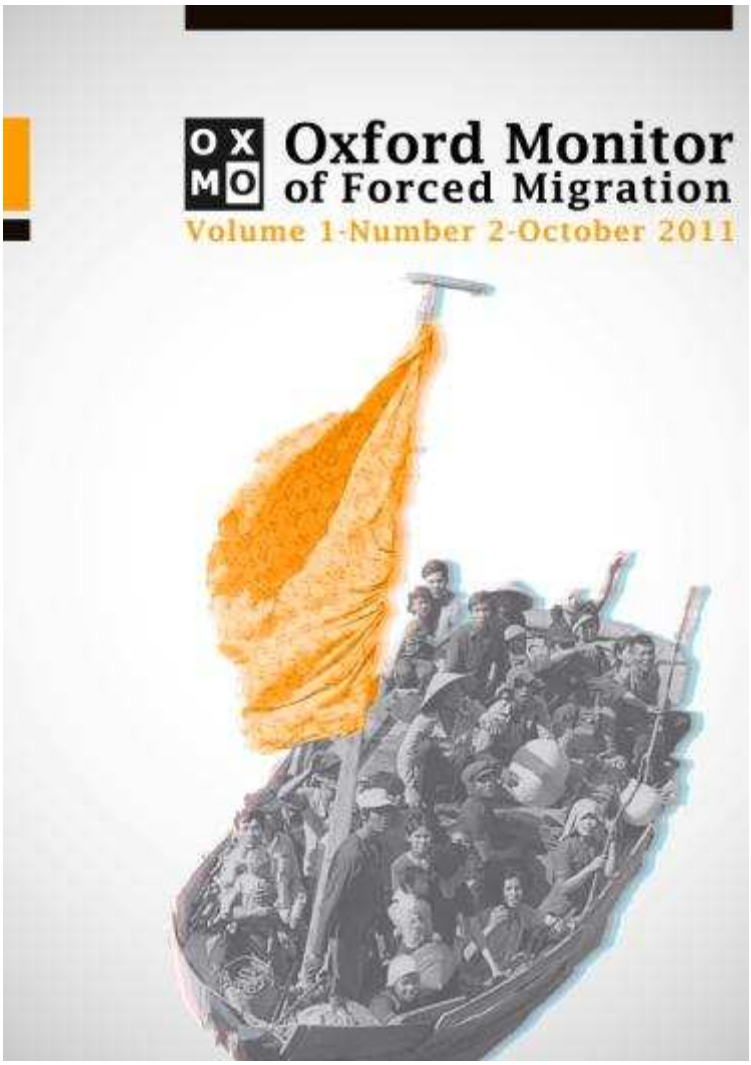

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Why Australia's 'Malaysian Solution' is No Solution at All

By Luke Lovell

On 7 May this year, Australian Prime Minister Julia Gillard announced that her Labor government was in talks with their Malaysian counterparts to finalise a bilateral agreement that would see the two nations trade asylum seekers and refugees. Signed on July 25, 2011, this policy stipulated that the next 800 asylum seekers intercepted attempting to reach Australia by boat after that date would be sent to Malaysia to have their claims for asylum heard there. In turn, Australia would have accepted 4,000 UNHCR-certified refugees currently residing in Malaysia for permanent resettlement – 1,000 a year over the next four years. A legal challenge against the policy lodged in the High Court of Australia by refugee lawyer David Manne saw this deal declared illegal on August 31, with the Court decreeing that asylum seekers could not be processed offshore unless the country in which processing would occur had certain legal safeguards in place to protect asylum seekers, safeguards Malaysia lacks (Hyland, 2011). Popularly dubbed the 'Malaysian Solution' the plan was certainly not the first time a country has sought to deter boat arrivals through the forced deportation of people to non-Convention states. However, in attempting to solve the nation's supposed asylum seeker 'problem' by engaging in such a trade, the Australian government was at risk of legitimising the future behaviour of other signatories to the Refugee Convention who would seek to prioritise negating domestic political pressure at the expense of fulfilling their international human rights obligations.

Why implement policies aimed at deterring asylum seekers arriving by boat? As an isolated island nation, Australia has always been able to maintain a tightly-controlled immigration program. A decade after former Prime Minister John Howard opined that 'We will decide who comes to this country and the circumstances in which they come' (Howard 2001), his sentiment still resonates deeply with many Australians. Historically the majority of asylum seekers have arrived by air, with estimates since 1976 typically varying from 96 to 99 percent (Phillips and Spinks 2011). The proportion of boat arrivals has increased significantly over the past few years, with figures for 2009-10 (the latest official figures available) show asylum seekers arriving by boat made up 47 percent of all applications for asylum lodged onshore – up from 16 percent in 2008-09 (Phillips 2011). Although irregular maritime arrivals still comprise less than half of Australia's asylum seeker population, this jump in numbers has seen debate and policy turn almost exclusively to asylum seekers arriving by boat. As unsolicited and largely undocumented arrivals, asylum seekers coming by boat provoke in many Australians a feeling of loss of control over the country's borders that stirs anxiety about national security and identity (Gale 2004). In a rush to court voters anxious about this perceived threat both major political parties have sought to position themselves as tough on border control (Gale 2004). The current Labor government recognised the political implications of increased boat arrivals with then Immigration Minister Chris Evans conceding in mid-2010 that a surge in irregular maritime arrivals was 'killing the government' (*Sydney Morning Herald* 2010). Undoubtedly, subsequent immigration policies have been developed in response to these concerns.

The 'Malaysian Solution' was not without historical precedent. From 2001 to 2007, asylum seekers attempting to reach Australia by boat were held in offshore detention centres as part of the then conservative Coalition government's 'Pacific Solution' (Phillips and Spinks 2011). Under this policy asylum seekers were actively intercepted in Australian waters and transferred to third countries for processing. Ensuring that people were processed outside of Australian territory denied them access to the nation's refugee determination process and court system, decreasing the likelihood that asylum seekers would be granted refugee status in Australia. In this way it was

hoped that the implementation of third-country processing would dissuade asylum seekers attempting to reach Australia by boat. Taken at face value, the policy appears to have been hugely and immediately successful, with boat arrivals dropping from 5516 in 2001 to just one person in 2002 (Phillips and Spinks 2011). What these numbers do not capture is the methods by which this decline was achieved – namely that asylum seekers were intercepted in Australian waters and transferred to Nauru and Manus Island for processing, or that boats were turned back to Indonesia during this period. Although exact numbers are difficult to ascertain, the UNHCR estimates that more than 1,600 people were transferred for third country processing (UNHCR 2008) – an estimate that does not include those asylum seekers pushed back out to sea.

While the Pacific Solution was successful in reducing the number of maritime arrivals seeking asylum in Australia, the policy came with an associated cost that went largely unseen. Detaining already vulnerable people in remote locations had severe consequences for their mental and physical health. Australia's policy of mandatory immigration detention has been found to have a number of adverse mental health effects, with rates of depression, post-traumatic stress disorder and self-harm skyrocketing among detainees (e.g. Coffey *et al.* 2010; Silove *et al.* 2007). Being detained indefinitely on islands thousands of kilometres from Australia without access to adequate mental health support would have only compounded these issues. The damage wrought by detention was undoubtedly exacerbated by the length of time people spent in detention facilities, with detainment for periods in excess of two years not uncommon (Coffey *et al.* 2010).

The primary concern with the more recent policy (and a major factor cited in the High Court ruling) is that it would have directly contravened Australia's international obligations governing how asylum seekers and refugees must be treated. As a signatory to the 1951 UN Convention on the Status of Refugees (1951 Convention), Australia is bound to protect those people seeking asylum within its territory. At the very heart of this obligation is the principle of *non-refoulement* – that individuals seeking protection should not be expelled into an area where they could again face persecution, or to a third territory that may return them to such an area (Goodwin-Gill 2011). During the time of the Pacific Solution, Australia maintained a significant presence in the running of offshore detention centres on Manus and Nauru. This would not have been the case under this new arrangement, under which Australia would have had little involvement in the refugee determination process for the 800 people who ended up in Malaysia.

Given the documented gaps in the treatment of refugees and asylum seekers in Malaysia, there was good reason to harbour concerns about what this agreement would have meant for the people transferred. Malaysia is not a party to the Refugee Convention and as such considers refugees and asylum seekers illegal immigrants. This failure to recognise asylum seekers means that people seeking refuge in Malaysia often find themselves placed into immigration detention. While conditions in Australian detention centres are sub-standard, the conditions facing asylum seekers in Malaysian immigration 'depots' such as Lenggeng and Semenyih can be much worse. Detainees in Malaysia face overcrowding, a lack of healthcare as well as insufficient supplies of food and clean drinking water (Amnesty International 2010a). Caning is employed as a form of punishment in Malaysian immigration detention, a practice that has been flagged as torture in violation of international law (Amnesty International 2010b). Those asylum seekers not in detention are forced to eke out a living on the fringes of Malaysian society, living in constant fear of harassment and arrest from the police and the People's Volunteer Corps (Ikatan Relawan Rakyat or RELA), the civilian paramilitary corps established by the Malaysian government to curb illegal immigration. Although the bilateral agreement between Malaysia and Australia contained safeguards exempting transferees from Malaysian immigration law, this would inevitably have led to issues about the logisitics and ethics of Malaysia maintaining two systems for dealing with asylum seekers and refugees – one for transferees from Australia and the other

for the tens of thousands of mostly Burmese asylum seekers already in the country. The treatment transferees could have expected in Malaysia must also be questioned given the resistance to such safeguards encountered during talks to finalise the agreement. A draft agreement obtained by the Australian Broadcasting Corporation's Lateline program on June 2 exposed that the Malaysian government had initially replaced all references to refugees with the term 'illegal immigrant' and exorcised all references to human rights (Cannane 2011).

Although overturned, this policy bolsters a dangerous trend for the way in which the governments of many Convention countries conceive of their obligations to asylum seekers. Symptomatic of a deteriorating international commitment to asylum, border control policies have also tightened significantly in Europe and the US over the past decade (Bosworth 2008). The introduction of the Malaysian Solution would have further eroded the fundamental right of people fleeing persecution to seek protection from a Convention country. By denying safe haven to those who would arrive on their shores uninvited, the Australian government would have, through their actions, diminished the value other states place on fulfilling their international obligations, paving the way for other countries to deny refuge to those seeking sanctuary if politically prudent. Sending asylum seekers to Malaysia would have also run the risk of legitimising current shortcomings in their treatment of asylum seekers and refugees.

The question is what would the Malaysian Solution have solved, and for whom? Unfortunately for the 800 asylum seekers set to be transferred to Malaysia under this arrangement, the policy was a political fix and not a human rights-oriented solution. While the move to resettle 4,000 refugees currently residing in Malaysia was a positive one, it should not have come at the cost of the mental and physical well-being of 800 other potential refugees, who would have faced an uncertain future in that country. By seeking to transfer asylum seekers offshore for domestic political gain, this policy would have only further eroded the institution of asylum. Although the Malaysian Solution may have helped to arrest the Australian government's sliding public approval, it would not have been a real solution. The policy is testament to the tension that exists globally between states trying to court domestic political popularity by being tough on border control and still living up to their international human rights obligations. By electing to prioritise domestic popularity, vulnerable people fleeing persecution would have unfortunately lost out under the Malaysian Solution. Now that the High Court has deemed it invalid, it will be of interest to see how the Australian government attempts to balance its international obligations and domestic political concerns in its response.

Luke Lovell is a British/Australian national who is in the final semester of a Masters in International Development from the School of Global Studies at RMIT University where he is concentrating on the ethics of international interventions in situations of gross human rights violations and the responsibility to protect (R2P) doctrine. He is currently a campaigns volunteer at The Asylum Seeker Resource Centre in West Melbourne, where he has conducted research into and written extensively on the problems inherent in the Australian policies of mandatory detention and offshore processing of asylum seekers.

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