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Interception of asylum seekers

–a minor field study on the co-operation between Australia and Indonesia.

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Contents

SUMMARY 2

ACKNOWLEDGEMENTS 4

ABBREVIATIONS 5

1 INTRODUCTION 7

1.1 Presentation of the topic 7

1.2 Aim of the thesis 9

1.3 Method and delimitation 9

2 INTRODUCTION TO THE AUSTRALIAN MIGRATION POLICY AND ITS APPROACH TO INDONESIA 11

2.1 Background 11

2.2 Australia's Humanitarian Program 12
2.2.1 The On-shore Program 12
2.2.2 The Off-shore program 12

2.3 New legislation as of September 2001 13

2.4 Australian activities in Indonesia 15
2.4.1 Information campaigns 15
2.4.1.1 Towards the elite 15
2.4.1.2 Towards the local fishermen. 16
2.4.2 The Regional Co-operative Arrangement 17

3 THE PRACTICAL EXAMPLE: FROM FLIGHT TO DURABLE SOLUTION 18

3.1 They head for Australia... 18

3.2 ...but are detected by the Indonesian authorities. 19
3.2.1 Support from Australia 19
3.2.2 Fraudulent documents? 20

3.3 Arrested and put in a Migration Quarantine or other detention facilities 20
3.3.1 Indonesian legislation 20
3.3.2 Financial restraints impede the enforcement of Indonesian legislation on irregular migrants 21

3.4 Contact with IOM 21

3.4.1 Registration 22
3.4.2 Information on the option of Voluntary Repatriation 22
3.4.3 Any fear of returning home? 22

3.5 New accommodation? Who pays and what are the facilities? 23
3.5.1 Some of them are brought to budget hotels 23
3.5.2 Local irritation? 25

3.6 Meeting with UNHCR 25
3.6.1 Screening 26
3.6.2 Interview for determination of refugee status 26

3.7 Voluntary repatriation? 26

3.8 Decisions from UNHCR 27
3.8.1 Negative decision 27
3.8.2 Positive decision, moved from IOM to the care of UNHCR 28

3.9 Reasons for defection 30

3.10 Results? 30

3.11 Future Developments 31
3.11.1 A new processing centre? 31
3.11.2 Indonesian ratification of relevant Conventions. 32
3.11.2.1 Ratification of the 1951 Refugee Convention? 32
3.11.2.2 Ratification of the International Convention on Trans-National Crimes, and its two protocols? 33

4 OVERVIEW OF THE CO-OPERATION BETWEEN THE PARTIES INVOLVED 34

4.1 The relation between the Indonesian parties in general 34

4.2 Australia- Indonesia 35

4.3 Australia- IOM 36

4.4 Indonesia- IOM 36

4.5 Indonesia-Australia-UNHCR 37

5 PROTECTION OF THE INTERCEPTED REFUGEES AND ASYLUM SEEKERS 39

5.1 The International Framework Regarding Interception 39
5.1.1 The definition of interception and its applicability to this arrangement. 39
5.1.2 The Protocol Against the Smuggling of Migrants by Land, Air and Sea. 40

5.2 The Regional Co-operative Arrangement 42
5.2.1 Non-refoulement 42
5.2.1.1 Article 33 of the 1951 Convention 42
5.2.1.2 Risks 43
5.2.1.2.1 Indonesia is not signatory to the 1951 Convention 43
5.2.1.2.2 No formal guarantees 43
5.2.1.3 Safeguards; the involvement of IOM and UNHCR 44

5.2.2 Access to a determination process 44
5.2.2.1 International law 44
5.2.2.2 Safeguards through UNHCR and IOM 45
5.2.3 Detention 45
5.2.3.1 International law 45
5.2.3.1.1 The 1951 Refugee Convention 45
5.2.3.1.2 International Covenant on Civil and Political Rights 46
5.2.3.2 This arrangement 46
5.2.3.2.1 No systematic use? 46
5.2.3.2.2 Plans on a processing centre 47
5.2.4 Other areas of concern 47
5.2.4.1 Most interception efforts are far removed from public scrutiny 47
5.2.4.2 Lack of adequate interpretation services 48
5.2.4.3 Authorities lack in expertise in refugee protection and Human Rights 48
5.2.4.3.1 Training of Police 48
5.2.4.3.2 No referral to human rights documents 48
5.2.4.3.3 ‘Remarkably restrained’, strong internal control 48
5.2.4.3.4 Protection of those subject to threats. 49

5.3 Concluding remarks 49

6 THE AMBIT OF THE PRINCIPLE OF *NON-REFOULEMENT* AND THE ISSUE OF STATE RESPONSIBILITY 51

6.1 The prohibition of *non-refoulement* and its implications for the strategies adopted 52
6.1.1 *Non-rejection* at the frontiers? 52
6.1.2 Excised areas or ‘international zones’ 53
6.1.3 Effective protection elsewhere? 54
6.1.3.1 Australia’s argumentation 55
6.1.3.2 Concluding remarks 56

6.2 The principle of *non-refoulement* and the obligations of Indonesia 57
6.2.1 Customary law? 57
6.2.2 Article 3 of the Convention against Torture 58
6.2.3 Concluding remarks on the principle of *non-refoulement* 60

6.3 General remarks on the issue of state responsibility. 60
6.3.1 Attributability 62
6.3.2 Breach of an international obligation 62
6.3.3 Complicity 63

7 CONCLUSIONS 66

BIBLIOGRAPHY 69

Summary

The thesis is based on a field study in Indonesia conducted in October-December 2001 and it focuses on one part of the Australian strategy for preventing asylum seekers from entering its borders in an irregular manner: an arrangement on the interception of asylum seekers transiting Indonesia en route to Australia. The Australian government argues that it wants to prevent *secondary movements*. It is held that many of the current flows are refugees either forsaking effective protection that they have enjoyed in a country of first asylum, or by bypassing opportunities to seek and obtain it in neighbouring countries.

Based on the material gathered in Indonesia, the thesis presents a rather thorough description of what happens in practice to those who are intercepted in Indonesia on their way to Australia. In addition the reader is informed on the roles of the different parties involved. Under this arrangement, the Indonesian authorities detect and intercept persons who are transiting Indonesia without the proper documentation, i.e. passport or visa. The authorities subsequently inform the International Organization for Migration (IOM) which mainly is in charge of providing the asylum seekers with accommodation and facilities while awaiting the United Nations High Commissioner for Refugees to process the asylum seekers for refugee status. Since Indonesia has not ratified the 1951 Refugee Convention, it has no system for handling claims of asylum and since those intercepted have entered without the proper documentation, they are regarded as irregular migrants who according to Indonesian legislation shall be subject to deportation. However the government allows the asylum seekers and refugees to remain during the process. Those accorded refugee status remain in Indonesia while awaiting UNHCR to find a third country to accept them for resettlement; a time-consuming and difficult task.

Further, the thesis includes an assessment under international law of the protection offered to the refugees and asylum seekers under this arrangement on interception. This part focuses *inter alia* on the protection available against *refoulement*, access to a determination process and the issue of detention of asylum seekers. The conclusion is drawn that due to the involvement of UNHCR and IOM, there are strong safeguards against *refoulement* and the asylum seekers and refugees are afforded basic protection.

The only existing agreement is a Memorandum of Understanding between IOM and Australia which stipulates that IOM shall provide the asylum seekers with facilities and that Australia will pay for the expenses IOM has for the asylum seekers. The conclusion is drawn that the arrangement never would operate without the financial support from Australia to IOM.

Further, the thesis analyses whether Indonesia may be bound by the principle of *non-refoulement* though it has not ratified the 1951 Refugee Convention and the conclusion is drawn that there are strong indications that the principle has achieved the status of customary law, obliging Indonesia to refrain from *refoulement*. In addition, Indonesia has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The conclusion is drawn that if Indonesia forcibly returns a person to a state where he or she may face persecution, it may be at risk of violating its international obligations.

The arrangement lacks formal agreements and a clear distribution of legal responsibilities. Thus, the thesis includes an assessment of the issue of international state responsibility and it is concluded that in case of any violation against the principle of *non-refoulement*, Indonesia is the only state that can be held viable. As a result, the refugees and asylum seekers are under the sole responsibility of a state which has neither any financial possibilities of protection refugees, nor any legal framework to provide such protection. The asylum seekers and refugees are dependent on international organisations towards which they have no possibilities to enforce their rights. Though the arrangement is an Australian invention, and is undertaken in order to enforce the Australian migration policy, Australia seems to remain legally untouchable since it more or less hides behind an international organisation, IOM and all actions towards the asylum seekers and refugees are undertaken within the Indonesian jurisdiction. The arrangement is carried out on an *ad hoc* basis without formal agreements on the distribution of responsibilities, and there is no effective supervision of the actions taken by the parties involved, and thus there is a high level of insecurity as to the enforcement of the protection offered.

In conclusion, Australia has created an arrangement which technically justifies its arguments that those entering Australia have forsaken protection offered elsewhere. However, the protection offered in Indonesia is at a minimum level and is not offered by another state but by international organisations. All actions are undertaken within the Indonesian jurisdiction and thus the legal responsibility for the asylum seekers and refugees is carried by a state without any infrastructure enabling it to take care of the asylum seekers and refugees remaining in its territory. In addition, it is highly questionable that a industrialised state, with a developed infrastructure for handling asylum cases creates an arrangement where the burden is carried out by a development country without supporting it in creating a proper refugee regime.

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Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEEC	Countries of Central and Eastern Europe
DIMA	Australian Department for Immigration and Multicultural Affairs
ExCom	UNHCR's Executive Committee
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
IOM	International Organization for Migration
MOU	Memorandum of Understanding
MQ	Migration Quarantine
NGO	Non-governmental Organisation
RCA	Regional Co-operation Arrangement
SHP	Special Humanitarian Program
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Presentation of the topic

Refugees are not migrants in the lay sense of the word. They move through compulsion and not on the basis of meaningful choice and their immediate objective is to seek protection, not to obtain a migratory outcome. Thus, there is a general distinction between refugees and migrants. However, modern migratory patterns make it difficult to distinguish between the refugees and ordinary migrants. In response to the perceived abuse of the asylum system by those not in need of protection from persecution, industrialised states have introduced a barrage of restrictive immigration policies and practices, making it increasingly difficult for any migrant or asylum seeker to legally enter their borders, and thus the states are "keeping asylum seekers from the procedural door".[1] Since the obligations of a state under international refugee law apply as soon as an asylum seeker claims protection within that states jurisdiction, those policies seems to permit states to exercise control over migration movements and thus the access to their territory without being at risk of violating the prohibition of *non-refoulement.* These so called policies of 'non-admission' or '*non-entrée*'[2] are regularly pursued by means of visa requirements and the enforcement of the requirements by sanctions on transport companies carrying passengers without the required documents. In addition, states have taken resort to safe third country arrangements, arguing that the individual can be protected elsewhere or that another state should handle the asylum process.

One strategy adopted by Western European Countries has been to unilaterally incorporate the countries of Central and Eastern Europe (hereinafter referred to as CEEC) into their emerging refugee regime through the extension of the re-distributive system for handling asylum claims and the export of high standards of border-control technology. These processes focus mainly on two main issues; the fight against irregular immigration and the strengthening of Eastern borders through the development of common standards of control and technology; and, asylum matters *per se* through the establishment of basic legislative, administrative and social infrastructure for the protection of refugees within the CEEC.[3] As a result of the increasingly restrictive immigration and asylum policies in the West and the application of the 'safe third country'[4] rule, the numbers of migrants who stay in the former transit countries have effectively increased.

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[1] Goodwin-Gill, *The Refugee in International Law,* 1996, p. 333.

[2] Hathaway, *The Emerging Politics of Non-Entrée,* in Refugees 1992, pp. 40-41

[3] Lavenex S., *Safe third Countries, Extending the EU Asylum and Immigration Policies to Central and Eastern Europe,* 1999. p. 75.

[4] 'Safe Third Country' agreements provide that an asylum applicant who has transited a state in which he or she could have sought asylum may be denied access to the asylum process and returned to the 'safe third country' to pursue an asylum claim there. This

Just as the Western European countries, Australia seeks to combat people smuggling and at the same time decrease the numbers of asylum seekers arriving at its borders through inter-state co-operation. However, the geographical situation is different. The closest neighbouring country, through which almost all asylum seekers and irregular migrants transit, is Indonesia, a developing country which has experienced widespread political strife, separatism and ethnic and political violence. At the end of 2001, there were more than 1.3 million internally displaced persons throughout Indonesia, and the economy is undergoing a severe crisis. While the strategy of the Western European countries partially is aimed at making the CEEC responsible for handling asylum claims, the Australian focus has been different, due to the fact that Indonesia has not ratified the 1951 Convention relating to the Status of Refugees, (hereinafter referred to as the 1951 Convention)[5] and consequently have no system for dealing with asylum seekers and refugees. Apart from the support given to Indonesia in order to strengthen its migration control and general awareness rising of the problems of 'illegal migration' and people smuggling, the two countries have set up a so called 'Regional Co-operative Arrangement'[6] (hereinafter referred to as RCA) in which also the International Organisation of Migration (hereinafter referred to as IOM) as well as the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) is involved. The aim of the RCA is to intercept asylum seekers[7] and to process their claims of refugee status already in Indonesia. Apart from the RCA, Australia has also engaged other states in the region in order to locate the determination process outside the Australian territory, a strategy that very much serves the same purpose as the RCA; deterrence by a higher level of discomfort and insecurity than if the process were to be undertaken in Australia.

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specific term is a European phenomenon. With regard to the definition of a 'safe country', member state practice extends form the requirement of a fair and equitable asylum procedure, in accordance with the 1951 Convention and the European convention on Human Rights, and the requirement of the consent of the readmitting state to examine the asylum seeker's claim to less far-reaching requirements, such as the fact that the country has signed the 1951 Convention: Lavenex, *Safe third Countries, Extending the EU Asylum and Immigration Policies to Central and Eastern Europe,* 1999. p. 77. See section 7.1.3. below.

[5] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[6] There is no definitive label of this arrangement, but in this presentation the arrangement will be referred to as the Regional Co-operative Arrangement.

[7] Due to individuals' unauthorised arrivals, many states label those persons as 'illegal migrants' or 'irregular migrants' even if they enter the state with the purpose of seeking asylum.. For the purpose of this thesis, I refer to the persons concerned as either irregular migrants or asylum seekers depending on the context.

1.2 Aim of the thesis

When I first heard of the RCA in late 2000, I soon found out that there was neither any information available on what the arrangement looked like in practice, nor any assessment of it. I realised that the only way to study the arrangement was by actually going to Indonesia to try to collect the material myself. The purpose of this thesis is thus first of all to describe as far as possible what happens in practice when this arrangement of interception is carried out, i.e. what party undertakes what measure and under what formalities. Secondly, the thesis aims at making a first assessment of the arrangement under international law, regarding the protection of asylum seekers and refugees when interception is used as a means for border control. Thirdly, the thesis includes a discussion on the principle of *non-refoulement* and its ambit, and the issue of state responsibility: what are the rules when actions are carried out in a state which has not ratified the 1951 Convention, but with the intensive encouragement of a state which is a signatory?

1.3 Method and delimitation

The thesis is based on a field study, conducted in Indonesia in October-December 2001. The study was financed by a 'minor field study' scholarship from SIDA, granted by the Raoul Wallenberg institute of Human Rights and humanitarian Law in Lund, Sweden. I gathered material by interviewing persons from the four parties involved in this arrangement: the Indonesian government, the Australian embassy in Jakarta, IOM and UNHCR. As far as possible I tried to speak to persons involved at different levels in the implementation. Though I visited several areas where the asylum seekers were located, the thesis does not claim to make a complete assessment of quality of protection provided for the individuals. Nor does the thesis aim at investigating the quality of the work of the organisations or authorities involved. Since the descriptive part is rather extensive, I have chosen to let the reader follow two fictious individuals through the process that they are exposed to. When an arrangement of interception is carried out, a wide range of human rights apply. However, this thesis focuses mainly on the concept of *non-refoulement*, the cornerstone of refugee protection, though there are several other rights that may be subject to concern. The arrangement on interception and processing of asylum seekers in Indonesia is not a isolated phenomenon; Australia undertakes various actions which inflicts on the situations of refugees and asylum seekers, and the ongoing political debate in Australia concerning refugees deserves much more attention than this thesis is able to cover. Thus, this thesis will not cover the domestic situation of Australia unless it has direct implications for the arrangement which will be described in this thesis. The Australian choice to locate the determination process outside its territory will only be touched upon briefly while the main focus is on the RCA. While Australia very much focuses on the issue of people smuggling, the phenomenon as such

will not be discussed in this thesis since I want to keep the focus on the asylum seekers and refugees and their protection.

2 Introduction to the Australian migration policy and its approach to Indonesia

Operating outside its territory, the overarching aim of the Australian migration policy abroad is to "shut down the pipe-line", through which the asylum seekers enter Australia. The Australian thus tries to create a 'queue system' where the asylum seekers are supposed to apply for asylum as close to their countries of origin as possible. Consequently, Australia argues that they want to discourage so called 'queue jumpers'.

2.1 Background

According to the Australian government, there has been a notable change in the caseload and country of origin and transit. First, between July 1999 and June 2001, there were 8 316 unauthorised boat arrivals compared to 4 114 in the ten year period from 1989-90 to 1998-99. Second, there has been a distinct shift in the nationality profile of unauthorised boat arrivals from mostly Asian to mostly Middle Eastern in origin. Third, there has been an increase in the percentage of these arrivals presenting protection claims. For the past two years, more than 80% of unauthorised boat arrivals in Australia made protection visa applications, compared with 46% for 1998-99. This development was perceived as a dramatic change. In late 1999, Australia adopted a comprehensive and integrated unauthorised arrivals strategy that addresses all points in the irregular migration chain, from source through first asylum and transit countries to destination countries. The strategy includes several parts but only a few will here be mentioned. In order to reduce the "push factors" from countries of origin as well as from countries of first asylum, Australia provides, *inter alia*, targeted aid funding and information campaigns, highlighting the dangers of irregular migration. In response to the role that people smugglers play in irregular migration, the Australian government has undertaken capacity building measures to assist other countries in the region to develop the systems and expertise necessary to deal with people smuggling and irregular migration. Intelligence gathering and sharing in the region is also an important part of the strategy to disrupt the activities of the people smugglers. Another significant part, as will be developed later on in the thesis, is that Australia has supported regional co-operation aimed at the interception of unauthorised arrivals in Indonesia and Cambodia. The last part of the strategy focuses in the reception of persons arriving in Australia, and aims *inter alia* at providing protection to those who need it while those who have entered in an unauthorised manner receive a lower level of entitlements. As of 1992,

Australia applies mandatory detention of all asylum seeker arriving without the proper documents, until they are granted a visa or leave the country.[8]

2.2 Australia's Humanitarian Program

In order to understand the logic behind the ongoing arrangement in Indonesia, a basic description will follow of Australia's programmes designed to meet their commitments to refugee and international protection. Australia's Humanitarian Program comprises two components: one offshore and one onshore. The Offshore Resettlement Programme provides permanent resettlement in Australia for those persons who are found to be in the greatest need of resettlement. The onshore component is for those persons who arrive in an unauthorised manner, and apply for protection once in Australia.[9]
In 2000-2001, a total of 13,733 visas were granted under the Humanitarian Program. This comprised 7,992 visas under the off-shore component and 5,741 visas under the onshore component.[10]

2.2.1 The On-shore Program

The on-shore component applies to those people who apply for protection once in Australia. To qualify for a Protection Visa, applicants must prove their refugee status and meet other criteria related to health and character. Those arriving unlawfully can obtain only a temporary visa, whereas permanent visas are for those who arrive lawfully and with genuine documents. Those who attain temporary visas do not have access to family reunion, and, if leaving the country they will have no automatic right of return to Australia.[11]

2.2.2 The Off-shore program

There are two categories of offshore visas: Refugee and Special Humanitarian Program (hereinafter referred to as SHP). Each application for entry under those categories is considered on its merits by officers at the department's overseas posts. The Refugee category assists people outside

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[8] Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Border Protection Background Paper on unauthorised Arrivals Strategy,* available at <http://www.minister.immi.gov.au/media_releases/media01/r01131_bgpaper.htm>, accessed on 5 July. For more detailed information on the statistics *see:* Population Flows: Immigration aspects, Departement of Immigration and Multicultural and Indigenous Affairs, 2002. Available at: http://www.immi.gov.au/statistics/publications/popflows2001/popflows2001.htm. *See also* Fact sheet 74, *Unauthorised Arrivals by Air and Sea,* Available at <http://www.immi.gov.au(facts74unauthorised.htm>

[9] DIMA., *Refugee and Humanitarian Issues, Australia's response.* October 2001, p.21.

[10] DIMA, *Population Flows: Immigration Aspects,* 2000. p. 25

[11] DIMA, *Refugee and Humanitarian Issues, Australia's response.* October 2001, p. 22

their country of origin and who are subject to persecution in their home country and have a strong need for resettlement. The majority of Australia's refugees are referred to Australian offices overseas by UNHCR. The Special Humanitarian Program assists people who are outside their home country and who, in their home country, have experienced substantial discrimination amounting to gross violation of human rights. The SHP enables the resettlement of those who, while not refugees, are in humanitarian need. People applying under SHP must demonstrate some connection with Australia. A formal proposal from a permanent resident or citizen of Australia, or body operating in Australia, is required. Every year, the government decides on the number of visa places for the coming year, and theses places are divided between the offshore resettlement component and the on shore resettlement component on the basis of need and demand.[12] For the year 2000-01, 7 992 visas were granted under the offshore Humanitarian Visa, out of these 3 997 were Refugee visas and 3 116 were SHP visas. The rest, 879 were Special Assistance Category Visas.[13] For the 2001-2002 programme year, a total of 13 645 places are available for Australia's Humanitarian Program, comprising 12 000 places and carry-over of unused places from 2000-01. In line with Australia's commitment to UNHCR, the Refugee category will continue to be maintained at 4000 places in 2001-02. There is no specific allocation for the SHP. However, places in the programme that do not get used to onshore protection visa grants during the course of 2001-02 will be re-allocated to the off-shore SHP or carried forward into the 2002-03 programme year. The influx of unauthorised arrivals into Australia, however, is according to the Australian government placing considerable demands on the Humanitarian Program. As a result, the number of places available in 2001-2002 for the off-shore component are significantly reduced. If additional places are required to meet onshore visa requirements, places are taken from off-shore allocation.[14] Thus, under the Australian visa system, off-shore places and on-shore places available are linked together, so that an increase of arrivals under one of the programmes will decrease the places available under the other.

2.3 New legislation as of September 2001

As a further response to the "increasing threats to Australia's sovereign right to determine who will enter and remain in Australia"[15], the Federal Parliament passed a series of new laws in September 2001. The aim of this new legislation was to make it as difficult as possible for people smugglers to use Australia's northern waters as a route to Australia. One of the results was that The Migration Act of 1958 was amended in order to excise certain

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[12] DIMA, *Refugee and Humanitarian Issues- Australia's response,* 2001, p. 7.
[13] DIMA, *Population Flows: Immigration Aspects*, 2000, p. 27.
[14] DIMA., *Refugee and Humanitarian Issues, Australia's response,* 2001, p.8.
[15] DIMA, *Notice of Legislation Change, Amendments to Australia's Border Protection Arrangements-Migration Amendment (Excision From Migration Zone) Act 2001,* available at <http://www.immi.gov.au/legislation/lc0901_5.htm>, accessed on 5 November 2001.

territories from the Australian migration zone in relation to people arriving unlawfully.[16] Following this new legislation, the Australian embassy in Jakarta published a brochure directed towards irregular migrants transiting Indonesia with the message that "illegal boat arrivals will have no right to apply for asylum under the Australian system". [17] However, the consequence of the excision from the migration zone is that, if entering illegally into any of the specific territories, a person can no longer apply for a protection visa upon arrival unless the Minister decides that it is in the public interest to exercise his discretionary power and allow an application to be made.[18] Since the only way to apply for asylum in Australia is by applying for a temporary visa, technically, the possibility to apply for asylum is removed. However, Australia will still assure that there be adequate determination procedures.[19] The new legislation also allows for people who arrive in an excised offshore place to be taken to a "declared country".[20] Thus those entering the above mentioned areas, without the proper documentation, can be relocated to a "declared country", where the status determination process is undertaken. Thus, as of 30 January 2002, 1550 asylum seekers were held in detention centres in Nauru and Papua New Guinea, even though they were seeking refuge in Australia. Nauru is not a signatory to the 1951 Convention and has no system for handling asylum processes and thus UNHCR have accepted to assess the protection claims. Though Papua New Guinea has signed the 1951 Convention, the determination process there is conducted by Australian officials since UNHCR has refused to contribute to the processing. [21]

As described above, a person chosen under the offshore programme receives a permanent visa while those arriving unlawfully to the territory of Australia only can be granted a temporary visa. It is however possible to apply for a renewal of the temporary visa. The Australian strategy aims at discouraging secondary movement, and rewarding people who choose the country of first asylum.[22] Coming as far as to Indonesia is considered a secondary movement, something that the government of Australia wants to

[16] Migration Act of 1958, section 46 A (7)
[17] The Brochure is labelled "Going to Australia illegally? Forget it!" . Though it is distributed by the Australian embassy in Jakarta, the brochure does not contain any information on the publisher or distributor. The brochure i sin file with the author.
[18] Migration Act of 1958, Section 46 A (1-7)
[19] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001.
[20] Migration Act of 1958, Section 198 A. *See also* DIMIA, Fact sheet 76, *Offshore processing Arrangements,* available at <http://www.immi.gov.au/facts/76offshore.htm>, accessed on 4 march 2002.
[21] Oxfam Community Aid Abroad, *Adrift in the Pacific, the Implications of Australia's pacific Refugee Solution,* p.8, available at <http://www.caa.org.au/campaigns/refugees/pacificsoultion/part1.html>, accessed on 5 March 2002. p.
[22] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001

discourage.[23] Hence, those intercepted in Indonesia, and accorded refugee status by UNHCR, are only eligible for a temporary visa if Australia agrees to resettle them. Hence, the further a refugee gets from their country of first asylum where that protection continues to be effective, the less benefit in terms of residence outcome will be obtained.

2.4 Australian activities in Indonesia

Indonesia's archipelago, with its 13 000 islands, stretches over 3 000 miles, mostly to the north and north-west of Australia. Closest to Indonesia are the Christmas Island and the Ashmore Reef, where almost all asylum seekers arrive. Hence a significant part of those entering Australia in an unauthorised manner have transited through Indonesia by using people smugglers, who in turn pay local Indonesian fishermen to bring them across the sea.
According to Hence, to disrupt the migrant flow already in Indonesia is an important part of the work to "shut down the pipe-line", as recalled by Kirk Koningham, Counsellor of Public Affairs at the Australian Embassy in Jakarta.

2.4.1 Information campaigns

One part of the work to shut down the pipe-line in Indonesia is to perform information campaigns towards various categories of people. The reason for presenting these campaigns in this thesis is because they clearly indicate the 'informal', yet essential, work performed by Australia in Indonesia. Essential in the sense that without the Indonesian awareness, RCA probably never would be able to operate. In addition it indicates the Australian attitude towards a category of individuals where there are several 'irregular migrants' that after due process are considered to be refugees, and thus it is worth to note how this perception is exported to a state which is about to ratify the 1951 Convention.

2.4.1.1 Towards the elite

Australia has a programme directed towards the elite among Indonesians, in order to raise awareness in Indonesia and to reduce the sympathy for the irregular migrants, i.e. the asylum seekers, but also to highlight the fact that irregular migrants and people smugglers are a problem for Indonesia as well. The information is normally spread during seminars. This campaign is operated without the participation of the Indonesian authorities. [24]

There are four key messages directed towards the elite.

[23] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001

[24] Interview with Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.

-The first is that people smugglers are criminals and hence closely involved with other trans-national criminal activities such as narcotics, weapon terrorism, money laundering and terrorism.
-The second message focuses on the fact that it is in Indonesia's essential interest to protect its own borders. The elite is informed that the flow of 'illegal migrants' causes major disruption in local communities, where they do not respect local customs (e.g. by drinking, harassing local women and encouraging prostitution). The result is an unchecked movement of radicals into and out of Indonesia and criminal activities such as corruption of local officials and false documentation.
-The third message is that joint action is required since there are very large numbers of Afghans, Pakistanis, Iraqis and Iranians who are looking to move to Europe, North America and Australia. If Indonesia, together with Australia, does not create a firm barrier to those people they will come in ever increasing numbers through Indonesia to Australia. While people smugglers make the money, Indonesia will pay the price in social disruption.[25]
-Fourthly, the campaign aims at reducing the sympathy for the 'illegal migrants' since the 'gate-crashers' make demands on Indonesia and, few of the migrants are genuine refugees; on the contrary, they are quite wealthy and looking to improve their economic circumstances at the expense of genuine refugees.

Information campaigns like this has opened up for a general perception in Indonesia that irregular migration is a problem that requires firm actions.

2.4.1.2 Towards the local fishermen.

The boats that bring the asylum seekers from Indonesia to Australia are mostly Indonesian fishermen who are paid by the people smugglers in order to bring the migrants/asylum seekers across the sea to Australia. Consequently, the fishermen are a natural target for the information campaign. Naturally, the campaign differs from the one directed towards the elite and so do the methods. The campaign is launched in co-operation with the Fishing Co-operatives and the Fishing Ministry. An effective method is to produce a soap opera where "soap opera stars" are involved. Since television is a rare phenomenon in the fishing villages, a van with the necessary equipment is brought to villages, something that attracts great attention.[26] The main message is "don't become a victim". They fishermen are informed that the people smugglers make US$ 10 000 per head, while the penalties for a fisherman range from five to twenty years in prison. The people smugglers, it says, are evil people who lie and cheat Indonesians and the smugglers are often involved in prostitution, money laundering and arms

[25] *Working Paper/Summary of the key message towards the elite*. Received from Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.
[26] Interview with Kirk Koningham, Counsellor of Public Affairs, Australian Embassy, Jakarta, 1 November 2001.

dealing. The fishermen are asked if they really want these criminals in their community, near their friends and families.[27]

2.4.2 The Regional Co-operative Arrangement

What will be described in detail below, is the interception arrangement that takes place in Indonesia. The strategy adopted by Australia has been to support the establishment of co-operative arrangements between UNHCR and IOM and the government of Indonesia to intercept irregular migrants/asylum seekers within the Indonesian territory.[28] A more elaborate description of this co-operative arrangement will follow below. The co-operation has been entitled the Regional Co-operative Arrangement (RCA). However, Greg Milles at the Australian embassy in Jakarta hesitates to define the arrangement in such definite terms since "it is operating in terms of anarchy".[29]

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[27] *Working Paper/Summary of the key message towards the Fishermen.* Received from Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.
[28] Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Border Protection Background Paper on unauthorised Arrivals Strategy,* available at <http://www.minister.immi.gov.au/media_releases/media01/r01131_bgpaper.htm>, accessed on 5 July 2001-11-05.

[29] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001

3 THE PRACTICAL EXAMPLE: FROM FLIGHT TO DURABLE SOLUTION

The objective of this chapter is to give a description of the process, partially by examining two fictitious individuals: Jalal, originating from Afghanistan, and Ali, from Iraq. When appropriate, different aspects of the involvement of the different parties will also be examined and explained. The various reasons for why these persons chose to leave their countries will be left aside.

3.1 They head for Australia...

Jalal and Ali arrive legally in Kuala Lumpur, Malaysia, since Malaysia grants visa-free entry to nationals of Muslim countries. Australia as well as Indonesia would both appreciate if Malaysia changed its regulations on visas since they perceive this generous policy of entry for citizens of Muslim countries as one of the factors that stimulate the flow of irregular migrants to Australia, and hence the use of Indonesia as a transit country.[30]
In Kuala Lumpur they make contact with a person who offers to bring them to Australia for approximately US$ 4 000. Late at night, together with 60 other men, women and children they enter the boat that will bring them to Australia. The boat is in a dreadful condition but they all enter it anyway. Jalal later on explains that, being brought up in Afghanistan, he has no idea of what a boat should look like or what the conditions can be like at sea.[31]
They head for Sumatra, the northern island of Indonesia, but after a couple of hours the weather gets harsh and the boat starts to take in water. Fortunately though, the shore of Sumatra is not too far away and they can save themselves by swimming ashore.

[30] According to Greg Milles, Australia has suggested Malaysia to change its visa policies. Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001. Lukmiardy, at the Directorate of Immigration, Measuring and Supervision, also stressed the problematic consequences of the Malaysian visa policy regarding irregular migrants arriving to Indonesia. Interview with Lukmiardy, Directorate of Immigration, Measuring and Supervision, 19 November 2001.
[31] Common answer by Afghani asylum seekers in Indonesia on the question why they entered a boat apparently under-dimensioned.

3.2 ...but are detected by the Indonesian authorities.

Only a couple of hours after they have come ashore, the Indonesian migration officials arrive, since the local people have contacted the local migration office and informed that they had spotted the irregular migrants.[32] Irregular migrants are also detected at the ordinary entry-points.[33] However, if a carrier arrives with irregular migrants at a legal entry point, the carriers are stopped by the authorities and are sometimes forced to turn back. Indonesian legislation obliges the carrier to take undocumented persons outside the Indonesian territory.[34] Mohammed Indra at the Directorate for Immigration confirms that Indonesian authorities have stopped boats and returned them to Malaysia, something which, as Richard Danziger at IOM stresses, is completely in order since they enter Indonesia illegally.[35] According to Indra, this is probably one of the reasons why the irregular migrants are dropped at illegal entry points; when the Indonesian authorities detect them, the carriers have disappeared and hence there is no one to bring them back to Malaysia. In this case they were stranded at the shore of Sumatra, but most irregular migrants are discovered in the region of Nusa Tenggara and also often by chance when the boats have broken, or more generally because they have difficulties.[36]

3.2.1 Support from Australia

In this case, the Indonesian authorities had already received information from Australia about the boat and that this particular boat might contain undocumented migrants, and that police men therefore should be sent to them.[37] In addition, Indonesia receives support in the form of facilities from

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[32] This is a common way for immigration authorities to get information about the arrival of irregular migrants when they enter outside the legal entry-points, Interview with Mohamed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001. *See also:* elucidation on Act 9 of 1992 on immigration affairs, where it is stated that *"The control of foreigners also require the participation of the community to report on foreigners who are known or are suspected to be in Indonesian territory illegally or to have misused his immigration permit.*

[33] Across Indonesia there are 114 legal entry-points, Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001. In Act 9 of 1992 on Immigration, Article 1: 4 they are referred to as *immigration examination locations*.

[34] Act of the Republic of Indonesia Number 9 of 1992 on Immigration, Article 9.e.

[35] Interview with Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.

[36] Interview with Rumondang, Directorate of International Organisations, Department of Foreign Affairs, 25 October 2001.

[37] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001. According to Indra, this is one example on how Australia and Indonesia co-operate on the exchange of information.

Australia to patrol the sea between Indonesia and Australia.[38] Australia has offered financial assistance if Indonesia needs assistance in creating infrastructure, training and technology in order to handle these issues.[39]

3.2.2 Fraudulent documents?

The migration authorities ask to see their travel documents, but both Jalal and Ali, like most of the people from the boat, claim that they have lost them during their travel. Later on they explain that they were advised by the people-smuggler to throw them away. There are however some individuals who do carry travel documents, but the authorities find them fraudulent. Australia has given support to Indonesia in training Indonesian officers to improve their skills in detecting fraudulent documents.[40]

3.3 Arrested and put in a Migration Quarantine or other detention facilities

In this case, the migration authorities bring Jalal and Ali and all the others from the boat to a Migration Quarantine (hereinafter referred to as MQ) over the night and contact the migration authorities. A MQ is defined as *a temporary accommodation place for foreigners, imposed with an expulsion or deportation process, or other immigration actions*.[41] A MQ can be compared to a detention centre.[42] Depending on the situation and the place of detection, the first nights can be spent in detention, MQ or just ordinary hotels while awaiting IOM to come and visit them, (the contact with IOM will be explained further below). Sometimes it can be the police who first encounter the migrants, and if there is no migration office in the area, it is the police that take care of migrants in the first instance.

3.3.1 Indonesian legislation

Why are Jalal and Ali brought to a MQ, and why can migrants be arrested at all? According to Indonesian legislation everyone who arrives in Indonesia

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[38] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001.
[39] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001
[40] Document awareness and fraud detection training were provided in March 2000 to Indonesian immigration officials. *See,* Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Border Protection Background Paper on unauthorised Arrivals Strategy,* available at <http://www.minister.immi.gov.au/media_releases/media01/r01131_bgpaper.htm>, accessed on 5 November 2001.
[41] Act of the republic of Indonesia, Number 9 of 1992 on immigration, Article 1: 15.
[42] Interview with Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.

illegally is supposed to be put in detention awaiting deportation. Any foreigner, staying in Indonesian territory without possessing a legal immigration permit can be placed in a MQ.[43] In addition, anyone who enters Indonesian territory without going through the inspection of immigration officers, or uses fraudulent documents shall be punished with imprisonment or a fine, of various length and value, depending on the crime or violation committed.[44] Hence, irregular migrants that are detected by Indonesian authorities shall be put in detention awaiting prosecution, or put in a MQ prior to deportation or expulsion. It is the migration authorities who are supposed to detain irregular migrants, but in lack of presence of these, the police authorities can detain irregular migrants; in some areas there is no migration office and the police has to make the decision.[45]

3.3.2 Financial restraints impede the enforcement of Indonesian legislation on irregular migrants

Due to economic restraints, the legislation is not consistently implemented; there are no financial means to buy new return tickets for the deportation of all the irregular migrants detected. In addition, Indonesia has no capacity to bring the irregular migrants to court. And furthermore, Indonesian finances are not sufficient to provide detention facilities for all the migrants arriving illegally.[46] Hence, the involvement of IOM is necessary in order to handle the persons detected.

3.4 Contact with IOM

As soon as the Indonesian authorities encounter the migrants, they contact IOM. In this case the local migration officials were aware of the program with IOM, but if not, IOM is informed about new arrivals through the Immigration Department in Jakarta.[47]

Due to the refugee flow that was a result of the East Timor crisis, IOM was already present in Indonesia. So, when Australia asked IOM to co-operate on the issue of irregular migrants transiting through Indonesia. IOM then advised the Australian government and IOM then decided that “it would be worth it”.[48] Since February 2001, IOM has been co-operating with the government of Indonesia as well as the Australian government on a programme aiming to address the problem of irregular migrants transiting

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[43] Act number 9 1992 on Immigration, Article 44.
[44] Act number 9 1992 on Immigration, Article 48-62.
[45] Interview with Ronny Bala, IOM, 26 November 2001.
[46] Interview with Ajat Sudrajat Havid, Director (International Co-operation), Directorate General of Immigration, 23 October, 2001.
[47] IOM, Richard Danziger, *IOM informal Presentation*, May 2001. Received by Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.
[48] Interview with Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.

through Indonesia in the attempt to clandestinely reach Australia. [49] Below, the formalities between the parties will be examined further.

3.4.1 Registration

After two days in the MQ, a team, which includes a medical doctor, from IOM comes to see them in order to register them and to find out where they shall stay and to make arrangements in order to provide all the facilities.
The two officers from IOM speak both English and Arabic, so Jalal as well as Ali can communicate with them though their English is poor. IOM does not yet have any Farsi speaker, but if needed they have contacts with interpreters.[50] IOM registers those who are at the MQ and all the migrants fill in a Personal Data Form where they state their names, nationality, occupation, relatives' names and other useful information, such as departure, the reason for it and the mode of transport.[51] IOM creates a file for each person.[52]

3.4.2 Information on the option of Voluntary Repatriation

The staff from IOM informs everyone about the option of voluntary return and that IOM can arrange their documentation and return travel if they choose to return to their home country. They are told about the hazards of continuing their journey to Australia, which can involve the risk of not making it through safely. A few persons from the boat agree to sign a Declaration of Voluntary Return, fully aware that it is not a binding document and that they can refuse return at any stage.[53] The mandate of IOM prohibits it to assist in forcible return.

3.4.3 Any fear of returning home?

As in most cases when migrants come in contact with IOM, Jalal and Ali, just as everyone else from their boat, already knew that they wanted to talk to UNHCR. Otherwise, if the migrants are not aware of this possibility the staff from IOM inform them that if they have any fear of returning home, IOM will contact UNHCR so that they can carry out a status determination procedure. Jalal and Ali then fill out a new form, stating that they wish to speak to UNHCR in order to submit their refugee claims so that UNHCR can assess their cases.[54] IOM subsequently informs the Jakarta office of UNHCR about those who request refugee status. In this case, UNHCR were

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[49] Interview with Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.
[50] Interview with Mahar Bodemar, Counsellor, IOM 3 October, 2001
[51] IOM Personal Data Form.
[52] Interview with Mahar Bodemar, Counsellor, IOM 3 October, 2001
[53] Interview with Mahar Bodemar, Counsellor, IOM 3 October, 2001
[54] Form for the Request for Refugee Status Determination for Intercepted Cases. IOM.

already aware of this group since the migration authorities as well as the Australian embassy already had contacted them.

3.5 New accommodation? Who pays and what are the facilities?

3.5.1 Some of them are brought to budget hotels

As mentioned above, the Indonesian authorities neither have financial means nor places enough to keep everyone in quarantines. Hence, IOM has started to make arrangements for accommodation and facilities for the asylum seekers.[55] IOM cannot provide any accommodation or facilities before they receive a letter from the Indonesian Immigration authorities stating that they want IOM to take care of the persons in question.[56]

Usually, asylum seekers under the IOM programme are located in local hotels, but sometimes the asylum seekers stay in the quarantines. As of 7 December 2001, 1156 migrants were under the programme of IOM. Out of these, 1097 were located in various forms of hotels, and the rest in quarantines.[57] However, in our case, the Indonesian authorities do not want to keep them, but want IOM to arrange a hotel for this group. After a couple of days, the group with Jalal and Ali are transported by IOM to a budget hotel outside Jakarta. Altogether they are 69 asylum seekers staying there, 41 originate from Iraq and the rest from Afghanistan. They do not know it yet, but this is the place where they are going to remain for months, waiting for their cases to be settled.

Their stay at the hotel is financed by IOM, which pays the owner of the hotel for their stay, for food three times a day, water and other facilities necessary. IOM also provides medical assistance; a medical doctor is employed by IOM and she visits almost all persons that are under the auspices of IOM. They all have access to emergency care which is financed by IOM.[58] For the asylum seekers remaining in quarantines, IOM also pays for the provision of food, water and medical assistance but in that case the Indonesian authorities are the ones in charge of the distribution. However, IOM has no system of supervision or control of how the funds are used, neither if it is hotel owners nor authorities who receive money for providing facilities.[59] According to Daniel Juliadi, UNHCR, a problem that sometimes occurs with the implementation of the co-operation with IOM and the immigration

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[55] Now that they have approached UNHCR, I will refer to them as asylum seekers.
[56] There have been individuals who come directly to IOM to ask for help but who did not want to contact migration for some reasons. IOM can not help those without letters from the migration authorities. Interview with Ronny Bala, IOM, 26 November, 2001.
[57] IOM, *Total Irregular Migrants Under IOM Programme on 7 December 2001.* Received at the IOM office in Jakarta, 7 December 2001
[58] Interview with Ronny Bala, IOM 26 November 2001,
[59] Interview with Erkan Zeybek, Operation Officer, IOM 7 December 2001.

authorities, especially in remote areas, is that many migration officers do not have proper knowledge about the procedure, for instance that IOM will refund them afterwards if they send an individual to emergency care. He further explains that officers working "on the ground" not always know what happens or what is said at the policy level.[60]

Who is responsible for the asylum seekers? According to Heru Santoso at the local immigration office in Batam, the asylum seekers are under the responsibility of IOM,[61] something that IOM denies since they can not have a legal responsibility, considering that the individuals are under Indonesian jurisdiction.[62]

Where does all the money come from? Approximately 90% of the funding of IOM's work in Indonesia comes from Australia and the rest comes from IOM itself. IOM reports regularly to Australia on their use of funds.[63] However, according to Greg Milles, Australia has no control of the standards of the work of IOM when it comes to the treatment of the asylum seekers under the care of IOM.[64]

For the next coming weeks and months, staff from IOM come to see Ali, Jalal and the other asylum seekers approximately once a week. Some asylum seekers are located in areas which are not as close to an IOM office as the hotel where Jalal and Ali stay, and therefore the visits may not be as frequent.
In the hotel where Jalal and Ali stay, they are allowed to move freely though they have to tell the hotel manager where they are going and for how long time they will be away.[65] Migration officials pass by to check that everything is working out as smoothly as possible at the hotel. On other locations, police or migration can come more often, once again depending on the local situation and the kind of accommodation used. On other locations the control can be more strict. Although there are no restrictions on the freedom of movement, according to Richard Danziger at IOM, the issue seems to be unclear.
According to David Juliadi, UNHCR, the migration officers in charge of the quarantines in Batam and Bali are much more strict and controlling, probably due to the fact that they are operating in tourist areas.[66]

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[60] Interview with David Juliadi, Senior Protection Clerk, UNHCR, 4 December 2001.
[61] Interview with Heru Santoso, Local Immigration Office in Batam., 5 December 2001.
[62] Interview with Erkan Zeybek, Operation Officer, IOM, 7 December 2001.
[63] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October, 2001
[64] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001
[65] In Hotel Sulanjana, Jakarta, where 71 asylum-seekers stayed, they only had to report to the hotel manager when they left the hotel, not to the police. However, immigration officers passed by every 10 days to check and control everything. Interview with Ibu Evi, Hotel Sulanjana, 26 November 2001.
[66] Interview with David Juliadi, Senior protection Clerk, UNHCR 4 December 2001.

Under the care of IOM, there is no kind of education for the children while they are waiting, but if the asylum seekers want to set up some form of education system among themselves, IOM tries to assist by providing material.[67] According to Indra at the Directorate of Immigration, when it comes to the implementation of the arrangement, there are no specific referrals to the CRC (Conventions on the Rights of the Child), but they are subject to "normal humane treatment". For instance, they never separate the children from their parents in the MQ. They also welcome assistance from NGO's and religious organisations to provide education.[68]

3.5.2 Local irritation?

IOM and the immigration authorities are trying to locate the asylum-seekers in more remote areas, since, if placed in more isolated, far reaching areas, the risk of local irritation is smaller. According to Rombli, Directorate General for Legal Administration, Department of Justice, the worst implications of this arrangement for the part of Indonesia are the social problems that it sometimes has caused. There have been fights, and the location population has put forward complaints.[69] The Director of Immigration in Jakarta also mentioned examples of local irritation saying that the local population become envious seeing the facilities provided for the irregular migrants.[70] According to Erkan Zeybek at IOM, by the end of November 2001, the Indonesian authorities declared that they do not want to locate any more irregular migrants, i.e. asylum seekers in Jakarta due to the conflicts it had created among people.[71] Bambang Harimuti, editor in chief of Tempo magazine, argues that a common reaction is: "why is the government helping those people, why not assist us and our Internally Displaced Persons and our domestic problems instead?"[72]

3.6 Meeting with UNHCR

After two weeks, UNHCR come to visit them in their hotel to make interviews with those who claim refugee status. Depending on the case load, and where the asylum seekers are located, UNHCR can assess their first meeting with the asylum seekers after a few days or sometimes after a couple of weeks. According to Rosa Maria Sierra-Sierra, protection officer

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[67] Interview with Mahar Bodemar, Councellor, IOM, 3 October, 2001
[68] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November 2001.
[69] Interview with Rombli, Directorate General for Legal Administration, Department of Justice and Human Rights, 2 November 2001.
[70] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001.
[71] Interview with Erkan Zeybek, Operation Officer, IOM, 7 December 2001.
[72] Interview with Harimuti Bambang, Editor in Chief of Tempo Magazine, Jakarta, 1 December 2001.

at the UNHCR office in Jakarta, the staff from UNHCR have perfect access to wherever they want to go, apart from their own security restrictions.[73]

3.6.1 Screening

Jalal, who claims to originate from Afghanistan, has to undergo a screening process. Some of the asylum-seekers undergo a screening which is a first meeting in order to assure identity and nationality; this screening is carried out by country and language experts. Particularly those claiming to come from Afghanistan are subject to screening while those claiming to come from Iraq are interviewed without a prior screening. The reason for this is that UNHCR has reason to believe that persons claiming to come from Afghanistan actually are of Pakistani origin. No one is ever rejected on the basis of a screening.[74]

3.6.2 Interview for determination of refugee status

After the screening, in which Jalal was found to come from Afghanistan as he claimed, Jalal and Ali are called to an interview, which is conducted through native speaking interpreters.
The eligibility officer who conducts the first interview makes a recommendation that is referred to the protection officer, although the decision is taken by the whole team. The decision has to be coherent and they all follow the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.[75] If the person receives a negative decision, he or she can appeal within 21 days, a period which can be negotiated. A person can only appeal once, but after a second negative decision, the case is closed, and the person in question can apply again, restarting the asylum process.[76]

3.7 Voluntary repatriation?

After the interviews by UNHCR, the weeks pass by, and everyday life looks quite the same. They are all frustrated, not knowing what will happen to them. Apart from the few persons that already in the beginning opted for voluntary return, another three persons tell IOM that they want to go back since they have realised the difficulties and small possibilities of ever getting to Australia. After a few weeks, two persons from Afghanistan, who

[73] Interview with Rosa Maria Sierra Sierra, Protection Officer, UNHCR in Jakarta, 28 November 2001
[74] Interview with Rosa Maria Sierra Sierra, Protection Officer, UNHCR in Jakarta, 28 November 2001.
[75] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 protocol Relating to the Status of refugees*, 1992.
[76] Interview with Rosa Maria Sierra Sierra, Protection Officer, UNHCR in Jakarta, 28 November 2001.

turned out to have all their papers in order, are able to leave. IOM arranged so that they received the travel documents necessary for entering Pakistan, and for further transportation in to safe parts of Afghanistan. For the other ones, months will pass until they will be able to return. Without proper identity documents, the embassies are reluctant to issue travel documents. Especially those coming from Afghanistan face difficulties since they, due to the war in Afghanistan have to pass by Pakistan and the Pakistani Embassy is not too willing to issue travel documents for those coming from Afghanistan without proper documentation.[77] In some of the cases it actually seems rather impossible to ever return, and hence they just have to wait, and wait.

3.8 Decisions from UNHCR

Jalal and Ali do not get their decisions at the same time. Since Jalal is from Afghanistan, UNHCR experiences difficulties to assess whether he will face persecution upon arrival; nobody knows yet what the outcome will be in Afghanistan. Jalal therefore, like most of the other persons from Afghanistan, has to wait for another period before he can receive his decision.

3.8.1 Negative decision

Finally UNHCR is able to determine Jalal's request for refugee status. He receives a negative answer, but is immediately informed that he can appeal and he does so. However, also the second interview results in a negative decision and hence he, like all other rejected asylum seekers, remains under the care of IOM. After this there are two possibilities: voluntary return or continue to stay in Indonesia. Some of the other rejected asylum seekers contact IOM, explaining that they have realised that they will never reach Australia, and hence want help from IOM to return. Jalal however refuses, saying that he might as well be dead as returning to Afghanistan.
What will happen to Jalal? According to the Indonesian legislation he can be forcibly returned, but the Indonesian authorities have not the financial resources. While IOM assists with and pay for voluntary return, the mandate forbids it to assist in involuntary repatriation and thus there is no likelihood that he is to be repatriated unless he agrees to. However, he cannot start a new life in Indonesia since he still is on their territory illegally and hence has no chance to take part in the society. He continues to be under the responsibility of the Indonesian authorities and continues to be illegal, but just as before, IOM pays for his living.[78] Neither IOM nor UNHCR know how to solve the situation for these people, who are not refugees but still refuse to go back. As will be described in a later section, the result is sometimes that the same people show up in the statistics after a new effort to

[77] Interview with Erkan Zeybek, Operation Officer, IOM, 29 November 2001.
[78] Interview with Mahar Bodemar, Counsellor, IOM, 3 October, 2001

reach Australia has failed. However, Jalal stays in the same hotel and is back to the everyday life he has had for the last seven months.

3.8.2 Positive decision, moved from IOM to the care of UNHCR

Ali, on the other hand, receives a positive decision and is accorded refugee status. Although Iraqis constitute 42 % of the asylum seekers, 82 % of those accorded refugee status are from Iraq.[79] Ali is then removed from the care of IOM and is now a case of UNHCR. Since UNHCR uses its mandate in a non-convention state, it provides the refugees with assistance, both financial as well as social, even though there is no explicit right for refugees to be provided this by UNHCR.[80] Ali receives cash assistance and he must now arrange and pay for his own accommodation with this money. He receives 520,000 Rupiahs per month.[81] (approximately US$ 50, November 2001). UNHCR also gives an identification card to Ali, which certifies that he is under the care of UNHCR. Since Indonesia has not ratified the 1951 refugee Convention, Indonesia does not formally recognise UNHCR Mandate Refugees. Hence, as every other refugee in Indonesia, Ali will still be illegal according to Indonesian law, but the Indonesian authorities will not take any action against him.[82] Together with some other refugees, Ali finds a cheap room in Jakarta where he can stay. Like everyone else accorded refugee status, he has to report to UNHCR every month. He is allowed go wherever he wants in Indonesia, but UNHCR recommends him not to go too far away from Jakarta, since there can be problems with the local authorities and UNHCR can not monitor all events.[83] In case there are persons in the quarantines who receive a positive decision on refugee status, they are immediately released. Hence there are no refugees in detention in Indonesia.[84]

As every person who is recognised as a refugee by UNHCR in Indonesia, Ali now has to await a “durable solution”. Normally, three different forms of durable solutions are to be considered for those accorded refugee status. Voluntary repatriation is one of the durable solutions, but it is not likely that any of those accorded refugee status are willing to go back. However, if any refugee wants to go back, IOM finances and arranges it. Normally, local integration is also considered when talking about durable solutions, but in

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[79] *Statistics of Individual Cases in Indonesia by Nationality*, as per 31 October 2001, Prepared by the Protection Unit UNHCR Regional Office Jakarta.
[80] Interview with Rosa Maria Sierra -Sierra, Protection Officer, UNHCR, 28 November, 2001
[81] Interview with David Juliadi, Senior Protection Clerk, UNHCR, 4 December 2001
[82] Interview with Ajat Sudrajat Havid, Director International Co-operation, Directorate General of Immigration, 20 November, 2001
[83] Interview with David Juliadi, Senior Protection Clerk, UNHCR, 4 December 2001
[84] Interview with Rosa Maria Sierra Sierra, Protection Officer, UNHCR, 28 November, 2001

the case of Indonesia it is not possible. First of all due to the fact that Indonesia has not yet ratified the 1951 convention and consequently has no system for granting them refugee status. Secondly, as mentioned in the previous chapter, they are in Indonesia illegally, but under this arrangement Indonesia allows the refugees and asylum seekers to remain. The third durable solution is resettlement and depends on the willingness of other states to accept those refugees. UNHCR has a resettlement consultant whose task is to find resettlement states and his efforts are directed primarily towards the embassies in Jakarta, where he basically tries to promote the different refugees.

Ali then goes to the UNHCR office in Jakarta and is interviewed by the Resettlement Consultant. The aim of the interview is to once again assess his family record; maybe he has relatives in potential resettlement countries? Now Ali also tells his working history, maybe he has some particular skill or experience. In addition, the consultant tries to assess whether he might have a criminal record or whether his background may raise any security concerns. Another purpose of the interview is to once again see why he was accorded refugee status. All information serves to see how the consultant can "sell" his case to potential resettlement countries. The next step for the consultant is to submit an application to a potential resettlement country. Since the interview with Ali *inter alia* resulted in the information that he has a sister in Australia, the application is submitted to the Australian embassy in Jakarta. However, the Australian embassy does not accept to make an interview with Ali.[85] As for the other off-shore locations, there are no Australian officers in Indonesia in charge of selecting refugees since they do not want to reward secondary movements. The Australian Embassy however have discussions with other potential countries of resettlement.[86] The resettlement consultant then resubmits Ali's case to the American embassy, and in this case he stresses the working experience that Ali possesses and they agree to interview him, but later on they refuse to resettle him. After another couple of weeks, the consultant tells Ali that he has made a new submission to the Swedish embassy, but, just as the contacts with the other embassies, it will take time before they can know anything for sure. If an embassy agrees, Ali will undergo a new interview at that particular embassy, where the work of UNHCR basically will be double checked once again.[87]

[85] As of 31 October, 2001, out of 12 refugees submitted to the Australian embassy, everyone was rejected. UNHCR *Statistics of Resettlement and Submission of Individual Cases in Indonesia,* as per 31 October 2001, received 6 December 2001, by Andrew Ginsberg, Resettlement Consultant for UNHCR,

[86] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001

[87] Interview with Andrew Ginsberg, Resettlement Consultant, UNHCR, 6 December 2001

3.9 Reasons for defection

Just like Jalal, who remains under the care of IOM, Ali has to wait and see. The difference between them is that Ali is under the care of UNHCR. Thus there is a large number of people who are waiting and waiting; not only the recognised refugees perceive the process to move slowly. Those who are awaiting their first interview, their decisions, their new interviews after an appeal, all experience that the process moves very slowly.

There is a large number of asylum seekers who defect from the accommodation provided by IOM, and, as stated above, the physical control is rather limited. IOM as well as UNHCR believe that they run away since they want to make a new effort to reach Australia. Some of the recognised refugees have run away after having waited too long for a potential country of resettlement. Some of them show up again in the statistics, sometimes after an unsuccessful attempt to reach Australia. No one really knows what happens to those who run away, but probably there are those who actually do arrive in Australia, and those that do not make it and drown at sea. Many police officers can feel a strong temptation to co-operate with the people smugglers since their salaries are very low.[88] According to IOM there are several people smugglers in Jakarta, which is one of the reasons why IOM prefer to locate the asylum seekers outside the city, to make it more difficult for them to get in contact with the people smugglers. Out of the 3 588 irregular migrants/asylum seekers that have been under IOM programme since December 1999, 1 689 persons have escaped as of 7 December 2001.[89] As will be further discussed in a later section, IOM as well as the Indonesian authorities consider the construction of one or more "reception centres", where the asylum seekers can be temporarily housed and protected from falling into the hands of the people smugglers.

3.10 Results?

According to Kirk Koningham, the numbers of asylum seekers going to Australia are already decreasing, and if this continues, within half a year no one will come to Australia since the message will have 'gone back the pipeline'.[90] Richard Danziger confirmed that the reduction is significant.[91] However, this is contradicted by Greg Milles, who said that during the 18 months this arrangement has been going on, he had not seen any remarkable results. Nevertheless, by November 2001, the flow was reduced, but according to Milles, it is impossible to assess whether the reduction was a result of the tragedy where 350 died when their boat sank on their way to

[88] Interview with senior staff at Interpol, 7 November 2001.
[89] IOM, *Summary of Irregular Migrants Under IOM Program 7 December 2001*. Received at IOM Head Office in Jakarta, 7 December 2001.
[90] Interview with Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.
[91] Interview with Richard Danziger, Head of the Liaison Office of IOM, 29 October 2001.

Australia,[92] or all the prevention activities made by Australia in Malaysia, Indonesia and domestically.[93] Unfortunately, two things are for certain about the results; firstly, the system is not able of providing refugees with durable solutions; secondly, refugees as well as rejected asylum seekers still try to reach Australia, showing that the system is not effective in preventing persons from entering Australia in an unauthorised manner.

3.11 Future Developments

3.11.1 A new processing centre?

According to Muhammed Indra, the Director of Immigration, Measuring and Supervision, Indonesia would like to set up a Task Force, with participants from the Department of Foreign Affairs, the Directorate General for Immigration, the Navy, the Police and the Department of Interior Affairs. One of the aims of such a Task Force would be to set up a big MQ where freedom of movement is more restricted and by that prevent asylum seekers/irregular migrants from running away and once again falling into the hands of people smugglers.[94] Another desirable result might be that local irritation would decrease if the asylum seekers/irregular migrants were under more strict control. As put forward by Ajat Havid, other countries have restricted areas for asylum seekers/irregular migrants, and so should Indonesia. Another reason is that the authorities cannot predict or estimate how many migrants will continue to use Indonesia as a transit country, and hence it is difficult to build and/or calculate on a system. In addition, Indonesia does not have the financial resources necessary.[95] The lack of such a quarantine, or quarantines big enough, has been seen as the reason for why the involvement of IOM is necessary.[96] IOM is considering providing support to the creation of one or more reception centres where the asylum seekers can be temporarily housed while awaiting their determination processes.[97] According to Kirk Koningham, Australia is working on the details on supporting the Indonesian authorities to detain, since the option of voluntary return then would seem more attractive.[98] This is nevertheless a

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[92] October 19, a boat from Sumatra, heading for Christmas Island, Australia sank outside Java, resulting in the death of 350 persons while 44 survived. There were persons accorded refugee status by UNHCR, as well as people under the care of IOM, at he boat.
[93] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001.
[94] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November 2001.
[95] Interview with Ajat Sudrajat Havid, Director (International Co-operation), Directorate General of Immigration, 23 October 2001.
[96] Comment from. Pramuningtis, Directorate for Measuring and Supervision, Directorate General of Immigration, 2 November 2001.
[97] IOM, Richard Danziger, *IOM informal Presentation*, May 2001. Received by Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.
[98] Interview with Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.

sensitive issue and though the Indonesian authorities would like to have big quarantine with the necessary restrictions and facilities, it should not be within an agreement with IOM, but based on Indonesian laws.[99] Indonesia does not want to be a guardian for Australia, and, as already by Richard Danziger, IOM, Indonesia is sensitive for being perceived as just doing what Australia tells them to do. In addition, Indonesia is very reluctant to become a new Galang island,[100] i.e. to turn Indonesia into a new processing centre.[101] They are particularly sensitive for handling cases that have been sent *to* Indonesia from neighbouring countries for processing, as happened in Galang Island. And, as stressed by Indra, today the agreement with IOM leads to an exception from national law.[102]

3.11.2 Indonesian ratification of relevant Conventions.

3.11.2.1 Ratification of the 1951 Refugee Convention?

Indonesia has not ratified the 1951 Refugee Convention and has no law on refugees within the national system.[103] Yet, the Indonesian Government is considering to ratify the 1951 Refugee Convention, but are concerned about Articles 8, 14 and 26, and in the end of November 2001, the government was discussing possible reservations to these articles.[104] Naturally, in case of a ratification, several changes in Indonesian laws would be necessary. One of the consequences, as put forward by Rombli, Director General for Legal Administrative Affairs, would be a differentiation between refugees and migrants, since if refugees also have to be handled by the Directorate

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[99] Interview with Lukmiardy, Directorate of Immigration, Measuring and Supervision, 19 November 2001.

[100] By mid-1979, over 700 000 Vietnamese had left their homeland, while some 500 000 had already been resettled and another 200 000 remained in the region, awaiting resettlement. Among these approximately 43 000 were in Indonesia. As a result of the International Meeting on Refugees and Displaced Persons in Southeast Asia, a refugee processing centre was built on Galang Island, Indonesia, one of two processing centres in the area. UNHCR was part of the programme that took place in the Galang Island. At the most there were approximately 40 000 refugees living in the processing centre and during the years 1989-90 it decreased to 20 000. Indonesia closed its last camp on Galang Island on September 8, 1996. At the end of the year, 1 377 of the 4 494 Vietnamese that remained were forcibly returned by the Indonesian authorities, while the rest chose voluntary repatriation.- Interview with David Juliadi, Senior Protection Clerk, UNHCR, 4 December 2001. For further background of the Comprehensive Plan of Action, *see*. Bronée S. A., *The History of the Comprehensive Plan of Action*, International Journal of Refugee Law, 1993, vol. 5. *See also:* US. Committee for Refugees, *Country Report* 1997, available at < http://www.refugees.org/world/countryrpt/easia_pacific/1997/indonesia.htm>, accessed on 7 March 2002.

[101] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November, 2001. Interview with Lies Seregar, Director of International law, Department of Justice and Human Rights, 2 November 2001.

[102] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November 2001.

[103] Interview with Lukmiardy, Directorate of Immigration, Measuring and Supervision, 19 November 2001.

[104] Interview with Lies Siregar, Director of International Law, Department of Justice and Human Rights, 2 November 2001.

General for Immigration the burden would be too heavy for them and therefore there should be a separate law handling refugees. Refugee issues are considered more related to human rights while migration is more related to security and law and order.[105]

3.11.2.2 Ratification of the International Convention on Trans-National Crimes, and its two protocols?

Today, Indonesian immigration law cannot handle irregular migrants and people smuggling, but Indonesia is preparing to sign the International Convention on Trans-National Crimes and its two protocols,[106] and provided that the Convention will enter into force, there will be changes in the Act on Immigration. Furthermore, Australia insists on discussing people smuggling and irregular migration with Indonesia and has urged Indonesia to revise it laws on extradition (Law number 8 of 1994) in order to insert people smugglers in the list of extraditable criminals.[107]

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[105] Interview with Rombli, Director General for Legal Administrative Affairs, Department of Justice and Human Rights, 2 November 2001

[106] United Nations Convention against Transnational Organised Crime, UN Doc. A/55/383.

[107] Interview with Rombli, Director General for Legal Administrative Affairs, Department of Justice and Human Rights, 2 November 2001.

4 Overview of the co-operation between the parties involved

4.1 The relation between the Indonesian parties in general

The Indonesian authorities most involved in this arrangement are the Department of Foreign Affairs, the Directorate General of Immigration, part of the Department of Justice and Human Rights and the National Police; it is an inter-departmental co-operation. The persons involved in these discussions are normally the heads of the sub-directorates or on directorate level. Within the Department of Foreign Affairs, the Directorate of International Organisation is the one which handles this arrangement on the operational level, while the Department of Legal Affairs give legal expertise on agreements between Indonesia and other parties. The Indonesian parties involved have regular meetings on this issue and they can invite IOM to the discussions as well. The Department of International Organisations also communicates with Australia, more specifically with DIMA.[108] For obvious reasons, the Directorate General of Immigration is the department that is most involved in the daily work. Approximately 20 persons within the Directorate General of Immigration work with irregular migration.[109]

Indonesia is constituted by several local (provincial) governments, which are autonomous. However, the autonomy is due to certain restrictions and there are some issues on which the local governments cannot decide. The foreign policy is one of those issues and immigration is a central issue within foreign policy. The Directorate General for Immigration has branch offices in the local governments and those offices follow the instruction from the central government and not the local.[110] All over Indonesia there are 84 migration offices.[111] It is not the local government's responsibility to deal with the irregular migrants and there are no directives from the central government to the local government; all communication goes through the local migration office.[112]

[108] Interview with Rumondang, Directorate of International Organisations, 25 October 2001.
[109] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November 2001.
[110] Interview with Ibnu Wahitomo, Head of Section for Territorial Affairs, Directorate for Treaties and Legal Affairs, Directorate of International Organisations., 25 October, 2001.
[111] Interview with Lukmiardy, Directorate of Immigration, Measuring and Supervision, 19 November 2001.
[112] Interview with Heru Santoso, Immigration Officer, local Immigration Office, Local Office of Department of Justice and Human Rights, November 5 2001.

4.2 Australia- Indonesia

When it comes to the operational part of this particular arrangement, Australia and Indonesia today only have a co-operation on exchange of information. There is formal agreements between Australia and Indonesia on this particular arrangement, and everything goes through IOM; what exists between Indonesia and Australia is discussions.[113] The Government of Indonesia and the Government of Australia, have informally consented to the implementation of this so called "Regional Co-operative Model on Combating People Trafficking and Irregular Migration".[114] However, there is a draft MOU being sent back and forth between the Indonesian and Australian governments,[115] but as pointed out by Danziger, head of IOM in Indonesia, Indonesia is sensitive for being perceived as doing what Australia tells them to do. So far, there are no plans within the Directorate for Treaties and Legal Affairs (within the Department of Foreign Affairs) to sign any agreement with Australia.[116]

According to Mr. Ajat at the Directorate General of Immigration, one of the reasons why there is no MOU between Indonesia and Australia yet, is that none of them wants to have a bilateral agreement, but rather agreements on a regional level.[117] At the Australian embassy, the opinion seems to differ. Koningham, Counsellor of Public Affairs, expressed that Australia would like to have a formal agreement with Indonesia,[118] while according to Milles, responsible for migration, Australia does not even wish for an agreement with Indonesia.[119] Australia does not have any kind of control or supervision of the work of the Indonesian police or migration authorities when it comes to the standards of implementation of this arrangement.[120] There is no indication that Australia even strives for any kind of supervision regarding the protection of the persons intercepted; the individuals are under Indonesian jurisdiction and thus Australia does not want to intervene.

Actually the only formal co-operation between Indonesia and Australia within the context of combating people smuggling and law enforcement, is the MOU on the targeting of smuggling syndicates located in Indonesia,

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113 Interview with Lukmiardy, Directorate of Immigration, Measuring and Supervision, 19 November 2001.
114 Schedule between IOM and Government of Australia, 2000, Section 1, Purpose.
115 Interview with Ajat Sudrajat Havid, Director (International Cooperation), Directorate General of Immigration, 23 October 2001.
116 Interview with Ibnu Wahitomo, Head of Section for Territorial Affairs, Directorate for Treaties and Legal Affairs, Department of Foreign Affairs, 25 October 2001.
117 Interview with Mr. Ajat Sudrajat Havid, Directorate General for Immigration, 23 October 2001.
118 Interview with Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.
119 Interview with Greg Milles, responsible for migration, Australian Embassy Jakarta, 22 November 2001.
120 Interview with Greg Milles, responsible for migration, Australian Embassy Jakarta, 22 November 2001.

between the Australian and the Indonesian Police (since 1997) and its protocol. This co-operation included the designation of four Indonesian police officers in five different areas engaged in people smuggling issues. The officers were involved in gathering information, arresting and prosecuting of people smugglers. Australia financed the salaries for these four officers, and according to both Indonesian authorities and the Australian embassy, that is combat people smuggling and irregular migrants. However, since September 2001, this co-operation is at hold and the police officers are back at their ordinary jobs. Indonesia is revising this co-operation since it believes that this kind of co-operation should not be between the police departments only, but on governmental level.[121]

There are no direct financial funds from Australia to support the Indonesian authorities for the increased workload that this arrangement has lead to.[122]

4.3 Australia- IOM

The two fundamental partners within this arrangement are IOM and Australia and between them there is a MOU covering the operational work of IOM and its relation to the government of Australia as far as this arrangement is concerned. The MOU describes what arrangements IOM shall undertake in order to provide the asylum seekers with basic protection. Apart form providing the persons intercepted with accommodations, food and basic medical care, IOM shall contact UNHCR if any of those intercepted express any fear of returning home. The role of Australia under this MOU is to finance the operational work of IOM under this arrangement.[123]

4.4 Indonesia- IOM

The co-operation between IOM and the Indonesian authorities is the result of the Manila Process on Irregular Migration and Trafficking in Migrants.[124] IOM has no separate agreement with Indonesia on this particular arrangement, but their work is included in the general MOU about the establishment of their Liaison Office in Jakarta. The MOU from October 2000 is merely to be seen as an umbrella agreement, and the everyday work of voluntary repatriation and the providing of the facilities is all arranged on an ad hoc basis.[125] However, IOM has been co-operating with the authorities

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[121] Interview with senior staff at Interpol, 7 November 2001.
[122] Interview with Greg Milles, Regional Director, Australian Embassy Jakarta, 22 November 2001.
[123] Unfortunately, I did not receive the MOU. However I received a Schedule which served as an interim agreement pending the signing of the MOU which now is in force.
[124] Interview with Rumondang, Directorate of International Organisations, Department of Foreign Affairs, 25 October 2001.
[125] Interview with Rumondang, Directorate of International Organisations, Department of Foreign Affairs, 25 October 2001.

on these issues since February 2000.[126] In December 2001, the Directorate of Treaties and Legal Affairs were working on a draft technical arrangement regarding co-operation of capacity building with IOM, especially with regard to the Nusa Tenggara region where there are not only irregular migrants and asylum seekers but also refugees from East Timor.[127] IOM has no in-depth information on how the Indonesian authorities intercept, what training they have or under what regulations they operate; how much information IOM receives varies from case to case.[128] Apart from arranging accommodation and facilities and arranging voluntary return, IOM also works on sensitising the Indonesian authorities that irregular migrants and people smuggling is an international problem.[129] As mentioned above, IOM has no system of supervision on how the authorities uses the funds for distributing facilities to the persons concerned.

4.5 Indonesia-Australia-UNHCR

The co-operation between IOM and the Indonesian authorities on intercepting irregular migrants started to operate in February 2000. Before that, UNHCR handled about 50 cases a year, while 2 111 asylum seekers had approached UNHCR for status determination between January 1999 and 31 August 2001. Australia has asked UNHCR to participate in a formal agreement but UNHCR has refused to be part of any formal agreement since they consider this arrangement to be opposed to the purpose of the Refugee Convention.[130] However, the international mandate of UNHCR obliges them to determine the refugee status of asylum seekers who express fear of returning home if they are in a state not signatory to the refugee convention. Thus, though UNHCR does not want to endorse these kind of arrangements, they are contributing to it since their presence serves as a guarantee, assuring that asylum seekers are not *refouled*. However, since the workload of UNHCR has increased considerably, Australia gives funding to UNHCR in order for them to handle the increased workload.[131] Once a person is accepted by UNHCR as a refugee, the government of Indonesia has nothing to do with them and UNHCR alone communicates with potential resettlement countries. There are no written agreements between the

[126] IOM, Richard Danziger, *IOM Informal Presentation*, May 2001. Received by Richard Danziger, Head of the Liaison Office of IOM in Indonesia, 2 October 2001.
[127] Interview with Ibnu Wahitomo, Head of Section for Territorial Affairs, Directorate for Treaties and Legal Affairs, Department of Foreign Affairs, 25 October 2001.
[128] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October 2001.
[129] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October, 2001.
[130] Interview with Guy Janssen, Consultant, UNHCR, 2 October 2001. *See also,* UNHCR, Regional Office Jakarta, Protection Unit, *Summary of UNHCR Position on the Australian/Indonesian Regional Co-operation Model*, 21 February 2000.
[131] Interview with Kirk Koningham, Counsellor Public Affairs, Australian Embassy, Jakarta, 1 November 2001.

government of Indonesia and the resettlement states that UNHCR has contacted.[132]

As described above, the four parties are all interacting with each other on different levels of the implementation of this arrangement. There is a close co-operation between the Indonesian and the Australian governments but there are no formal agreements regulating it. Important to notice is the fact that Australia is not contributing with any additional funding to Indonesia though there has been a distinct increase in the workload imposed at the Indonesian authorities as a result of this co-operation. However, since Australia finances the activities of IOM and thus, a significant part of the expenses relating to the asylum seekers is not carried by the Indonesian authorities. The determination processes provided by the UNHCR are essential for minimising the risk of *refoulement*. However, UNHCR refuses to sign any agreement with Australia on this arrangement, and it undertakes the determination processes because of its mandate. There are no formal agreements between IOM and UNHCR regulating IOM's referral of asylum seekers to UNHCR. Thus, this arrangement is carried out on a ad hoc basis where there are few documents regulating it. Consequently, the supervision of the actions taken towards the asylum seekers and refugees is not formalised.

[132] Interview with Ibnu Wahitomo, head of Section for Territorial Affairs, Directorate for Treaties and Legal Affairs, Directorate of International Organisations, 25 October 2001.

5 Protection of the intercepted refugees and asylum seekers

The objective of this chapter is to make an assessment under international law of the protection offered to the refugees and asylum seekers under this arrangement on interception. The focus of this chapter is thus on the individual and the level of protection that he or she receives. In the next chapter a more general analysis on the ambit of the principle of *refoulement,* and the issue of state responsibility will take place.

5.1 The International Framework Regarding Interception

5.1.1 The definition of interception and its applicability to this arrangement.

There exists no internationally accepted definition of *interception*. In 'Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach', UNHCR uses the following working definition:

Interception is defined as encompassing all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.[133]

Does the arrangement described above fit into this definition? It takes place on Indonesian territory and all actions towards the individuals concerned are undertaken by the Indonesian authorities and the present international agencies. IOM as well as the Indonesian authorities refer to the actions taken at the borders by the Indonesian authorities as interception. However, this cannot fall under the definition used by UNHCR, since the authorities act on their own territory and since Indonesia is not the prospective destination for the asylum seekers. Thus, this not an interception arrangement on behalf of Indonesia.

When describing interception, UNHCR looks at state practice. The most typical form of interception is the physical interception of vessels suspected of carrying irregular migrants, either within territorial waters or on the high

[133] ExCom, Standing Committee, 18th meeting, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CRP.17. paragraph 10.

seas. Such an interception may be followed by disembarkation either on dependent territories of the intercepting country or on the territory of a third country which approves of their landing. Thus, when Australia stops vessels that are approaching the Australian territory, refusing them entry, it is a very typical form of interception. Other examples of interception may be administrative measures such as the location of a states own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. Further examples of interception measures given by UNHCR are financial and other assistance from prospective destination countries in order to enable the authorities in countries of transit to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.[134]

Thus, the arrangement must be seen as an interception arrangement on behalf of Australia, but the matter is complicated since it is difficult to assess precisely what measures, under this particular arrangement, that are applied by Australia. Australia's contribution to the enforcement of this arrangement is not formalised and only defined in vague terms. However, it would never operate without Australia's financing and support. In addition, Australia has carried out effective campaigns on awareness raising with the aim of minimising the sympathy for those transiting Indonesia and showing Indonesian authorities that people smuggling and irregular migrants are of major concern for Indonesia and its interest. Hence, Australia is not directly involved in the operative parts of this particular arrangement. But, without the financing and the campaigns, the arrangement would never take place. Thus, Australia is the motor and an essential part for the arrangement to function. It can then be concluded that Australia actually is undertaking actions amounting to interception and thus the Regional Co-operation arrangement can be defined as interception.

5.1.2 The Protocol Against the Smuggling of Migrants by Land, Air and Sea.

There is no legal framework, particularly applicable to those types of arrangements; international law includes various parameters which can apply. However, in November 2000, the General Assembly of the United Nations adopted the United Nations Convention against Transnational Organised Crime which will be open for signature until 12 December 2002.[135] Supplementing the Convention is the Protocol against the Smuggling of Migrants by Land, Air and Sea.[136] These instruments have not yet entered into force but are still of interest for the purpose of this thesis

[134] ExCom, Standing Committee, 18th meeting, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CRP.17. paragraphs 17-19.
[135] United Nations Convention against Transnational Organised Crime, UN Doc. A/55/383.
[136] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime. UN Doc. A/55/383.

since the provisions in Article 8 of the protocol opens for an *authorisation* for state parties to intercept vessels on the high seas, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea. The restriction laid down in the protocol is that the intercepting state must abide by conditions laid down by the flag state. The protocol also contains provisions regarding the co-operation in several areas in order to prevent and combat and eradicate the smuggling of migrants.

While implementing the protocol the state parties shall take, in consistence with its obligations under international law, all appropriate measures to preserve and protect the rights of those persons who have been the object of people smuggling. The right to life, and the right not to be subjected to torture or other cruel, inhuman or degrading treatments or punishment are explicitly mentioned in Article 16 paragraph 1. Article 16 further states that state parties shall afford appropriate assistance to migrants whose lives or safety are endangered by reasons of being the object of people smuggling and that the states shall take into account the special needs of women and children. While the protocol contains provisions aiming at facilitating the return of smuggled persons, the protocol does not address the issue of refugees but simply reiterates state's obligations under the 1951 Convention, stating that the protocol does not prejudice the protection afforded by those instruments and the principle of *non-refoulement* as contained therein.[137] The draft protocol hence provide a certain framework for the protection of smuggled asylum seekers and explicitly mentions that the principle of *non-refoulement* as contained in the 1951 Convention shall not be affected by the protocol. However, the protocol does not mention what state shall bear the responsibility for upholding the principle of *non-refoulement,* nor does it address the situation that may occur if a state is not a signatory to the 1951 Convention. As will be discussed below, the principle of *non-refoulement* seems to have achieved the status of customary law, and it is a pity that the Protocol only addresses the principle as enshrined in the 1951 Convention.. Apart from the provision stating that state parties shall afford appropriate assistance to migrants whose lives or safety are endangered by reasons of being the object of people smuggling, the protocol does not actually provide any particular new safeguards for asylum-seekers. By referring to the fact that the state parties shall act in consistence with their obligations under international law, it still remains unclear what actually will happen when the accepting state is not a signatory to certain Human Rights Instruments.

There are two other documents which can be used as a guidance when assessing the enforcement of interception arrangement and that is the above mentioned paper on interception by UNHCR, and the Key Conclusions and Recommendations adopted within the Global Consultations on International

[137] Article 18 and 19, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime. UN Doc. A/55/383.

protection.[138] The annual Conclusion on International Protection by the Executive Committee are without binding force; however they are an indicator of current state practice and reflect the consensus of a broad group of states, including non-signatories to the international refugee instruments.[139]

Interception of asylum seekers is not *per se* violating international law, however, the result of various actions taken may be subject to serious concern. For the purpose of this thesis, certain recommendations emanating from these two documents will be used as parameters while assessing the enforcement of the RCA. They are: first and foremost, the need for the principle of *non-refoulement* to be fully respected, and hence the development of effective safeguards in order to ensure this; the importance of proper procedure and mechanisms to identify intercepted persons who are in need of international protection; the risk of prolonged detention and the need to identify durable solutions for those found to be refugees.[140] The Protocol reiterates that the states shall provide appropriate assistance to migrants whose lives or safety are endangered by reasons of being the object of people smuggling, which must be presumed to mean that they shall be protected from threats from the people smugglers. In the following sections we will look into those areas with regard to the enforcement of the RCA.

5.2 The Regional Co-operative Arrangement

5.2.1 Non-refoulement

5.2.1.1 Article 33 of the 1951 Convention

As stressed in the conclusions made under the Global Consultations, as well as by ExCom, the principle of *non-refoulement* must be fully respected, and effective safeguards to ensure this should be developed when interception of asylum seekers occur.[141]

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[138] Global Consultations on International protection, *Incorporating Refugee Protection Safeguards Into Interception Arrangements,* 2001, EC/GC/01/13.

[139] Landgren K., Comments on the UNHCR position on Detention of Refugees and Asylum Seekers, in Hughes J. and Liebaut F. (eds.), *Detention of asylum seekers in Europe: analysis and perspectives,* 1998, p. 144.

[140] ExCom, Standing Committee, 18th meeting, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CRP.17. Global Consultation on International Protection: *Incorporating Refugee Protection Safeguards Into Intercepting Measures, Key Conclusion and recommendations.* 2001, EC/GC/01/13.

[141] Global Consultations on International protection, *Incorporating Refugee Protection Safeguards Into Interception Arrangements,* 2001, EC/GC/01/13. paragraph 10. And, ExCom, Standing Committee, 18th meeting, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CRP.17.. EC/50/SC/CRP.17, paragraph 34 b.

Article 33 of the 1951 Convention states that: *No Contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.* A more elaborated analysis of the principle as enshrined in other international instruments, and of the question whether the principle may be considered as part of international customary law as well as the issue of state responsibility will be presented in chapter 7. This section only focuses on whether any refugee is at risk of being sent back to a territory where he or she is at risk of facing persecution due to the reasons stated in Article 33.

5.2.1.2 Risks

5.2.1.2.1 Indonesia is not signatory to the 1951 Convention

Indonesia has not yet ratified the 1951 Refugee Convention but may however, as will be developed in chapter 7, if the principle of *non-refoulement* is to be considered a principle of customary law, be bound to not deport any refugee to a state where he or she may face persecution. However, authorities in charge have no overall knowledge about the principle and there is no system in Indonesia to ensure that asylum seekers/refugees, if they are deported, will not face persecution. As stated above, there are no regulations concerning refugees in the Indonesian national laws.[142]

5.2.1.2.2 No formal guarantees

There are no formal guarantees, from the Indonesian authorities in order to eliminate the risk of *refoulement*. All migrants/asylum seekers and refugees are under Indonesian jurisdiction, and neither IOM nor Australia has any system for controlling whether or in what way asylum seekers are being forcibly returned.[143]

As mentioned above, irregular migrants, i.e. asylum seekers have, in accordance with Indonesian law, been returned to Malaysia at the borders. There are no reports on whether those persons claimed to be asylum seekers or not, but UNHCR have not received any reports of *refoulement* to Iran, Iraq or Pakistan; they are probably just returned to Malaysia.[144] Once again, the arrangement operates under Indonesian jurisdiction, and neither Australia, nor the organisations involved have any formalised supervisions of actions taken by the Indonesian authorities.

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[142] Interview with Ajat Sudrajat Havid, Director (International Co-operation), Directorate General of Immigration, 23 October, 2001

[143] Interview with Greg Milles, Regional Director, Australian Embassy, Jakarta, 22 November 2001, and Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October, 2001

[144] Interview with Rosa Maria Sierra Sierra, Protection Officer, UNHCR, 28 November 2001.

5.2.1.3 Safeguards; the involvement of IOM and UNHCR

There are several factors that prevent a person from being deported to a state where he or she may face persecution according to Article 33 in the 1951 Refugee Convention. Through the co-operation between the Indonesian authorities and IOM, every intercepted person gets in contact with IOM. Probably, this can be explained by the fact that the Indonesian authorities are under financial restraints and thus rather see that IOM takes care of the expenses. IOM has the practice of informing every person about the possibility to apply for asylum if they have any fear of returning home. IOM then refer those cases to UNHCR. The presence of UNHCR obliges them to process everyone who seeks asylum and can hence make certain whether the person in question has a legitimate fear of returning to his or her country. When IOM inform about voluntary return, they ensure the voluntariness and the individual sign a Declaration for Voluntary Return, written in both English and the signatory's own language. The declaration states that the migrant wants to 'return peacefully and voluntarily' and that it is signed 'after due consideration and entirely of my own will'. Hence, even if there would be mistakes during the determination process, no one will be forcibly returned. The last factor, which is of major importance, is that Indonesia has no financial means to deport persons, except when there is a possibility to oblige the carrier to bring the migrants on board back to where they came from. Consequently, though there are no formal guarantees for *non-refoulement*, the system does not open up for *refoulement.*

5.2.2 Access to a determination process

5.2.2.1 International law

The 1951 Convention as well as the 1967 protocol are both silent on the forms of procedures that should be assessed for the determination of refugee status. They do not even require the existence of such procedures in order to be fully implemented. Nonetheless, the eventual right to have an application examined on its merits is connected to the prohibition of *non-refoulement;* only by examining an application can the state ascertain that an eventual decision to return the individual will not result in *refoulement*. Since a person becomes a refugee at the moment when he or she satisfies the determination laid down in the 1951 Refugee Convention, the determination is declaratory rather than constitutive, and the principle of *non-refoulement* applies as soon as an asylum seeker claims protection.[145] Consequently, unless a state agrees to grant refugee rights to everyone claiming to be a refugee, it will have to examine such claims in order to determine which persons actually have refugee status. Otherwise the state would violate the

[145] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of refugees*, 1992, paragraph 28. Grahl-Madsen A., *The Status of Refugees in International Law, vol. 1, 1966,* p. 340.

obligations undertaken toward those individuals who, upon scrutiny of their case, would prove to have the status of refugee and the consequent right to be treated in accordance with the standards of the 1951 Convention. While many refugee rights under the 1951 Convention reasonably can be suspended for a certain period, e.g. while awaiting examination of the case, the prohibition of *refoulement* must be observed irrespective of recognition, unless and until the examination of the case has shown no risk of persecution.[146] In 1977, the UNHCR's Executive Committee (hereinafter referred to as ExCom) not only urged the state parties to establish procedure, but also gave recommendations on certain requirements for such procedures.[147] Those requirements include *inter alia*; the demand for competent officials to whom applicants address themselves at the border,; a clearly identified authority with responsibility for examining applications; the possibility to appeal a negative decision and the right to remain in the country pending the process. However, since Indonesia is not signatory to the 1951 Convention, those provision are not applicable, but as stressed by UNHCR, though intercepted in a non-signatory state, states shall establish appropriate mechanisms in transit countries in order to identify those in need of protection in order to not violate the principle of *non-refoulement.*[148]

5.2.2.2 Safeguards through UNHCR and IOM

Every person intercepted in Indonesia who is under the care of IOM is referred to UNHCR if he or she expresses any fear of returning back. UNHCR interviews those cases that are referred to them in accordance with the guidelines established by UNHCR, and hence the asylum seekers are subject to a proper determination process.

5.2.3 Detention

5.2.3.1 International law

5.2.3.1.1 The 1951 Refugee Convention

First, the 1951 Refugee Convention, does not in it self prohibit the use of detention of asylum-seekers. Article 31 states that the Contracting States shall not impose *penalties* on account of their illegal entry or presence, on refugees coming directly from a territory where their life and freedom was threatened in the sense of Article 1 of the 1951 Convention. Article 31(2)

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[146] Vedstedt-Hansen, J. *Europe's response to the arrival of asylum seekers: refugee protection and immigration control,* UNHCR Working Paper No. 6, available at <http://www.unhcr.ch/refworld/pub/wpapers/wpno6.htm>accessed on 12 March 2001. *See also* Hyndman P., *The 1951 Convention and its implications for procedural Questions,* International Journal of Refugee law, vol 6, No. 2 1994 p. 246

[147] ExCom Conclusion No. 8 (XXVIII) on Determination of Refugee Status, 1977, Report of the 28th Session: UN doc. A/AC.96/549. paragraph 53.6.

[148] ExCom, Standing Committee, 18th meeting, *Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 2000, EC/50/SC/CRP.17, paragraph. 34 d.

provides that the Contracting States shall not impose restrictions on their freedom of movement other than those which are necessary. Such restriction shall only apply until their status is recognised, or they obtain admission into another country.[149]

In 1986, ExCom stated that 'detention should normally be avoided':

If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim for refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national or public order. [150]

5.2.3.1.2 International Covenant on Civil and Political Rights

Another international instrument of relevance is the International Covenant on Civil and Political Rights[151] (hereinafter referred to as ICCPR), where Article 9 states that no one shall be subject to *arbitrary* detention. In its comment 8/16, the Human Rights Committee states that "paragraph 1 of Article 9 in the ICCPR is applicable to all deprivations of liberty, whether in criminal cases or in other cases, such as [...] immigration control". The UN Human Rights Committee has stated that

...detention should not continue beyond the period for which the state can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[152]

Hence it is not *per se* arbitrary to detain individuals requesting asylum, but it should normally be avoided and only taken resort to when, and as long as, the state in question can provide appropriate justification.

5.2.3.2 This arrangement

5.2.3.2.1 No systematic use?

Indonesia has neither ratified the ICCPR, nor the 1951 Refugee Convention but still, the instruments are useful in order to assess the level of protection offered to the asylum seekers and refugees. However, due to the lack of proper documentation, it is difficult to assess the actual use of detention:

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[149] Landgren K., Comments on the UNHCR position on Detention of Refugees and Asylum Seekers, in Hughes J. and Liebaut F. (eds.), *Detention of asylum seekers in Europe: analysis and perspectives,* 1998, p 146. *See also* Hathaway J. and Dent J., *Refugee Rights: Report on a comparative Survey*, 1995, p. 19.

[150] ExCom Conclusion No. 44. (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, report of the 37th Session: UN Doc. A/AC.96/688*,* paragraph. 128 (b).

[151] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

[152]Communication No. 560/1993; A. v. Australia, Views adopted on 3 April 1997, 59th session, UN Doc. CCPR/C/59/D560/1993, paragraph. 9.3.

what the restrictions are, the duration of detention etc. As described above, Richard Danziger at IOM, stated that there is no restriction on the freedom of movement, while David Juliadi from UNHCR declares certain MQ to be more strict. In addition, most asylum seekers stay in hotels. However, the HRC states that the state must provide appropriate justification for the use of detention. The Indonesian authorities do not take any actions, e.g. investigation, while the persons are in the MQ since the process is handled by IOM and UNHCR. Basically, the asylum seekers are kept in detention for the sole purpose of keeping them somewhere, while awaiting UNHCR to assess their claims for refugee status, or while awaiting some kind of solution for those not accorded refugee status. Hence, it is a delicate task to determine whether the use of detention is appropriate in relation to the purpose of detention, since primarily, the detention is not used in order to uphold Indonesian law.

5.2.3.2.2 Plans on a processing centre

Though most asylum seekers stay in hotels, there are plans of the creation of new detention facilities which would lead to the systematic use of detention. If one or more big detention centres for the purpose of processing would be set up, with the support from Australia, it would lead to the export of the use of detention of asylum seekers to Indonesia. The government of Indonesia is considering the ratification of the 1951 Convention, and may thus be more inclined to use detention of asylum seekers. However, as put forward by Indonesian authorities, the government of Indonesia can not finance such a centre by itself and it remains to see what the outcome will be.

5.2.4 Other areas of concern

5.2.4.1 Most interception efforts are far removed from public scrutiny

There are several indications showing that the process and the outcome of this co-operation is subject to little transparency. Firstly, it operates in a state where external refugees is a minor issue and thus, there are few who investigate the actions taken. Secondly, there are hardly any official documents on the co-operation between the parties, neither on agreements, nor on the current funding. In addition, those having knowledge on what is happening are all parties to the same co-operation, hence there is no extensive debate questioning the outcome and the work of the other parties involved. In addition, IOM has no mandate to criticise states officially.[153] Since the operational work of the regional offices of IOM and UNHCR in Jakarta depends on Australian funding, it may result in reluctance to officially criticise or even share information to outside parties. Another concern is that neither IOM nor Australia or UNHCR have any formal supervision of the actions taken by the Indonesian authorities. According to Greg Milles, at the Australian embassy, they have no knowledge about the

[153] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October 2001

standards of the work of IOM. Since both IOM and Australia refers to the fact that the asylum seekers are under Indonesian jurisdiction, and since both are operating on Indonesian territory, it may be concluded that both parties are reluctant to take any formal actions in order to supervise the process. The result? Since there is no institutionalised supervision, there is no organ that can guarantee the provision of impartial information.

5.2.4.2 Lack of adequate interpretation services

Every person intercepted are referred to IOM, and consequently to UNHCR. Both organisations assure contact with adequate interpreters. However, there is information that both organisations have faced problems in finding interpreters for certain languages, particularly Kurdish and Farsi.[154]

5.2.4.3 Authorities lack in expertise in refugee protection and Human Rights

5.2.4.3.1 Training of Police

Under a co-operation between UNHCR and the Indonesian Department of Justice, approximately 6 000 police officers are subject to training in Human Rights. According to Yadi Partiwi, at the National Police Headquarters, they are also informed about refugee protection, even though Indonesia is not yet a signatory to the Convention.[155]

5.2.4.3.2 No referral to human rights documents

According to Muhammed Indra, Director General for Immigration, the actions carried out by the Indonesian authorities regarding the asylum seekers, are not guided by any regulations, recommendations or any other form of documents regarding human rights or refugee protection. The work is carried out under guidance of 'humanity'.[156] IOM, which is the implementing partner that has close co-operation with the Indonesian authorities, does not talk about human rights with the authorities and does not specifically aim at raising the awareness among the Indonesian authorities since it is not within their mandate to train.[157]

5.2.4.3.3 'Remarkably restrained', strong internal control

As put forward by Richard Danziger, Head of the IOM office in Jakarta, the Indonesian authorities are very sensitive to accusations of contravening Human Rights, and that the authorities when dealing with asylum seekers, are 'remarkably restrained'.[158] However, though IOM have no formal precautions for dealing with potential abuse, they try to arrange for

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[154] Mason J., *Sea Change: Australia's new approach to Asylum Seekers,* 2002, U.S. Committee for Refugees, p.13.

[155] Interview with Partiwi E. Yadi, National Police, 13 November 2001.

[156] Interview with Mohammed Indra, Director of Immigration, Measuring and Supervision, 19 November 2001.

[157] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October 2001.

[158] Interview with Richard Danziger, Head of the Liaison Office of IOM, 3 October 2001.

improvements in case of allegations.[159] John Campbell, field safety adviser at the UNHCR, also stressed the fact that though the behaviour of the Indonesian Police may raise concern when dealing with local population, there have been no violence from the police towards the asylum seekers and refugees. Campbell also stresses the impression that the police are remarkably restrained when handling the asylum seekers and refugees. [160]

5.2.4.3.4 Protection of those subject to threats.

When refugees have been subject to threats from the people smugglers, UNHCR undertake precautions by sending persons to guard them or even relocate the asylum seekers to more safe areas. Those awaiting refugee status are under the care of IOM, but IOM have no security officer and thus they sometimes ask for help from the UNHCR Field Safety Advisers.[161] In addition, the Indonesian Police have, when threats have occurred, located police officers in order to protect the asylum seekers; their testimonies can be very useful when people smugglers are to prosecuted.[162] Thus, precautions are taken in order to protect the refugees and asylum seekers in case of threats from people smugglers.

5.3 Concluding remarks

First of all it is necessary to recall that to initiate and carry out interception arrangements is not *per se* contravening international law unless the actions taken would be tantamount to the *refoulement* of refugees. Thus, it was first of all assessed that within the RCA there are several safeguards that minimise the risk of *refoulement*, where the presence of IOM and UNHCR is the most important one. When it comes to other areas of concern, there are certain distinct features of this arrangement which affects them all. First of all, the operative work is very much performed on an ‘ad hoc’ basis, i.e. the asylum seekers’ and refugees’ situations may vary from to time to time and from location to location. Secondly, there is no form of institutionalised supervision of actions taken towards the intercepted persons. On the other hand, since IOM and UNHCR are present, there is a rather high level of informal supervision, and the their presence seems to serve as a guarantee for the protection of the persons intercepted.

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[159] Interview with Mahar Bodemar, Counsellor, IOM 3 October 2001.
[160] Interview with John Campbell, Field Safety Adviser, UNHCR Office Jakarta, November 28 2001.
[161] Interview with John Campbell, Field Safety Adviser, UNHCR Office Jakarta, November 28 2001.
[162] Interview with Bambang Wahyu Suprapto, Field Safety Adviser, UNHCR, 20 November 2001.

6 The ambit of the principle of *non-refoulement* and the issue of state responsibility

This chapter starts with an outlook on the ambit of the principle of *non-refoulement* while highlighting the Australian argumentation. Then the chapter focuses on whether Indonesia may be bound by the principle as part of customary law, or under any other international instrument that it has ratified. The last part contains a discussion on the law of international state responsibility in order to establish whether Australia may be held responsible for breaches of international law made under this arrangement by the Indonesian authorities.

Australia argues that apart from combating people smuggling, they want to prevent *secondary movements*. It is held that many of the current flows are refugees either forsaking effective protection that they have enjoyed in a country of first asylum, or by bypassing opportunities to seek and obtain it in neighbouring countries. This prevention is partially maintained by the current arrangement in Indonesia, firstly by making it a country where, according to Australia, effective protection is available and secondly by generally not accepting any recognised refugee under the arrangement for resettlement in Australia. The reason for this strategy is, according to Australia, that otherwise Australia will not be able to give protection to those who most need it. Here it is necessary to recall the first chapter which described the Australian off-shore resettlement programme aiming at selecting refugees as close to their countries of origin as possible.

The difference between asylum seekers removed to a 'declared country' as a result of the legislation from September 2001 and those under the arrangement in Indonesia, is that the former have actually entered Australian territory while the latter, never physically have been in Australia. The most important difference is the question of what obligations Australia actually has towards those different categories. Generally, Australia argues that its protection obligations extend to the limits of its territorial seas[163] and that their primary obligation under the Refugee Convention is not to *refouler*, either directly or indirectly, to a country where the person has a well founded fear of persecution for a Convention ground. According to this argumentation, this obligation is only relevant for those who arrive to an excised offshore area and who then is moved to a declared country, and to those asylum seekers onboard vessels who are demanded to return to Indonesia, and not to those stopped by Indonesian migration officials while transiting through Indonesia.

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[163] *Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime- Australia's Commitment.* p. 10.

In the following chapter, we will start to look into the relevant aspects of the principle of *non-refoulement* as contained in the 1951 Convention. Then we will move on further to look at other instruments that are relevant for the principle of *non-refoulement* and assess whether the norm may have achieved the status of customary law.

6.1 The prohibition of *non-refoulement* and its implications for the strategies adopted

Although UNHCR, in its Note on Interception of Asylum Seekers and Refugees, defines interception and presents areas of concern when interception is used as a means for border control, they do not raise the question of state responsibility. In this case, it is of importance to settle the question of responsibility, especially since Indonesia is not a signatory to the 1951 Refugee Convention and the Australian representatives constantly refer to the fact that all actions fall under Indonesian jurisdiction. Since we especially want to find what state that has the responsibility for *non-refoulement,* there will first be an assessment of this principle.

6.1.1 *Non-rejection* at the frontiers?

To start with it is relevant to bring up the issue of *non-refoulement* and admittance at the frontiers. The Australian point of view is that the 1951 Convention does not give any right to a refugee to enter or remain in the territory of a contracting state. The question of whether there is a right to remain, i.e. a right to asylum, will for the purpose of this thesis be left aside. The issue here is whether Article 33(1), which prohibits the return of refugees 'in any manner whatsoever', also includes a right to be *admitted* at the frontier. Authors have debated over the interpretation of the article in question in the preparatory work of the 1951 Convention.[164] However, the fact that the drafter chose to include the expression 'in any manner whatsoever' indicates that a state shall not refuse admission to refugees if

[164] Robinsson, argues that no contracting State is prevented form refusing entry in the territory to refugees at the frontier and that Article 33 concerns refugees who have gained entry into the territory of a contracting state, legally or illegally, but not to refugees who seek entry into this territory; Robinson N., *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation,* 1953, p. 163. Grahl-Madsen states that Article 33 may only be invoked in respect of persons who are already present in the territory of a contracting state and that the article does not oblige the contracting states to admit any person who has not already set foot on their respective territories; Grahl-Madsen A., *The Status of Refugees in International Law,* Vol. II, 1972, p. 94. However, according to Weis, a state shall not refuse admission to a refugee, i.e. that it shall grant him at least temporary asylum -pending his settlement in a country willing to grant him residence- if non-admission is tantamount to surrender to the country of persecution; Weis P., *Legal Aspects of the Convention of 25 July 1951 relating to the Status of Refugees,* British Yearbook of International Law, Vol. 30, 1953, p. 483. *See also,* Goodwin-Gill G.S., *The Law of Refugee Status,* 1996, pp. 121-124.

non-admission is tantamount to surrender to the country of persecution. In addition, in its conclusion No. 22 ExCom stated that (even) in situations of large scale influx, asylum seekers should be admitted at least on a temporary basis, and in all cases the principle of *non-refoulement* must be scrupulously observed.[165] This leads to the conclusion that a principle of non-rejection at the borders applies where *refoulement* otherwise would be likely. The issue of non-rejection at the borders is thus a question of *non-refoulement*, and not an issue of whether is also entails a right to asylum, i.e. a right to remain in the admitting country. However, once again we have the problem of the need for status determination in order to asses whether such a rejection at the frontiers would result in direct or indirect *refoulement* of the persons in question. This position seems to be supported by Australia, since they argue that, when an unauthorised vessel is detected and escorted back to the contiguous zones, they are confident that the vessel will return to Indonesia and that due to the RCA, they are sure that such actions will not constitute *refoulement*, neither directly nor indirectly. In such situations, Australia relies partially on the fact that Indonesia has anounced that it will not *refouler* refugees and that UNHCR will process the asylum seekers for refugees status. And, for those removed to declared countries, in accordance with the new legislation, Australia relies on the fact that Nauru has publicly undertaken not to *refouler* any asylum seekers. Thus, though Australia maintains its sovereign right to control who may enter or not, they undertake several safeguards in order to make sure that the rejection will not result in indirect *refoulement.* Put the other way around; unless they have at least informal announcement from the receiving country that it will not *refoule* and arrangements for status determination process, rejection at the frontiers would not be in accordance with Australia's international obligations. On the other hand it is difficult to asses whether Australia regard those arrangements as benevolent safeguards in order to forestall criticism or whether Australia consider it to be *required* safeguards when rejecting asylum seekers at the frontiers.

6.1.2 Excised areas or 'international zones'

While some European countries, in an effort to avoid responsibility for *non-refoulement,* have assigned part of their airports as 'international zones' where neither domestic nor international law is said to apply,[166] Australia has excised certain areas from the migration zone and thus removed the possibility to formally apply for asylum. According to Australia, its protection obligations will still be met since persons arriving in an excised area claiming to be refugees will still be provided a determination process (and thus not be subject to *refoulement),* but in a 'declared country'. A country cannot be 'declared' unless the Minister is satisfied that it will not *refouler* and will meet basic human rights standards with respect to any

[165] ExCom Conclusion No. 22 (XXXII) 1981, Protection of Asylum Seekers in Situations of Larg-Scale Influx, Report of the 32nd Session: UN Doc. A/AC.96/601, paragraph 57(2).
[166] Hathaway J. and Dent J., *Refugee Rights: Report on a Comparative Survey,* 1995, p. 16.

person taken there.[167] As Nauru, assigned to be a 'declared country' has not ratified the 1951 Convention, Australian officials will be responsible for determining the asylum application. When it comes to the 'international zones', it is clear that it is a fundamental principle of international law that every state enjoys jurisdiction over its territory and persons within its territory, and with that jurisdiction goes responsibility.[168] The fact that the harm caused by State action may be inflicted outside the territory of the actor or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.**[169]** Thus, the principle of *non-refoulement* still applies no matter if parts of a state's territory has been declared to be an 'international zone' or 'excised area', which Australia acknowledges. In addition, since the determination process in Nauru is carried out by Australian officials, their actions are still attributable to the Australian state. However, as stated by Goodwin-Gill, to apply different procedures and standards in such zones will not necessarily result in the breach of an international obligation, but the underlying issue is the one of monitoring and compliance. Errors and *refoulement* are more likely when procedural shortcuts are taken in zones of restricted guarantees and limited access. This is precisely what is the risk when Australia makes use of 'declared countries' as processing centres.

6.1.3 Effective protection elsewhere?

Generally the two notions 'safe third country' and 'country of first asylum' are generally used in order to prevent asylum seekers from moving on to a third country. The 'safe third country' is most of all a European phenomenon, which presumes that the applicant could and should already have requested asylum if he or she passed through a safe country *en route* to the country where asylum actually is being requested. Thus, it generally aims at regulating what state shall be responsible for the determination process. [170]

The notion of 'first country of asylum' is somewhat different since it is used by states when denying a person access to asylum on their territory if she or he has already found *protection* in another state. Article 31 of the 1951 Convention requires that refugees present or entering illegally shall not be penalised. However, this only pertains to those refugees who are 'coming directly from a territory where their life or freedom was threatened'. Against this background, states have denied access to asylum procedures if the asylum seeker in question is considered to have found asylum *or* protection

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[167] *Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime-Australia's Commitment,* P. 13.
[168] Goodwin-Gill G.S., *The Refugee in International Law,* 1996, p. 147.
[169] I. Brownlie, *System of the Law of nations: State responsibility, Part 1,* 1983, p. 135-7, 159-66.
[170] Lavenex S., *Safe third Countries, Extending the EU Asylum and Immigration Policies to Central and Eastern Europe,* 1999, p. 77.

elsewhere, have came directly form a territory where his or hers life or freedom was threatened.[171]

Unfortunately, there are no regulations at the international level, providing substantial criteria for what constitutes a 'effective protection elsewhere'. However, in Conclusion No. 58, ExCom addressed the problem of asylum seekers who move in an irregular manner from a country where they already have found protection. According to the Committee, refugees and asylum seekers may be returned to such a country if they are protected there against *refoulement,* and if they are permitted to remain there and to be treated in accordance with recognised basic human rights until a durable solution is found for them, i.e. they have access to durable solutions. [172]

6.1.3.1 Australia's argumentation

In the view of Australia, the 1951 Convention does not give to a person who falls within the refugee definition any right to enter or remain in the territory of a contracting state. According to Australia, the provisions of exceptions which permit the return of certain categories of refugees to the country of risk for reasons of state security or public safety, together with the absence in the 1951 Convention of a right to be granted asylum, indicate an intention by the Convention's founders to preserve the sovereign right of States to determine who may enter and remain within their territory.[173] Australia thus maintains that a refugee can be sent back to a country were he or she face *effective protection* and that they thus can refuse the entry of asylum seekers if they can be sent back to a country where they are afforded effective protection. Further, as described in chapter 2, moving on from Indonesia to Australia is considered to be a 'secondary movement' since effective protection is available already in Indonesia.

According to Australia, apart from not being returned to a country where the person may face persecution, effective protection includes the right to reside, enter and re-enter the other country in question, but Australia also argues that even informal temporary residence may afford a sufficient foundation for the application of the principle. In addition, it is the capacity of the person as a matter of practical reality and fact to avail himself or herself of protection in another country that is critical, not whether he or she has a legal right to do so.[174] And, according to Australian law, it is not necessary for a country to be a signatory to the 1951 Convention in order to

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[171] Goodwin-Gill G.S., *The Refugee in International Law,* 1996, p. 88.

[172] ExCom Conclusion No. 58 (XL) 1989 The problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which they had already found Protection, Report of the 40th Session: UN.Doc. A/AC/96/737, paragraphs f and g.

[173] DIMIA, *Principle of Non-refoulement: An Australian Perspective, A paper Prepared as a contribution to the UNHCR's Expert Roundtable Series 2001,* 2001, p. 24.,

[174] DIMIA, *Principle of Non-refoulement: An Australian Perspective, A paper Prepared as a contribution to the UNHCR's Expert Roundtable Series 2001,* 2001, p. 13

be able to provide effective protection.[175] Hence, in considering another state's capacity to provide effective protection, Australian law goes no further than requiring that the third country provides the applicant with protection in practice against any breach of Article 33 in the 1951 Convention.

6.1.3.2 Concluding remarks

The ExCom has recognised the problems of asylum seekers who move in an irregular manner from a country where they already have found protection, and have outlined the basic criteria which are necessary when determining whether the protection is to be considered effective or not. However, this does not give any guidance as to the quality of the protection. There are difficulties in assessing the safety since it remains unclear what is implied by the notion 'basic human standards' and what safeguards that can be considered as sufficient to guard against possible *refoulement.* Further, it remains unclear whether it is sufficient that a state informally permits a person to remain on the territory or whether the individuals stay must be regularised in some way. In the case of Indonesia, the refugees and asylum seekers are remaining on its territory illegally, but the Indonesian authorities make informal exceptions and are thus not taking any actions against those persons. Since it is required that a refugee must be protected against *refoulement,* it seems odd to add that they he or she has to be 'permitted to stay' if it only means that the state in question must not deport them. Further, there are no requirements stating that a state must have ratified the 1951 refugee Convention in order to be considered to be able to give protection to refugees. Nor do the conclusion explicitly address whether an asylum seeker must be provided with a determination process carried out by a state. However, when UNHCR have addressed the issue of protection elsewhere, it has been considered as a useful means for *states* to allocate responsibilities among themselves for *examining asylum requests*.[176] thus indicating that the protection should be afforded by the state in question. Though the criteria set up in the ExCom Conclusion may seem to be defined in imprecise terms, they still go further than the Australian perception which only requires that a person in *practice* is protected against *refoulement.* On the other hand, if a person has no legal right to avail himself of the protection in a state, and only has informal residence, i.e. no legal right to reside, then the safeguards against *refoulement* are rather limited. However, the RCA includes strong safeguards against *non-refoulement* due to the involvement of IOM and UNHCR. On the other hand though the protection

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[175]DIMIA, *Principle of Non-refoulement: An Australian Perspective, A paper Prepared as a contribution to the UNHCR's Expert Roundtable Series 2001,* 2001, p.13. In MIMA v. Al-Sallal (1999) the Federal court of Australia stated that *So long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country – that will suffice. The fact that a country is a party to the Convention is relevant but not determinative either way.*

[176] UNHCR, *Note on International Protection,* 1993, UN Doc. A/AC.96/815, paragraphs 21-22.

against *refoulement* well may be considered to be 'effective' in Indonesia, the fact still remains that while the refugees intercepted under the RCA theoretically have access to durable solutions, very few of them has access to it in real life.

6.2 The principle of *non-refoulement* and the obligations of Indonesia

The purpose of this section is to establish whether Indonesia has an obligation of *non- refoulement* towards refugees present in Indonesia.

6.2.1 Customary law?

Can the principle of *non-refoulement* enshrined in Article 33 of the 1951 Convention be binding upon all states, irrespective of ratification of the 1951 Convention, i.e. can it be seen as part of international customary law? Article 38, 1 c, of the Statute of the International Court of Justice,[177] refers to 'international custom as evidence of a general practice accepted as law'. The proof of international customary law requires consistency and generality of practice and the practice must be accepted as law: *opinio juris.* According to Brownlie, the 'sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough'.[178] According to Goodwin-Gill, state practice is "persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement".[179] Investigating general state practice on *non-refoulement* is not easy done, especially when it comes to evaluate whether non-contracting states to the 1951 Convention apply to the principle. The most common approach is then to look at the processes within international organisations, in order to see how states have positioned themselves. In 1958, the Economic and Social Council set up the Executive Committee for the UNHCR Programme (ExCom) with the task to advise the High Commissioner. The conclusions adopted by ExCom have considerable argumentative, persuasive and legitimating power, and Brandl argues that since states consider 'reservations' it necessarily implies that they regard the Conclusions as sources of legal obligations.[180] Though the conclusions adopted by ExCom do not have force of law and do not, of themselves, create binding obligations, they may contribute to the formulation of *opinio juris*.[181] Both ExCom and the Sub-Committee on International Protection, have on several occasions asserted the opinion of universal recognition and of fundamental importance of the principle of *non-refoulement*. The fact the

[177] Statute of the International Court of Justice. 26 June 1945, 1 UNTS XVI.
[178] Brownlie I., *Principles of Public International Law,* 1998, p. 7.
[179] Goodwin-Gill, *The Refugee in International Law,* 1996, p. 167.
[180] Brandl U, Soft Law as a source of International and European Refugee Law, in Carlier J-Y. and Vanheule D. (eds.), *Europe and refugees: a Challenge*, 1997. p. 214.
[181] Goodwin-Gill, *The Refugee in International Law,* 1996, p. 127.

committees at the same time express concern over the fact that states have violated the principle may be seen as an indication of the exemptions. In 1982, ExCom stated that the principle of *non-refoulement* progressively had acquired the character of a peremptory rule of international law.[182] At the Ministerial meeting of States Parties to the 1951 Convention in December 2001, the parties adopted a Declaration stating that the applicability of the principle of *non-refoulement* is embedded in customary international law.[183]

However, as mentioned above, the principle of *non-refoulement* is under increasing attack in state practice. According to Hathaway and Dent, the return of refugees physically present in the territory of the state, the return of refugees at or near the border and the evolution of arms-length *non-entrée* policies are different types of state practice that may offend the principle of *non-refoulement.*[184] However, as pointed out by Stenberg, if a state sends a refugee back to a country of persecution, it usually maintains either that the criteria of refugee status are not satisfied, or that reasons of security of the country justify the return. [185]

In conclusion, there are several indications that the principle of *non-refoulement* may be part of international customary law and hence the principle would be applicable to Indonesia as well, though not yet a signatory to the 1951 Convention. What are the consequences if Indonesia may be seen as bound by the principle of *non-refoulement?* In theory, it will lead to the fact that Indonesia will have to provide a determination process in order to establish whether they would violate the principle by deporting a person to persecution. Otherwise Indonesia will have to treat every migrant in accordance with the Convention. However, as previously described, there is no such system in Indonesia at the moment. And, since Indonesia have not ratified the 1951 Convention they are not obliged to co-operate with the UNHCR in order to facilitate UNHCR's duty to supervise the application of the provisions of the Convention.

6.2.2 Article 3 of the Convention against Torture

Although the term *non-refoulement* traditionally has been associated with refugees, it has found parallel meanings and expressions in broader human

[182] ExCom, General Conclusion in International Protection, No 25 (XXXIII) 1982, (A/AC.96/614), paragraph B

[183] Declaration, adopted on 13 December 2001 in Geneva at the Ministerial meeting of States Parties to the 1951 Convention and /or its 1967 Protocol relating to the Status of Refugees, Global Consultations of International Protection.

[184] Hatahway J.C. and Dent J.A., *Refugee Rights: Report on a Comparative Survey,* 1995, p. 5-6.

[185] Stenberg G., *Non-Expulsion and Non-Refoulement: the prohibition against Removal of Refugees with Special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees t,* 1989, p. 278. According to Fitzpatrick, "elaborate and disingenuous strategies to avoid the obligation of *non-refoulement* testify to the continuing centrality of the duty": Fitzpatrick J., *Revitalizing the 1951 Convention,* Harvard Human Rights Journal, Vol. 9 1996, p. 237.

rights instruments. Article 3 in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[186] (hereinafter referred to as CAT) prohibits state parties to expel, *refouler* or extradite persons to any country where they may be subject to torture. The Committee Against Torture was established as a monitoring body under the Convention and has the competence to receive and consider inter-state and individual complaints respectively. Hence, the principle of *non-refoulement* has been covered within a treaty monitoring body. The committee have one several occasions considered complaints on rejected asylum seekers. According to the CAT Committee, the phrase 'another state' in Article 3 refers to the state to which the individual concerned is being expelled, returned or extradited, as well as to any state to which the author may subsequently be expelled, returned or extradited, which means that Article 3 in CAT supports the prohibition of indirect *refoulement*.[187] Thus, though the formulations in the two different conventions differ, the principle of *non-refoulement*, enshrined in Article 3 of the CAT also applies to asylum seekers. In those cases, the alleged states are not only signatories to the CAT but also to the 1951 Refugee Convention.[188] It seems possible, at least in theory, to regard Article 3 as applicable to *all* cases where there are substantial grounds for believing that a person who is about to be expelled or returned, directly or indirectly, to a country would be in danger of being subjected to torture. This would lead to the conclusion that though the returning state is not signatory to the 1951 Convention and hence the person is not formally an *asylum seeker,* the state party has an obligation to refrain from *refoulement* of asylum seekers, just as any other person, if it has ratified the CAT. Consequently, if Indonesia forcibly returns irregular migrants/ asylum seekers, it may be at risk of violating the principle of *non-refoulement* at least in the sense of Article 3 in the CAT.

However, since Indonesia only has incorporated CAT into their laws on extradition, there are no precautions regarding irregular migrants facing deportation. And, Indonesia has not recognised the competence of the committee in accordance with Article 22 of CAT and thus the possibility to investigate potential cases of *refoulement* are rather limited.

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[186] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1957, 506 UNTS 125.

[187] Committee Against Torture, General Comment 1, *Implementation of article 3 of the Convention in the context of article 22, 1997*, UN Doc. (A/53/44).

[188] *See inter alia:* Communication No. 13/1993; Mutombo v. Switzerland, 27 April 1994: UN Doc. CAT/C/12/D/13/1993; Communication No. 15/1994, Khan v. Canada, 18 Nov. 1994. UN Doc.CAT/C/13/D/15/1994; Communication No. 21/1995, Ismail Alan v. Switzerland, UN Doc. CAT/C/16/D/21/1995,(1996). Communication No. 43/1996: Kaveh Yaragh Tala v. Sweden, UN Doc.CAT/C/17/D/43/1996 (1996).

6.2.3 Concluding remarks on the principle of *non-refoulement*

The first section regarding the the principle of *non-refoulement* showed that it seems very likely to conclude that the principle has achieved the status of customary law. However, in case of doubt, the subsequent section strongly indicates that even if a state has not ratified the 1951 Convention, it is bound by the prohibition *non-refoulement* if the state in question has ratified CAT Though the CAT Committe only has delt with asylum seekers when assessing whether a breach of Article 3 is at hand, it seems likely to conclude that the principle apply to irregular migrants as well, though they have not been able to formally apply for asylum or express a fear of persecution in case of deportation. Thus, Indonesia is bound by the principle of *non-refoulement* under CAT, which it has ratified, and it seems likely to be bound by the principle of *non-refoulement* as enshrined in customary law as well. Thus, if Indonesia forcibly returns a person to a state where he or she may face persecution, it may be at risk of violating its international obligations.

The reason for this comprised description of the principle of *non-refoulement* is that we now will move on further and look at the international law on state responsibility. The aim is to establish which state that actually carries the legal *responsibility* under this arrangement, in case of breaches of the prohibition of *non-refoulement.* It is necessary to bear in mind that the following chapter does not deal with the responsibility for actions taken towards those persons who have been returned from Australia to Indonesia; in those cases, it is clear that Australia can be held responsible in cases of *indirect refoulement.*

6.3 General remarks on the issue of state responsibility.

International law is designed to make each state responsible for the human rights protection of its own population and it includes litigation for violations targeting another state. The rights enumerated in the Refugee Convention however, are different from those in other Human Rights instruments since the beneficiaries by necessity are non-citizens of the state obliged to fulfil its commitments under the Convention.

Since 1975 the International Law Commission (hereinafter referred to as ILC) have been elaborating the development of Draft Articles on Responsibility of States for Internationally Wrongful Acts.[189] The work of

[189] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session* UN Doc. A/54/10), chp. IV.E.1).

the commission aims at codifying the current principles of international law on state responsibility and the latest draft is from 2001.

Article 1 of the Draft Convention states that: *Every internationally wrongful act of a state entails the international responsibility of that state*. In its commentaries, the ILC concludes that the term 'international responsibility' in Article 1 covers the relations which arise under international law from the international wrongful act of a state *whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law.*[190] ILC further comments that: *...the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.*[191] *Thus, state responsibility extends, for example, to human rights violation and other breaches of international law where the primary beneficiaries of the obligation breached is not a state.*[192] However, the draft articles do not deal with the possibility of the *invocation* of responsibility by persons or entities other than states, and Article 33 p. 2 makes this clear.[193] However, as stated by the ILC, state responsibility arises under international law independently of its invocation by another state.[194]

Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of a state. An internationally wrongful act of a

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[190] Commentaries to the Draft Articles on Responsibility of States for Internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2)* p. 66-67.

[191] Commentaries to the Draft Articles on Responsibility of States for Internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 62.

[192] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 214.

[193] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 234.

[194] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 292.

state occurs when: a conduct consisting of an action or omission is *attributable* to the state under international law, and, that conduct constitutes a breach of an *international obligation* of the state.

6.3.1 Attributability

For a particular conduct to be characterised as an internationally wrongful act, it must first be attributable to the state. However, an 'act of a state' must involve some action or omission by a human being or a group. The question is which persons should be considered as acting on behalf of the state, i.e. what constitutes an 'act of the state' for the purpose of state responsibility? The general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state.[195] According to Article 4 in the ILC draft, *the conduct of a State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*

In this case, we need not dwell further upon the issue of attributability since, based on the facts enumerated above, we will assume that no relevant actions are undertaken by Australian authorities in Indonesia, while actions are undertaken by Indonesian authorities, clearly attributable to the Indonesian state i.e. the Indonesian migration authorities, the Indonesian police etc.

6.3.2 Breach of an international obligation

Article 12 of the Draft Convention on Responsibility of States for Internationally Wrongful acts, states that: *There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character*. A conduct proscribed by an international obligation may require the taking of precautions or the enforcement of a prohibition.[196]

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[195] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2)* p. 80. *See also:* Brownlie I., *System of the Law of Nations: State Responsibility,* 1983, pp. 132-166.

[196] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 125.

According to the ILC, international obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international order. ILC explicitly states in its commentaries that the formula 'regardless of its origin' refers to all possible sources of international obligations, to all processes for creating legal obligations recognised by international law.[197] Hence, the state of Indonesia may be responsible for violation of the principle of *non-refoulement* no matter if a state is bound by it by a treaty or by customary law.

6.3.3 Complicity

Since it has been concluded above that the Indonesian state may be held internationally responsible for violations of the principle of *non-refoulement*, it is of interest to look into whether there is any possibility that the state of Australia may be held responsible for such violations as well. According to the basic principles laid down above, each state is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under the articles in chapter II of the Draft Articles. However, internationally wrongful conduct often results from the collaboration of several states rather than from one state acting alone. A state may engage in conduct in a situation where another state is involved and the conduct of the other state may be relevant or even decisive in assessing whether the first state has breached its own international obligations. As an example, the ILC point at the outcome in the *Soering* case, where the European Court of Human Rights held that extradition of a person to a state where he was likely to suffer inhuman or degrading treatment involved a breach of Article 3 in the European convention on Human Rights.[198]

Chapter IV in the Draft Articles describes the responsibility of a state in connection with the act of another state and defines the cases where it is appropriate that one state should assume responsibility for the internationally wrongful act of another. Three situations are covered in chapter IV. Article 16 deals with cases where one state provides aid or assistance to another state with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one state is responsible for the internationally wrongful act of another state because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one state deliberately coerces another into committing an act which is, or but for the coercion, would be an internationally wrongful act

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[197] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2),* p. 127

[198] *Soering vs. the United Kingdom,* Judgement of 7 July 1989, European Court of Human Rights, Ser.A., No. 161, (1/1989/161/217).

on the part of the coerced state. For the purpose of this paper, only Article 16 is of interest. The Article reads:

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

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

However, in its commentaries, ILC dictates the exclusion of certain situations of 'derived responsibility' from chapter IV. One of theese is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting state if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting state.[199]

Thus, if Indonesian authorities would return a person to a country where he or she may face persecution, then Indonesia would commit an internationally wrongful act. Then what about the role played by Australia? The funding and assistance given by Australia is primarily given through international organisations, IOM and UNHCR, and the only form of support given to Indonesia is in the form of certain facilities in order to improve their border control. And, the support given clearly serves the purpose of *minimising* the risk of *refoulement.* Thus, just as reiterated by Australia, the RCA operates under Indonesian jurisdiction, and if Indonesia would violate the prohibition of *non-refoulement*, Australia cannot be held responsible for such violation. Firstly, since the support is very vaguely defined and is more to be considered as incitement. Secondly, the support is not given with the intention of helping Indonesia to violate the prohibition of *non-refoulement*; on the contrary, Australia provides international organisations with funding in order to safeguard this obligation towards refugees. This leads us to the conclusion that the only state that can be held responsible for the actions taken under the RCA towards the asylum seekers and refugees, is Indonesia.

The ILC has from the Draft Convention excluded issues of the responsibility of a state for the acts of an international organisation, i.e. where the international organisation is the actor and the state is said to be responsible by virtue of its involvement in the conduct of the organisation.[200] The reason seem to be that the responsibility of international organisations has acquired

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[199] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2).* p. 154.

[200] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), (Extract from the report of the ILC on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2).*pp. 361-363.

substantial controversies. Thus the question of accountability within the RCA becomes even more blurred since when it comes to the implementation of the protection of asylum seekers and refugees in Indonesia, it is the international organisations which *in practice* are responsible and not the Indonesian government. And though an international organisation may it self be held responsible for actions taken, there is no way for the individuals concerned to enforce their rights.

7 Conclusions

It can be assessed that the arrangement provided for in Indonesia serves at least three identifiable purposes. First, it serves as a *deterrent*; those detected while transiting through Indonesia will live under conditions less comfortable and with a lower threshold of protection while they await their determination processes and durable solutions. And, if considered a refugee, the person will only be given a Temporary Protection Visa if Australia at all offers resettlement. In this sense, it can be said that the insecurity about where to be afforded asylum also serves as a deterrence. Second, this arrangement serves as a strong argument when returning boats to Indonesia, since it then is held that the asylum-seekers have forsaken *effective protection* offered there. Third, under the arrangement Australia handles over the issue of *state responsibility* to Indonesia, in case of violation of international obligations. Since Indonesia cannot provide even its own population with effective protection, and has no system, neither legal nor informal, for providing refugees and asylum seekers with protection, that responsibility is thus in practice maintained by international organisations. Consequently, the persons intercepted under this arrangement may well be afforded appropriate protection in practice, but in cases of violations the refugees and asylum seekers basically stand alone.

In addition it is worth noting is that while Australia strongly emphasises the problems arising from irregular migrants, and make use of the Indonesian territory as a refugee processing centre there are no efforts to prepare Indonesia to build up a strong regime of refugee protection. Though the Western European states' strategies towards the CEECs have had the primary aim of combating irregular migration, there has also been a substantial work on promoting a regime of refugee protection, Since the application of the concept of 'safe third country' presupposes a certain level of legal compliance with international human right norms, the western states have striven to help the CEECs to fulfil the requirements of the 1951 Convention and the European Convention on Human Rights and. Thus those states can join the system of international protection of refugees and hence the responsibility can be redistributed in an orderly manner. It is this kind of work which is lacking when Australian authorities have elaborated the co-operation with Indonesia. While Indonesia seriously contemplates to ratify the 1951 Convention, the authorities are encouraged by the Australian government to concentrate on the issue of irregular migrants instead of on the refugee protection regime itself. And, while detention of asylum seekers generally is regarded as something that normally should be avoided, Australia is encouraging Indonesia in its plans to create one or more big Migration Quarantines. Thus, Australia actually weakens the refugee protection potential within the region.

Though intensive efforts are made by UNHCR to find durable solutions for those considered to be in need of protection, finding states willing to offer resettlement is difficult. No international law obliges any state to provide durable solutions or to offer protection. Thus, those states that have agreed to resettle refugees intercepted in Indonesia has a completely free choice to decide whether they at all want to consider a resettlement application, and in case they do, they are free to choose whom they want to resettle and for what reasons. Certainly, this sometimes results in the fact that, contrary to what Australia argues, that states tend to choose the persons who are most likely to benefit the states in question, instead of those refugees appearing to be those most in need. And, since Australia has declared that normally they will not resettle those intercepted in Indonesia since such a solution would be considered as encouraging secondary movement, other potential resettlement states may be unwilling to carry the burden that Australia strives to get rid of. The lack of access to durable solutions has in addition sometimes resulted in refugees 'running away' in a new effort to reach Australia with the help of people smugglers, sometimes with a tragic outcome on the high seas. The lack of agreements on resettlement thus contribute to the use of people smugglers.

As long as the off-shore resettlement places offered by Australia are limited, persons must continue to "jump the queue", i.e. make secondary movements in order to seek protection. In addition, there can be various reasons why a person chooses to flee to another country, such as the risk to some persons in a country of first asylum, or the wish to join family members. Most important of all, there are refugees among those intercepted under the RCA, i.e. they are in need of protection, just as those who are closer to their countries of origin.

Since refugees tend to come from poor regions, the primary movements are within the region, and it is thus very likely that the countries of first asylum are developing countries, just as Indonesia. Consequently, by setting up arrangements like the RCA, and promoting overseas refugee processing, the poorest countries of the South are required to meet the needs and have the legal responsibilities for the refugees until the states which actually have the financial resources and protection infrastructure chooses to resettle them. The need for 'burden-sharing', as expressed in the preamble to the 1951 Convention, has been reiterated several times by states on the international arena. However, in the case of Australia, we have a state with the financial resources and the domestic infrastructure for providing asylum seekers and refugees with protection, which basically creates a burden for a second state, which has no such infrastructure, thus placing an unduly burden on a state with severe internal difficulties, while intentionally lowering the quality of the protection available for asylum seekers and refugees.

Though the RCA seems to provide the asylum seekers and refugees with basic protection during the determination process, there are two major reasons why this is not a recommended method for exercising migration

control. First and foremost, the RCA lacks formal agreements and a clear distribution of legal responsibilities. As a result, the refugees and asylum seekers are under the sole responsibility of a state which has neither any financial possibilities of protection refugees, nor any legal framework to provide such protection. The asylum seekers and refugees are completely dependent on international organisation towards which they have no possibilities to enforce their rights. Secondly, the RCA is carried out on an *ad hoc* basis without any formal agreements on the distribution of responsibilities, and there is no effective supervision of the actions taken by the parties involved, and thus there is a high level of insecurity as to the enforcement of the protection offered.

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