

THE REGIONAL PERSPECTIVE: EXPORTING DETERRENCE AND NEGATING HUMAN RIGHTS STANDARDS

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The international law that we're upholding is our sovereignty in that we're maintaining our borders.¹

Australian responses to asylum seekers have been predicated on the importance of border control, and the characterisation of onshore boat arrivals as 'less worthy' than displaced persons in overseas refugee camps. The false sub-text to this paradigm is that refugee movement in the Asia Pacific region consists of persons who transit through the region aiming to reach Australia or New Zealand.

This view denies the regional aspects of forced migration, and ignores large scale, long term and complex refugee inflows to countries in Australia's near north. The reasons behind regional population movement are political and military structures in many Asia Pacific states, along with the relative ease of cross border movement.

Indonesia, Burma and Cambodia are refugee producing states, whose refugee outflows have resulted in diplomatic tensions and fears about border security in Australia. Other states, including Thailand, Papua New Guinea, Fiji and the Solomon Islands have fluctuating social, political and ethnic conflicts, so potentially could become refugee producing. Despite Australian government fears that future regional refugee outflows would be directed to Australia, past forced migration indicates that refugee populations in the Asia Pacific have moved into neighbouring states and that comparatively few asylum seekers attempt to illegally enter Australia.

While Australian concerns with border security have concentrated on its sea border with Indonesia, some regional states are more prone to unauthorised arrivals because of national visa-on-arrival regimes, and porous jungle borders. Equatorial landscapes and their archipelagic nature

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1 Chris Ellison, Commonwealth Minister for Customs and Justice, on proposals to turn around boats from West Papua: 'Govt prepared to repel asylum seekers, Ellison says' (8 April 2006) *ABC Online* <<http://www.abc.net.au/nwesitem/s/200604/s1611757/htm>> at 8 April 2006.

result in Malaysia, Indonesia and Papua New Guinea being unable to control illegal cross border movement without unlimited expenditure on immigration and military border controls.

While persons fearing persecution, from within and without the Asia Pacific region, can enter and seek safety, regional governments resent the growth of refugee populations and refuse to implement policies which provide unauthorised arrivals with basic human rights protections. Few states are signatories to the 1951 *United Nations Convention Relating to the Status of Refugees (Refugee Convention)*, and resettlement programs through the UN Human Rights Committee are inaccessible for most asylum seekers.

Therefore many regional states carry refugee populations which are considerably larger than the numbers feared by Australia in 2000/2001.² Refugee inflows tend to be greater than the numbers of recognised refugees who are resettled to developed states; therefore regional refugee numbers remain relatively constant.³ In addition, less than half the refugee and asylum seeker populations are assisted by the UN Human Rights Commission,⁴ and are therefore liable to adverse community reactions and characterisation as illegal migrant workers. Most asylum seekers are trapped in countries of first refuge, and are vulnerable to the harsh policies of Asia Pacific governments who lack the resources and commitment to deal positively with international protection.

The region has multiple examples of the warehousing of refugees and asylum seekers, whereby they remain in prolonged situations of segregation and denial of basic human rights. They are often unable to access a determination process and a durable solution. Lack of interest in the human rights of asylum seekers is entrenched in many regional states.

This paper aims to highlight the interrelated responses of various regional states to the human rights of refugees and asylum seekers. I consider that Australia has adopted many regional attitudes, as evidenced in changes to refugee law and policy since 1999. The Australian Government actively encourages repressive regional responses by exporting deterrence and border control strategies to Asia Pacific states. While involving those states in the prevention of secondary movement of asylum seekers, Australia is only engaged to a limited extent in regional burden sharing, either through

2 UNHCR statistics indicate that at the end of 2005 there were 488,961 refugees, asylum seekers and persons of concern in South East Asian and Pacific states; *UNHCR 2005 Global Refugee Trends*, Table 1 (June 2006) <www.unhcr.org/statistics/STATISTICS/224ceb12.pdf> at 21 January 2007.

3 UNHCR reports that during 2005, 12,827 persons arrived in South East Asian and Pacific states and sought international protection. While a large number of Burmese refugees (24,841 persons) were resettled from Thailand in 2005, the regional refugee and asylum seeker population only decreased from 836,897 to 824,599 persons during 2005; *Ibid*, Table 3.

4 Of the 825,598 refugees or asylum seekers in the region in 2005, UNHCR assisted 302,714; above n 2, Table 3.

specific aid programmes for refugee populations or resettlement under the off shore humanitarian program.⁵

I will focus on Australia's three important northern neighbours—Papua New Guinea, Malaysia, and Indonesia.

Papua New Guinea

West Papuan asylum seekers were the focus of legal, political and diplomatic debate in Australia during 2006, but they are also historically significant as the first regional refugee outflow occurring after the adoption of the *Refugee Convention* in 1951. The departure of Dutch colonial administration from West Papua in 1963 led to concerns among Australian and European officials that groups of West Papuans who opposed the transfer to Indonesia might be at risk of persecution.

Yet diplomatic rather than human rights concerns prevailed for the Australian administrators of Papua and New Guinea: 'the people of West New Guinea and the Administration of Papua and New Guinea have to learn to live with that situation', stated the Department of External Affairs, and 'the word 'refugee' is largely inapplicable to the kind of cross border movement that has taken place between West Irian and the Territory of Papua and New Guinea.'⁶

In 1968, while Papua and New Guinea was still under Australian trusteeship, 1,200 West Papuans crossed the border. Approximately 200 were granted temporary status of permissive residency,⁷ but others were removed to Manus Island and have remained in migration limbo for three decades.⁸

International protection issues were ignored by the Australian Government which increasingly referred to the threat of mass influx into the Australian territories and consequent diplomatic problems:

To allow permanent movement across the border for dissidents to settle in the Australian Territory could start migration of such numbers as might burden the people receiving them and create administrative and other problems in our own territory, and at the same time give grounds for suspicion on the part of the Indonesian Administration that this was deliberate and ill-meant, thereby impairing neighbourly relations.⁹

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- 5 Between 1999 and 2005, the percentage of persons resettled from Asia under Australia's offshore humanitarian program varied from 1.5% to 3.95%; DIMA, *Refugee and Humanitarian Issues: Australia's Response* (June 2005) p 34, and DIMA Fact Sheet 60, *Australia's Refugee and Humanitarian Programme* (October 2006) p 4 <<http://www.immi.gov.au/media/fact-sheets/60refugee.htm>> at 21 January 2007.
 - 6 Correspondence from R W Furlonger, Department of External Affairs, Canberra to A. Molver, UNHCR Representative in Australia and New Zealand, 13 April 1964 (3036/14/1/6, National Archives of Australia).
 - 7 A permissive residency permit is valid for three years, but limits freedom of movement, rights to work or study, and expression of political opinion.
 - 8 Dr Jumogot, Governor of Manus Island raised the plight of 60 West Papuans who have remained stateless and without any government support since 1969. S Solomon, 'The refugees of Manus', *The National* (PNG), 14 October 2005.
 - 9 R Marsh, 'Policy regarding refugees from West New Guinea', 11 March 1964 (A452 1963/8261, National Archives of Australia).

The feared influx occurred in 1984–86 after a failed Papuan independence uprising and ongoing clashes between the Indonesian military and the Papuan separatist guerrillas (Operasi Papua Merdeka—OPM).¹⁰ By September 1986, there were approximately 12,000 Papuans in border camps on the Fly River and near the north coastal town of Vanimo. The group consisted of academics, students, civil servants and family members of arrested independence activists, and the UNHCR Liaison Officer in PNG considered that all the West Papuans were refugees on the basis of mass influx determination.¹¹

The refugees became a diplomatic problem for the Papua and New Guinea Government as Indonesia requested their repatriation, but in 1986, Papua and New Guinea acceded to the *Refugees Convention*¹² and was bound by the principle of non-refoulement to permit the West Papuans to remain.

There were fears that the OPM fighters could use the border camps as bases for attacks on the Indonesian military, so threatening Papua and New Guinea's security.¹³ Therefore it was proposed to move the refugees with UNHCR assistance to the East Awin area which is 60 km from the border. While 3,000 were relocated in 1987, most West Papuans refused to move, citing problems of isolation in East Awin, and lack of suitable land for growing staple crops.

Only those refugees who relocated were able to apply for temporary residence status through a permissive residency permit; after initial validity for three years, the permit required reassessment by the Citizenship Advisory Committee. Those remaining in the border camps (over 11,000) were de facto illegal immigrants and lived under the threat of forced return.

For more than two decades, the West Papuan refugees in the border region have remained in a situation of 'warehousing' in which they were denied basic human rights and the possibility of accessing a durable solution through naturalisation or resettlement. They lack permission to work and access to state education or health services. Their essential needs are met by local villagers, the UN Human Rights Commission or local churches. Until 2004, there was not even a process for registering the birth of refugee children. Without permissive residency permits, most

10 The cross border movement was no longer Australia's responsibility as the territories of Papua and New Guinea had become the independent state of Papua New Guinea in 1975.

11 International Commission of Jurists, *Refji—Report of the 1986 Mission to PNG* (1986) 17.

12 As a newly independent state with limited financial resources, PNG made seven reservations to its accession to the 1951 Refugees Convention, most dealing with economic and social rights.

13 'Three million Papuan New Guineans and their security are of greater strategic importance than 12,000 West Irianese', Prime Minister of PNG, Pius Wingti in comment to the 1985 ICJ Mission; ICJ, *The Status of Border Crossers from Irian Jaya to Papua New Guinea* (1985) 28.

of the West Papuan refugees were unable to move to other areas in Papua and New Guinea without fear of arrest and detention.

After 20 years of uncertainty and discrimination for the refugees, the Papua and New Guinea Government has recently begun to recognise refugee rights. Since 2005, residents of East Awin camp can apply for permanent residence, and there is planned registration program for the border camps with the aim of granting permissive residency permits to all West Papuans. Any new arrivals who claim to be fleeing persecution may undertake refugee status determination to obtain permanent residence. However there is still no process to permit naturalisation.

Australia has not demonstrated any commitment to regional burden sharing in relation to the large refugee population in Papua and New Guinea; rather the primary concern has been with the sensitive diplomatic relationship with Indonesia. A West Papuan activist who fled to Papua and New Guinea in 1971 sought asylum in Australia in 1984; his application was at first refused by the Department of Immigration and Ethnic Affairs and the departmental decision maker refused to provide a written statement of reasons.¹⁴ When five West Papuans arrived by canoe in the Torres Strait in 1985, the Minister for Immigration stated that they would not be granted permanent residence as this would result in mass influx of West Papuans who would voice their opposition to Indonesia.¹⁵ Later arrivals, who had transited or resided in Papua and New Guinea, were returned to Papua and New Guinea, without accessing legal advice or lodging refugee status applications.¹⁶

Despite requests from refugee advocacy groups, and the apparent lack of interest, or inability, of the Papua and New Guinea Government to provide basic services for this large and long term refugee community, the West Papuans have never been included in Australia's offshore refugee and humanitarian resettlement program.

The Australian and Papua and New Guinea governments' responses to the West Papuan influx provided an important precedent for other regional states dealing with similar population movement across porous jungle borders. A large number of asylum seekers and refugees was placed in virtual segregation through their illegal migration status or restrictions on freedom of movement. While the UN Human Rights Commission provided limited support, the refugees were denied basic rights over a prolonged period.

The treatment of the West Papuan refugees places both Papua and New Guinea and Australia in breach of their obligations under the 1951

14 *Minister for Immigration and Ethnic Affairs v Mathew Rak Rain Mayer* (1985) 157 CLR 290.

15 Chris Hurford, Minister for Immigration and Ethnic Affairs, 'Five Irian Jayans', *News Release MPS 49/85* (17 July 1985).

16 Thirty West Papuans who had resided in the border camps arrived in Thursday Island in 1998. They were kept in isolation until repatriated to PNG within a week.

Refugees Convention. In addition to its reservations on rights to work, housing and education, Papua and New Guinea did not permit freedom of movement (article 26), access to identity documents (article 27) and travel documents (article 28).

For Australian politicians and immigration bureaucrats, the situation of the West Papuans demonstrated that regional states could be used as a barrier to refugee inflows. West Papuans were deemed to have effective protection in Papua and New Guinea; therefore any boat arrivals could be returned. In addition, Manus Island had already been used in 1968 as a suitable site for holding 'sensitive' refugee populations. Australia could draw on this experience and involve Papua and New Guinea in the Pacific Solution with the detention of 1,000 South Asian and Middle Eastern asylum seekers at Lombrum Naval Base.¹⁷

Australia provided little financial assistance for the West Papuans; there was a grant of \$1.5 million to the UN Human Rights Commission in 1985 to avert starvation in the border camps, but no on-going aid assistance for basic refugee needs. In contrast, the cost of the Manus Island facility in 2001–2002 was \$42.5 million,¹⁸ and the centre continues to be maintained by Australia for possible future use.¹⁹

The UNHCR Agenda for Protection calls on states to assist regionally to

build capacity, in particular in developing countries ... especially those which are hosting large-scale influxes or protracted refugee situations ... to ensure that refugees have access to safer and better conditions of stay and timely solutions to their problems.²⁰

Yet, Australia has ignored its responsibility to assist its struggling neighbouring state with a large refugee population, either through refugee assistance projects or resettlement programs.

Malaysia

Refugees and asylum seekers are in a vulnerable situation in Malaysia as the government is reluctant to accede to international human rights norms, and is sensitive to international criticism of its human rights practices. Malaysian political rhetoric defers to the 'Asian values', rather than international law.

17 Oxfam, *Adrift in the Pacific* (February 2002) 10 <http://www.oxfam.org.au/campaigns/refugees/pacificsolution_OCAA.pdf> at 30 November 2002.

18 Table 11.2, 'Offshore Asylum Seeker Management Budgeted Costs, 2001-2002', Australia, Senate, *Report of Select Committee on a Certain Maritime Incident* (23 October 2002) Chapter 10—'Pacific Solution: Outcomes and Costs'.

19 Evidence to Senate Legal Standing Committee on Legal and Constitutional Affairs, Estimates Committee, *Hansard*, 12 February 2007, 81 (Bob Correll, Deputy Secretary of DIAC, 'Maintenance cost are \$3 million per year').

20 UNHCR Executive Committee, *Agenda for Protection*, 26 June 2002, UN Doc. A/AC.96/965/Add.1, para 12.

However Malaysian immigration law and practice reflect a contradictory approach to the entry and residence of asylum seekers. The land border with Thailand and the sea border with Indonesia are both long and porous, with the Malaysian Government admitting that 'increasingly heavy volume of movement of people and goods to and from neighbouring countries has made thorough inspection at our borders difficult.'²¹ In addition, Malaysia encourages tourism from ASEAN countries and the Middle East, and grants short term entry permits on arrival to citizens of many refugee producing states, including Cambodia, Sudan, Iraq, Iran, Syria, Palestine and Somalia. Similarly, citizens of ASEAN states, apart from Burma, can stay for one month without a visa.²²

Drawn by the economic boom of the mid-1990s, there have been up to a million illegal immigrants in Malaysia, mainly from Indonesia, Thailand and the Philippines, working in construction and plantation industries. The Malaysian Government considers that all illegal immigrants are 'economic migrants', and does not distinguish asylum seekers or UNHCR recognised refugees. 'We will treat them as we do other refugees. We will detain them and send them back.'²³

Currently there are approximately 152,700 refugees and asylum seekers in Malaysia,²⁴ as well as 66,000 Filipino Muslims who fled from ethno-religious conflict in Mindanao Island in the 1980s and have been permitted to remain on temporary permits in Eastern Malaysia.²⁵ Following Burmese military repression in 1988, ethnic Rohingya Muslims fled through Thailand to Malaysia, and more than 10,000 ethnic Chin Christians fled from Burma in the 1990s. Over the last decade, Acehese linked with the separatist movement have entered Malaysia by boat to avoid Indonesian military violence.

Malaysia's position on international air routes and the liberal visa requirements for citizens of predominately Muslim states have resulted in refugee inflows from the Middle East and South Asia, often facilitated by people-smuggling networks.

Malaysia's refusal to acknowledge international protection obligations results in the warehousing of refugees and asylum seekers in segregated

21 Statement of Dato Muhammad Hatta Abdul Aziz, representative of Malaysia at the Conference to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, New York, 28 June 2006.

22 Immigration Department of Malaysia, Visa Information <http://www.imi.gov.my/eng/perkhidmatan/im_HapusVisa.asp> at 5 December 2005.

23 Khalil Yaacob, Malaysian Minister for Immigration discussing Acehese asylum seekers: 'Malaysia: Stop Deportations of Acehese Refugees' (1 April 2004) *Human Rights Watch* <http://hrw.org/english/docs/2004/04/01/mala8379_txt.htm> at 13 April 2004.

24 US Committee for Refugees, *World Refugee Survey 2006* (2006) 5.

25 The situation of the Filipino Muslims accords with that of the West Papuans in PNG. They are granted renewable temporary residence permits, but have limited freedom of movement and work rights. Their situation is dependent on the goodwill of local communities and politicians.

situations where their basic rights are denied. Because of their status as ‘illegal immigrants’, asylum seekers are denied free movement, and are at risk of arrest without warrant by police or immigration officers, resulting in detention for an initial period of thirty days.²⁶ Once ordered to be removed from Malaysia, a person is liable to indefinite detention in a prison, immigration detention centre or police station.²⁷

Rohingya asylum seekers from Burma have been detained at police road blocks or during sweeps of homes and workplaces, especially construction sites.²⁸ If a person is unable to immediately produce valid identity and entry documents, there is a statutory presumption of illegal entry or residence.²⁹ Corrupt police take advantage of this presumption to extort bribes from illegal immigrants.³⁰

Large sweeping operations to locate and detain illegal immigrants are undertaken by police and RELA (Peoples Volunteer Corps). This paramilitary group of up to 500,000 reservists, under the Ministry of the Interior, is armed with batons, and has been used to locate illegals and undertake identity checks.³¹ The group is notorious for human rights violations, but appears to act with impunity.³²

After arrest for illegal entry, asylum seekers are liable to both punitive and extrajudicial physical abuse. They are beaten by police during initial detention at local police stations, especially if they are working illegally or can not meet police demands for money.³³ Similar violence is perpetrated for minor offences in detention centres. Once found guilty of immigration offences, asylum seekers and refugees, as well as the employers of illegal immigrants, can be detained, fined and sentenced to caning.³⁴

There are fifteen immigration detention centres in Malaysia, under the control of the Prisons Department. The statutory period of imprisonment for illegal residence is six months, but delays can result in imprisonment for more than one year. The International Committee of the Red Cross is not

26 *Immigration Act 1959/63* (Malaysia) s 35.

27 *Immigration Act 1959/63* (Malaysia) s 34.

28 Human Rights Watch, ‘Malaysia/Burma: Living in Limbo’ in *Malaysia’s Treatment of Undocumented Rohingya*, (May 2000) 6.

29 *Immigration Act 1959/63* (Malaysia) s 56(4).

30 Human Rights Watch, above n 28, 8.

31 UN Watch, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World—Human Rights Violations in Malaysia* (8 March 2005) UN E/CN.4/2005/NGO/309.

32 The group has been accused of unwarranted violence, house burning and the possible deaths of five migrant workers in February 2005, but there have not been any official investigations.

33 Rohingya refugees described various forms of inhumane treatment including beating, kicking, and standing semi-naked for long periods: Human Rights Watch, above n 28, 9–12.

34 A senior politician announced in 2004, that all illegal immigrant males under 50 years of age should be caned prior to deportation. *US Department of State Report on Human Rights Practices in Malaysia, 2005* (8 March 2006) 2 <<http://www.state.gov/g/drl/rls/hrrpt/2005/61615.htm>> 22 September 2006.

permitted to enter Malaysian prisons or detention centres for monitoring or tracing activities.

The Malaysian government has steadfastly maintained its sovereign right to deport recognised refugees,³⁵ while stressing the duty of the international community to resettle refugees who are permitted to remain on an ad hoc basis. Rohingya asylum seekers and Acehese asylum seekers have been at risk of refoulement on several occasions in recent years.

In 1998 545 Acehese were forcibly returned to Indonesia, notwithstanding that some held temporary residence permits and one had been recognised as a refugee by the UN Human Rights Commission. Acehese groups reported that up to thirty seven persons died as a result of the deportation, either during violence in the Malaysian detention centre or after being handed over to the Indonesian authorities.³⁶

Rohingya and Chin asylum seekers faced similar threats of imminent deportation following police sweeping operations on jungle camps and building sites.³⁷ But Malaysia's pragmatic policy is to deport Rohingya and Chin persons to Thailand where they are at risk of detention as illegal entrants, and refoulement to Burma. Yet they may bribe Thai police to 'facilitate' return to Malaysia across the porous jungle border.³⁸

Their status as illegal immigrants dictates that refugees and asylum seekers are vulnerable to human rights violations and are unable to enjoy many key rights in safety and certainty. Most lack permission to work, therefore are liable to exploitation and dangerous work practices in construction and plantation industries. Refugee children are not entitled to public primary education, nor is government subsidised health care available. Asylum seekers are confined to 'ghetto' urban areas and jungle camps by the threat of police checks and possible detention. The *Immigration Act* creates an offence of 'harbouring' illegal immigrants;³⁹ therefore landlords are reluctant to rent premises to asylum seekers. Asylum seekers are dependent on the UN Human Rights Commission and Malaysian non-government associations for the provision of basic services and legal representation.

In 2005–06, the Malaysian Government agreed to grant rights to some long term refugee communities; this is an acknowledgement both of the stress and difficulties associated with illegal status, and of the importance of these communities as unofficial cheap labour forces. Refugees who have been recognised by the UN Human Rights Commission are no longer liable

35 In the late 1990s, UNHCR recognised refugees from Indonesia, Sri Lanka and Afghanistan were refouled: Human Rights Watch, above n 28, 5.

36 US Committee for Refugees, *The 'Least Risky Solution': Malaysian Detention and Deportation of Acehese Asylum Seekers*, (Washington: USCR, 1998) 16.

37 Refugee International, 'Malaysia: Chin Refugees on the Run' (28 March 2005) <http://www.chro.org/index.php/refugees_concern/184/?submit=print> at 17 August 2006.

38 Human Rights Watch, above n 28, 5 and US Committee for Refugees, above n 24, 77.

39 *Immigration Act 1959/63* (Malaysia) s 56(1)(d).

to arrest and detention. All Acehnese have been granted temporary work permits, and there was a proposal to register all Rohingya asylum seekers with a view to granting them work permits.⁴⁰

Interestingly, plans to grant temporary status only apply to Muslim refugee communities. Chin asylum seekers from Burma have been excluded to date; perhaps because their religion and ethnicity do not engage the interest of Malaysian politicians. Unfortunately the planned registration of Rohingya has not eventuated because of political changes and rumours of corruption.⁴¹ This frustrated hope for a large community of asylum seekers highlights the politicised and tenuous nature of refugee policies in Malaysia.

Malaysia presents a harsh example of refugee warehousing where large and long term refugee communities live in uncertainty and with limited rights. While Malaysia may facilitate entry for asylum seekers through porous borders and visitor visas, the government is hostile to recognising refugee rights including protection from state-condoned violence and threats of refolement.

The Australian Government has engaged with Malaysia on refugee issues, not to assist by resettling significant numbers of refugees from Burma, but by involving Malaysian authorities in deterrence policies to prevent secondary movement to Australia. The Bangkok Declaration on Irregular Migration of April 1999 links Australia and Malaysia in managing irregular migration, while 'respecting the sovereign rights and legitimate interests of each country to safeguard its borders and develop and implement its own migration/immigration laws'.⁴² The Declaration promotes 'timely return of those without right to enter or remain' as an important strategy,⁴³ so formalising the threat of refolement for asylum seekers attempting to remain in Malaysia or undertake secondary movement to Australia.

In accordance with the Bangkok Declaration's aims of regional information sharing and practical cooperation, the Department of Immigration, Multicultural and Indigenous Affairs has developed various strategies at regional airports to prevent the embarkation of unauthorised arrivals. Since 2004–05, overseas compliance officers are stationed at Kuala Lumpur airport to oversee document and passenger checking; in addition there are airline liaison officers to train airline and airport staff and monitor passenger checking. The Department of Immigration, Multicultural and Indigenous Affairs and Australian customs officers screen passports of

40 US Committee for Refugees, above n 24, 79.

41 Fauwaz Abdul Aziz, 'Rohingya registration: Suhakam to visit immigration depot', *Malaysiakini* (17 August 2006) <http://www.suaram.net/display_article.asp?ID=554> at 25 September 2006.

42 Bangkok Declaration on Irregular Migration, art 12 <<http://pandora.nla.gov.au/nph-arch/2000/Z2000-Apr-12/http://www.immigov.au/illegals...>> at 31 December 2005.

43 Bangkok Declaration on Irregular Migration, art 13.

prospective passengers, with any irregularities resulting in an interview with an immigration inspector. In 2004–05, 207 persons were refused embarkation on the basis of document fraud.⁴⁴

These placements indicate Australia's preoccupation with using regional states as barriers to refugee movement to Australia. Treatment of refugees and asylum seekers in Malaysia falls short of international standards, yet the Australian focus is not to advance human rights or provide humanitarian assistance.⁴⁵ In contrast to the current emphasis on deterrence, Australia should support Malaysian initiatives to ameliorate its strict policies by offering to resettle a significant number of recognised refugees.

Indonesia

Although not a party to the 1951 *Refugee Convention*, Indonesia has demonstrated awareness of the principle of non-refoulement in its treatment of asylum seekers. Yet any such compliance is based in political pragmatism, not respect for international law norms.

Indonesia has experienced the problems and stresses associated with large scale population movement; but this is the result of internal displacement following military or religious violence, not the cross border movement of asylum seekers.⁴⁶ Accordingly refugees and asylum seekers are often neglected in Indonesian political and social dialogue, in comparison to attention given to internally displaced populations. This low profile, in conjunction with Indonesia's poor history on human rights, renders asylum seekers vulnerable to human rights violations.

Indonesia has become a refugee attracting state because of transport networks and harsh immigration policies in states to its north: Malaysia, Singapore and Thailand.

For entry to Indonesia, non-citizens are required to have a valid travel document and entry permit, and violations of immigration law are punishable by detention and deportation.⁴⁷ Yet people-smuggling networks have moved asylum seekers from the Middle East and South Asia through Indonesia to Australia by boat.⁴⁸ These criminal operations became more established after the collapse of the Soeharto government in 1998 through the tacit involvement of the Indonesian military.⁴⁹

44 DIMIA, *Managing the Border: Immigration Compliance* (December 2005) 88.

45 In 2007/2008, there is no AusAid funding to Malaysia for refugee or humanitarian assistance projects. Therefore the Australian Government's assistance would be solely through its global contribution to UNHCR.

46 In late 2000, there were more than 750,000 internally displaced persons in eighteen provinces in Indonesia contrasted to 788 refugees and asylum seekers; US Committee for Refugees, *World Refugee Survey 2001* (2001) 133. By the end of 2002, there were up to a million internally displaced persons in Indonesia, in contrast to approximately 1,000 asylum seekers.

47 Undang Undang Keimigrasian (Immigration Law—Indonesia) arts 39, 42.

48 ABC Television, 'People smuggling trade thriving in Indonesia', *Lateline*, 22 October 2001 <<http://www.abc.net.au/lateline/content/2001/s397778.htm>> 22 October 2001.

49 ABC Television, 'Indonesia: alleged people smuggler due to be released from jail', *Asia*

Approximately 700 asylum seekers sought UNHCR assistance in Jakarta in 2000,⁵⁰ but more than 4,000 persons arrived in Australia on Indonesian-owned boats in 1999–2000.⁵¹ Even after the MV *Tampa* incident, six boats with 1,212 asylum seekers left Indonesia for Australia in 2001–02. Official statistics indicate that up to 9,000 asylum seekers, from outside the Asia Pacific region, left Indonesia by boat for Australia in the last decade.⁵²

While the Indonesian Government has become an active partner in regional suppression of people smuggling, asylum seekers generally have not been returned. They are recognised as the victims of criminal gangs and as facing problems in their country of origin. Indonesian human rights and immigration bureaucrats consider that the government will not forcibly return asylum seekers to Iraq or Afghanistan, but will permit them to remain pending determination and resettlement.⁵³

More than 1,500 asylum seekers, mainly Afghans, Iraqis, and Iranians, were brought to the attention of the Indonesian authorities in 2001. In late 2006, approximately 200 remain in Indonesia awaiting UNHCR determination, or resettlement.

Many have been resettled after long delays, but others have been voluntarily repatriated. Afghan asylum seekers consider that some of their colleagues were emotionally pressured to accept repatriation, because of their long term uncertain status and sense of isolation in Indonesia.⁵⁴ Yet such returns are not undertaken by the Indonesian authorities; rather they are facilitated by the International Organisation for Migration (IOM) and financed by the Australian Government.

While refugees and asylum seekers from refugee-producing states are permitted to remain, Indonesian practice is inconsistent. A group of fourteen Kurdish asylum seekers was returned to Indonesia after attempting to reach Australian territory in 2003; they were permitted to choose individually between UNHCR assessment and return to Turkey.⁵⁵ In contrast, seventy three Vietnamese asylum seekers who travelled by boat through Indonesian waters in 2003 were labelled ‘illegal immigrants’

Pacific, 1 March 2003 <<http://www.abc.net.au/ra/asiapac/prprgrams/s756302.htm>> at 2 March 2003.

50 US Committee for Refugees, above n 24, 133.

51 Australian Parliamentary Library, ‘Australia and Refugees, 1901–2002: An Annotated Chronology based on Official Sources’, 6, 14–18 <http://www.aph.gov.au/library/pubs/online/refugees_s6.htm> at 24 October 2005.

52 *Ibid.*, 9.

53 Interviews in Sydney with Indonesian police officer, 6 May 2003, and immigration bureaucrat, 9 June 2004; both were participants in a human rights training course at the University of Technology Sydney, and do not wish to be named.

54 Interview at Pulih, non-government organisation assisting asylum seekers in Jakarta, 4 April 2005; emails from Isaac (asylum seeker) and Dari interpreter, August 2005 and September 2006.

55 ‘Some Turkish boat people in Jakarta want to go home’, *Jakarta Post* (Jakarta) 20 November 2003 <<http://thejakartapost.com/detaillatestnews.asp?fileid=20031120115818&irec>> at 20 November 2003.

by a senior Indonesian minister and their return promptly negotiated with the Vietnamese Government.⁵⁶

As long as there is no legislative basis to permit asylum seekers to remain legally in Indonesia, persons fleeing persecution will remain vulnerable to shifting political demands. The Indonesian authorities understand the principle of non-refoulement, but need to give it legislative substance, rather than implied respect.

Refugees and asylum seekers in Indonesia are warehoused in situations of segregation and discrimination. Their daily needs of accommodation, food and health care are provided by IOM, again financed by the Australian Government. Yet financial support has the impact of segregating them from the local community, who can resent their apparently 'privileged' existence.

Because of their lack of official migration status, the asylum seekers are denied basic rights such as the right to work, access to state education, and the option of applying to remain permanently in Indonesia on the basis of family ties. Their freedom of movement is restricted as they need IOM and police permission to travel from their area of habitual residence. Most have been in this limbo for more than five years, and their physical and mental health is deteriorating because of the indefinite uncertainty about their future.

Australia bears the responsibility for the inhumane situation faced by these refugees and asylum seekers. The interception policies were mandated by Australian border security fears, and the warehousing of asylum seekers has only continued in Indonesia because of Australian support. Yet continued Australian financial assistance will ensure that interception will remain an integral part of Australia-Indonesia relations.⁵⁷

Neglect of Human Rights Standards

While all the states discussed in this paper are members of the United Nations and therefore subscribe to the Universal Declaration of Human Rights, there is scant regard for the rights of refugees and asylum seekers, even those who are long term residents. Basic rights, such as freedom of movement, right to work, and access to education and health services are denied. In addition, asylum seekers may lack protection from violence because of their illegal migration status. There is no path to naturalisation and family reunion, yet many of the asylum seekers suffer guilt and anxiety for family members left behind in persecutory situations.

56 W Miller, 'Boat people aground in Indonesia', *Sydney Morning Herald* (Sydney) 1 May 2003, 2.

57 A\$8.9 million has been allocated in the 2007 budget for IOM to care for intercepted persons in the region; Refugee Council of Australia, '2007-08 Australian Government Budget: Spending on Programs related to Refugees' (9 May 2007) <http://www.refugeecouncil.org.au/docs/releases/2007/070509%20REbudget_2007_08> at 30 May 2007.

These characteristics can also be identified in Australia's temporary protection regime. Temporary Protection Visa holders have no certainty about their future in Australia, as they are unsure whether future claims for protection will be recognised when their visas expire after three years. Their inability to access language classes and vocational education restricts employment opportunities and connection with the broader community. Therefore while there is no formal restriction on their freedom of movement, they are in reality limited to those areas where they can access casual employment and cheap accommodation through personal associations. The Temporary Protection Visa system is Australian warehousing of recognised refugees; they are second class residents with no access to key human rights, including family reunion.

Warehousing policies place refugees and asylum seekers in situations of structural discrimination in which they are vulnerable to fluctuating community and political attitudes. Warehousing has become commonplace in the Asia Pacific region with many states following the practice, first seen in Papua and New Guinea in the 1980s, of confining asylum seekers to specified areas, and denying access to key rights of employment, education and health care. Australia's deterrence policies of interception and interdiction have resulted in asylum seekers being placed in uncertain and vulnerable situations. Australia has adopted negative aspects of regional treatment of refugees and asylum seekers, and exacerbated the size of refugee populations by preventing onward movement.

Forced migration is a regional problem created by open borders and continuing impunity for human rights violations in Asia Pacific states. Effective solutions can be achieved within the region through cooperative agreements and assistance programs. Much will depend on the legal norms advanced in Australia's responses to secondary movement of asylum seekers. The offshore processing regime punishes asylum seekers who attempt to move to Australia after being warehoused for years in Asian states,⁵⁸ while unauthorised arrivals who are found to be refugees remain restricted to temporary protection. The priorities for Australia are interdiction and maintaining Asian states as a barrier through which asylum seekers can not pass.⁵⁹

58 In June 2007 the asylum seekers on Nauru consisted of Burmese Rohingyas who had lived in Malaysia for many years, and Sri Lankan Tamils who had been in Indonesia. Both groups attempted to travel to Australia by boat from Indonesia.

59 Australia has signed agreements with Indonesia and Malaysia to prevent people smuggling, and Australia airline liaison officers are stationed at regional airports to prevent unauthorised arrivals. 'Deal signed to combat people smuggling', *The Age* (Melbourne) 22 March 2007 <<http://www.theage.com.au/news/National>> at 4 April 2007; DIMIA Fact Sheet, *Border Control* (12 May 2005) <<http://www.immi.gov.au/illegals/border.htm>> at 5 December 2005; DIMIA, *Managing the Border: Immigration Compliance* (2005) 6.

Yet the human rights of refugees and asylum seekers in situations of regional warehousing should not continue to be ignored. There is tacit acceptance of the humanitarian issues related to forced migration in the Bangkok Declaration on Irregular Migration signed by most Asian states, Australia and New Zealand in 1999.⁶⁰ Australia and New Zealand need to provide regional leadership by advancing the capacity of regional states to assist refugee populations through targeted aid programs. As few states are signatories to the *Refugee Convention*, there is currently no normative framework to bind states to respect the rights of aliens resident in their territory. Australia should facilitate discussion on the development of a regional agreement on forced migration, similar to those in Africa and central America.⁶¹ If Australia is serious about regional cooperation on forced migration, burden sharing should be increased through greater opportunities for regional refugee resettlement.

60 Arts 4, 10, Bangkok Declaration on Irregular Migration.

61 Addis Ababa Document on Refugees and Forced population Displacements in Africa, September 1994; Cartagena Declaration on Refugees, November 1984.