance deterrence and to fight against illegal immigration networks.
- 3) Enhancing cooperation on border and visa systems to improve the detection and prevention of illegal movement.
- 4) Increasing public awareness of the facts of smuggling and trafficking operations to discourage those considering illegal movement and to warn those susceptible to trafficking, including women and children - enhancing the effectiveness of return as a strategy to deter illegal migration through the conclusion of appropriate arrangements.
- 5) Cooperating in verifying the identity and nationality of illegal migrants, in a timely manner.³¹

²⁷ International Centre for Migration Policy Development (ICMPD); United Nations Development Programme; United Nations Office on Drugs and Crime; International Labour Organization; Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC); Inter-Governmental Consultations on Migrants, Asylum and Refugees (IGC).

²⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Human Rights in the Asia Pacific: Challenges and Opportunities*, (2010) 17. Sourcing adequate funding has, however, been an ongoing problem for the Bali Process, see: 'Senior Officials Report to Ministers' (Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime Senior Officials Meeting, Brisbane, 7-8 June 2004) <<http://www.baliprocess.net/files/ConferenceDocumentation/SOMReport.pdf>>.

²⁹ Australia and Indonesia (Co-Chairs), 'Co-Chairs' Statement' (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14-15 February 2009) [3]-[4] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

³⁰ *About the Bali Process*, Bali Process Website <<http://www.baliprocess.net/index.asp?pageID=2145831401>>.

Seven years later, at the Third Bali Process Regional Ministerial Conference (Bali III), these objectives were reviewed and expanded in order to encompass a greater ‘humanitarian approach’ to migrant smuggling and trafficking in persons, and to better identify the ‘root causes’ of these phenomena.³² The objectives of the Bali Process were amended accordingly to now include:

- 1) The development of more effective information and intelligence sharing;
- 2) Improved cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks;
- 3) Enhanced cooperation on border and visa systems to detect and prevent illegal movements;
- 4) Increased public awareness in order to discourage these activities and warn those susceptible;
- 5) Enhanced effectiveness of return as a strategy to deter people smuggling and trafficking through conclusion of appropriate arrangements;
- 6) Cooperation in verifying the identity and nationality of illegal migrants and trafficking victims;
- 7) The enactment of national legislation to criminalise people smuggling and trafficking in persons;
- 8) Provision of appropriate protection and assistance to the victims of trafficking, particularly women and children;
- 9) Enhanced focus on tackling the root causes of illegal migration, including by increasing opportunities for legal migration between states; and
- 10) Assisting countries to adopt best practices in asylum management, in accordance with the principles of the Refugees Convention.³³

These ten goals complement the Bali Process’ two principal objectives to (1) raise awareness of, and (2) develop greater cooperation among regional countries to combat people smuggling and trafficking in persons. The list of ten goals was intended for better monitoring of the forum’s progress, and to help inform judgment as to whether the forum is meeting its mandate.

IV A VIABLE REGIONAL CONSULTATIVE PROCESS?

A Regional Consultative Processes: A Global Phenomenon

To understand and assess the emergence, mandate, and operation of the Bali Process, it is necessary to analyse this regional forum in the context of — and in comparison to — other regional consultative processes. Indeed, over the past 25 years, there has been a proliferation of regional consultative processes (RCPs) around the world on a great variety of topics. Today, there are at least fourteen separate RCPs that focus, directly or indirectly, on international migration.³⁴ The Bali Process is,

³¹ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [17] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>.

³² Australia and Indonesia (Co-Chairs) ‘Co-Chairs’ Statement’ (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14-15 February 2009) [18] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>; for further background to the expansion in objectives, see Commonwealth, *Parliamentary Debates*, Senate, 22 October 2009, 37-38 (Ursula Stephens).

³³ Australia and Indonesia (Co-Chairs) ‘Co-Chairs’ Statement’ (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14-15 February 2009) [18]-[19] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

³⁴ Inter-Governmental Consultations on Migrants, Asylum and Refugees (‘IGC’); Budapest Process; Puebla Process or Regional Conference on Migration (‘RCM’); Sönderköping Process or Cross Border Cooperation Process (‘CBCP’); South American Conference on Migration (‘SACM’); Regional Ministerial Conference on Migration in the Western Mediterranean (‘5 + 5 Dialogue’); Mediterranean Transit Migration Dialogue (‘MTM’); Migration Dialogue for West Africa (‘MIDWA’); Migration Dialogue for Southern Africa (‘MIDSA’); Inter-governmental Authority on Development- Regional

however, thematically focused on the specific issue of migrant smuggling, as well as trafficking in persons (although the topic of trafficking in persons has practically gained very little attention by the Bali Process).

To date, the vast literature analysing the RCP model has tended to present RCPs as effective, welcome mechanisms in international diplomacy, and a preferable alternative to the formal multilateralism model of the United Nations and other global international organisation.³⁵ There is, however, to this day no critical evaluation of the Bali Process. It is difficult and not entirely instructive to assess the Bali Process by reference to the same criteria that have been devised to analyse other migration-focused RCPs. This is not only because of the unique and very limited focus of the Bali Process, but also because the Bali Process constitutes merely a series of irregular meetings that have taken place since 2002. Unlike most other RCPs, the Bali Process does not have a secretariat or any ongoing physical presence. Since the meetings of the Bali Process have not followed a clear schedule or agenda, it is also difficult to identify any clear progress or achievement by this forum.

An evaluation of the strengths and weaknesses of the Bali Process thus has to be limited to questions about coordination of this forum, evidence of achievements and outcomes, policy agenda, and oversight and accountability.

From an Australian perspective, these questions are of particular relevance, as both sides of politics have repeatedly expressed their unwavering commitment to the Bali Process. Ten years since its inception, the Australian Government today regards the Bali Process as the most important diplomatic component of Australia's regional engagement to prevent and disrupt migrant smuggling.³⁶ This commitment is also evidenced in the substantial funding that the Australian Government has allocated to the Bali Process. For example, the 2011-2012 federal budget announced in May 2011 flagged a

Consultative Processes on Migration ('IGAD-RCP'); Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants ('APC'); Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia ('Colombo Process'); Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia ('Abu Dhabi Dialogue').

³⁵ See, for example Amanda Klekowski von Koppenfels, 'Informal But Effective: Regional Consultative Processes as a Tool in Managing Migration' (2001) 39(6) *International Migration* 61-84; Amanda Klekowski von Koppenfels, *The Role of Regional Consultative Processes in Managing International Migration*, IOM Migration Research Series 3 (IOM, 2001); Frédérique Channac & Colleen Thouez, 'Shaping International Migration Policy: The Role of Regional Consultative Processes' (2006) 29(2) *West European Politics* 370-387; Frédérique Channac & Colleen Thouez, *Regional Consultative Processes for Migration: An Evaluation Based on IMP's Work*. (United Nations Population Fund, 2005); Randall Hansen, *An Assessment of Principal Regional Consultative Processes on Migration*, IOM Migration Research Series No 38 (IOM, 2010); Randall Hansen & Jobst Koehler, *The Future of Migration Governance and Regional Consultative Processes*, Background Paper WMR 2010 (IOM, 2010); Jobst Koehler, 'What Government Networks Do in the Field of Migration: An Analysis of Selected Regional Consultative Processes', in Rahel Kunz, Sandra Lavinex, and Marion Panizzon (eds), *Multi-Layered Migration Governance: The Promise of Partnership* (Routledge, 2011) 67-93; Alexander Betts, 'The Global Governance of Migration and the Role of Trans-regionalism', in Rahel Kunz, Sandra Lavinex, and Marion Panizzon (eds), *Multi-Layered Migration Governance: The Promise of Partnership* (Routledge, 2011) 23-45.

³⁶ Department of Immigration and Citizenship, *Annual Report 2010-11*, 'Program 3.1 Border Management' <<http://www.immi.gov.au/about/reports/annual/2010-11/html/outcome-3/program3-1.htm>>; Caroline Millar, 'Bali Process – Building Regional Cooperation to Combat People Smuggling and Trafficking in Persons' (Speech delivered at the Institute for the Study of Global Movements, Monash University, 29 July 2004). See also Kevin Rudd, 'Rudd Says Australia Will Do its Part to Aid Regional Security' (22 July 2011) *ABC Radio Australia: Connect Asia* <<http://www.radioaustralia.net.au/connectasia/stories/201107/s3275704.htm>>.

total of AUD 23.8 million for ‘anti-people smuggling border security measures’.³⁷ AUD 9 million of this amount has been provided to support the Bali Process and fund the position of Ambassador for People Smuggling in the Department of Foreign Affairs and Trade.³⁸ By way of comparison, this funding is substantially greater than Australia’s total contribution to anti-migrant smuggling and trafficking in persons initiatives led by the United Nations Office on Drugs and Crime (UNODC), the International Organisation for Migration (IOM), and other regional and international organisations working in this field.

B Coordination

With presently 43 Member States, the Bali Process is one of the largest regional consultative processes worldwide. In addition, a number of international and regional organisations, and a considerable number of observer states, participate in this forum. While there appear to be no formal guidelines pertaining to membership and admission, the majority of countries are, not surprisingly, Asia Pacific nations, in addition to a number of countries affected by, or with a special interest in, irregular migration in the Asia Pacific. Canada, as the newest member of the Bali Process, joined the forum in late 2011.³⁹ No financial contribution is required by Member States, which facilitates the inclusion of developing countries and small island states. A 2010 assessment of migration-related RCPs note that the Bali Process is a notable exception to the rule that RCPs are generally more effective with a smaller number of members; this has been attributed to the leadership and coordination provided by the Bali Process’ Steering Group.⁴⁰

Since its inception in 2002, four regional ministerial conferences have been held in 2002, 2003, 2009, and, most recently, in 2011. The Steering Group has also overseen a total of 36 workshops on a wide range of topics relating to migrant smuggling and, in smaller number, trafficking in persons.⁴¹ By and

³⁷ Commonwealth, *2011-2012 Australian Government Budget – Budget Paper No 2 (Budget Measures)*, 10 May, 2012, 201.

³⁸ Commonwealth, *2011-2012 Australian Government Budget – Budget Paper No 2 (Budget Measures)*, 10 May 2012, 201. These contributions are part of a six-year, AUD 1.3 billion ‘whole of government strategy to combat people smuggling’ announced by the Federal Government in 2009, see Attorney General’s Department, ‘\$1.3 Billion to Combat People Smuggling and Strengthen Australia’s National Security’ (Press Release, 12 May 2009), <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_\\$1.3BilliontoCombatPeopleSmugglingandStrengthenAustraliasNationalSecurity](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_$1.3BilliontoCombatPeopleSmugglingandStrengthenAustraliasNationalSecurity)>.

³⁹ Canada has been participating in the Bali Process as an observer country since the Fourth ministerial conference in March 2011.

⁴⁰ Randall Hansen, *An Assessment of Principal Regional Consultative Processes on Migration*, IOM Migration Research Series No 38 (IOM, 2010) 34.

⁴¹ Legislation Workshop (September, 2002); Law Enforcement and Travel Document Fraud Workshop (November, 2002); Best Practice Workshop (March 2003); Trafficking/Public Awareness Workshop (September, 2003); Legislation Workshop (November, 2003); Identity Management Workshop/Document Fraud Workshop (March 2004); Refugee Status Determination Workshop (April, 2004); Return of Unlawful Migrants Workshop (May, 2004); Targeting Workshop (May, 2004); Best Practices in International Cooperation Workshop (September, 2004); International Trafficking and Public Awareness (November, 2004); Protection, Return and Reintegration of the Victims of Human Trafficking (December, 2004); Multi-Jurisdictional People Smuggling Targeting Meeting (December, 2004); Enabling Electronic Exchange of Lost and Stolen Travel Document Information Workshop (April, 2005); Developing a Co-ordinated Inter-Agency National Action Plan to Eradicate Trafficking in Persons Workshop (June, 2005); Harmonising anti-people trafficking legislation (October, 2005); Combating Child Sex Tourism Strategy Seminar (November, 2005); Operationalising Immigration Intelligence Workshop (January, 2006); Child Sex Tourism Workshop (June, 2006); Human Trafficking: Victim Support Workshop (November, 2006); Enabling Electronic Authentication of Travel Document Information (August, 2007); Multi-Jurisdictional People Smuggling Targeting Workshop (December, 2007); Threat Assessment and Risk Analysis (June, 2008); Document Examination at the Border (May, 2009); Best Practice Information Campaigns to Combat People Smuggling (October, 2009); Irregular

large, these workshops have primarily served as forums to share experiences between Member States, involving a process of comparative discussion through which Member States explore what has worked and what has not. There appears to be a degree of evolution, coordination, and development between these workshops, with one commentator noting that:

Generally speaking, workshops are often organised as a follow-up to the recommendations of another workshop. In the case of the Bali Process, a logical progression from the general to the concrete is apparent from the patterns of workshops: workshops tend to elaborate on the recommendations of previous workshops in order to make them more concrete.⁴²

Better and more effective coordination within the Bali Process and among Member States is, however, still hampered by poor information sharing. Although information sharing has been a principal purpose of the Bali Process since its inception, the forum has failed to improve information sharing capabilities between the Member States in any meaningful way. The 'lack of technical information and intelligence sharing about irregular movements through immigration borders' was singled out as a major impediment to combating migrant smuggling as recently as May 2011 during a technical experts meeting of Bali Process members in Sri Lanka.⁴³

Since 2009, the Bali Process' Technical Experts Working Group has been developing a network known as the Regional Immigration Liaison Officer Network (RILON) to help alleviate information sharing between countries in the region. To date, regional liaison offices have been established in Bangkok, Canberra, Bangkok, and Colombo, with offices in India, Pakistan and Malaysia to follow. The RILON initiative does, however, only target irregular migration by air, by aiming to:

- develop better understanding of irregular movements impacting the region through info sharing and immigration-related intelligence sharing and cooperation.
- awareness of best practices worldwide to detect and deter irregular movements by air;
- keep pace with new methodologies used by transnational criminal networks to move their clients; and
- to enhance the integrity of travel docs and visa processes and address vulnerabilities at airports.⁴⁴

C Outcomes and Achievements

Because of its nature as an informal, non-binding forum for discussion, measuring the outcomes and achievements of the Bali Process in absolute terms is not possible. The Bali Process has been defined by soft diplomacy, serving merely as a forum for dialogue and trust-building trust between Member States, not as a forum to negotiate treaties or settle disputes. This accords with the main aim of other migration-focused RCPs:

In the first place, RCPs' objectives are to build networks between participating states so as to promote trust between actors sharing common ideas and cultures, and a common understanding of migration

Movement by Air (March, 2010); Protection, Resettlement and Repatriation (June, 2010); Immigration Aspects of Seaport Security (July, 2010); Passport Integrity (July, 2010); Refugees and Irregular Movements Workshop (November, 2010); Repatriation and Reintegration and Reintegration Workshop (November, 2010); Visa Integrity Workshop (December, 2010); Irregular Movements by Air Workshop (May, 2011); Mutual Legal Assistance and Law Enforcement Cooperation (June, 2011); Aspects of Airport Security (June, 2011); Irregular Movement by Air Workshop (November, 2011). For a full of Bali Process workshops to date, see: <<http://www.baliprocess.net/index.asp?pageID=2145876967?>>.

⁴² Jobst Koehler, 'What government networks do in the field of migration: an analysis of selected Regional Consultative Processes', in Rahel Kunz, Sandra Lavinex, and Marion Panizzon (eds), *Multi-Layered Migration Governance: The Promise of Partnership* (Routledge, 2011) 67, 79.

⁴³ Australia and Sri Lanka (Co-Chairs), 'Co-Chairs' Statement', (Bali Process Ad Hoc Group Meeting: Technical Experts on Irregular Movement by Air, 10-11 May 2011, Colombo) 3 <<http://www.baliprocess.net/index.asp?pageID=2145874806?>>.

⁴⁴ Australia and Sri Lanka (Co-Chairs), 'Co-Chairs' Statement', (Bali Process Ad Hoc Group Meeting: Technical Experts on Irregular Movement by Air, 10-11 May 2011, Colombo).

priorities. Thereafter, this commonality of perceptions gradually translates into a process of convergence and harmonisation in practices and policies.⁴⁵

In a similar vein, Alexander Downer, the then Australian Minister for Foreign Affairs, reiterated in 2004 that, '[t]he Bali Process doesn't legislate, the Bali Process doesn't force anybody to do anything. What it does do is provide a framework, it provides context and it provides priority.'⁴⁶ It is fair to say the Bali Process has sparked dialogue and discussion on a topic that, especially among countries in the Asia Pacific region, has been guarded by secrecy and concerns over national sovereignty. States in the Asia Pacific region are today considerably more open and fluid in their discussions about migrant smuggling than they were prior to the creation of the Bali Process.

Furthermore, although Member States of the Bali Process experience the smuggling of migrants in very different ways and at different levels as sending, transit, or destination points, the Bali Process has succeeded in fostering a sense of cooperation.⁴⁷ 'Far from being homogeneous and characterised by common features',⁴⁸ the Asia Pacific region is one with significant geo-political, as well as cultural, social, economic and legal differences. To this end, the Bali Process represents a remarkable diplomatic achievement in terms of building solidarity among a disparate group of nations around a topic that is inherently political and divisive.⁴⁹

Apart from succeeding in creating this 'elevated atmosphere of collaboration',⁵⁰ the Bali Process has, however, produced very few concrete, practical outcomes. The following sections outline the main, albeit modest, deliverables.

1 Model laws

One of the few tangible outcomes of the Bali Process is the development of a *Model Law to Combat People Smuggling* (in addition to a separate model law relating to trafficking in persons). This document is in large parts based on the United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air*⁵¹ supplementing the *Convention against Transnational Organised Crime*.⁵² The Convention entered into force on September 29, 2003; the Protocol followed on January 28, 2004. The *Smuggling of Migrants Protocol* is the most universal framework to prevent and suppress the smuggling of migrants. As on February 1, 2012, 129 countries have signed the Protocol; 112 countries have also ratified it.⁵³

⁴⁵ Frédérique Channac & Colleen Thouez, 'Shaping International Migration Policy: The Role of Regional Consultative Processes' (2006) 29(2) *West European Politics* 370, 385–386.

⁴⁶ Alexander Downer (Press Conference, 2004), cited in Gareth Larsen, 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', in Berne Initiative & IOM (eds) *Interstate Cooperation and Migration* (Stationary Office: 2006) 43.

⁴⁷ Andrew Hurrell, 'Regionalism in theoretical perspective: regional organization and international world order', in Louise Fawcett & Andrew Hurrell (eds), *Regionalism in World Politics* (Oxford University Press: 1997) 39; cf. Christopher Chung, 'Threats without enemies: are Australia's alliances and alignments still relevant?', in Brendan Taylor (ed) *Australia as an Asia Pacific Power: Friendships in Flux?* (Routledge: 2007) 155, 162.

⁴⁸ International Organization for Migration, 'Trends in the Movement of People in the Region' (Speech delivered at the Bali Process Senior Official's Meeting, Brisbane, 24-25 February 2009), 7 <<http://www.baliprocess.net/index.asp?pageID=2145870325>>.

⁴⁹ Frédérique Channac, 'Global or International Governance for Migration? Building up a Co-operation and Enhancing Multilateralism from Regional to Global Level', Garnet Working Paper no. 19/07, 13 <<http://www2.warwick.ac.uk/fac/soc/garnet/workingpapers/1907.pdf>>.

⁵⁰ IOM, 'Trends in the Movement of People in the Region' (Speech delivered at the Bali Process Senior Official's Meeting, Brisbane, 24-25 February 2009), 7.

⁵¹ Opened for signature 15 Dec 2000, 2241 UNTS 507 [hereinafter, the *Smuggling of Migrants Protocol*].

⁵² Opened for signature 15 Dec 2000, 2225 UNTS 209.

⁵³ UNODC, *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (2 January 2012) Status of Ratification, <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>>.

During its first year of operation, the Bali Process Ad hoc Expert Groups conducted a survey of existing national laws pertaining to migrant smuggling and trafficking in persons in Member States. Following this survey, Australia and China led the work of drafting a model law to assist governments to implement and harmonise domestic laws to criminalise these offences. The model law was presented in 2003 and was followed by a number of workshops to promote the adoption of this legislative framework, targeted especially at countries that had no or only rudimentary laws relating to migrant smuggling (and trafficking in persons). At least eighteen Member States had adopted the model law domestically, in addition to nineteen other States with equivalent national laws.⁵⁴

The successful development and implementation of model laws has been an important achievement for the Bali Process. Greater uniformity in legislation will allow for greater mutual legal assistance to take place between states in the future, which raises the likelihood of future bilateral and multilateral, law enforcement and judicial cooperation to take place between Member States.⁵⁵ Furthermore, the adoption of the model law on migrant smuggling has been particularly significant in countries that have not (or not yet) signed and ratified the *Smuggling of Migrants Protocol*. Indeed, ratification of the Protocol has been low among countries in the Asia Pacific region, relative to other parts of the world. As on February 1, 2012 fifteen Member States have signed the *Smuggling of Migrants Protocol*; 21 Member States of the Bali Process have yet to sign and ratify the Protocol.⁵⁶ It is for that reason that since the first ministerial conference in 2002, the Bali Process has repeatedly called on Member States to ‘consider the benefits of signing and ratifying the Convention and its Protocols’.⁵⁷ As a non-binding forum for discussion, the Bali Process has no avenue to compel Member States to implement and comply with international treaties. As such, the development of model laws represents the only viable way to achieve greater consistency between national legislation in the region. The close similarity of the model law on migrant smuggling with provisions in the *Smuggling of Migrants Protocol* also ensures consistency with international standards. Importantly, the definition of ‘people smuggling’ in s 2 of the *Bali Process Model Law to Combat People Smuggling* reflects the definition of ‘smuggling of migrants’ in the Protocol.⁵⁸

⁵⁴ These figures are based on a Bali Process document retrieved from 2004, see: Alexander Downer, ‘Opening Remarks – Australia’ (Speech delivered at Bali Process Senior Officials’ Meeting, Brisbane, 8 June 2004), <http://www.foreignminister.gov.au/speeches/2004/040608_bali_process.html>.

⁵⁵ Frédérique Channac & Colleen Thouez, *Convergence and divergence in migration policy: the role of regional consultative processes*, Global Migration Perspectives no. 20 (GCIM, 2005) 15.

⁵⁶ UNODC, *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (2 January 2012) Status of Ratification, <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>>.

⁵⁷ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002) [15] <http://www.mofa.go.jp/policy/i_crime/people/conf0202.html>; Australia and Indonesia (Co-Chairs) ‘Co-Chairs’ Statement’ (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 29–30 April 2003) [17] <<http://www.baliprocess.net/files/ConferenceDocumentation/SRMCStatement.pdf>>; Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 14–15 February 2009) [17] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>; Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’, (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29–30 March 2011), [12] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁵⁸ Pursuant to Section 2 of the *Bali Process Model Law to Criminalise People Smuggling*, the crime of migrant smuggling (‘people smuggling’) is defined ‘arranging or assisting a person’s illegal entry into any country of which the person is not a citizen or permanent resident, including [name of country], either knowing or being reckless as to the fact that the person’s entry is illegal, in order to obtain a financial or other material benefit’, see Bali Process, *Bali Process Model Law to Criminalise People Smuggling* <<http://www.baliprocess.net/files/Legislation/Model%2520law%2520%2520people%2520smuggling%2520-%2520final.pdf>>.

2 Law enforcement cooperation – best practice guidelines

Of less practical significance is a series of best practice guidelines the Bali Process has developed on a range of topics relating to improving cooperation among law enforcement agencies in the region. These guidelines have been, for the most part, the result of various workshops convened between 2002 and 2011, though the guidelines do not follow a uniform template and are not combined or published in a single document. The focus of these guidelines has been largely on capacity building.⁵⁹ Noteworthy are the guidelines relating to identity and travel documents which are said to have achieved greater uniformity in identity verification and document examination procedures for visas and passports across the region.⁶⁰ Other achievements include the development and dissemination of anti-migrant smuggling information campaigns in countries such as Bangladesh, Sri Lanka, Indonesia, and Pakistan.⁶¹

3 Regional Framework Agreement

A significant milestone was reached at the Fourth Regional Ministerial Conference (Bali IV), held in March 2011, with the endorsement of a (non-binding) *Regional Framework Agreement*.⁶² This agreement is designed to ‘provide a more effective way for interested parties to cooperate to reduce irregular movement through the region’.⁶³ The stated purpose of the *Regional Framework Agreement* is to create an ‘umbrella under which participating states [can] pursue common objectives through practical arrangements at a bilateral or subregional level’.⁶⁴

The idea for a *Regional Framework Agreement* first emerged at a workshop held in Manila in November 2010.⁶⁵ During this meeting, UNHCR presented a paper, calling upon States to formulate a set of ‘common understandings’ in respect of migrant smuggling, in order to construct ‘a more predictable yet flexible way in which States, UNHCR, IOM, and other stakeholders might come together to develop practical arrangements that would respond to, and manage, specific situations of

⁵⁹ Khalid Koser, ‘Strengthening Policy Responses to Migrant Smuggling and Human Trafficking’ (Discussion paper prepared for the Civil Society Days of the Global Forum on Migration and Development, Manila, October 2008) 18.

⁶⁰ Key workshops in this regard have been the Ad Hoc Group Visa Integrity Workshop Maldives (7-9 December 2010); Workshop on Lost & Stolen Travel Document Information held in Bangkok, Thailand (20-22 April 2005); Identity Management Workshop, Bangkok, Thailand, (17-19 March 2004); Ad Hoc Group Workshop on Passport Integrity was held in Kuala Lumpur, Malaysia, (26-29 July 2010). One of the crucial practical outcomes of these workshops has been the enabling and standardization of electronic authentication of travel documents across the region.

⁶¹ International Organization for Migration (IOM) and New Zealand (Co-Leaders), ‘Co Leaders’ Statement’ (Bali Process Workshop on Best Practice Information Campaigns to Combat People Smuggling, Bangkok, 28-30 October 2009) [3]–[4] <http://www.baliprocess.net/files/Workshop%20Info%20Campaigns%20Oct09/Wrkshop_Info%20Campaigns_Co-leaders%20statement_30Oct2009.pdf>.

⁶² The Regional Framework Agreement (RFA) embodies the considerations and principles agreed upon at the March 2011 Bali Process Ad Hoc Meeting and the subsequent Fourth Ministerial Conference. See: Australia and Indonesia, (Co-Chairs), ‘Co-Chairs’ Statement’ (Fourth Meeting of Ad Hoc Group Senior Officials, Bali, 9 March 2011) [16]–[19] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁶³ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’, (Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29-30 March 2011), [16] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁶⁴ Kevin Rudd, ‘Opening Session Remarks – Australia’, (Speech delivered at the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29 March 2011) <http://www.foreignminister.gov.au/speeches/2011/kr_sp_110330.html>.

⁶⁵ Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, (Ad Hoc Group Workshop: UNHCR Regional Cooperation on Refugees and Irregular Movements Workshop Manila, 22-23 November 2010).

mixed movement.⁶⁶ At a Senior Official Ministers meeting on March 9, 2011, the Bali Process Steering Group endorsed this suggestion to establish a set of common understandings and agreed on the development of a *Regional Framework Agreement* to ‘provide a more effective way for interested parties to cooperate to reduce irregular movement through the region.’⁶⁷ The Steering Committee further articulated five principles which should underpin the agreement:

- i. Irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunities for orderly migration.
- ii. Where appropriate and possible, asylum seekers should have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres, taking into account any existing sub-regional arrangements.
- iii. Persons found to be refugees under those assessment processes should be provided with a durable solution, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible “in country” solutions.
- iv. Persons found not to be in need of protection should be returned, preferably on a voluntary basis, to their countries of origin, in safety and dignity. Returns should be sustainable and States should look to maximize opportunities for greater cooperation.
- v. People smuggling enterprises should be targeted through border security arrangements, law enforcement activities and disincentives for human trafficking and smuggling.⁶⁸

It was further suggested that in developing and implementing practical arrangements, Member States should be guided by the following considerations:

- i. Arrangements should promote human life and dignity.
- ii. Arrangements should seek to build capacity in the region to process mixed flows and where appropriate utilise available resources, such as those provided by international organisations.
- iii. Arrangements should reflect the principles of burden-sharing and collective responsibility, while respecting sovereignty and the national security of concerned States.
- iv. Arrangements should seek to address root causes of irregular movement and promote population stabilisation wherever possible.
- v. Arrangements should promote orderly, legal migration and provide appropriate opportunities for regular migration.
- vi. Any arrangements should avoid creating pull factors to, or within, the region.
- vii. Arrangements should seek to undermine the people smuggling model and create disincentives for irregular movement and may include, in appropriate circumstances, transfer and readmission.
- viii. Arrangements should support and promote increased information exchange, while respecting confidentiality and upholding the privacy of affected persons.⁶⁹

These principles and considerations form the central elements of the *Regional Framework Agreement* that was approved by the Bali IV conference in March 2011.⁷⁰ Although this agreement is not a

⁶⁶ UNHCR, ‘Regional Cooperative Approach to address Refugees, Asylum Seekers and Irregular Movement’ (Paper presented at Bali Process Ad Hoc Group UNHCR Regional Cooperation on Refugees and Irregular Movements Workshop’ Manila, 22-23 November 2010) [5] <<http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>>.

⁶⁷ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Fourth Meeting of Ad Hoc Group Senior Officials, Bali, 9 March 2011) [16] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁶⁸ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Fourth Meeting of Ad Hoc Group Senior Officials, Bali, 9 March 2011) [16] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁶⁹ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Fourth Meeting of Ad Hoc Group Senior Officials, Bali, 9 March 2011) [19] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

binding or enforceable instrument, it has been hailed by some commentators as a ‘ground-breaking’ achievement,⁷¹ blending border security objectives in the context of broader principles of international humanitarian law. Savitri Taylor, for instance, notes that:

Most countries in the Asia-Pacific region are not parties to the Refugee Convention or Protocol and have made little or no attempt to provide for the protection of refugees in domestic law. Against this background, the mere willingness to talk about refugee protection cooperation at a regional level was a huge step forward. Consider how legally and culturally diverse the countries in this region are and how great their obsession with defending national sovereignty and it becomes apparent how truly impressive an accomplishment it was on the part of the UNHCR and the Australian Government to have got them to take even this baby step beyond merely talking.⁷²

The implementation and operationalisation of the *Regional Framework Agreement* have yet to be fully finalised. On October 12, 2011, UNHCR made a presentation to a meeting in Sydney during which it proposed one possible working structure for the agreement.⁷³ This proposal would see the establishment of a Regional Support Office, which would operate under the directorship of Co-Chairs, Australia and Indonesia. This Regional Support Office would serve to coordinate activities relating to training and capacity building, ad hoc working groups, research, and practical projects.⁷⁴

D Policy Agenda

As mentioned previously, one of the features that distinguishes the Bali Process from other regional consultative processes is its unique focus on migrant smuggling and, to a lesser extent, on trafficking in persons. While this very specific mandate has been helpful in focusing discussions on the immediate issues of concern,⁷⁵ the narrow focus of the Bali Process may also be detrimental in the sense that it has prevented a broader discussion of irregular migration and its root causes and human rights dimensions. For the most part, the policy agenda of the Bali Process has been driven by border security imperatives and there are some signs that the more dominant Member States have routinely dictated this policy agenda.

1 Narrow focus

Between 2002 and 2011, the deliberations and activities of the Bali Process have predominantly centred on law enforcement and border control strategies to combat the smuggling of migrants. This is also evidenced in the focus of and topics explored by the Ad hoc Experts Groups and the many workshops conducted by the Bali Process. By contrast, issues relating to the protection of, and assistance available to, asylum seekers and refugees, the root causes of irregular migration, and general human rights matters have not captured much attention. Most Bali Process Member States – chief among them Indonesia and Malaysia – also are not States Parties to the *Convention and Protocol relating to the Status of Refugees*, and minimal effort has been made by the Bali Process to encourage greater accession to and compliance with the obligations and principles of international refugee law.

⁷⁰ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 March 2011), [15]-[19] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁷¹ Savitri Taylor, ‘Regional Cooperation and the Malaysian Solution’ *Inside Story* (online), 9 May 2011, 1 <<http://inside.org.au/regional-cooperation-and-the-malaysian-solution/>>.

⁷² Savitri Taylor, ‘Regional Cooperation and the Malaysian Solution’ *Inside Story* (online), 9 May 2011, 2 <<http://inside.org.au/regional-cooperation-and-the-malaysian-solution/>>.

⁷³ UNHCR, ‘Operationalising the Regional Cooperation Framework’ (Meeting of the Ad Hoc Group Senior Officials, Sydney, 12 October 2011) <<http://www.baliprocess.net/index.asp?pageID=2145831461>>

⁷⁴ UNHCR, ‘Operationalising the Regional Cooperation Framework’ (Meeting of the Ad Hoc Group Senior Officials, Sydney, 12 October 2011) <<http://www.baliprocess.net/index.asp?pageID=2145831461>>

⁷⁵ See, for example, Randall Hansen, *An Assessment of Principal Regional Consultative Processes on Migration*, IOM Migration Research Series No 38 (IOM, 2010) 23.

The Bali Process' failure to foster a robust dialogue on matters relating to refugee protection and human rights has attracted criticism from a number of sources. For instance, Human Rights Watch, a US-based non-government organisation (NGO), noted that the Bali Process 'has taken a narrow law enforcement approach to controlling irregular migration, with inadequate consideration of human rights or refugee protection',⁷⁶ and called on the Bali Process Steering Group to

make the humane treatment of migrants, the ability of asylum seekers to access asylum processing systems, and the principle of non-refoulement core objectives of the Bali Process, in addition to making the Bali Process more transparent and accountable by including civil society organisations.⁷⁷

A recent high-level roundtable held by the Bangkok-based NGO Global Alliance Against Trafficking in Women (GAATW) in conjunction with the Office of the High Commissioner for Human Rights (OHCHR) also levelled criticism against the Bali Process for its failure to deal with human rights, noting that the forum tends to 'ignore human rights obligations'.⁷⁸ The roundtable further remarked that the response to migrant smuggling, including forums such as the Bali Process, has been driven by western, industrialised countries and achieve little more than 'serving their interests rather than reflecting a migrant-centred perspective'.⁷⁹ The roundtable further heard that countries such as Australia:

[n]eed migrants and yet also do not wish to be seen as welcoming migrants which complicates "migration management": migration responses often involve offsetting public relations threats while addressing the realities of labour markets which depend upon migrant labour.⁸⁰

Some of the criticism has been addressed with the development of the *Regional Framework Agreement* in 2011. There are some signs that over the past year the Bali Process has broadened its scope to include a greater focus on humanitarian issues, and pay some attention to the root causes of irregular migration, especially migrant smuggling. It is, however, too early to suggest that this development signals a more fundamental shift of the Bali Process and alleviates the concerns expressed by NGOs.

Currently, UNODC is undertaking a comprehensive information-gathering project for Bali Process Member States focused on improving the policy direction of the Bali Process.⁸¹ The aim of the

⁷⁶ Human Rights Watch, 'Letter to Australian Political Party Leaders Regarding Asylum Seekers and Irregular Migration', (8 August 2010) <<http://www.hrw.org/news/2010/08/09/letter-australian-political-party-leaders-regarding-asylum-seekers-and-irregular-mig>>.

⁷⁷ Human Rights Watch, 'Letter to Australian Political Party Leaders Regarding Asylum Seekers and Irregular Migration', (8 August 2010) <<http://www.hrw.org/news/2010/08/09/letter-australian-political-party-leaders-regarding-asylum-seekers-and-irregular-mig>>.

⁷⁸ Global Alliance Against Trafficking in Women International Secretariat, 'Smuggling Roundtable Meeting Report', (Report based on a roundtable meeting hosted by the Global Alliance Against Trafficking in Women in conjunction with the UN Office of the High Commissioner for Human Rights in Bangkok, Thailand, 20-22 June 2011), <http://www.gaatw.org/index.php?option=com_content&view=article&id=639:smuggling-roundtable-meeting-report&catid=68:GAATW%20News>.

⁷⁹ Global Alliance Against Trafficking in Women International Secretariat, 'Smuggling Roundtable Meeting Report', (Report based on a roundtable meeting hosted by the Global Alliance Against Trafficking in Women in conjunction with the UN Office of the High Commissioner for Human Rights in Bangkok, Thailand, 20-22 June 2011), <http://www.gaatw.org/index.php?option=com_content&view=article&id=639:smuggling-roundtable-meeting-report&catid=68:GAATW%20News>.

⁸⁰ Global Alliance Against Trafficking in Women International Secretariat, 'Smuggling Roundtable Meeting Report', (Report based on a roundtable meeting hosted by the Global Alliance Against Trafficking in Women in conjunction with the UN Office of the High Commissioner for Human Rights in Bangkok, Thailand, 20-22 June 2011), <http://www.gaatw.org/index.php?option=com_content&view=article&id=639:smuggling-roundtable-meeting-report&catid=68:GAATW%20News>.

project is to initiate a new voluntary reporting system for Member States, thereby encouraging better evidence-based policy formulation among Process delegates. The project is significant in scale and is due for completion in late 2012.⁸²

2 Captured by state interests

The Bali Process has been criticised for being primarily geared towards the interests of its main donors, Australia in particular. Indeed, the Bali Process is a politicised forum led by a select Steering Group with particular interests in the activities and outcomes of this forum. Chief among them is Australia, the main instigator of the Bali Process and its main source of funding. Despite the outwards appearance of a consultative forum in which Member States have equal say, there is no doubt that Australia wields considerable clout in the forum, which is reflected in most, if not all of the Bali Process' reports and minutes.

Concerns that the Bali Process may indeed have fallen captive to Australian political interests was manifested in the 2011 negotiations of the *Regional Framework Agreement*. The development and content of this agreement has been influenced by the domestic interests of the Australian Government to respond to mounting pressure over the rising numbers of unauthorised boat arrivals in 2009 and 2010, concerns over the capacity and conditions in Australia's immigration detention facilities (especially on Christmas Island), and unsolicited proposals by the Government to open a regional refugee processing centre.

In regards to the issue of offshore detention, in October 2010 the then Australian Minister for Immigration and Citizenship, Mr Chris Bowen, initially raised the possibility of establishing such a regional processing centre in East Timor,⁸³ though it was not immediately clear whether the Government of East Timor had been consulted about this proposal when first announcements were made.⁸⁴ After further negotiations with East Timor stalled in late 2010 and early 2011, the Government reached 'instinctively' to the Bali Process for its endorsement of the proposal.⁸⁵

⁸¹ The project is known as the Bali Process Evidence Base Project (BPEBP), see UNODC 'UNODC Activities in Support of the Bali Process', (Bali Process Ad Hoc Senior Officials' Meeting, Sydney, 12 October 2011) <www.baliprocess.net/files/0940%20UNODC.ppt>.

⁸² UNODC, 'Ministers welcome UNODC assistance in establishing a reporting system on migrant smuggling', (5 April 2011) <<http://www.unodc.org/eastasiaandpacific/en/2011/04/som-indonesia/story.html>> Australia and Indonesia (Co-Chairs), 'Co-Chairs' Statement' (Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 March 2011), [20] <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.

⁸³ Chris Bowen, Minister for Immigration and Citizenship (Press Conference, 12 October 2010) <<http://www.chrisbowen.net/media-centre/transcripts.do?newsId=3778>>.

⁸⁴ Cf Lindsay Murdoch, 'Dili gets outline of Gillard's Timor solution, five months on', *The Age* (online), 20 December, 2010, <<http://www.theage.com.au/national/dili-gets-outline-of-gillards-timor-solution-five-months-on-20101219-191xd.html>>; Stephen Smith, 'Interview by Jim Middleton, Australia Network' (Press release, 7 July 2010), <<http://www.foreignminister.gov.au/transcripts/2010/100707.html>>; Karlis Salna, 'East Timorese open to processing centre plan', *The Sydney Morning Herald* (online), 29 March 2011, <<http://news.smh.com.au/breaking-news-world/east-timor-open-to-processing-centre-plan-20110329-1cdm7.html>>; Agence France-Press (author unknown), 'Talks begin on regional processing centre but East Timor worried it'll attract asylum-seekers', *The Australian* (online), 12 October 2010, <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/talks-begin-on-regional-processing-centre-but-east-timor-worried-itll-attract-asylum-seekers/story-fn59nm2j-1225937732450?>>; Commonwealth, *Hansard*, Foreign Affairs, Defence and Trade Legislation Committee, Senate, 24 February 2011, 78-80 (Eric Abetz).

⁸⁵ Savitri Taylor, 'Regional Cooperation and the Malaysian Solution' *Inside Story* (online), 9 May, 2011, 3 <<http://inside.org.au/regional-cooperation-and-the-malaysian-solution/>>. For further background to the East Timorese deal and critical comment, see Michelle Grattan, 'Bowen looks to Bali for help but the horizon is bleak', *The Sydney Morning Herald* (online), 27 March 2011,

As a result, the *Regional Framework Agreement*, endorsed by the Senior Officials Meeting on March 9, 2011 includes a reference to ‘the possible establishment of regional assessment arrangements which might include a centre or centres, taking into account any existing sub-regional arrangements.’⁸⁶ As Taylor points out, such a reference clearly reflects ‘Australian language intended to enable establishment of the regional assessment centre it was already pursuing’.⁸⁷

Despite this inclusion in the *Regional Framework Agreement*, the Bali IV meeting held in March 2011 did not provide further and more concrete endorsement of Australia’s proposal to establish a regional processing centre.⁸⁸ As it became clear that discussions with East Timor on this matter had reached an impasse,⁸⁹ the Australian Government then began negotiations with the Government of Malaysia about an alternative arrangement to ‘swap’ asylum seekers and refugees between them.⁹⁰ This agreement envisaged Australia would send 800 asylum seekers who arrived in Australia unlawfully to Malaysia, and in return would accept 4000 recognised refugees from Malaysia.⁹¹

Immediately after the agreement was signed and became operational on July 25, 2011,⁹² a group of lawyers representing asylum seekers who had arrived in Australia successfully challenged the

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- <<http://www.smh.com.au/opinion/politics/bowen-looks-to-bali-for-help-but-the-horizon-is-bleak-20110326-1cay1.html>>.
- ⁸⁶ Australia and Indonesia (Co-Chairs), ‘Co-Chairs’ Statement’ Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 9 March 2011) [16(ii)]. <<http://www.baliprocess.net/index.asp?pageID=2145831461>>.
- ⁸⁷ Savitri Taylor, ‘Regional Cooperation and the Malaysian Solution’ *Inside Story* (online), 9 May 2011, 3 <<http://inside.org.au/regional-cooperation-and-the-malaysian-solution/>>.
- ⁸⁸ Several commentators labelled this as a ‘failure’ as far as Australia’s political interests were concerned because, whilst the Regional Framework Agreement included a reference to a regional processing centre, it did not *guarantee* such a proposal or nominate a specific country to house such a centre. See, Greg Sheridan, ‘Gillard suffers humiliating failure in Asia talks’ *The Australian* (online) 31 March 2011; Steve Pennells, ‘Bali summit falls short of real deal’, *The West Australian* (online), 31 March 2011 <<http://au.news.yahoo.com/thewest/election/a/-/article/9104739/bali-summit-falls-short-of-real-deal/>>; ‘Dead in the water’ [author unknown] *The Economist* (online), 1 April 2011, <http://www.economist.com/blogs/banyan/2011/04/australias_processing_centre>; Damien Kingsbury, ‘Australia’s asylum seeker policy dying a death of a thousand cuts’, *The Analyst Journal* (online), 6 April 2011, <<http://www.analystjournal.com/component/k2/item/1045-australias-asylum-seeker-policy-dying-a-death-of-a-thousand-cuts.html>>.
- ⁸⁹ Sara Everingham, ‘East Timor slams door on refugee talks’, *ABC News* (online), 7 April, 2011, <<http://www.abc.net.au/news/2011-04-06/east-timor-slams-door-on-refugee-centre/2625700>>; Lanai Vasek and Paul Maley, ‘Not a single interest in East Timor centre’, *The Australian* (online), February 22, 2011, <<http://www.theaustralian.com.au/news/nation/not-a-single-interest-in-east-timor-centre/story-fn7dlx76-1226009700642>>; Australian Associated Press (author unknown), ‘Gillard’s East Timor plan bogs down’, *Herald Sun* (online), 1 April, 2011, <<http://www.heraldsun.com.au/ipad/gillards-east-timor-plan-bogs-down/story-fn6bfm6w-1226031561229>>; Australian Associated Press (author unknown), ‘East Timor contradicts Australia over asylum centre, saying there’ve been no talks for months’ *The Australian* (online), 12 April, 2011, <<http://www.theaustralian.com.au/national-affairs/east-timor-contradicts-australia-over-asylum-centre-saying-thereve-been-no-talks-for-months/story-fn59niix-1226037659852>>.
- ⁹⁰ Chris Bowen and Julia Gillard, ‘The regional cooperation framework’, (Joint Press Release, 7 May 2011), <<http://www.minister.immi.gov.au/media/cb/2011/cb165079.htm>>.
- ⁹¹ Chris Bowen and Julia Gillard, ‘The regional cooperation framework’, (Joint Press Release, 7 May 2011), <<http://www.minister.immi.gov.au/media/cb/2011/cb165079.htm>>.
- ⁹² *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (25 July 2011) <http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf>.

agreements in the High Court of Australia.⁹³ By a majority of 6:1, the High Court rejected the legality of any decision to send asylum seekers from Australia to Malaysia, principally because

Malaysia: first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments.⁹⁴

It appears that on this occasion the Australian Government failed to engage the Bali Process for advancing its domestic political purpose. Moreover, the High Court's decision may also provide further support to calls that regional consultation pertaining to migrant smuggling need to pay greater attention to matters relating to the protection of refugees and asylum seekers.⁹⁵

E Accountability and Oversight

The influence that individual Member States can exercise within the Bali Process raises concerns about accountability and transparency of this forum. As mentioned previously, the forum is governed mostly by the select number of countries represented in the Steering Group. The Bali Process is a 'state-owned' process in which the Ministers representing Member States carry out all matters of administration via the Steering Group. While this has allowed the Bali Process to become involved in a broader range of activities (including discussions relating to normative matters such as model laws), and has been effective in coordinating the large number of Member States, it has also reduced the transparency of the organisation.⁹⁶ As one recent report concludes, the Steering Group control over the Bali Process has created a forum that operates in a 'closed environment'.⁹⁷

While international organisations and some NGOs are represented in the Bali Process, there is no independent oversight of the activities or decisions taken. The Asia Pacific Refugee Rights Network (APRRN) claims to monitor the Bali Process,⁹⁸ but has yet to participate in a single workshop or conference. For this reason, the Refugee Council of Australia, an NGO, is currently petitioning the Australian Government to establish an independent entity to oversee the work of the Bali Process.⁹⁹

⁹³ *Plaintiff M70/2011; Plaintiff M106 v Minister for Immigration and Citizenship* [2011] HCA 32.

⁹⁴ *Plaintiff M70/2011; Plaintiff M106 v Minister for Immigration and Citizenship* [2011] HCA 32, [135]. These factors buttressed the High Court's technical ruling that 'jurisdictional fact error' had undermined Minister Bowen's decision to enter into the offshore processing agreement with Malaysia. Specifically, the High Court held that Minister Bowen's declaration that Malaysia was a valid 'specified country' for offshore processing was unauthorised pursuant to *Migration Act 1958* (Cth) s 198A(3).

⁹⁵ Melissa Curley and Dane Moores, 'Issues in Australian Foreign Policy: January to June 2011' (2011) 57(4) *Australian Journal of Politics and History* 597, 212-13.

⁹⁶ Jobst Koehler, 'What government networks do in the field of migration: an analysis of selected Regional Consultative Processes', in Rahel Kunz, Sandra Lavinex, and Marion Panizzon (eds), *Multi-Layered Migration Governance: The Promise of Partnership* (Routledge, 2011) 78-79.

⁹⁷ Human Rights Law Centre and Anti-Slavery Australia, *Briefing Paper on Key Human Rights Issues in Australia*, (report prepared for the UN Special Rapporteur on Trafficking in Persons, November 2011), 24.

⁹⁸ Asia Pacific Refugee Rights Network, 'Nothing About Us Without Us' (Prepared for the 3rd Asia Pacific Consultations on Refugee Rights, Bangkok, 25-27 November, 2010) 12.

⁹⁹ Refugee Council of Australia 'Submissions to the Attorney General's Department on Recommendations made under the Universal Periodic Review of Australia', 2010 <http://www.refugeecouncil.org.au/resources/submissions/1103_UPR_sub.pdf>

V RHETORIC AND REGIONALISM

A Political Rhetoric

Current and former Australian Governments have repeatedly characterised the Bali Process as the single most important initiative to prevent and suppress migrant smuggling in the Asia Pacific Region. In June 2004, for instance, Mr Alexander Downer, Australia's then Minister for Foreign Affairs, described the Bali Process as an 'integral' organisation which had generated 'numerous and significant' achievements.¹⁰⁰ Equally, the incumbent Minister, Mr Kevin Rudd, regards the Bali Process as vital and said in June 2011 that he was told by UNHCR that 'all regions of the world are striving towards a comparable agreement'.¹⁰¹

The Australian Government, together with the Government of Indonesia, are indeed of the firm belief that the Bali Process has had 'demonstrable success in creating an environment in which operational agencies in regional countries increasingly cooperate in practical ways to combat people smuggling and trafficking'.¹⁰² The Australian and Indonesian Co-Chairs promoted the view that there was a causal link between the work of the Bali Process and the decrease in migrant smuggling activities from 2002 onwards. As recently as March 2009, the Co-Chairs declared that 'the spirit of cooperation that followed the two previous ministerial conferences in 2002 and 2003 [has] helped to mitigate the number and intensity of people smuggled and trafficked for several years'.¹⁰³ The considerable increase in migrant smuggling activity since September 2008, especially from Sri Lanka, Malaysia, and Indonesia to Australia, has, however, proved these statements premature and – ultimately – wrong.

Some critics thus point to a failure of the Bali Process to achieve its stated purpose. Furthermore, the reality of migrant smuggling is of a complexity that defies single and simplistic solutions. It is merely naïve to believe that a consultative regional forum like the Bali Process which focuses almost exclusively on law enforcement and border control measures in the region can have any real impact on the levels of irregular migration, especially so long as this and other international forums fail to acknowledge, let alone address, the complex 'push' and 'pull' factors that drive international migration.¹⁰⁴

Concerns have also been expressed about the limited practical outcomes of the Bali Process and of the political rhetoric surrounding this forum, with one Australian Senator noting that:

In the end it is all very well to talk tough and thump the desk and say, "We are going to do this", but the reality is the concrete key performance indicators out of this Bali Process. If we are investing a lot of

¹⁰⁰ Alexander Downer, 'Opening Remarks – Australia' (Speech delivered at Bali Process Senior Officials' Meeting, Brisbane, 8 June 2004), <http://www.foreignminister.gov.au/speeches/2004/040608_bali_process.html>.

¹⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June, 2011, 7141 (Kevin Rudd). The legitimacy of Rudd's comments are strengthened by a United Nations report handed down in 2008 following a side-event hosted by the Australian and Indonesian governments at the 2008 UN.GIFT Vienna Forum. The side-event offered a chance for the Bali Process Co-Chairs to disseminate information about the Bali Process and discuss its progress (albeit in the context of human trafficking). The subsequent report prepared by the UN recommends the Bali Process as a suitable model for other regions to follow, see United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), *The Vienna Forum report: a way forward to combat human trafficking* (United Nations, 2008) 58.

¹⁰² Global Commission on International Migration (GCIM), *Migration in an Interconnected World: New Directions for Action* (GCIM, 2005) 2.

¹⁰³ Co-Chairs (Australia and Indonesia), 'Opening Statement by Co-Chairs' (Speech delivered at the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14 March 2009), <http://www.foreignminister.gov.au/speeches/2009/090414_bali_statement.html>.

¹⁰⁴ For an excellent examination on this point, see Mary Crock & Daniel Ghezelbash, 'Do Loose Lips Bring Ships?' (2010) 19(2) *Griffith Law Review* 238–287.

time and effort into it, what are we going to get out of it, and when are we going to get something out of it?¹⁰⁵

Concerns over the usefulness and sustainability of the Bali Process increased considerably after the failed attempt by the Australian Government in 2011 to establish a regional processing centres for asylum seekers. These attempt followed announcements made by the Australian Labor Party during the 2010 federal election campaign.¹⁰⁶ It appears that the Government had formed the false belief that the infrastructure of the Bali Process and the trust formed between Member States in the ten years since the inception of the forum would offer a sufficient foundation to negotiate an arrangement that would ultimately divert some, if not all, of the unauthorised boat arrivals away from Australia to some of its neighbours. The Australian Government, however, received no support for its idea from the Bali Process at the Bali IV meeting. As Professor James Jupp predicted prior to the meeting, ‘the [Australian] Government can’t just waltz into the Bali Process and expect its regional partners to cooperate’.¹⁰⁷

B Regional Plurilateralism

Some of the shortcomings of the Bali Process are not, however, the fault of the forum itself and are rather explained by circumstances that plague a great range of international initiatives, including regional consultative processes such as the Bali Process. Specifically, there appears to be a lack of enthusiasm by countries to engage in open discussions about the underlying causes, circumstances, and characteristics of international migration, of which migrant smuggling is merely one form. There is a remarkable void in international law insofar as binding agreements pertaining to international migration are concerned. The many treaties and declarations on issues such as refugees, asylum seekers, migrant workers, migrant smuggling et cetera, and the work done by organisations such as UNHCR, IOM, ILO, and UNODC are seen by some merely as patchwork to regulate or control rudimentary aspects of what is a much wider and far more complex problem. As Alexander Betts explains:

The complexity of global migration governance points to a different type of global governance beyond the formal and inclusive multilateralism that characterized the post-Second World War consensus. In the absence of a comprehensive UN framework, it highlights an environment in which institutional proliferation has created a complex, multi-level tapestry of diverse and contested institutions. This form of plurilateralism, in which a range of institutions with different degrees of inclusivity and exclusivity coexist, is increasingly becoming the norm in a range of issue-areas, and global migration governance offers an extremely salient case study within which to explore international politics in the context of a dense framework of overlapping, parallel, and nested institutions.¹⁰⁸

It is, however, highly unlikely that the international community, especially the countries of the Asia Pacific region, will develop more comprehensive, binding frameworks that manage and monitor international migration in a more coordinated and sustainable way in the foreseeable future. Instead, many scholars view the evolution of the Bali Process and of the very many other non-binding consultative processes relating to migration as a trend towards ‘informal socialisation networks’¹⁰⁹ or

¹⁰⁵ Commonwealth, *Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 22 October, 2009, 44 (Concetta Fierravanti-Wells).

¹⁰⁶ Gillard’s election promise to establish a regional processing centre did receive criticism from immigration experts, see Lanai Vasek, ‘Gillard told to toss ‘silly’ regional plan’, *The Australian* (online), 31 January 2011, <<http://www.theaustralian.com.au/national-affairs/pm-told-to-toss-silly-regional-plan/story-fn59niix-1225997091504>>.

¹⁰⁷ James Jupp, quoted in Lanai Vasek, ‘Gillard told to toss ‘silly’ regional plan’, *The Australian* (online), 31 January 2011, <<http://www.theaustralian.com.au/national-affairs/pm-told-to-toss-silly-regional-plan/story-fn59niix-1225997091504>>.

¹⁰⁸ Alexander Betts, *Global Migration Governance* (2011, Oxford University Press), 9.

¹⁰⁹ Frédérique Channac & Colleen Thouez, ‘Shaping International Migration Policy: The Role of Regional Consultative Processes’ (2006) 29(2) *West European Politics* 370, 371.

‘informal plurilateralism’.¹¹⁰ ‘Informal plurilateralism, explains Christina Oelgemöller, refers to ‘an opaque process in which a shared interest among a limited number of governments brings these together for consultation, the moulding of ideas about a shared contentious issue that is constructed as a problem.’¹¹¹

Notwithstanding this criticism, there appears to be a contemporary role and need for the type of plurilateralism embodied in the Bali Process, for it is a forum that brings together source, transit, and destination countries of migrant smuggling, many of which are not States Parties to the *Smuggling of Migrants Protocol*. To this end, the Bali Process is a direct – and indeed a useful – response to the apparent unwillingness and inability of some States to subscribe to more binding, international frameworks on this issue.¹¹² Some supporters praise the Bali Process for pioneering new forms and functions of plurilateralism with IOM describing the Bali Process as a ‘model’ regional consultative process it recommends for other regions to adopt.¹¹³ The activities and achievements of the Bali Process must be seen in this context and against the backdrop of international cooperation in the Asia Pacific region more generally. To that end, the significance of Australia projecting a positive diplomatic message to its regional neighbours via leadership and cooperation in the Bali Process must not be underestimated.

On the other hand, the Bali Process should not be seen as an end in itself, and this analysis has shown this consultative forum provides no true alternative to binding and enforceable international treaties that go beyond the boundaries of individual regions. More importantly, the Bali Process should not distract from the plight of refugees that drives much of the irregular migration in the Asia Pacific region, and the forum is not equipped to address the multifaceted political, social, economic, and environmental factors that constitute root causes of migrant smuggling.

VI CONCLUSION

Since its inception in 2002, the Bali Process has only produced limited tangible outcomes and has had no immediate impact on the levels and patterns of migrant smuggling in the Asia Pacific region. But the Bali Process has served the interest of its chief advocate — that is the Australian Government — well, and it has created an ongoing, high-level forum for discussion of a topic that prior to the inception of the Bali Process did not feature prominently in international affairs and cooperation in this region.

This analysis suggests that over the ten years of operation the Australian Government may have placed excessive reliance on the Bali Process and has overstated – and perhaps overestimated – the capabilities and maturity of this forum. As the Bali Process enters its second decade, it is important for Member States, especially Australia, not to burden this forum with unrealistic expectations:

They are processes and not institutions, even if it is true that some processes tend to become institutionalised as their objectives become clearer and their activities diversify [...] RCPs are not

¹¹⁰ Christina Oelgemöller, ‘Informal Plurilateralism: The Impossibility of Multilateralism in the Steering of Immigration’ (2011) 13(1) *British Journal of Politics and International Relations*, 110–126.

¹¹¹ Christina Oelgemöller, ‘Informal Plurilateralism: The Impossibility of Multilateralism in the Steering of Immigration’ (2011) 13(1) *British Journal of Politics and International Relations*, 110, 113–114.

¹¹² This observation is not intended to weigh into the more general “multilateralism versus democracy” debate. To do so would be unwise for the compelling reasons set out in: Robert Keohane, Stephen Macedo and Andrew Moravcsik, ‘Democracy-Enhancing Multilateralism’ (2009) 63 *International Organization* 1, 26–28.

¹¹³ See, for example, William Lacy Swing, ‘Remarks by William Lacy Swing – Director General, International Organization for Migration’, (Speech delivered at the Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 March 2011), <<http://www.iom.int/jahia/Jahia/media/all-speeches/cache/offonce?entryId=29430>>.

institutions intended to design standards, binding legal rules or agreements, nor do they have the responsibility to assess whether participating governments respect their international commitments.¹¹⁴

Evidently, the Bali Process is not yet at the ‘point of maturity’ the Australian and Indonesia Co-Chairs believed had been reached in 2009. Since that time, however, further progress has been made, as is most evidently demonstrated in the *Regional Framework Agreement* launched in 2011. Abandoning the Bali Process at this point would be counterproductive – and deeply injurious to Australia’s political interests.¹¹⁵ Despite its slow progress and many failings, the Bali Process remains the single most important regional forum on migrant smuggling in the Asia Pacific.

Whether the Bali Process will develop into a more comprehensive and more effective regional organisation over the next ten years will depend predominantly on the cooperation and willingness of Member States. This is where Australia has to provide further leadership into the foreseeable future, but must be careful not to dominate the Bali Process – and potentially alienate other Members – with its domestic policy agenda. Australia’s ‘political games’ must not be allowed to obfuscate regional policy dialogue on what is an already complex security and humanitarian issue.¹¹⁶ Instead, greater attention needs to be paid to the complexities and root causes of migrant smuggling, and to the assistance and protection offered to smuggled migrants.

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¹¹⁴ Frédérique Channac & Colleen Thouez, ‘Shaping International Migration Policy: The Role of Regional Consultative Processes’ (2006) 29(2) *West European Politics* 370, 377–378.

¹¹⁵ John Menadue and Arja Keski-Nummi, ‘No man is an island they say. So why the sea of heartbreak?’ *The Age* (online), 24 December 2011, <<http://www.theage.com.au/opinion/no-man-is-an-island-they-say-so-why-the-sea-of-heartbreak-20111223-1p8lx.html>>;

¹¹⁶ Cf. Susan Metcalfe, ‘Asylum seeker solution: focus on the policy, not political games’ *ABC News* (online), 22 December 2011, <<http://www.abc.net.au/unleashed/3743706.html>>; Dennis Shanahan, ‘Talks promise end to political point-scoring’, *The Australian* (online), 24 December 2011, <<http://www.theaustralian.com.au/national-affairs/opinion/talks-promise-end-to-political-point-scoring/story-e6frgd0x-1226229717620>>; Neil James, ‘An even keel for boat people’, *The Canberra Times* (online), 3 January 2012, <<http://www.canberratimes.com.au/news/opinion/editorial/general/an-even-keel-for-boat-people/2408434.aspx>>.