

# Deterring asylum seeking in Australia

## Bribing Indonesian smugglers to return asylum seekers to Indonesia

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### I Overview

Since 2001, successive Australian governments have increasingly used unilateral and bilateral migration and border protection policies to prevent refugees and migrants from reaching Australia, where they have the legal right to apply for asylum.<sup>1</sup> Amongst many other measures, the Australian government uses mandatory detention and offshore processing in third countries, such as Nauru and Papua New Guinea, to deter asylum seekers from attempting to enter the country by sea without a valid visa. Turning back asylum seeker boats in the Indian Ocean is deemed to be another effective means to discourage future claimants. This and other border protection measures extend well beyond Australia's internationally recognised borders, reaching into neighbouring transit countries, such as Indonesia and Malaysia, and even further away, to countries of origin for asylum seekers, including Sri Lanka and Vietnam.

Australian government policies tend to frame the purpose of preventing asylum seekers from reaching Australia by sea as disrupting and deterring people smuggling

activities.<sup>2</sup> They view irregular border crossings narrowly as transnational organised crimes, neglecting the fact that such crossings enable foreigners' claims to a basic human right: asylum.<sup>3</sup> Such perceptions have garnered substantial political support from the Australian electorate, on whose behalf the government bankrolls expensive anti-asylum measures to reduce the number of 'illegal maritime arrivals'.<sup>4</sup> Measures to deter entry ignore legal status like 'refugee' or 'person at risk of harm in their country of citizenship', as they are solely concerned with whether a person holds a valid visa or not. Some critics argue that the expenses of offshore detention and other related border protection measures are not value for money.<sup>5</sup> Furthermore, international non-government organisations, such as Amnesty International, and various United Nations bodies have continually criticised Australia for abusing the human rights of asylum seekers.<sup>6</sup> On occasion, too, neighbouring countries have also spoken out against Australia's unilateralism as negatively impacting their region. As early as January 2014, Indonesia's Minister for Foreign Affairs, Marty Natale-



Sri Lankan asylum seekers on their way to New Zealand by boat were intercepted by Indonesian Marine Police. Waters off Tanjungpinang, Riau Islands province, Indonesia, 11 July 2011 (Syarifullah/AAP Image)

gawa, had again labelled Australia's policies 'not a solution' to the movement of asylum seekers through the region, in response to reports that the Australian government had turned back boats carrying asylum seekers within Indonesia's territorial waters.<sup>7</sup>

To complement the raft of scholarly and policy studies that assume the state is always an inhibitor of people smuggling, this article also examines the rarely discussed role of states as smugglers themselves. Generally, people-smuggling is defined as a crime against the state, because the primary victim is deemed to be the state whose immigration laws are violated. But this narrow understanding ignores the possibility that states can and do facilitate crimes against other states. Here, we discuss one such case in which the Australian government paid six Indonesian smugglers to return to Indonesia with 65 asylum seekers.<sup>8</sup> In the discussion and analysis that follow, we also draw attention to how the turn-back may have violated international as well as domestic laws in Australia and in the neighbouring country of Indonesia. We conclude that Australia's turnback in this instance is not a deterrence model to be adopted by other sought-after destination countries for asylum seekers in the Global North.

## II Return to sender

In September 2013, the Australian government established Operation Sovereign Borders to disrupt and deter people smuggling by intercept asylum seeker boats at sea.<sup>9</sup> The joint agency taskforce is military-led, and has reportedly pushed or towed back at least 36 boats to Indonesia, Vietnam and Sri Lanka.<sup>10</sup> In the forced returns to Indonesia, the Australian Navy claimed to have only escorted boats back to the edges of Indonesia's territorial waters — 12 nautical miles from the coast and from an area over which states exercise sovereignty, as recognised at international law.<sup>11</sup> Indonesian authorities often claim to have no prior knowledge of the returns, and that the Australian government only notifies them days after the forced returns — if at all.<sup>12</sup> Amongst other negative consequences, this lack of coordination risks the safety of the asylum seekers or crew, especially those who in need of urgent medical attention when the Australian authorities first intercept their boat.<sup>13</sup> Despite strong protests from the Indo-

nesian government, Australia has continued to turn back boats regardless.<sup>14</sup>

On 5 May 2015, 20 months after the Australian government recommenced the 'turnback' of asylum seeker vessels, an asylum seeker boat named the *Andika* set sail from Indonesia's Pelabuhan Ratu on Java's coast.<sup>15</sup> The 65 asylum seekers and six Indonesian transporters were destined for the distant New Zealand. Normally, the final destination was one of Australia's remote islands, such as Christmas Island. This time, however, the asylum seeker boat intended to risk the longer journey, as Christmas Island had been excised from Australia's migration zone and applications for asylum were thus no longer an option there.<sup>16</sup>

After almost two weeks at sea, on 17 May 2015, two Australian Border Force vessels intercepted the *Andika* in international waters near Timor-Leste.<sup>17</sup> At first, the *Andika*'s boat crew objected to being stopped in international waters so far from Australia. They explained that the *Andika* was an Indonesia-flagged vessel, over which the Australian government had no authority. According to international law, the Indonesian government, as the flag state, should have had exclusive jurisdiction.<sup>18</sup> Regardless, the Australian Border Force boarded the *Andika* to warn the crew and asylum seekers that they could not enter Australian territory without a valid visa or complete set of documents. For the next five days, the Australian Border Force shadowed the *Andika* as it continued on its planned sea journey to another desirable destination for the asylum seekers.<sup>19</sup>

On 22 May 2015, another Australian authority, the HMAS *Wollongong*, stopped the *Andika*.<sup>20</sup> Given that the Australian government has not released the coordinates, it remains unclear as to whether the boat was in Indonesian waters as the *Andika*'s crew claimed.<sup>21</sup> The Indonesian captain was ordered to return to Indonesia, which he refused to do, but after long discussions, he agreed to reroute the *Andika* to Australia. The next day, the *Andika* anchored at Australia's Green Hill Island near Darwin, where Australian officials then boarded to interview and photograph the asylum seekers. The processing did not result in the much-expected assessment of asylum claims.<sup>22</sup>

It was here on Greenhill Island that the Australian officials allegedly paid the crew so

that they would more readily return to Indonesia.<sup>23</sup> The asylum seekers claimed that the captain accepted a 'thick white envelope', and that the other crew were 'very happy' — so much so that they began 'joking with the Australian officers, whereas beforehand they had seemed frightened and nervous'.<sup>24</sup> According to the captain and his crew, the Australian authorities had initially promised to facilitate a return to the edges of Indonesian waters near Java, but the destination was changed to Rote Island in East Nusa Tenggara, the remote east of the Indonesian archipelago.<sup>25</sup> The boat crew were disappointed, but they were in a weak position to resist the change in plan, largely because the Australian Border Force had taken control of their vessel, and they had already accepted payment to return to Indonesia.<sup>26</sup>

Early the next morning on 31 May, the Australian Border Force divided the boat crew and asylum seekers more or less equally between two new boats — the Jasmine and the Kanak.<sup>27</sup> Ten Australian vessels then escorted the boats to the edge of Indonesian waters, not far from Rote Island. The Australian Border Force left the boats there, but before reaching the destination the Jasmine ran out of fuel, so everyone overcrowded the Kanak for the final stretch. A few hours later, that boat struck a reef off the southeast coast of Rote Island, and asylum seekers who could swim abandoned the shipwreck by making their own way to the closest beach.<sup>28</sup> The others, including women and children, relied on locals, who had not been alerted by any government authorities, for rescue from the stricken vessel.

Once onshore, the crew, who feared being arrested for people smuggling fled, leaving behind the confused, frightened and angry asylum seekers, who gathered in the local village head's house. Four hours later, the police arrested the crew, and seven months later the Rote Ndao District Court convicted them for attempting to smuggle asylum seekers from Indonesia to New Zealand.<sup>29</sup>

### III Breaches of international and domestic law

At the trial of the captain and his crew, the judges ignored the supporting roles played by Australian agencies in the smuggling of asylum seekers from Australia to Indonesia.<sup>30</sup> Aus-

lian officials directed and otherwise arranged the crime by providing material assistance, including two boats, fuel, maps, and a GPS.<sup>31</sup> They had directed the boat captain and crew to land at identified points in Rote Island, rather than an official entry spot where Indonesian authorities could have registered the arrivals, as required by Indonesian law.<sup>32</sup> Effectively, the Australian government bankrolled the crime against Indonesia, even paying the captain and crew to commit it. Although Australia was certainly complicit, the Indonesian court ignored the inconvenient fact that another state could commit the transnational organised crime of people smuggling.<sup>33</sup>

At international law, the Australian officials may have also breached the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('*Smuggling Protocol*'),<sup>34</sup> which requires ratifying states, such as Australia and Indonesia, to adequately punish smugglers for endangering the safety of their migrant and refugee passengers. In turning back Andika's asylum seekers, Australian authorities clearly put lives at risk, as the crew and passengers ended up abandoning one of the Australia-provided boats and overcrowded the other because of insufficient fuel. The turnback might have fallen through the cracks of national law in Indonesia, and it is unlikely that the Australian legal system will ever adjudicate the issue. Regardless, the UN *Smuggling Protocol* contains a safeguard clause which clearly stipulates that states ought to 'ensure the safety and humane treatment of the persons on board'.<sup>35</sup>

Over four years later, it seems unlikely that either government will conduct further investigations with the view to punish the Australian officials. In Australia, there is a lack of political will to investigate the events fully, as the government continues to shield its anti-people smuggling activities from any public scrutiny. The Australian Senate published an Interim Report in 2016, but has since abandoned the inquiry with the following technical justification: '[a]t the dissolution of the Senate and the House of Representatives on 9 May 2016 for a general election on 2 July 2016, the parliamentary committees of the 44th Parliament ceased to exist'.<sup>36</sup> Therefore, inquiries that were not completed have lapsed and submissions cannot be received.<sup>37</sup>

Even if future Australian governments decide to punish the crime, certain categories

of officials, such as officers of the Australian Secret Intelligence Service, who were reportedly involved, enjoy immunity from liability under Australian law.<sup>38</sup> Likewise, there seems to be little appetite in Indonesia to reopen the case, as the Indonesian government does not deem it a priority and its officials are busy with other policy problems.

#### iv State, illegality and a new generation of bordering practices

Putting aside the Andika case and taking a wider look at the advancement of global bordering practices by states, it becomes apparent that bordering practices to deter asylum seekers are becoming more diversified and are not always legal. There is a growing body of literature that focuses on different kinds of interceptions, concentrating in particular on uni-, bi- and multilateral initiatives to combat people smuggling and block access to asylum.<sup>39</sup> Interceptions are often used to prevent unauthorised arrivals of vessels and their passengers, but are only permissible in certain situations as outlined in international law.<sup>40</sup> When called to account, governments in destination countries, such as Australia, are known to 'quarantine domestic law and policy from [their] international legal obligations', for example, by attempting to prevent the use of international law when assessing the legality of their interception activities.<sup>41</sup> They also selectively choose articles under international law to justify their interception activities while ignoring obligations in others.<sup>42</sup>

Although the number of boats reaching Australia has substantially decreased since the start of Operation Sovereign Borders, the direct and indirect costs of interceptions and returns of asylum seeker boats remain high — not only in financial terms, but in human costs and even political terms.<sup>43</sup> Unilateral action might bring quick results in preventing people smuggling, but cannot guarantee long-term success. In addition to the unsustainability of these methods in the long-term, they might result in unwanted impacts. For example, the nature of the Australia-Indonesia relationship in seeking to combat and prevent people smuggling marks this risk very clearly, as unannounced and unapproved turnbacks could jeopardise Canberra's diplomatic relations with Jakarta. More drastically, other

countries in the Indo-Pacific region might follow suit and adopt the Australian practice to some extent, which would result in even weaker protections for maritime asylum seekers and refugees in the region. For example, during the Andaman Sea Crisis in May 2015, Malaysia, Thailand and Indonesia all carried out pushbacks against Rohingya asylum seekers fleeing Myanmar until international criticism became too strong.<sup>44</sup>

In conclusion, the unilateral policies pursued by the Australian government under its Operation Sovereign Borders have threatened to undermine the fragile regional collaboration between states and the already weak protection spaces for asylum seekers. Pursuing its own interests at a neighbour's expense will not only weaken Australia's diplomatic relations, but also severely undermine international trust in Australia's adherence to the rule of law. In this regard, Australia can be deemed to be playing with fire by setting dangerous precedents that might then be copied by other states beyond the region. ☐

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References

- 1 *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth). For a comprehensive overview, see Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum Is Legal and Australia's Policies Are Not* (UNSW Press, 2014).
- 2 'Operation Sovereign Borders', *Department of Home Affairs* (Web Page) <<https://www.osb.border.gov.au>>. See also Susan Kneebone, 'Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia' (2017) 33(1) *Refuge: Canada's Journal on Refugees* 29.
- 3 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 14.
- 4 According to a report by UNICEF and Save the Children, the Australian Government has spent almost \$10 billion on offshore processing, mandatory detention and other border protection policies since 2013: UNICEF and Save the Children, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives* (Report, September 2016). For updated figures, see also 'Offshore Processing Statistics', *Refugee Council of Australia* (Web Page, 27 September 2019) <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/>> ('Offshore Processing Statistics').
- 5 Refugee Council of Australia, *2018–19 Federal Budget: What It Means for Refugees and People Seeking Humanitarian Protection* (Report, 9 May 2018).
- 6 'Amnesty International Condemns Australia's Asylum Seeker Policies, Labels Counter-Terrorism Measures "Regressive" and Says Global Response to Terrorist Groups "Shameful"', *ABC News* (online, 25 February 2015) <<https://www.abc.net.au/news/2015-02-25/amnesty-condemns-australias-asylum-seeker-policies/6261348>>; 'Scathing UN Report Slams Australia as Refugees on Manus Abandoned to Danger', *Human Rights Law Centre* (Web Page, 10 November 2017) <<https://www.hrlc.org.au/news/2017/11/9/scathing-un-report-slams-australia>>.
- 7 'Indonesia Warns Anew on Boat Turnbacks', *SBS News* (online, 7 January 2014) <<https://www.sbs.com.au/news/indonesia-warns-anew-on-boat-turnbacks>>.
- 8 See Amnesty International, *By Hook or By Crook: Australia's Abuse of Asylum-Seekers at Sea* (Report, 28 October 2015) 14. See also Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Payment of Cash or Other Inducements by the Commonwealth of Australia in Exchange for the Turn Back of Asylum Seeker Boats* (Interim Report, May 2016).
- 9 Department of Home Affairs (n 3). See also Australian Border Force, 'Fact Sheet: Operational Update 30 September 2013' (Web Page, 30 September 2013) <<https://newsroom.abf.gov.au/channels/operational-updates/releases/operational-update-30-september>>.
- 10 'Statistics', *Asylum Insight* (Web Page, 27 August 2019) <<https://www.asyluminsight.com/statistics#XV9TiZmZBw>>.
- 11 *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('UNCLOS'). For an inquiry about Australian incursions into Indonesia's 12-mile zone and related breaches of Indonesia's sovereignty, see Australian Senate, *Breaches of Indonesian Territorial Waters* (Report, 2014).
- 12 Kate Lamb and Oliver Laughland: 'Australian Navy Went into Indonesian Waters "Too Easily" and "Often"', *The Guardian* (online, 14 February 2014) <<https://www.theguardian.com/world/2014/feb/14/australian-navy-incursion-into-indonesian-waters-intentional>>.
- 13 See Amnesty International, *By Hook or By Crook: Australia's Abuse of Asylum-Seekers at Sea* (Report, 28 October 2015).
- 14 Jewel Topsfield, 'Indonesia Protests Boat Push-Back Policy After Asylum Seekers Found Stranded', *The Sydney Morning Herald* (online, 27 November 2015).
- 15 Amnesty International (n8) 14.
- 16 Parliament of Australia, 'Excisions from the Migration Zone: Policy and Practice' (Research Note No 42, 1 March 2004).
- 17 Amnesty International (n8) 15.
- 18 UNCLOS (n 12).
- 19 Amnesty International (n 8) 3.
- 20 *Ibid* 15.
- 21 *Ibid* 16.
- 22 *Ibid* 17.
- 23 *Ibid*.
- 24 *Ibid*.
- 25 *Legal Decision No 37/Pid.Sus/2015/PN.Rno with defendant Yohanis Humiang* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 38/Pid.Sus/2015/PN.Rno with defendants Marthen Karaeng, Medi Ampow, Yapi Aponno, Indra Reza Rumambi, Stevan Ivan Janny Worotitjan* (Rote Ndao District Court) 14 January 2016.
- 26 Amnesty International (n 8) 4.
- 27 *Ibid* 20.
- 28 *Ibid* 21.
- 29 *Legal Decision No 37/Pid.Sus/2015/PN.Rno with defendant Yohanis Humiang* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 38/Pid.Sus/2015/PN.Rno with defendants Marthen Karaeng, Medi Ampow, Yapi Aponno, Indra Reza Rumambi, Stevan Ivan Janny Worotitjan* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 37/Pid.Sus/2015/PN.Rno with defendant Yohanis Humiang* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 38/Pid.Sus/2015/PN.Rno with defendants Marthen Karaeng, Medi Ampow, Yapi Aponno, Indra Reza Rumambi, Stevan Ivan Janny Worotitjan* (Rote Ndao District Court) 14 January 2016.
- 30 *Legal Decision No 37/Pid.Sus/2015/PN.Rno with defendant Yohanis Humiang* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 38/Pid.Sus/2015/PN.Rno with defendants Marthen Karaeng, Medi Ampow, Yapi Aponno, Indra Reza Rumambi, Stevan Ivan Janny Worotitjan* (Rote Ndao District Court) 14 January 2016.
- 31 Amnesty International (n 9) 31–2.
- 32 *Ibid* 32.
- 33 *Legal Decision No 37/Pid.Sus/2015/PN.Rno with defendant Yohanis Humiang* (Rote Ndao District Court) 14 January 2016; *Legal Decision No 38/Pid.Sus/2015/PN.Rno with defendants Marthen Karaeng, Medi Ampow, Yapi Aponno, Indra Reza Rumambi, Stevan Ivan Janny Worotitjan* (Rote Ndao District Court) 14 January 2016.
- 34 *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) art 6 ('*Smuggling Protocol*').
- 35 *Ibid* art 9(1)(a).
- 36 Senate Standing Committees on Legal and Constitutional Affairs (n 8).
- 37 'Payment of Cash or Other Inducements by the Commonwealth of Australia in Exchange for the Turn Back of Asylum Seeker Boats', *Parliament of Australia* (Web Page) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Payments\\_for\\_turn\\_backs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs)>.
- 38 Amnesty International (n 8) 33.
- 39 David Scott FitzGerald: *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press, 2019).
- 40 Efthymios Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing, 2013).
- 41 Joyce Chia, Jane McAdam and Kate Purcell, 'Asylum in Australia: Operation Sovereign Borders and International Law' (2014) 32 *Australian Yearbook of International Law* 33, 64.
- 42 *Ibid*.
- 43 'Offshore Processing Statistics' (n 5); UNICEF and Save the Children (n 4).
- 44 'Turning Back Boats', *Kaldor Centre for International Refugee Law* (Web Page, 26 February 2015) <<https://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats>>.

# Tension between the government and the courts



Surgical theatre of Lorengau  
Hospital on Manus Island.  
Manus Island, 29 October 2017  
(Amnesty International/AAP Image)