

DIFFICULT JOURNEYS: ACCESSING REFUGEE PROTECTION IN INDONESIA

SAVITRI TAYLOR* AND BRYNNA RAFFERTY-BROWN**

I INTRODUCTION

Australia engages in extensive bilateral border management cooperation with likely countries of origin and/or transit of non-citizens intent on travelling irregularly to Australia. Indonesia is one such country. Australia has posted immigration, customs, police and other officials in Indonesia to assist with the interception of people heading towards Australia and has poured millions of dollars into building Indonesia's border control capacity. By actively encouraging and assisting the Indonesian government to intercept irregular movers (including asylum seekers) in Indonesian territory, Australia is forcing asylum seekers who might otherwise have presented their claims in Australia to seek protection in Indonesia instead.

To its credit, Australia has also attempted to improve the access to protection of asylum seekers in Indonesia through an arrangement with the Indonesian government and the International Organization for Migration ('IOM'). Under this so-called Regional Cooperation Arrangement ('RCA'), Indonesian authorities intercept irregular migrants and refer those they determine to have been headed toward Australia or New Zealand to IOM for 'case management and care'.¹ IOM in turn refers those who indicate that they wish to make asylum claims to the Office of the United Nations High Commissioner for Refugees ('UNHCR'), which determines such claims pursuant to its own international mandate. IOM continues to provide asylum seekers with material assistance pending the determination of their asylum claims and the finding, where applicable, of a durable solution.² IOM

* School of Law, La Trobe University. Email: s.taylor@latrobe.edu.au. The authors wish to acknowledge the research funding provided by the Australian Research Council Linkage Projects Scheme, the Jesuit Refugee Service Australia, Oxfam Australia, the La Trobe Refugee Research Centre and La Trobe University's Faculty of Law and Management. They also acknowledge with gratitude the assistance provided by Indonesian field researchers Melati Adidamayanti, Donny Amir, Laura Ariestiyanti, Rika Fitriyana, Peni Hanggarini, Muslaeni, Laily Nihayati, Aan Rukmana, and Yulyana, the co-investigator on the Linkage Project, Professor Sandra Gifford, and the following volunteer researchers: Katherine Brabon, Scott Bulman, Emma Frean, Jessica Gatenby, Natalia Gould, Samantha Hazlett, Jane Hodge, Nic Nelson, Yuta Noguchi, David Peiris and Febriansyah Soebagio. Responsibility for content lies, of course, with the authors alone. For further research arising from the Project, see Savitri Taylor and Brynna Rafferty-Brown, 'Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesia Solution' (2010) 22 *International Journal of Refugee Law* 558.

** Project manager and research officer, School of Law, La Trobe University at the relevant time.

1 International Organization for Migration ('IOM') Indonesia, 'Irregular Migration' (Fact Sheet No 1, 2010).

2 UNHCR, *Senate Legal and Constitutional References — Inquiry into the Administration and Operation of the Migration Act 1958: Response of United Nations High Commissioner for Refugees to Questions Taken on Notice* (26 October 2005) [2.2] <http://www.aph.gov.au/senate/committee/legcon_ctce/migration/qon/26oct-unhcr.pdf>.

also provides repatriation assistance to those who wish to return home at any stage.³ IOM's RCA activities are funded by Australia.⁴

Although UNHCR is not a formal participant in the RCA, at the commencement of the RCA in 2000⁵ the Australian government provided UNHCR with funding of \$763 870.⁶ A Department of Immigration official described this as a 'payment which enabled them to set up their office in Jakarta, so they could undertake the processing in relation to this intercepted group of people in Jakarta and Indonesia generally'.⁷ Further funding has been provided since. In 2006–07, Australia gave \$700 000 to UNHCR to enhance protection capacity in Malaysia and Indonesia through 'faster processing of refugee status determinations and the provision of basic services, such as health and education'.⁸ Likewise, in 2007–08, Australia gave \$702 000 to UNHCR, and in 2008–09 gave \$807 727, to fund protection capacity building activities in Indonesia such as 'the deployment of additional UNHCR protection officers in field locations throughout Indonesia' to speed up refugee status determinations.⁹ Australia has also committed a further \$2 million in funding to UNHCR in Indonesia over the next two years for the same purpose.¹⁰ The question is: have Australia and the other actors involved in dealing with asylum seekers in Indonesia done *enough* to ensure that those in need of international protection receive it?

In September 2007, the authors and their colleagues commenced a research project which had the objective, among others, of ascertaining the impact on asylum seeker protection of Australia's border control cooperation with Indonesia. This article sets out what was learned about the difficulties that asylum seekers in Indonesia experience in obtaining access to the refugee status determination process and in obtaining recognition of refugee status. It also makes recommendations for mitigating the difficulties identified.

3 IOM Indonesia, 'Irregular Migration', above n 1.

4 Ibid.

5 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 25 November 2003, 26 (Mr Killesteyn, Department of Immigration).

6 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 29 May 2002, 460 (Mr Okely, Department of Immigration).

7 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 25 November 2003, 45 (Mr Killesteyn, Department of Immigration). In each of the financial years from 2002–03 to 2005–06 inclusive, UNHCR received in the range of \$3 million to \$5.3 million from AusAID's International Refugee Fund for strengthening protection capacity and providing subsistence assistance in asylum countries in the Asia Pacific including Indonesia: AusAID, 'Initiatives Funded under the International Refugee Scheme' (17 February 2009) (copy on file with authors). However, a further breakdown is not available.

8 Department of Immigration and Citizenship, *Annual Report 2006–07* (2007) 140–1.

9 Department of Immigration and Citizenship, *Annual Report 2007–08* (2008) 144; Department of Immigration and Citizenship, *Annual Report 2008–09* (2009) 153.

10 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 20 October 2009, 172 (Ms Keski-Nummi, Department of Immigration); Chris Evans, Minister for Immigration, 'A Strengthened Commitment to Our International Obligations' (Media Release, 23 February 2009) <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09020.htm>>.

II STATISTICS AND RESEARCH METHODOLOGY

At the end of 2007, when the research project commenced, there were 526 persons registered with UNHCR in Indonesia: 211 asylum seekers and 315 recognised refugees or ‘people in refugee-like situations’.¹¹ At the end of 2009, when the field research was completed, there were 2567 persons registered with UNHCR Indonesia: 1769 asylum seekers and 798 recognised refugees or ‘people in refugee-like situations’.¹² Table 1 sets out the nationality and gender breakdown of persons of concern to UNHCR present in Indonesia on 31 December 2009.¹³

Table 1: Nationality and gender of persons of concern to UNHCR in Indonesia at 31 December 2009

Nationality	Category	Males	Females	Subtotal	Total
Afghan	Asylum seekers	1341	70	1411	1631 (63 per cent)
	Refugees	175	45	220	
Burmese	Asylum seekers	8	1	9	163 (6 per cent)
	Refugees	153	1	154	
Iraqi	Asylum seekers	121	11	132	341 (13 per cent)
	Refugees	137	72	209	
Iranian	Asylum seekers	45	15	60	85 (3 per cent)
	Refugees	17	8	25	
Somali	Asylum seekers	12	9	21	65 (2.5 per cent)
	Refugees	26	18	44	
Sri Lankan	Asylum seekers	96	3	99	220 (8.5 per cent)
	Refugees	113	8	121	
Other¹⁴	Asylum seekers	36	5	41	66
	Refugees	15	10	25	
Totals		2295 (89 per cent)	276 (11 per cent)		2571

11 UNHCR, *2007 UNHCR Statistical Yearbook* (December 2008) Statistical Annex Table 1.

12 UNHCR, *2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (June 2010) Statistical Annex Table 1.

13 This data is taken from UNHCR Indonesia, *Active Caseload Breakdown as of 31 December 2009* (copy on file with authors). It is not known why four more asylum seekers are included in this data set than are included in the more recently prepared *2009 Global Trends* statistics.

14 The other asylum seekers and refugees came from Algeria (1), Burundi (1), Cameroon (2), China (4), Cote d'Ivoire (4), Democratic Republic of Congo (11), Egypt (2), Guinea (15), Lebanon (1), Liberia (1), Kuwait (6), Pakistan (9), Palestine (1), Sierra Leone (3), Syria (3), Tunisia (1) and Western Sahara (1).

As part of the project, the field researchers — all Indonesian nationals — conducted interviews with 59 asylum seekers and refugees in Indonesia.¹⁵ A purposive, quota sampling strategy was employed as it was not logistically possible to undertake random sampling. Three of the interview locations (Bogor, Jakarta and Mataram) were selected because together they hosted the vast majority of the asylum seekers and refugees in Indonesia at the time of the study. Eleven of the interviewees were living under the care of IOM or UNHCR's implementing partner, Church World Service ('CWS'), in Indonesia's capital city, Jakarta. Twenty two of the interviewees were living under the care of IOM or CWS in Bogor, a cooler hillside town located around an hour's drive from Jakarta. Nineteen of the interviewees were living under the care of IOM in the Ampenan area of Mataram city on Lombok island, West Nusa Tenggara province. The field researchers also interviewed four people in immigration detention in Meuloboh, the capital of the West Aceh regency in Aceh province, and three others in immigration detention in Batam, a city in Riau Islands province.

The interview quotas were determined on the basis of the nationality and gender composition of the asylum seeker and refugee population in Indonesia at the time the determination was being made (mid-2008).¹⁶ Considerations such as accessibility and willingness to be interviewed meant that quotas could not be adhered to rigidly and that selections within the quotas were based on judgment and convenience. Nonetheless, the sample approximates the profile of persons of concern residing in Indonesia at the time of the interviews.

In mid-2008, the refugee and asylum seeker population registered with UNHCR in Indonesia was about three quarters male, one quarter female. The gender composition of the project sample reflects this. Iraqis constituted about 44 per cent of the population compared with 34 per cent of the project sample, Sri Lankans constituted about 20 per cent (22 per cent of the project sample), Somalis constituted 9 per cent (12 per cent of the project sample), Afghans constituted 9 per cent (10 per cent of the project sample), Burmese constituted 5 per cent (5 per cent of the project sample), and Vietnamese constituted 3.5 per cent (7 per cent of the project sample). The remaining 9.5 per cent of the asylum seeker and refugee population present in Indonesia in mid-2008 was made up of less than ten persons each from Algeria, Brunei, China, Cote d'Ivoire, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, India, Iran, Kenya, Laos, Morocco, Pakistan, Palestine, Saudi Arabia, Syria and Tunisia. The remaining 10 per cent of the project sample came from Bangladesh, Cambodia, China, Iran and Pakistan. The project sample included six people who were not included in UNHCR statistics because they were classified by UNHCR as 'closed cases'.¹⁷

As well as interviewing asylum seekers and refugees, the field researchers interviewed 49 Indonesian government officials and others who interacted

15 In referencing these interviews pseudonyms have been used for the interviewees and in some cases non-essential details of their stories have been changed in order to further protect their identity.

16 UNHCR Indonesia, *Active Caseload Breakdown as of 1 July 2008* (copy on file with authors).

17 'Closed cases' refers to refugee status applications that have received the final negative determination from UNHCR decision makers.

with asylum seekers and refugees in a variety of ways in a range of locations. The 25 government officials interviewed included 11 immigration officials, eight police officers, and another four provincial and two central government officials. In addition, 13 people who worked for or with relevant non-government organisations ('NGOs'), and 11 other people who were in a position to provide useful information, were interviewed.

All of the Indonesian interviews were qualitative, semi-structured interviews conducted between mid-October 2008 and early November 2009. They were conducted in Bahasa Indonesia and/or English, audio recorded, fully transcribed and translated into English as required. They have been supplemented by field notes from the field researchers, interviews with key informants in Australia and by extensive documentary research.

III THE INTERNATIONAL PROTECTION REGIME AND INDONESIA

The key international instruments providing for international protection of those in need of it are the 1951 *Convention Relating to the Status of Refugees* ('*Refugees Convention*')¹⁸ and the 1967 *Protocol Relating to the Status of Refugees* ('*Refugees Protocol*').¹⁹ Article 33(1) of the *Refugees Convention* provides that no state party shall return ('*refouler*') a 'refugee' to a place where he or she is at risk of being persecuted.²⁰ According to the same treaties, a 'refugee' is a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.²¹ In other words, persons who fear persecution for other reasons fall outside the ambit of these treaties. Also falling outside the ambit of these treaties are those who fall within the mandate of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East,²² those who are able to enjoy the same rights as citizens in their country of residence,²³ those who have committed certain kinds of serious crimes²⁴ and those whom the receiving country believes on reasonable grounds to be a threat to its national security.²⁵

18 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

19 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

20 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1).

21 *Ibid* art 1A(2), as modified by *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 1(2).

22 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1D.

23 *Ibid* art 1E.

24 *Ibid* arts 1F, 33(2).

25 *Ibid* art 33(2).

Fortunately for those who fall outside their scope, the *Refugees Convention* and *Refugees Protocol* are not the only source of so-called *non-refoulement* obligations. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT')²⁶ and the *International Covenant on Civil and Political Rights* ('ICCPR')²⁷ also impose on states that are parties to those treaties *non-refoulement* obligations which are not limited in application to 'refugees' within the meaning of the *Refugees Convention* and *Refugees Protocol* and which are not subject to exceptions. Finally, and very importantly, the principle of *non-refoulement* is now part of customary international law and thus binding even on states which are not parties to any of the treaties previously mentioned.²⁸

Indonesia is a party to *CAT* and the *ICCPR* and is also, of course, bound by the customary international law principle of *non-refoulement*. However, it is not a party to either the *Refugees Convention* or the *Refugees Protocol*. While Indonesia has for some years indicated an intention to accede to the two treaties, it has not acceded to them yet. Whether accession ever takes place remains to be seen. One Indonesian official explained to the Committee on the Elimination of Racial Discrimination that

Indonesia had traditionally been a transit country for refugees and asylum-seekers, rather than a destination country, which was one reason why it had not ratified the Convention relating to the Status of Refugees. The commitments arising from ratification, in particular the prohibition on refoulement or expulsion, would overburden an archipelagic State with a large ocean territory, and one which had many internally displaced persons as a result of disasters and conflict.²⁹

- 26 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1486 UNTS 85 (entered into force generally 26 June 1987 and for Indonesia 27 November 1998) ('CAT'). Article 3 provides that 'no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.
- 27 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Indonesia 23 May 2006) ('ICCPR'). Unlike *CAT*, the *ICCPR* does not actually contain an express *non-refoulement* obligation. Nevertheless, according to the UN Human Rights Committee General Comment on art 2 of the *ICCPR* which in this respect recaps its previous jurisprudence, 'the article 2 obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed': United Nations Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev 1/Add.13 (2004) para 12.
- 28 For a detailed justification of this proposition, see Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement' (Background Paper for Expert Roundtable Series, United Nations High Commissioner for Refugees, 2001) [201]–[216]. *Contra* James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 363–7; Nils Coleman, 'Non-Refoulement Revisited: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *European Journal of Migration and Law* 23.
- 29 Committee on the Elimination of Racial Discrimination, *Summary Record of the 1832nd Meeting Held at the Palais Wilson, Geneva, on Thursday, 9 August 2007: Consideration of Reports, Comments and Information Submitted by State Parties under Article 9 of the Convention*, UN Doc CERD/C/SR.1832 (14 August 2007) para 34.

Turning to domestic law, the Constitution of the Republic of Indonesia of 1945 (as amended) provides in article 28G(2) '[e]ach person has the right to be free from torture or inhuman and degrading treatment and shall be entitled to obtain political asylum from another country'.³⁰ The same right appears in Indonesia's Law No 39 of 1999 on Human Rights.³¹ Further, Indonesia's Law No 37 of 1999 on Foreign Relations contains the following provisions:

Article 25 The authority for granting asylum to foreign nationals is vested in the President and shall take into account the views of the Minister.

The exercise of said authority as described in paragraph (1) shall be regulated by Presidential Decision.

Article 26 The granting of asylum to foreign nationals shall be exercised in accordance with national legislation taking into account international law, custom, and practice.

Article 27 The President shall determine policy with respect to foreign refugees taking into account the views of the Minister.

The principles of the policy referred to in paragraph (1) shall be set forth in a Presidential Decision.³²

A presidential decree was issued in relation to Vietnamese refugees in the 1970s.³³ As far as the authors are aware, however, no further presidential decrees have been issued which relate to current processes for the provision of asylum or other refugee issues. The Indonesian government does not have any legal or administrative procedures in place to identify Convention refugees or those to whom it may owe international protection obligations for other reasons. However, Indonesia cooperates with UNHCR by allowing it to maintain a presence and, pursuant to its own mandate,³⁴ to conduct refugee status determinations in

30 *Constitution of the Republic of Indonesia* (as amended by the fourth amendment, 11 August 2002) art 28G(2). The reference to 'another country' actually suggests that the right being articulated is limited to a right to obtain asylum from countries other than Indonesia. However, the authors have encountered one source which assumes that it is not so limited: Solidarity Center/International Catholic Migration Committee, *Trafficking of Women and Children in Indonesia* (2003) 207 <<http://www.solidaritycenter.org/files/IndoTraffickingLegislation.pdf>>.

31 *Undang-Undang Nomer 39 Tahun 1999 Tentang Hak Asasi Manusia* (Indonesia) art 33(1) [Human Rights Legal Instruments trans, *Law No 39 of 1999 Concerning Human Rights (Indonesia)* <<http://hrli.alrc.net/mainfile.php/indonleg/133/>>].

32 *Undang-Undang Nomer 39 Tahun 1999 Tentang Hubungan Luar Negeri* (Indonesia) [Embassy of Ottawa trans, *Law No 37 of 1999 on Foreign Relations* (Indonesia) <http://aps.indonesia-ottawa.org/page.php?s=1000f_relations>].

33 *Keputusan Presiden Nomor 38 Tahun 1979 Koordinasi Penyelesaian Masalah Pengungsi Vietnam Di Indonesia* [Presidential Decree 38/1979 regarding Coordination of the Resolution of Issues Related to Vietnamese Refugees in Indonesia] (1979) [authors' trans].

34 *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UN Doc A/RES/428(V) (14 December 1950).

respect of asylum seekers in Indonesia.³⁵ In addition, the Indonesian Immigration Directorate General issued a Directive in 2002 which states that persons seeking asylum or refugee status are to be referred to UNHCR for refugee status determination and that ‘the status and presence of aliens holding Attestation Letters or identification cards issued by UNHCR as asylum seekers, refugees or persons of concern to UNHCR, must be respected’.³⁶ In October 2009, an official of Australia’s Department of Immigration informed a Senate Committee that, as far as she knew, ‘there has never been an instance where an Imigrasi officer has not abided by those particular directives of the director general’.³⁷ Left unmentioned were the difficulties faced by those who in fact have an entitlement to international protection in securing UNHCR recognition of that entitlement and thereby safety from *refoulement*. The rest of this article is devoted to a consideration of those difficulties.

IV GETTING INTO INDONESIA

In 2008, Hafiz, an Afghan political journalist, decided to get out of Afghanistan in order to ensure his personal security. He was sure that those who wished to persecute him had networks of agents throughout the Middle East so he decided to travel further afield. Fortunately, he managed to get a visa for Indonesia and travelled from Kabul to Jakarta by plane.³⁸ For many years, George, a Burmese human rights activist, lived in Singapore but in 2008 its government required him to leave the country. George too was able to travel legally to Jakarta by plane.³⁹ Hafiz, George and Khin-Nyunt, a Burmese man whose story is very similar to George’s,⁴⁰ all knew about UNHCR and knew that they fell within UNHCR’s protection mandate. As soon as each of them arrived in Indonesia they presented themselves at the UNHCR office. Very quickly after so doing each was formally recognised as a refugee. Unfortunately, the journeys of most of the other asylum seekers and refugees interviewed for the project were far more complicated and gruelling.

- 35 UNHCR’s presence in Indonesia is governed by the *Agreement between the Government of the Republic of Indonesia and the United Nations High Commissioner for Refugees Regarding the Establishment of the Office of the UNHCR Representative for Indonesia*, 15 June 1979. A request to UNHCR for a copy of this treaty elicited the response: ‘[w]e are not able to share these as they belong to the signatory parties and may only be shared externally with the prior approval of the concerned counterpart’. According to Marjoleine Zieck, who has seen a copy of the treaty, the wording indicates that UNHCR proposed the establishment of the office and Indonesia permitted it: Marjoleine Zieck, *UNHCR’s Worldwide Presence in the Field: A Legal Analysis of UNHCR’s Cooperation Agreements* (Wolf Legal Publishers, 2006) 162–3.
- 36 Department of Law and Human Rights, Directorate General of Immigration, ‘Directive from the Director General of Immigration — Re: Procedures Regarding Aliens Expressing Their Desire to Seek Asylum or Refugee Status to: 1. Coordinators of Immigration Affairs / Head of Immigration Affairs 2. Head of Immigration Offices in Indonesia’ (Directive No: F-IL.01.10-1297, 30 September 2002) (copy on file with authors).
- 37 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 20 October 2009, 94 (Ms Keski-Nummi, Department of Immigration).
- 38 Interview with Hafiz (Indonesia, 4 May 2009).
- 39 Interview with George (Indonesia, 2 July 2009).
- 40 Interview with Khin-Nyunt (Indonesia, 14 June 2009).

Ten of the 59 asylum seeker and refugee interviewees said they had travelled to Indonesia by plane using valid travel documents.⁴¹ Another 16 asylum seeker and refugee interviewees also travelled to Indonesia by plane, but probably used false documents. Fatima and Abdullah, a married couple, stated explicitly that they had done so. The rest said nothing about documents but in many cases did indicate that they had been assisted by ‘agents’.⁴²

Those who attempt to enter Indonesia via an airport or other formal point of entry without proper travel documents run the risk of being turned around since immigration officers posted at those ports appear not to have official guidelines for dealing appropriately with irregularly documented arrivals who might also be asylum seekers. For example, the Head of Soekarno–Hatta Airport Immigration Office seemed unaware of the possibility that he might come into contact with asylum seekers in the discharge of his border control duties.⁴³ While evidence of actual *refoulement* is of its nature almost impossible to procure, there are some indications that its occurrence upon arrival in Indonesia cannot be ruled out. For example, news reports in July 2008 mentioned the case of two Iranians who had ‘fled from Iran to pursue a living in a free country’.⁴⁴ They had arrived in Indonesia on 7 July and were attempting to board a plane to Japan on 14 July when they were arrested for travelling on false passports.⁴⁵ The news reports described their deportation as imminent and referred to the fact that another Iranian national holding a false passport had been deported on 10 July.⁴⁶

Although often physically more dangerous, it is in many ways easier for those without the correct travel documents to enter Indonesia via one of its many unofficial sea ports. Thirty asylum seeker and refugee interviewees said they had travelled to Indonesia by boat or ship.⁴⁷ Of these, 17 crossed without authorisation from Malaysia into Indonesia — often into Batam (Riau Islands province) or Medan (North Sumatra province) and usually with the assistance of smugglers. Hanif was among their number. When his son, the eldest of his three children, was 16 years old, Hanif sent him to Syria because he was concerned that his son’s work had made Iraq too hazardous for him. Not long after, Hanif and the rest of the family travelled from Iraq to Syria themselves to search for the boy but could not find him. Unable to return to Iraq because it was too dangerous, or

41 Hafiz (Afghan); Khin-Nyunt (Burmese); George (Burmese); Li (Chinese); Nasrallah (Iraqi); Redwan (Iraqi); Safwan (Iraqi); Abdo (Somali); Munawar (Somali); and Lingaratnam (Sri Lankan).

42 Fatima (Afghan); Amina (Iraqi); Laila (Iraqi); Maryam (Iraqi); Zainuddin (Iraqi); Abdullah (Pakistani); Issa (Somali); Mustafa (Somali); Aisha (Somali); Latif (Sri Lankan); Kamal (Sri Lankan); Khadija (Sri Lankan); Karaimidarran (Sri Lankan); Junaid (Sri Lankan); Devanesan (Sri Lankan); and Kalaiselvan (Sri Lankan).

43 Interview with Lukman Hakim, Head of Soekarno-Hatta Airport Immigration Office (Indonesia, 19 June 2009).

44 ‘Indonesia Combats Illegal Immigration’, *Epoch Times* (online), 21 July 2008 <<http://www.theepochtimes.com/n2/content/view/1490>>.

45 ‘Ngunrah Rai Immigration to Deport Two Iranians’, *Antara News* (online), 16 July 2008 <<http://www.antara.co.id/en/arc/2008/7/16/ngurah-rai-immigration-to-deport-two-irani>>.

46 Ibid; ‘Indonesia Combats Illegal Immigration’, above n 44.

47 The remaining three asylum seeker and refugee interviewees (Jaleel, Abidin, Busra) did not specify the mode of transport by which they had entered Indonesia.

to remain in Syria beyond the three month duration of their visas, they moved on to Malaysia which imposed no visa requirement. In Malaysia, the family kept looking for its missing member in the hope that he might have travelled there too. They encountered a man who told them that the boy had been in Malaysia but may have since moved on to Indonesia so they decided to travel to Indonesia. Miraculously, the family was reunited in Indonesia and all have now received refugee status.⁴⁸

Although many of those who enter Indonesia without authorisation manage to avoid detection by the authorities, there are many others who are not so lucky. Indonesian authorities are on the look out for groups of foreign-looking people entering or travelling within Indonesia or staying in hotels and will arrest them if their visas or other documents are suspected to be fakes.⁴⁹ A lot of effort is being put into raising awareness of irregular entry on the part of transport companies, hotels and the wider community, thus multiplying the eyes and ears which the authorities have working for them.⁵⁰ At least 18 asylum seeker and refugee interviewees were detained by Indonesian authorities upon arrival in Indonesia or shortly thereafter.⁵¹ In most cases, Indonesian authorities appear to have made detainees aware of the availability of UNHCR assistance fairly quickly even though actual contact with UNHCR was often long delayed.

In addition, asylum seekers are quite often referred to IOM instead of UNHCR in the first instance partly because of the existence of the RCA, but also because IOM is usually closer to hand,⁵² and because Indonesian officials often confuse the roles of IOM and UNHCR. This is not a huge problem since IOM will then refer asylum seekers on to UNHCR. Whether referral to either UNHCR or IOM takes place in all cases is, however, open to question. IOM's *Annual Report 2008* contained the following assessment of the RCA:

Although the above arrangements work, the interception and the subsequent handling of irregular migrants has remained a problem due to a number of factors, including loose border controls and a lack of cooperation among law enforcement agencies in the field ... Coordination between immigration and the police is also sometimes lacking and

48 Interview with Hanif (Indonesia, 30 September 2009).

49 Interview with Muhammad Setiawan, Head of Immigration Enforcement, Bogor Immigration Office (Indonesia, 20 April 2009); Interview with immigration official, Riau Islands Province (Indonesia, 1 July 2009 and 21 July 2009); Interview with Ohan Suryana, Head of Tanjung Pinang Immigration Office (Indonesia, 16 July 2009); Interview with Indonesian National Police officer (Indonesia, 30 June 2009).

50 Interview with Ohan Suryana (Indonesia, 16 July 2009); Interview with Indonesian National Police officer (Indonesia, 30 June 2009).

51 Sanjeevan (Sri Lankan); Devanesan (Sri Lankan); Vitt (Vietnamese); Selim (Bangladeshi); Ahmed (Iranian); Hamid (Afghan); Abu Nur (Iranian); Karaimidarran (Sri Lankan); Kalaiselvan (Sri Lankan); Lingaratnam (Sri Lankan); Farouq (Sri Lankan); Latif (Sri Lankan); Gunalan (Sri Lankan); Harsha (Sri Lankan); Thahn (Vietnamese); Anh (Vietnamese); Mai (Vietnamese); and Aung Hla (Burmese).

52 There are 26 IOM offices across Indonesia: IOM Indonesia, *IOM Indonesia at a Glance* <<http://www.iom.or.id/>>. UNHCR has an office in Jakarta and five staff co-located in IOM offices in Pontianak, Medan, Mataram, Makassar and Kupang.

authorities are sometimes unaware of support and resources available for stranded migrants.⁵³

Not all irregular migrants fall within the scope of the RCA, of course, and there is some evidence that persons with protection needs, who neither fall within the scope of that arrangement nor raise protection claims in unmistakable terms (eg ‘I am a refugee’), may not always be identified as persons of concern to UNHCR. Aung Hla, a Burmese man who arrived by boat in Padang (West Sumatra province) in 2001, was detained for four and a half years in three different facilities before he found out about UNHCR and asked for its help. In his words: ‘Actually, we could become refugees. But we didn’t know so we just asked for help. We couldn’t stand being detained’.⁵⁴ Aung Hla is now a recognised refugee.

As with those intercepted at ports of entry, the project did not uncover incontrovertible evidence of the actual *refoulement* of irregularly documented persons intercepted within Indonesian territory. However, once again there are indications that *refoulement* cannot be ruled out. For example, on 10 March 2008 Indonesia’s Metro TV News reported that seven foreign nationals from Burma, Bangladesh and Algeria had been arrested in three cities in East Java and were being held in a military detention facility in Surabaya. The full names and images of the detainees were included in the news story along with the information that the seven foreigners would be deported to their country of origin after being processed at their respective embassies. This is despite the fact that the Algerian national was described as being in the process of seeking asylum from a third country.⁵⁵ Similarly, news reports in May 2009 described the interception of seven Iraqis who reportedly claimed to be ‘refugees wanting to travel to Australia’.⁵⁶ While four of the people involved were in possession of refugee cards and thus referred to the UNHCR, the deportation of the other three was described as imminent.

Where UNHCR learns of interceptions and/or pending deportations of irregular movers it is proactive in seeking access to the persons concerned for the purpose of ascertaining whether they are asylum seekers or not. Thus far Indonesian authorities have complied with such requests — eventually. Of course, UNHCR is only able to intervene when it finds out in time about persons of potential concern to it.

IOM, in collaboration with the Indonesia’s Immigration Directorate General and the Indonesian National Police, is trying to deal with deficiencies in the implementation of the RCA through a project titled ‘Reinforcing Management of Irregular Migration in Indonesia through the Setting Up of a Network of

53 IOM Indonesia, *Annual Report 2008* (2009) 91–2.

54 Interview with Aung Hla (Indonesia, 13 May 2009).

55 ‘Kantor Imigrasi Jawa Timur Menahan 7 Warga Asing’ [East Java Immigration Office Detains 7 Foreigners], *Metro TV News* (online), 10 March 2008 <<http://metrotvnews.com/index.php/metro/main/news/video/2008/03/10/55059/-Kantor-Imigrasi-Jawa-Timur-Menahan-7-Warga-Asing->>.

56 ‘Tiga Warga Irak Dideportasi’ [Three Iraqis Deported], *Tempo* (online), 19 May 2009 <<http://www.tempointeraktif.com/hg/hukum/2009/05/19/brk,20090519-177090.id.html>>.

Monitoring and Coordinating Offices'.⁵⁷ The project commenced in October 2007 and is funded by Australia.⁵⁸ It includes, among other things, the provision of training 'to the relevant law enforcement officials at both local and provincial levels'.⁵⁹ According to IOM,

The subjects covered by the training included the fundamentals of international migration; international law and covenants that cover the rights of migrants; national human rights instruments and its application in the context of irregular migration; and people smuggling and trafficking in persons as a trans-national crime.⁶⁰

Such training is a good start, assuming that refugee protection issues are adequately covered. If they are not, they should be. That alone is not, however, sufficient. All officials involved in border control need to be issued with official guidelines for dealing appropriately with irregularly documented arrivals who might also be asylum seekers. Included in these guidelines should be a set of questions which must always be asked and which are designed to identify persons who should be referred to UNHCR.⁶¹ There also needs to be procedures put in place to monitor and enforce compliance with the guidelines.

V FINDING UNHCR

As demonstrated by the large number of asylum seekers presently travelling irregularly to Australia via Indonesia, many people who manage to evade detection by Indonesian authorities will simply keep travelling to an intended final destination. However, some do seek the assistance of UNHCR's office in Jakarta. At least 25 of the asylum seekers and refugees interviewed for the project did so.⁶² What is worth noting is that several of those who presented themselves at UNHCR's Jakarta office said they had only learned of the existence of UNHCR and/or its Jakarta office from fellow nationals or others whom they had met days or weeks after their arrival in Indonesia.⁶³

Safwan fled Iraq in 2007, together with his wife and baby. He didn't really mind where the family ended up as long as they were safe. He thought of fleeing to

57 IOM Indonesia, *Annual Report 2008*, above n 53, 91.

58 Ibid 91–2; Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 94 (Mr Metcalfe, Department of Immigration).

59 IOM Indonesia, *Annual Report 2007* (2008) 35.

60 IOM Indonesia, *Annual Report 2008*, above n 53, 92.

61 A requirement that every irregularly documented arrival be referred to UNHCR would impose an unmanageable and unnecessary burden on that agency.

62 Safwan (Iraqi); Maryam (Iraqi); Nasrallah (Iraqi); Abdo (Somali); Zainuddin (Iraqi); Hafiz (Afghan); Redwan (Iraqi); Ruqaiyah (Iraqi); George (Burmese); Khin-Nyunt (Burmese); Kamal (Sri Lankan); Khadija (Sri Lankan); Zahra (Iraqi); Silma (Iraqi); Amina (Iraqi); Raihan (Iraqi); Ahlam (Iraqi); Munawar (Somali); Li (Chinese); Hanif (Iraqi); Junaid (Sri Lankan); Abdul Razak (Iraqi); Harendra (Sri Lankan); Issa (Somali); and Hussein (Kurdish).

63 Interview with Junaid (Indonesia, 27 May 2009); Interview with Abdul Razak (Indonesia, 30 September 2009); Interview with Hanif (Indonesia, 30 September 2009); Interview with Harendra (Indonesia, 6 May 2009).

Syria, but the road was too dangerous. He then thought of Jordan, but the road was closed. Kuwait, Turkey and Saudi Arabia were other options he considered, but none of them were practically available for one reason or another. Eventually he decided to take his family to Iran and succeeded in doing so. Safwan hoped that the family would be able to remain in Iran until it was safe to return to Iraq. However, he discovered that the Iranian government did not tolerate Iraqis staying in the country for more than two or three months. Someone he met in Iran told him that if he got the family to Indonesia they would be able to remain for a long time so that is what he did. When he got to Jakarta he went to the Norwegian embassy because he had heard on Iraqi TV that Norway welcomed Iraqi refugees. However, the embassy directed him to the UNHCR office informing him that Norway only resettled refugees referred by UNHCR. Safwan and his family, including a second child born in Indonesia, have now been recognised as refugees by UNHCR.⁶⁴

Hussein was 18 years old when he was brought from Iraq to Indonesia by his boss who said that they were travelling on to Australia. However, Hussein's boss abandoned him in Jakarta. Not knowing what else to do, he got into a taxi and managed to communicate a desire to be taken to UNICEF. Fortunately, one of the UNICEF staff was an Arabic speaker who was able to tell Hussein about UNHCR and direct him to its Jakarta office.⁶⁵ Junaid left Sri Lanka when he was 25 years old believing that he was headed to Paris for work. Like Hussein he was abandoned in Jakarta. Junaid survived in Jakarta for some time before befriending a fellow Sri Lankan who told him about the UNHCR office.⁶⁶ Issa was 17 years old when his extended family paid for him to be smuggled out of Somalia. He too was abandoned in Jakarta. He ended up sleeping in mosques for a month and a half before running into an Indonesian army officer who told him that UNHCR might be able to assist him.⁶⁷ These young men made their way to the UNHCR office and all are now recognised refugees. Possibly they or others who found their way to UNHCR by chance would otherwise have ended up travelling onward from Indonesia. By the same token, some who have engaged in onward travel possibly would not have done so if they had realised that there was help to be had closer to hand.

In its new policy document on urban refugees, UNHCR has indicated that it aims to make information on the registration process widely available, 'disseminated as appropriate by means of posters in community centres and other places where refugees gather, as well as by radio, TV, internet and SMS messages', and also to engage in other forms of community outreach.⁶⁸ UNHCR needs to put this strategy into practice in Indonesia. Of course, Indonesia is a vast country and substantial resources would be required for adequate outreach. Australia, through

64 Interview with Safwan (Indonesia, 19 October 2009).

65 Interview with Hussein (Indonesia, 27 May 2009).

66 Interview with Junaid (Indonesia, 27 May 2009).

67 Interview with Issa (Indonesia, 27 April 2009).

68 UNHCR, 'UNHCR Policy on Refugee Protection and Solutions in Urban Areas' (Policy Document, September 2009) [57], [79]–[83].

IOM's Reinforcing Management of Irregular Migration in Indonesia project, is already funding 'raising awareness of irregular migration through information campaigns targeting both relevant government officials and local communities'.⁶⁹ Raising awareness of UNHCR's location and role in Indonesia should be an integral part of these information campaigns.

VI UNHCR REFUGEE STATUS DETERMINATION

A Registration

The first step in UNHCR's procedures for dealing with asylum seekers in Indonesia is registration. Registered asylum seekers are provided with an attestation letter/asylum seeker certificate written in both English and Bahasa Indonesia. This document includes a photograph of the asylum seeker, sets out basic details such as name and date of birth and, in more recent versions, expressly states that the bearer is a 'person of concern to the Office of the United Nations High Commissioner for Refugees, and should, in particular, be protected from forcible return to a country where he would face threats to his life or freedom, pending the final decision on his refugee status'.⁷⁰ The document needs to be renewed every month or two.⁷¹ Recognised refugees are issued with a different document which only needs annual renewal.⁷² Despite the provision of this document, it is worth noting that at least one interviewee was successfully convinced by a smuggler that they would be deported by Indonesian authorities if they overstayed their visa, despite having reported to UNHCR. The same person was later arrested in Makassar attempting to travel to Australia.⁷³

At the time of registration, asylum seekers complete a Refugee Status Determination ('RSD') form setting out the details of their asylum claims. Bangun Mitra Sejati, UNHCR's implementing partner until the end of 2003, assisted asylum seekers to complete the form at its offices and then forwarded the form to UNHCR.⁷⁴ According to Puhli, UNHCR's implementing partner from 2004 to 2007, its social workers actually interviewed asylum seekers and completed the forms for them at their offices and 'on the basis of the form and documents which are sent by Puhli, UNHCR undertakes an assessment to determine if the person in

69 IOM Indonesia, 'Irregular Migration', above n 1, 1; IOM Indonesia, *Annual Report 2008*, above n 53, 92.

70 Asylum seeker certificate issued on 2 December 2005 (copy on file with authors).

71 Interview with Safwan (Indonesia, 19 October 2009); Interview with Ruqaiyah (Indonesia, 24 October 2009); Interview with Zainuddin (Indonesia, 1 October 2009). One letter the authors have on file was issued 5 April 2002 and expired 26 April 2002. The other the authors have on file was issued 2 December 2005 and expired 27 January 2006.

72 Interview with Zainuddin (Indonesia, 1 October 2009); Interview with Safwan (Indonesia, 19 October 2009).

73 Interview with Nasrallah (Indonesia, 17 October 2009).

74 Interview with Sue Hoffman, School of Psychology, Murdoch University (Telephone Interview, 26 September 2008). Ahmed, who arrived in Indonesia in 2001, confirms this: Interview with Ahmed (Indonesia, 29 July 2009).

question fulfils the convention criteria to be recognised as a refugee or not'.⁷⁵ An Australian asylum seeker supporter, who has seen forms which were completed during this period, says some contained glaring errors. For example, one man who had three children and a wife was recorded as having no dependants.⁷⁶ UNHCR has since decided all aspects of refugee status determination ought to be handled by its own staff, so UNHCR's current implementing partner, CWS, has no involvement in the process.⁷⁷

Those among the project interviewees who had been in a position to present themselves at UNHCR's Jakarta office did not appear to have experienced much difficulty at the registration stage. One Iraqi interviewee did complain that the RSD form, which is written in English, had not been translated for him, but conceded that this may have been because he could speak English very well.⁷⁸ Other Iraqis who completed the RSD form at UNHCR's Jakarta office said they had assistance from an Arabic interpreter/translator and were able to respond to the questions on the form in Arabic.⁷⁹

The experience of interviewees who sought registration as asylum seekers while in immigration detention was quite different. A couple of Sri Lankans interviewed at a penal facility in West Aceh in August 2009 had been waiting three months for UNHCR to visit and were still waiting.⁸⁰ Other Sri Lankans interviewed said they had been in immigration detention in Jakarta for about a month in 2006 before UNHCR visited them with forms to complete.⁸¹ There are a couple of factors which seem to account for the delay between interception of asylum seekers and first contact with UNHCR. One is that Indonesian authorities prefer to finish their own investigations and processing before giving UNHCR access to intercepted persons. The other is that it takes time for UNHCR staff to arrange and execute trips to remote locations.⁸² Whatever the explanation, the goal of discouraging secondary movement is ill-served by allowing weeks to elapse between an asylum seeker's interception and his or her first contact with UNHCR. The Sri Lankans interviewed in West Aceh were still waiting for contact with UNHCR but had been visited by Sri Lankan embassy officials at the invitation of Indonesian officials who wanted assistance in identifying any Tamil

75 Yayasan Pulih, 'Penanganan Pengungsi Dari Manca Negara' [Handling of International Refugees] (Report) <<http://pulih.or.id/?lang=&page=content&id=42>>. Confirmed by interview with Miryam Nainggolam, Chair, Managing Board, Pulih Foundation (Indonesia, 26 August 2009).

76 Email from Louise Cook-Tonkin to the authors, 11 April 2009.

77 Interview with Lukman Moeslich, Project Manager, Church World Service (Indonesia, 19 May 2009).

78 Interview with Nasrallah (Indonesia, 17 October 2009). It is not clear when the form was completed but it was probably in 2007.

79 Interview with Safwan (Indonesia, 19 October 2009); Interview with Redwan (Indonesia, 17 October 2009); Interview with Ruqaiyah (Indonesia, 24 October 2009); Interview with Ahlam (Indonesia, 23 October 2009); Interview with Abdul Razak (Indonesia, 30 September 2009).

80 Interview with Harsha (Indonesia, 23 August 2009); Interview with Farouq (Indonesia, 20 August 2009).

81 Interview with Karaimidarran (Indonesia, 2 October 2009); Interview with Kalaiselvan (Indonesia, 26 October 2009). Similar findings are made in Jessie Taylor, 'Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia' (Report, November 2009).

82 Elizabeth Biok, *Australia and Refugees in the Asia Pacific* (SJD Thesis, University of Sydney, 2009) 262.

Tigers among them.⁸³ Unsurprisingly, some asylum seekers have escaped from immigration detention simply in order to get to Jakarta and access UNHCR.⁸⁴ Others have kept on going and made their way to Australia. One asylum seeker who pursued the latter course explained to an Australian court that after waiting a month himself and knowing of others who'd been waiting three months:

Of course, we were very afraid because the UN did not come to us and there was no procedures that started in order for us to be assured. So that's why I was very afraid and that's why we had to escape.⁸⁵

In light of the foregoing it is recommended that the Indonesian government introduce a policy of ensuring that intercepted asylum seekers have access to UNHCR without delay.

B Interview

As well as being asked to complete an RSD form, asylum seekers in Indonesia are interviewed. The interview usually takes place about six months after initial registration, although some effort seems to be made to expedite the processing of cases involving particularly vulnerable individuals such as children. In the case of asylum seeker families, husband and wife are interviewed separately but children are not interviewed at all.⁸⁶ Present practice in Indonesia is for the interview to be conducted by a UNHCR protection officer, via an interpreter if necessary. According to UNHCR, it uses 'qualified' interpreters.⁸⁷ However, the authors know of several cases in which a reasonably bilingual person (usually another asylum seeker or refugee) who happened to be at hand has been used as an interpreter rather than a professionally accredited person. It is a cause for concern if amateur interpreters are being used in interviews, most obviously because their language skills may not be adequate to the task but also because they would not necessarily understand that they are supposed to function as a conduit not a filter. For example, one asylum seeker used as an interpreter by Pulih explained that he often did not translate emotional statements made by those for whom he was interpreting because '[a]side from preventing the situation becoming heated, it's also difficult to translate angry or sad feelings'.⁸⁸

83 Interview with Suryo Santoso, Head of Meulaboh Immigration Office (Indonesia, 26 August 2009).

84 Interview with Latif (Indonesia, 26 August 2009).

85 Transcript of Proceedings, *R v Keis Abd Rahim Asfoor* (District Court of Western Australia, 1328/2002, Martino DCJ, 10 March 2006) 4376.

86 Interview with Maryam (Indonesia, 23 October 2009); Interview with Redwan (Indonesia, 17 October 2009).

87 UNHCR Indonesia, 'UNHCR Indonesia Fact Sheet' (Fact Sheet, February 2010); United Nations in Indonesia, *Projects in Sector: Disaster Management and Recovery* <http://www.un.or.id/projects/detail_Sector.asp?sectid=7>.

88 Arde Wisben, *Pak Dokter ... Interpreter Dengan Banyak Peran* [Mr Doctor ... Interpreter with Many Roles] (19 December 2006) Yayasan Pulih <<http://pulih.or.id/?lang=&page=article&id=125>>. See Jessie Taylor, above n 81, 28 for further documentation of interpreter-related concerns.

At the beginning of a UNHCR interview, the asylum seeker is asked whether he or she is satisfied with the interpreter provided.⁸⁹ However, it seems unreasonable to expect an asylum seeker to be able to make such a judgment at all, let alone up front. Moreover, some asylum seekers have reported that UNHCR did not heed them in cases where they complained that an interpreter did not understand their dialect or indicated a lack of confidence in the interpreter for some other reason (for example, perceived bias where the interpreter is of a different ethnicity).⁹⁰

The information which UNHCR believes it has obtained in interviews conducted using incompetent or biased interpreters may be different in important respects from the information which the asylum seeker has actually provided. Where the asylum seeker does not trust the interpreter, there is the further problem that he or she may withhold important information because of a fear that the interpreter will pass it on to potential persecutors. UNHCR is fully cognisant of such issues,⁹¹ but presumably believes that it has no practicable alternative.

There are no easy solutions to the problem of finding qualified and impartial interpreters as and when required. Insistence that only qualified interpreters whose impartiality is unchallenged be used will likely introduce significant delay and/or significant extra cost into the refugee status determination process. At the end of the day, however, it seems no more acceptable to use untrained or biased interpreters than to use untrained or biased decision makers. The risk of incorrect decisions is simply too great in either case. It is, therefore, recommended that UNHCR always use qualified impartial interpreters and that Australia underwrite the cost of doing so.

C Assessment of Protection Claims

Following the interview, the interviewing officer makes a refugee status determination on the basis of the information procured through the interview and information gathered from all the sources available to UNHCR on conditions in the country against which protection is sought.⁹² Asylum seekers are first assessed against the definition of ‘refugee’ contained in art 1A(2) of the *Refugees Convention*. If an asylum seeker is found not to meet this definition, an assessment is made about whether they have ‘other international protection needs’.⁹³ The criterion which the asylum seeker must meet to be determined to be a refugee within UNHCR’s wider mandate is that they are outside their country of nationality or habitual residence and ‘unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from

89 Hassan Ghulam, *Afghani Asylum Seekers and Refugees in the Republic of Indonesia: First Report* (Report, April 2004) 11.

90 Ibid 5, 13; Interview with Felicia Di Stefano, asylum seeker supporter (Telephone Interview, 26 September 2008); Email from Louise Cook-Tonkin to authors, 11 April 2009.

91 UNHCR, ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’ (Procedural Standards, 1 September 2005) [2-17]–[2-18].

92 For example, UNHCR offices in that country: Ghulam, above n 89, 20.

93 UNHCR, ‘Procedural Standards’, above n 91, [12-25].

generalized violence or events seriously disturbing public order'.⁹⁴ Persons found to meet the *Refugees Convention* art 1A(2) definition of 'refugee' or to have 'other international protection needs' are then assessed against the exclusion clauses in art 1F of the *Refugees Convention* and if found to fall within one of those clauses will have their protection application rejected.⁹⁵

UNHCR's across-the-board application of the *Refugees Convention* art 1F exclusion criteria leaves open the possibility that some persons who are entitled to protection under *ICCPR* and *CAT* will be denied mandate refugee status. This means that Indonesia cannot rely on UNHCR to make good its lack of a legal or administrative system for ensuring that it meets its *non-refoulement* obligations under *ICCPR* and *CAT*. Several non-government organisations have, in fact, documented instances of suspected terrorists being extradited⁹⁶ or simply 'rendered' by Indonesia to the authorities of third states in circumstances where there was a significant risk of the person being subjected to torture by those authorities.⁹⁷ In one case the risk appears to have eventuated.⁹⁸

D Notification of Initial Decision

According to UNHCR's procedural standards manual, as a general rule refugee status decisions should be issued within a month of the interview.⁹⁹ One refugee interviewed for the project, a Burmese political activist with a high media profile, received a positive decision within two weeks of his interview.¹⁰⁰ However, no other interviewee had received a decision that quickly. The next quickest was a positive decision received by a Sri Lankan refugee within two months of the interview.¹⁰¹ He too was able to point to a great deal of independent verification of his claims. Four other people with legally straightforward claims for refugee status also received positive decisions fairly quickly — five months¹⁰² in one case, six months¹⁰³ in another case, and eight months¹⁰⁴ in the other two. At the other

94 Ibid.

95 Ibid [12-26]–[12-27].

96 Although Indonesia asserts that it seeks inclusion of a *non-refoulement* provision in all its extradition treaties, it is party to extradition treaties which include no protection or inadequate protection against *refoulement*: Working Group on the Advocacy Against Torture, 'Shadow Report Prepared for the UN Committee against Torture in Connection to its Review of Indonesia's Second Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Report, May 2008) 55.

97 Amnesty International, 'Indonesia Briefing to the UN Committee Against Torture' (Report, 14 April 2008) 18–19.

98 Amnesty International, above n 97, 18–19.

99 UNHCR, 'Procedural Standards', above n 91, [4-20].

100 Interview with George (Indonesia, 2 July 2009).

101 Interview with Kamal (Indonesia, 6 May 2009).

102 Interview with Hussein (Indonesia, 27 May 2009).

103 Interview with Hafiz (Indonesia, 4 May 2009).

104 Interview with Khin-Nyunt (Indonesia, 14 June 2009); Interview with Nasrallah (Indonesia, 17 October 2009).

extreme, one interviewee received a decision (a rejection) two years after his interview.¹⁰⁵

UNHCR's decision is conveyed to asylum seekers in the form of a letter written in English stating reasons for the decision in very generic terms and, in the case of rejection, advising that they have 21 days to seek review of the decision. The authors were provided with a copy of one such rejection letter. It is a brief pro forma letter which does not provide the asylum seeker with the detailed case-specific reasons needed in order to evaluate whether the decision was based on a shaky foundation of fact and/or law.¹⁰⁶ This meant that he was poorly placed to judge whether there was any point in seeking review and disabled from make the best possible case for reversal of the original decision in the event of doing so.

A key improvement to the RSD process would be to ensure that decisions, and for that matter all written communications with asylum seekers, are in the native language of the person concerned. Just as important, rejection letters should set out as much case-specific reasoning as is necessary to enable the recipient either to understand and accept the rejection or to challenge it effectively.

E Review

According to UNHCR Indonesia statistics,¹⁰⁷ its recognition rates from 1 January to the end of October 2009 were as follows: Afghans: 87 per cent; Iraqis: 91 per cent; Burmese (mainly Rohingyas): 100 per cent; Sri Lankans: 96 per cent; and Somalis: 69 per cent. These are the kind of figures one would expect given the source countries concerned, which is comforting, but does not necessarily mean that UNHCR is making a correct decision in every case. The availability of independent review is an important safeguard against incorrect decisions. Unfortunately, independent review is something which UNHCR is incapable of providing because it is an organisation not a state. Of necessity, review of an initial negative decision is conducted by another UNHCR officer.¹⁰⁸ In other words, it is conducted by someone who will be equally subject to any institutional pressures that affected the primary decision-maker.

One project interviewee, an Iranian man, was extremely dissatisfied with both the reasons he was given for rejection at first instance and the process of review.¹⁰⁹ According to his account, UNHCR's stated reason for rejecting him was its assessment that the only problems he faced in Iran were of an economic nature. He therefore asked his father in Iran to send over title documents and the like which would prove that he was actually quite wealthy. Before the documents had arrived, however, he was summoned for a second interview which was conducted

105 Interview with Selim (Indonesia, 3 May 2009). Similar findings are contained in Jessie Taylor, above n 81, 4.

106 Similar findings are contained in Jessie Taylor, above n 81, 29.

107 Email from Peter Mares (journalist) to authors, 25 November 2009.

108 UNHCR, 'Procedural Standards', above n 91, [7-2].

109 Interview with Ahmed (Indonesia, 29 July 2009).

by a person who had just started working at UNHCR. The second interview lasted only twenty minutes and, in the asylum seeker's view, none of the questions asked were relevant to his case. He received a second rejection but unsurprisingly has not reconciled himself to it.

UNHCR notifies asylum seekers of a review decision in the form of a letter which once again is written in English and states reasons for decision in very generic terms. One such letter which the authors have on file ends with the sentence, '[p]lease note that this decision is final and your case is therefore closed'. Despite being informed that their case has been closed, many twice rejected asylum seekers approach UNHCR seeking a re-opening.¹¹⁰ According to a letter sent to one asylum seeker interviewee who unsuccessfully sought a re-opening, UNHCR only 'exceptionally' agrees to reopen a file if there has been a 'significant change in your personal circumstances', 'reliable and material new evidence' can be proffered or there is 'serious reason to believe that your claim was improperly decided'.¹¹¹ However, UNHCR in Indonesia is more accommodating of requests for a third chance than the language used in that letter would suggest.¹¹² In fact, a group of rejected Afghan asylum seekers who had been in Indonesia since 2001 (often referred to as the 'Lombok group') had their cases assessed for the fourth time in 2009, though it is doubtful that this would have occurred but for pressure which supporters in Australia exerted on the Australian government which in turn 'encouraged' UNHCR to look at their cases again.¹¹³ They were fourth time lucky.¹¹⁴ This does not necessarily mean that the previous three decisions were incorrect. Changed circumstances in Afghanistan might well account for the change in the decisions. However, the fact that UNHCR processing in Indonesia falls short of minimum standards of procedural fairness such as the use in all cases of qualified, unbiased interpreters, the provision of case specific reasons for decision in a language which the asylum seeker understands, and the provision of *independent* review,¹¹⁵ means that it is not beyond the realms of possibility that the previous three decisions were incorrect.

F Client Service

Unsurprisingly, the asylum seekers interviewed for the project were very unhappy about the delay experienced at every stage of their endeavour to gain recognition of refugee status in Indonesia. Moreover, UNHCR seemed to contribute

110 Interview with Abu Nur (Indonesia, 29 July 2009); Interview with Ahmed (Indonesia, 29 July 2009).

111 Letter from UNHCR Indonesia to Ranariddh, 26 June 2009 (copy on file with authors).

112 Interview with Lukman Moeslich, Project Manager, Church World Service (Indonesia, 19 May 2009).

113 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 20 October 2009, 86 (Arja Keski-Nummi, Department of Immigration and Senator Chris Evans, Minister for Immigration).

114 Ibid (Arja Keski-Nummi).

115 For an elaboration of these standards see, eg, Michael Bliss, "'Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 *International Journal of Refugee Law* 92; Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1.

unnecessarily to the anxiety levels of asylum seekers through poor management of expectations, for example, promising to deliver decisions by a particular date and then subjecting asylum seekers to multiple postponements,¹¹⁶ and poor communication more generally. Several asylum seekers criticised UNHCR for unresponsiveness on the occasions on which they attempted to initiate contact.¹¹⁷ In fairness it should be noted that some of these people had closed cases and were, therefore, technically no longer persons of concern to UNHCR.¹¹⁸ Other people, however, had active files but still found it difficult to get hold of anyone who was willing to answer their questions about the progress of their cases either on the phone or in person. One person was particularly bitter about the fact that anyone who wanted to see a UNHCR officer had to line up outside UNHCR's Jakarta office on a Friday even if it was raining. He said: 'We have human rights and the right to meet officers but we can't! We can only meet security guards! The guards told us to wait out there! My shoes and clothes were all wet and I had fever when I got home! The UN never cares!'¹¹⁹

The lengthy processing times and other deficiencies in UNHCR's client service performance are entirely understandable given the high ratio of asylum seekers and refugees to UNHCR staff in Indonesia. As at 1 February 2010, UNHCR Indonesia's all inclusive staff complement of 38 people was dealing with 853 recognised refugees and 1920 asylum seekers.¹²⁰ There appeared to be only 12 staff actually engaged in refugee status determination.

UNHCR's recent policy document on urban refugees contains commitments relating to reception arrangements such as the provision of appropriate facilities in waiting areas and the establishment of 'efficient appointments and referral systems' to minimise waiting times.¹²¹ Implementation of these commitments is required in Indonesia. However, better systems will only go part of the way towards remediating the deficiencies in UNHCR's client service performance. Increased staffing will also be required.

Since the propensity of asylum seekers to engage in secondary movement increases as their levels of anxiety and frustration increase, it would appear very much in the Australian government's interests to fund further UNHCR staff positions in Indonesia. If it stops there, however, it risks creating a problem for Indonesia. UNHCR's client service performance in neighbouring countries such as Malaysia, which have much larger caseloads than Indonesia, is much worse than in Indonesia and the disparity is already tempting asylum seekers to keep

116 Interview with Felicia Di Stefano, asylum seeker supporter (Telephone Interview, 26 September 2008). The asylum seeker and refugee interviewees mention this as well.

117 See, eg, interview with Abdul Razak (Indonesia, 30 September 2009); Interview with Raihan (Indonesia, 29 September 2009). Similar findings are contained in Jessie Taylor, above n 81.

118 For example, Ahmed.

119 Interview with Selim (Indonesia, 3 May 2009).

120 UNHCR Indonesia, 'Fact Sheet', above n 87.

121 UNHCR, 'UNHCR Policy on Refugee Protection and Solutions in Urban Areas' (Policy Document, September 2009) 9 [48]–[49].

travelling until they reach the ‘good’ UNHCR office in Indonesia.¹²² The wider the disparity in service standards becomes, the greater the likelihood that the numbers of asylum seekers arriving in Indonesia will increase past the limits of Indonesia’s tolerance and capacity. Since neither the goal of improving refugee protection nor that of discouraging secondary movement to Australia would be served by all UNHCR offices in the region being equally *dysfunctional*, what is needed is investment in building UNHCR capacity throughout the region. In fairness, it must be said that the Australian government recognises the need for regional capacity building and is already engaging in it to some extent.¹²³

G The Need for Independent Legal Assistance

Most of the asylum seekers and refugees interviewed for the project seemed to have little understanding of the legal substance of their case or of UNHCR’s refugee status determination procedures in Indonesia. One Sri Lankan asylum seeker thought he had been rejected by UNHCR,¹²⁴ but upon checking with an Indonesian immigration official familiar with his case the field researcher discovered that UNHCR had yet to make a first instance decision. A Vietnamese asylum seeker was very sure that his case was still being processed by UNHCR,¹²⁵ but upon checking with IOM (in whose care he was) the field researcher discovered that his case was in fact closed. Several rejected asylum seekers understood that they had been rejected but could not understand why — not surprising given the apparently generic nature of reasons provided for decisions.

One obvious way of dispelling much of the confusion presently experienced by asylum seekers and refugees in Indonesia is for UNHCR to make a far greater effort than it presently does to ensure that asylum seekers really understand everything they need to understand. One simple step in this direction would be to provide key documents in a language spoken and easily understood by the asylum seeker. An even better solution is to ensure that asylum seekers also have effective access to independent legal assistance. It was very evident to the authors that one of the rejected asylum seekers interviewed was not a refugee, but it was not evident to him. Others quite possibly were refugees but the legally relevant facts were not necessarily those which featured most prominently when they told their own stories. An independent legal adviser may well have been able to convince the non-refugee that his persistent efforts to get UNHCR to reopen his case were futile and would definitely have been much better able to distil and articulate the legal claims of some possible refugees to UNHCR than they were able to do themselves.

122 Rizal Harahap, ‘Afghan Refugees Hope to Meet with UNHCR’, *The Jakarta Post* (Jakarta) 12 March 2009, 8; Interview with immigration official, Riau Islands Province, 1 July 2009, who was reporting what asylum seekers had told him.

123 See above nn 7–8.

124 Interview with Sanjeevan (Indonesia, 1 July 2009).

125 Interview with Anh (Indonesia, 29 September 2009).

UNHCR does not object to asylum seekers having independent legal assistance,¹²⁶ but does not fund it. To the best of the authors' knowledge, none of the project interviewees actually had access to independent legal or other assistance during the RSD process. One interviewee, an 18 year old Vietnamese girl, said that her father had rejected an offer from an Australian lawyer to assist her family and some others on the proviso that his costs were reimbursed. She said that her family might have asked her aunt in Australia for the necessary money if a successful outcome could have been guaranteed but it could not.¹²⁷ Since asylum seekers may not be aware of the assistance which lawyers can provide and/or have capacity to pay for such assistance, it is recommended that they be provided with the contact details of suitably qualified free legal service providers when they first raise asylum claims with Indonesian officials, IOM or UNHCR and also have explained to them how a lawyer can be of assistance in presenting their refugee status claims.

Australian or other foreign lawyers may well be willing to provide pro bono legal assistance to asylum seekers in Indonesia, but the logistical difficulties created by distance (and the need to keep on the right side of Indonesian immigration and labour law) are likely to result in less than satisfactory arrangements. Local lawyers who provide pro bono legal services to Indonesians may well be willing to extend those services to asylum seekers but this will necessarily be at the expense of other disadvantaged groups unless development assistance is provided for increasing overall capacity. Local lawyers will also need specialised training in order to be of actual use. A lawyer with Indonesian Legal Aid in Jakarta explained that they had received a half day of training from UNHCR on the refugee definition but that they were not provided with information regarding the actual refugee status determination process. Thus far more training would be needed to equip them to represent refugee status claimants.¹²⁸ In order to ensure that there are a sufficient number of suitably qualified local lawyers to meet the needs of asylum seekers, UNHCR will have to invest heavily in lawyer training. It is in Australia's interests to underwrite this investment. In order to ensure that the provision of legal assistance to asylum seekers is not at the expense of other disadvantaged groups in Indonesia, it is further recommended that the legal assistance which is provided free to asylum seekers is in fact paid for by Australia.

VII CONCLUSION

This article has identified the difficulties which asylum seekers in Indonesia face in obtaining access to the refugee status determination process and in obtaining recognition of refugee status. It has also made recommendations for mitigating the difficulties identified. Although crucial to improving the current situation of

126 Ghulam, above n 89, 20.

127 Interview with Mai (Indonesia, 20 October 2009).

128 Interview with Edy Halomoan Gurning, Public Attorney, Indonesian Legal Aid Institute (Indonesia, 12 January 2009).

asylum seekers and refugees in Indonesia, even if all of these recommendations are implemented they will not address the most fundamental difficulty faced by refugees seeking protection in Indonesia. As UNHCR is at pains to emphasise, it cannot in any meaningful sense provide long-term protection to refugees. Only states can do that. UNHCR does have procedures in place to identify refugees and others falling within its mandate so that it can advocate on their behalf. However, in conducting refugee status determination UNHCR is inherently incapable of instituting the procedural safeguard of truly independent review and may not, therefore, correctly identify all those who fall within its mandate. Moreover, UNHCR's mandate does not cover all those who may have international protection needs. In short, there is no adequate substitute for Indonesia acceding to the *Refugees Convention* and *Refugees Protocol*, putting in place a procedurally sound protection claim determination system (which identifies not only refugees but also those protected from *refoulement* by *CAT*, *ICCPR* and/or customary international law) and, of course, providing protection to all those found to be entitled to it.

Australia is rightly trying to persuade Indonesia to accede to the *Refugees Convention* and *Refugees Protocol*,¹²⁹ but it is unlikely to make any headway unless it simultaneously offers to share the costs of domestic implementation on an on-going basis. More to the point, given that Australia is actively engaged in forcing asylum seekers who might otherwise have presented their claims in Australia to seek protection in Indonesia instead, it is surely morally incumbent upon Australia to work with UNHCR and the Indonesian government to ensure that upon becoming a party to the *Refugees Convention* and *Refugees Protocol* Indonesia will actually have the capacity to make correct refugee status determinations and to accord refugees the rights to which they will be entitled under those treaties.

129 Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, Canberra, 22 October 2009, 40 (Peter Woolcott, Ambassador for People Smuggling Issues).