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Inquiry into the Breach of Indonesian Territorial Waters

Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade

Andrew & Renata Kaldor Centre for International Refugee Law

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19 March 2014

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Committee's Inquiry into the Breach of Indonesian Territorial Waters.

The Kaldor Centre is Australia's foremost research centre on international refugee law. Based at UNSW Law, it was established in 2013 with the aim of bringing a principled, evidence-based approach to the issue of refugee law and policy in Australia.

Our submission addresses the Inquiry's third term of reference, namely 'the extent to which the incidents complied with international law', and the final term of reference, 'other matters relating to Operation Sovereign Borders'.

In summary, it is our assessment that the incursions into Indonesian territorial waters by Australian Navy or Customs and Border Protection vessels without Indonesian consent were in violation of the international law of the sea and the obligation to respect the territorial sovereignty of other States, which is a basic principle of international law.

Further, there is a significant and inherent risk that Operation Sovereign Borders breaches Australia's obligations under international refugee law and international human rights law. The interdiction and pushback of boats is also inconsistent with Australia's obligations under the law of the sea, including the law relating to search and rescue at sea, as well as the Migrant Smuggling Protocol.

If we can provide further information, please do not hesitate to contact us on kaldorcentre@unsw.edu.au.

Yours sincerely,

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Director

Dr Kate Purcell
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1. Outline of submission

The first part of the Kaldor Centre's submission explains why the incursions into Indonesian waters by Australian Navy and Customs and Border Protection vessels were in violation of Australia's international obligations under the law of the sea.

The second part of the submission analyses other likely violations of international law by Australia as a result of Operation Sovereign Borders. The Kaldor Centre has published a factsheet on this issue, which is attached for your reference.

2. Violations of international law entailed by Australia's entries into Indonesian territorial waters

The Australian Government has admitted that Australian Navy or Customs and Border Protection vessels entered Indonesian territorial waters six times during December 2013 and January 2014. In our view, these constitute clear breaches of international law. In particular, as discussed below, Australia's entries into Indonesian territorial waters cannot be justified as either 'innocent passage' or attempts to undertake 'search or rescue'. Nor does their inadvertence alter the fact that the entries were in breach of Australia's obligation to respect Indonesian sovereignty in its territorial waters. Any evidence that the officials on board acted in excess of their authority or contravened instructions will not alter the fact of breach or prevent its attribution to Australia.

a) Innocent passage

Pursuant to the UN Convention on the Law of the Sea (UNCLOS), Australia could only enter Indonesian territorial waters[1] without Indonesian consent if its 'passage' were 'innocent'.[2] Australia's actions did not fall within the meaning of 'innocent passage' for two principal reasons.[3]

First, the right of innocent passage is intended to protect freedom of navigation. 'Passage' is defined in Article 18 of UNCLOS as 'continuous and expeditious' 'navigation through the territorial sea for the purpose of (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.'[4] In the present case, the purpose of the Australian Navy or Customs and Border Protection vessels was not to navigate

[1] Waters up to 12 nautical miles seaward of the established baseline: United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, 1833 UNTS 396, entered into force 16 November 1994) ('UNCLOS'), Art 3.

[2] UNCLOS, Art 18, discussed below. See generally Donald R Rothwell, 'Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice' in Donald R Rothwell, WS Walter and Samuel Grono Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea* (Kluwer Law International, 2000) 74; see also Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing, 2013) ch 8; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 271–75.

[3] This view is consistent with that held by other international lawyers: see the comments of Professor Donald Rothwell and Dr Tim Stephens, quoted in Jonathan Swan, 'Australia May Avoid Legal Action with Swift Apology for Indonesia Breach: Law Experts' *The Sydney Morning Herald*, 17 January 2014 <http://www.smh.com.au/federal-politics/political-news/australia-may-avoid-legal-action-with-swift-apology-for-indonesia-breach-law-experts-20140117-30z8d.html>.

[4] The provision allows for stopping and anchoring, but only 'in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'

through Indonesian waters. Indeed, they were under instructions not to enter Indonesian waters.

Secondly, even if these incidents could be classified as 'passage', they were not 'innocent'. Article 19 of UNCLOS defines 'innocent' passage as that which is not 'prejudicial to the peace, good order or security of the coastal State'. Activities that would render passage non-innocent include: 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State',[5] and 'any other activity not having a direct bearing on passage'.[6] Both pushing back boats and patrolling for this purpose clearly constitute activities 'not having a direct bearing on passage',[7] and therefore cannot qualify as innocent passage.

b) Search and rescue

There is no evidence that Australia's six incursions into Indonesian territorial waters occurred in the context of a search and rescue operation. However, under the International Convention on Maritime Search and Rescue (SAR Convention), Australia can only lawfully enter Indonesia's territorial waters 'for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties' with Indonesia's consent.[8] Further, the SAR Convention only recommends the authorisation of such entry by the coastal State (i.e. Indonesia) where it is *solely* for a search and rescue purpose.[9] Indonesia may also indicate the conditions under which the mission may be undertaken. The SAR Convention also provides that, as far as practicable, Indonesia's Search and Rescue Centre or another authority designated by Indonesia shall coordinate any such search and rescue operation.[10]

c) Inadvertence of entry

Even if Australia's incursions into Indonesian waters were inadvertent, Australia is not relieved of responsibility for breaches of international law.[11] However, to the extent that Australia's obligation to respect Indonesia's sovereignty includes a duty to exercise due diligence in operations close to limits of Indonesia's territorial sea, any failure to exercise such due diligence contributes to the breach.[12]

It is relevant to note that, as required by international law, Indonesia has published the list of geographical coordinates specifying the basepoints used in its system of archipelagic baselines.[13] This enables the outer limits of its territorial waters to be determined.[14]

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[5] UNCLOS, Art 19(2)(g).
[6] Ibid, Art 19(2)(l).
[7] These purposes may also fall within the exception 'loading or unloading of … person[s] contrary to the … immigration laws … of the coastal State', as entry without a valid visa would be contrary to Indonesia's immigration laws: see Immigration Law No 6 of 5 May 2011 (Indonesia), unofficial English translation at <http://www.ilo.org/aids/legislation/WCMS_174559/lang--en/index.htm>. However, it is unclear whether the 'unloading' requires physical unloading, which may not have occurred here.
[8] International Convention on Maritime Search and Rescue (opened for signature 27 April 1979, 1405 UNTS 971, entered into force 22 June 1985) ('SAR Convention') Annex, 3.1.
[9] SAR Convention, Annex, 3.1.2. Indonesia remains entitled to agree to entry into its territorial waters for another purpose.
[10] SAR Convention, Annex, 3.1.
[11] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Art 2 and Commentary.
[12] Ibid.
[13] M.Z.N.67.2009.LOS of 25 March 2009: Deposit of a list of geographical coordinates of points of the Indonesian Archipelagic Baselines based on the Government Regulation of the Republic of Indonesia Number 38 of 2002 as amended by the Government Regulation of the Republic of Indonesia Number 37 of 2008,

Australian Navy and Customs and Border Protection vessels are equipped with charts and advanced navigational technologies that allow them to determine their position with a high degree of accuracy.[15]

d) Excess of authority or contravention of instructions

The acts of officials responsible for the navigation of Australian Navy and Customs and Border Protection vessels, as the acts of organs of the State, are attributable to Australia.[16] Any evidence that those officials acted in excess of their authority or in contravention of instructions will not prevent their internationally wrongful conduct being attributed to Australia.[17]

3. Other international law violations relating to Operation Sovereign Borders

In addition to the concerns outlined above, Australia's policy of turning back boats of asylum seekers pursuant to Operation Sovereign Borders risks violating Australia's obligations under:

a) international refugee law and human refugee law (in particular, the principle of *non-refoulement*, but also obligations with respect to the treatment of asylum seekers by Australian officials);
b) the law of the sea and the Migrant Smuggling Protocol,[18] by turning back boats within Australia's contiguous zone;
c) the law of the sea and the Migrant Smuggling Protocol, by turning back boats on the high seas; and
d) the law relating to search and rescue at sea, by failing to comply with its obligations to coordinate and cooperate with Indonesia and to ensure the delivery of rescued persons from vessels in distress to a place of safety.

a) Non-refoulement *obligations*

Australia's *non-refoulement* obligations require (inter alia) that Australia not return any person to a place where he or she would be at risk of persecution, torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life. These obligations arise

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available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm. This list has been published in (2009) 69 *Law of the Sea Bulletin* 81.

[14] UNCLOS Arts 47(8), (9). Article 47(8) of UNCLOS requires coastal States making use of archipelagic baselines to identify them on either 'charts of a scale or scales adequate for ascertaining their position' or by 'lists of geographical coordinates of points, specifying the geodetic datum'. There is no separate obligation to chart the outer limits of the territorial sea, because knowledge of the location of the baseline is sufficient to determine the location of those limits.

[15] The Australian navy's patrol boats are 'fitted with a satellite navigation system that enables the ship's position to be determined with great accuracy.': <https://www.navy.gov.au/fleet/ships-boats-craft/pb>. Customs and Border Protection 'Bay Class' vessels are similarly well-equipped: see Austal, 'Vessel Review' (23 March, 1999) <http://www.austal.com/en/products-and-services/defence-products/patrol-boats/australian-customs-38m.aspx>.

[16] Customary international law relating to state responsibility recognizes that the acts or omissions of organs of the State must be attributed to it. International Law Commission, Draft Articles and Commentary on the Responsibility of States for Internationally Wrongful Acts (2001), Art 4 and commentary.

[17] International Law Commission, Draft Articles and Commentary on the Responsibility of States for Internationally Wrongful Acts (2001), Art 7 and commentary.

[18] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (opened for signature 12 December 2000, 2241 UNTS 507, entered into force 28 January 2004) ('Migrant Smuggling Protocol').

under the Refugee Convention,[19] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[20] and the International Covenant on Civil and Political Rights.[21]

Importantly, these obligations apply within and outside Australia, such as on Australian-flagged ships (including Naval or Customs and Border Protection vessels) or where the Australian government exercises effective control over asylum seekers.[22] As Professor Guy Goodwin-Gill has observed: 'In this context, jurisprudence and doctrine have clearly detached certain obligations from territory; they have located responsibility in the acts of individuals or organs, and thereby primarily in the principle of attribution.'[23]

UNHCR's Executive Committee has stressed the importance of fully respecting the principle of *non-refoulement* in the context of maritime operations, noting that interception measures 'should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.[24]

This means that Australia must refrain from any act or omission that could foreseeably expose an asylum seeker to serious harm – whether within Indonesia itself, or to *refoulement* by Indonesia. Australia would breach international law if, by returning asylum seekers to Indonesia, it exposed them to a risk of persecution, torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life. This would be so whether such treatment occurred in Indonesia itself, or if Indonesia arbitrarily sent them to another country where they were at risk of such harm. For instance, in *MSS v Belgium and Greece*, the European Court of Human Rights said that Belgium violated its *non-refoulement* obligations under human rights law by returning asylum seekers to Greece when it was on notice of their poor treatment there and risk of *refoulement* (e.g. through many published reports).[25]

In the present case, the risk of *refoulement* derives from the fact that: (a) Indonesia does not have adequate refugee status determination procedures in place, which means that refugees may not be properly recognised and protected; and (b) the fact that in some cases,

[19] Convention Relating to the Status of Refugees (opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 April 1954) ('Refugee Convention'), read in conjunction with the Protocol Relating to the Status of Refugees (opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967).
[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987 (opened for signature 4 February 1985, 1465 UNTS 85, entered into force 26 June 1987), Art 3.
[21] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976), Arts 6 and 7.
[22] Under the Refugee Convention, the obligation is not to return 'in any manner whatsoever', and therefore this applies to extraterritorial conduct of a State: Goodwin-Gill and McAdam, above n 2, 248. Under international human rights law, see *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; 'UNHCR Intervention before the European Court of Human Rights in the Case of Hirsi and Others v. Italy' (Application No 27765/09, March 2010) <http://www.refworld.org/docid/4b97778d2.html>; UN Human Rights Committee, General Comment No. 31 (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13.).
[23] Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 *International Journal of Refugee Law* 443, 443.
[24] UNHCR Executive Committee, 'Protection Safeguards in Interception Measures', Conclusion No 97 (LIV), 2003, para (a).
[25] *MSS v Belgium and Greece* (2011) 53 EHRR 2.

the living conditions for asylum seekers and refugees in Indonesia may themselves violate human rights law (see further below).

It is not clear whether asylum seekers on board ships turned back by Operation Sovereign Borders are given any opportunity to claim asylum, but we presume they are not. Under its predecessor Operation Relex, asylum claims were not entertained.[26] If individual claims are not assessed prior to return, then Australia cannot be assured that the principle of *non-refoulement* will be respected.[27]

In assessing this risk, it is relevant to consider the protections Indonesia affords asylum seekers. Indonesia is not a signatory to the Refugee Convention[28] and does not have domestic refugee status determination procedures in place.

Under Indonesia's immigration law, any person who enters Indonesia without proper documentation is regarded as an illegal immigrant and is subject to possible imprisonment and detention pending deportation (or, if deportation is not possible, detention for up to 10 years). [29] As Human Rights Watch recently reported:

> Immigration authorities and Indonesian police arrest migrants and asylum seekers either as they cross into Indonesia or as they move towards the boats to Australia; NGOs and asylum seekers have also reported arrests in the areas outside Jakarta where many migrants live. Indonesian authorities routinely detain families, unaccompanied migrant children, and adult asylum seekers for months or even years in informal detention facilities and formal Immigration Detention Centers (IDCs). Migrants, including children, are typically detained without judicial review or bail, access to lawyers, or any way to challenge their detention.[30]

Detention facilities are often overcrowded, with inadequate sleeping facilities and poor sanitation, and inadequate nutrition.[31] Further, migrants and asylum seekers (including children) are frequently beaten within Indonesian detention centres, and in one incident, an Afghan migrant was beaten to death in an Indonesian detention centre in February 2012.[32]

For both registered refugees and asylum seekers not in detention, life remains precarious. Asylum seekers and refugees are confined to particular geographical areas and in some cases are required to live in assigned housing.[33] Refugees cannot work and children have limited access to school.[34] Asylum seekers receive no assistance from the Indonesian government and may be arrested at any time. While those with an asylum seeker certificate

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[26] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report*, 23 October 2002, para 2.68.

[27] In *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, the European Court of Human Rights found that the failure to assess individual claims was also a breach of the prohibition against collective expulsions. While the breach related to an obligation under European human rights law, the United Nations High Commissioner for Human Rights argued that this was now a principle of general international law, and one that could be extended to the high seas: see para 164.

[28] Indonesia is a State Party, however, to major human rights instruments, including relevantly the Convention against Torture and the International Covenant on Civil and Political Rights.

[29] 'Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia' (Human Rights Watch, 19 June 2013) 30 <http://www.hrw.org/reports/2013/06/19/barely-surviving-1> 30.

[30] Ibid, 25.

[31] Ibid, 53–61.

[32] Ibid, 32–41.

[33] Ibid, 68.

[34] Ibid 70–71.

may receive some assistance from NGOs, the rising numbers of asylum seekers far exceeds the capacity of NGOs to assist.[35]

Operation Sovereign Borders therefore carries an inherent risk of violating Australia's *non-refoulement* obligations. This is particularly so given that the overwhelming majority of people coming to Australia by boat are, in fact, refugees. The most recent figures from the Department of Immigration show that, in the June quarter of 2013, 85.8% of asylum seekers who arrived by boat were granted protection visas at first instance.[36]

b) Interdiction in Australia's contiguous zone

Operation Sovereign Borders risks violating international law not only within Indonesia's territorial waters, but also within Australia's contiguous zone and on the high seas.[37] In the contiguous zone, Operation Sovereign Borders is likely to exceed the exercise of control permitted under the law of the sea.

Under Article 33 of UNCLOS, in its contiguous zone Australia is only permitted to 'exercise the *control necessary to prevent infringement*' of its immigration laws within its territory or territorial sea (emphasis added). The article authorises limited preventative action in relation to infringements that have not yet occurred.

The 'control' that may be exercised in the contiguous zone does not amount to sovereignty or jurisdiction.[38] As a consequence, action to prevent infringement of Australia's immigration regulations is likely to be limited to 'inspections and warnings' and cannot extend to arrest, 'forcible taking into port', or by extension, forcible return to the high seas.[39]

In assessing what is 'necessary to prevent infringement' of Australia's immigration laws, it is further relevant that Article 31(1) of the Refugee Convention prohibits Australia from imposing penalties on asylum seekers for 'illegal entry or presence' (e.g. for entry without a passport or visa). Only very limited action to prevent the infringement of entry requirements is likely to qualify as 'necessary' where such infringement would in any case be excused.

To the extent that Australia purports to rely on the Migrant Smuggling Protocol to justify measures taken in the contiguous zone, those measures are subject to the requirements and restrictions set out in the Protocol. These requirements and restrictions are discussed below in connection with interdiction on the high seas. However, they apply equally to measures taken by Australia pursuant to the Migrant Smuggling Protocol in the contiguous zone.

Australia also remains bound by the *non-refoulement* obligations detailed above in any action with respect to asylum seekers taken in the contiguous zone.

c) Interdiction on the high seas

The principles of freedom of navigation and exclusive flag-State jurisdiction mean that interference with foreign vessels on the high seas is generally prohibited. There are limited

[35] Ibid, 67.
[36] 'Asylum Statistics—Australia' (Department of Immigration and Border Protection, 2013) 11.
[37] The outer limits of the contiguous zone lie 24 nautical miles from the established baseline (12 nautical miles from the outer limit of the territorial sea): UNCLOS, Art 33(2).
[38] Douglas Guilfoyle, *Shipping Interdiction in the Law of the Sea* (Cambridge University Press, 2009) 12.
[39] Ibid 12–13; Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330.

exceptions to this prohibition, which partly differ for flagged and stateless vessels (see below).

Other obligations apply in the context of measures taken by Australia with respect to either flagged or stateless vessels. Primarily, in the case of both flagged and stateless vessels, Australia's international obligations in respect of the principle of *non-refoulement* (discussed above) continue to apply. Article 19(1) of the Migrant Smuggling Protocol expressly provides that '[n]othing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.' Article 19(2) of the Migrant Smuggling Protocol requires non-discrimination in the interpretation and application of the measures it provides.

Where Australia relies on the Migrant Smuggling Protocol to justify the interdiction and push back of (flagged or stateless) boats (measures that would otherwise be in breach of international law), it must 'ensure the safety and humane treatment of the persons on board'.[40] Australia also has obligations under the Migrant Smuggling Protocol relating to the return of smuggled persons. Under the Protocol, Indonesia is only required to facilitate and accept the return of Indonesian nationals or permanent residents who have been smuggled.[41] If Australian authorities push back boats to Indonesia without determining whether such persons have a right of entry into that country, they may be considered complicit in the resulting breach of Indonesia's immigration regulations, and arguably in breach of the Migrant Smuggling Protocol.[42] Further, pushing back boats would appear to violate the obligation under the Migrant Smuggling Protocol to carry out the return 'in an orderly manner and with due regard for the safety and dignity of the person.'[43] These obligations would be violated if boats are pushed back that are not seaworthy. Significantly, they would also be violated if people were placed on lifeboats and left at sea where it was unclear that the lifeboat could be successfully brought safely ashore.

In relation to the last point, it must be stressed that Australia will breach requirements to ensure the safety of those it leaves in boats on the high seas whether the vessel in question is an Australian-owned lifeboat, a stateless vessel or foreign-flagged vessel. The conduct breaching Australia's obligation to ensure the safety of persons in respect of whom measures have been taken under the Migrant Smuggling Protocol is the act of leaving persons on vessels on the high seas in circumstances where their safety cannot be guaranteed. Breach in this regard does not depend upon the nationality or lack of nationality of the vessel concerned. Nor does the location of any such vessels within Indonesia's search and rescue region alter Australia's obligations or excuse or justify their breach. Leaving unsafe boats within Indonesia's search and rescue region may, however, be inconsistent with Australia's obligation to coordinate and cooperate with Indonesia in search and rescue operations.[44]

(i) Interdiction of flagged vessels

[40] Migrant Smuggling Protocol, Art 9(1)(a).
[41] Migrant Smuggling Protocol, Art 18(1)–(4).
[42] This is based upon a good faith interpretation of Article 18, in its context and in light of the object and purpose of the treaty to 'promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants': *Vienna Convention on the Law of Treaties* (opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980), Arts 26, 31; Migrant Smuggling Protocol, Art 2.
[43] Migrant Smuggling Protocol, Art 18(5).
[44] SAR Convention, Annex, Ch 3.

On the high seas, Australia can only intercept, visit (board), search or take any other action interfering with the free navigation of foreign-flagged ships (such as turning back boats) with the consent of the flag State,[45] including where the Australian authorities have 'reasonable grounds to suspect' that the vessel is engaged in people smuggling.[46]

Under the Migrant Smuggling Protocol,[47] a State party having reasonable grounds to suspect that a foreign-flagged vessel is engaged in people smuggling and wishing to take action must first notify the flag State and request confirmation of registry. The flag State must authorise any further action in relation to the suspected people-smuggling vessel, and may subject its authorisation to conditions, 'including conditions relating to responsibility and the extent of effective measures to be taken'.[48] Potential action includes boarding and searching the vessel, and if 'evidence is found that the vessel is engaged in the smuggling of migrants by sea', taking 'appropriate measures with respect to the vessel and persons and cargo on board'.[49] The flag State must also be promptly informed of the outcome of any measures it authorises.[50]

If there are no 'reasonable grounds to suspect' people smuggling, Australian vessels can only 'visit' (that is, board) boats on the high seas in limited circumstances, including relevantly if the boat is stateless.[51]

(ii) Interdiction of stateless vessels

If a vessel reasonably suspected of people smuggling is stateless, the measures that Australia can take remain limited in two ways. Australian authorities are initially only entitled to board and search the vessel for evidence of nationality and evidence of people smuggling.[52] If the vessel is genuinely stateless[53] and there is evidence of people smuggling, any further action Australia can take is expressly subject to the principle of *non-refoulement* in the Refugee Convention and other applicable domestic and international law.[54] Other 'relevant … international law' applying includes the obligation to respect Indonesia's sovereignty over its territorial waters and obligations with respect to the safety of lives at sea. Operation Sovereign Borders carries an inherent and significant risk of violating these obligations.

(d) Rescue and the safety of lives at sea

Operation Sovereign Borders carries a risk of breaching obligations relating to the 'duty to render assistance' to persons 'in danger of being lost' or in 'distress' at sea.[55] This duty

[45] The flag State is ordinarily the State in which the vessel was registered, although nationality may be conferred by other means determined by the State concerned: UNCLOS, Art 91.
[46] Migrant Smuggling Protocol, Art 8(2).
[47] Both Australia and Indonesia are parties to this Protocol.
[48] Migrant Smuggling Protocol, Art 8(5).
[49] Migrant Smuggling Protocol, Art 8(2).
[50] Ibid, Art 8(3).
[51] UNCLOS, Art 110.
[52] Ibid; Migrant Smuggling Protocol, Art 8(7).
[53] If it is not stateless, then the procedure in relation to flagged vessels described above is to be followed.
[54] Migrant Smuggling Protocol, Art 19(1).
[55] UNCLOS Art 98; International Convention for the Safety of Life at Sea (opened for signature 1 November 1974, 1184 UNTS 2, entered into force 25 May 1980) ('SOLAS') Ch V, Reg. 33. The SAR Convention aims to establish 'an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea' and 'promote co-operation among search and rescue organizations around the world and among those participating in search and rescue operations at sea': Preamble.

applies to the masters of Australian Navy and Customs and Border Protection vessels.[56] Warships, naval auxiliaries and other ships owned or operated by a Contracting Government and used only on Government non-commercial service are also encouraged to act consistently with the regulations in Chapter V of the International Convention for the Safety of Life at Sea (SOLAS),[57] including regulation 33, which sets out a ship master's obligations and indicates appropriate procedures relating to a case of distress. Under both the SOLAS and the SAR Conventions, Australia must 'ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts' and in their broader 'search and rescue region'.[58] The rescue coordination centre or rescue sub-centre responsible for a particular case of distress is required (inter alia) to 'notify the consular or diplomatic authorities concerned or, if the incident involves a refugee or displaced person, the office of the competent international organization'.[59]

At present, there is no indication that Operation Sovereign Borders is acting to fulfil duties of search and rescue or that it has exercised its duty to render assistance in cases of distress. Indeed, Operation Sovereign Borders carries an inherent risk that boats and lives may be further endangered because it turns back boats to Indonesian waters without the cooperation of the Indonesian government, leaving the boats to navigate to safety.

If Australian Navy or Customs and Border Protection vessels are involved in rescue, however, the responsible officials (as organs of the State) would be subject to Australia's *non-refoulement* obligations under international refugee and human rights law, discussed above. In addition, under SOLAS, Australia must ensure that rescued persons are delivered to a place of safety through coordination and cooperation with other States.[60] This place of safety need not be the nearest port.[61]

A policy of leaving rescued persons in unseaworthy boats, or lifeboats, on the high seas would be inconsistent with Australia's obligation to ensure delivery to a place of safety. As noted above, Australia could not be certain of the capacity of the persons on board to successfully navigate the lifeboat to a place of safety without risk of collision or running aground.

[56] UNCLOS, Art 98.
[57] SOLAS, Ch V, Reg 1.
[58] SOLAS, Ch V, Reg 7; SAR Convention, Annex, Ch 2. Details of the Australian maritime search and rescue region and other search and rescue arrangements can be found on the website of the Australian Maritime Safety Authority at www.asm.gov.au.
[59] SAR Convention, Annex, 5,5.3 (8).
[60] SOLAS, Ch V, Reg 33, 1-1 (as amended by Resolution MSC 153 (78), 20 May 2004).
[61] SOLAS, Ch V, Reg 33, 1-1.

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Factsheet

'Turning back boats'

Andrew & Renata Kaldor Centre for International Refugee Law

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What does a policy of 'turning back boats' involve?

A policy of 'turning back boats' was introduced by the Howard Government on 3 September 2001. Under this policy, named Operation Relex, the Royal Australian Navy was directed to intercept and board 'Suspected Illegal Entry Vessels' (SIEVs) – that is, boats that were suspected of carrying people seeking to come to Australia without a visa – when they entered Australia's contiguous zone (24 nautical miles from the Australian coast).[1] The Navy was directed to return these boats to the edge of Indonesian territorial waters, either by operating the boat under its own engine power or attaching the boat to an Australian vessel and towing it.[2] The aim of Operation Relex was to deter people from arriving in Australia by boat by denying them access to Australia.[3]

Operation Relex ended on 13 March 2002 to enable information relating to the operation to be made available to the Senate Select Committee's Inquiry into a Certain Maritime Incident.[4] It was succeeded by Operation Relex II, which commenced on 14 March 2002 and ended on 16 July 2006.[5]

The Abbott Government's policy is to turn back boats 'where it is safe to do so'.[6]

What operational challenges are posed by turning back boats?

Past experience suggests that a policy of turning back boats is fraught with significant risks. The challenges involved in intercepting and turning back boats under Operation Relex were documented in the Senate Select Committee's Inquiry into a Certain Maritime Incident.[7] Under Operation Relex, 12 boats were intercepted, although only four were turned back to Indonesia.[8] Three SIEVs sank at some point during the Navy's operations: two lives were lost in the process, and the rescued passengers were taken to detention centres on Christmas Island, Manus Island (Papua New Guinea) and Nauru for processing.[9] The passengers on the remaining five SIEVs were also taken to detention centres for processing.[10] Even in the four 'successful' cases where SIEVs were turned back to Indonesia, the Navy was required to deal with incidents such as threats and acts of self-harm, aggression towards members of the boarding party, and acts of sabotage to the boat.[11]

In total, 17 SIEVs were intercepted under the Howard Government, although only five were turned around.[12] The fifth and final boat was turned back in November 2003, under Operation Relex II.[13]

According to evidence provided by Vice Admiral Ray Griggs at a Senate Estimates Hearing in 2011:

> There are risks involved in this whole endeavour. As I said, there were incidents during these activities, as there have been incidents subsequently, which have been risky. There have been fires lit, there have been attempts to storm the engine compartment of these boats, there have been people jumping in the water and that sort of thing. Again, I am going back to 2001.[14]

Similar concerns were expressed by retired Admiral Chris Barrie, who was Chief of the Australian Defence Force during Operation Relex,[15] and in a Border Protection Command report obtained by *The Australian* in 2012 under Freedom of Information laws.[16]

Given that boats coming to Australia are commonly unseaworthy and overcrowded,[17] it seems that turning back boats and leaving them at the edge of Indonesian territorial waters would seldom be 'safe'. Indeed, during Operation Relex, a boat which was 'successfully' turned around sailed for 12 hours towards Indonesia before it ran aground, about 300 or 400 metres from an island. Three people reportedly drowned trying to reach the shore.[18]

According to defence sources, the only 'safe' way of returning a boat would be for the Australian Navy to transfer control of the intercepted boats to the Indonesian Navy at the edge of Indonesian territorial waters, or alternatively to transport intercepted boats directly to Indonesian shores.[19] Both of these would require the cooperation of the Indonesian Government. However, to date, Indonesian cooperation has not been forthcoming.[20] In May 2013, Indonesia's ambassador to Australia, Nadjib Riphat Kesoema, stated 'I think it's not possible for the Coalition to say that it [the flow of boats] has to go … back to Indonesia, because Indonesia is not the origin country of these people.'[21] In September 2013, an Indonesian Member of Parliament, Tantowi Yahya, described the Coalition's policy as 'offensive' and 'illegal', and expressed concern that the policy would impinge upon Indonesia's sovereignty and 'might potentially jeopardise our already good relationships in the past'.[22] However, the Coalition has claimed that cooperation is possible.[23] In October 2013, Prime Minister Tony Abbott visited Jakarta and met with President Susilo Bambang Yudhoyono. During his two-day visit, the Prime Minister emphasized the importance of bilateral cooperation to 'stopping the people-smuggling trade' and expressed Australia's respect for Indonesia's sovereignty.[24] The Prime Minister indicated that 'operational details' would be the subject of further talks 'at ministerial and official levels', and secured the agreement of the Indonesian President to hold future bilateral talks on the 'people-smuggling' issue.[25]

There are also other risks inherent in a policy of turning back boats. According to Associate Professor Savitri Taylor at La Trobe University, '[a]part from the risk of death by drowning, the unsanitary and volatile conditions on board such vessels would constitute a serious risk to health and well-being especially of children'.[26]

Is turning back boats consistent with international law?

Under the UN Convention on the Law of the Sea (UNCLOS), vessels on the high seas (all parts of the sea, except the territorial sea or the internal waters of a country) are subject to the exclusive jurisdiction of the State in which the vessel is registered (the 'flag state').[27] Hence, without the consent of the flag state, Australia has no right to intercept and turn back boats on the high seas.[28] Apart from limited situations where the exercise of universal jurisdiction is permitted (such as to prohibit the transportation of slaves or to repress piracy[29]), Australia is only allowed to board a boat (a) if is a stateless vessel or (b) in the case of a rescue operation.[30] Moreover, although Australia is permitted to 'exercise the control necessary' to prevent infringement of its immigration laws within the contiguous zone,[31] the requirement of necessity mandates a proportional response in each case. One may well question whether boarding a boat and forcibly returning it to Indonesia constitutes a proportional response in the circumstances.[32] There is support for the position that the power to prevent infringement of laws in the contiguous zone would 'merely entail a right to approach, inspect and warn a vessel, rather than to take enforcement measures such as arrest, diversion or the forcible escort to a port'.[33] In any case, Australia's exercise of jurisdiction in the contiguous zone is limited by its obligations under international refugee law and human rights law.[34]

Australia would be at risk of breaching international refugee law and human rights law if it turned back boats without assessing refugee claims made by people on board. Specifically, it would be at risk of breaching its obligation of *non-refoulement* under the Refugee Convention, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which require Australia not to return people to countries where they face a risk of persecution and other forms of serious harm.[35] Indonesia is not a party to the Refugee Convention and refugees in Indonesia are treated as illegal migrants, liable to detention and deportation.[36] By turning boats back to Indonesia, Australia is therefore at risk of breaching its *non-refoulement* obligations. This is the case irrespective of whether Australia is able to secure Indonesian cooperation on its policy of turning back boats, since a State cannot 'contract out' of its *non-refoulement* obligations or transfer responsibility for its obligations to another State.[37]

The likelihood of Australia breaching the principle of *non-refoulement* is significant, especially since the overwhelming majority of people coming to Australia by boat are, in fact, refugees. The most recent figures from the Department of Immigration show that, in the March quarter of 2013, more than 90 per cent of asylum seekers arriving by boat were found to be refugees.[38] This is consistent with data from previous years: in 2010–11, 93.5 per cent of boat arrivals were refugees, and in 2011–12, 91.0 per cent were refugees.[39] Yet, during the Senate Select Committee's Inquiry into a Certain Maritime Incident, when Real Admiral Smith was asked whether there were any processes in place under Operation Relex to identify potential refugees on SIEVs and handle their claims, he responded:

> It had no relevance for us. Our mission was clear – that is, to intercept and then to carry out whatever direction we were given subsequent to that. The status of these people was irrelevant to us ... Claims from the UAs [unauthorized arrivals] were not factors to be taken into account in terms of how we conducted that mission.[40]

Australia also has obligations to render assistance to those in distress at sea, in accordance with UNCLOS, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue.[41] Australia could be in breach of these treaties if it turned back unseaworthy boats and thereby placed lives at risk.[42]

Do other countries turn back boats?

Some other countries also turn back boats, but as explained above, the legality of doing so is highly questionable.

Since 1981, the United States has had a policy of intercepting and turning back boats carrying people seeking to enter the US mainly from Haiti, Cuba, the Dominican Republic and the Bahamas.[43] In contrast to the unilateral nature of Operation Relex, the US returns boats to these countries pursuant to agreements with these countries.[44] The approach of the US towards potential refugee claims depends on the country of origin of the individuals concerned. Under current US policy, Cubans who are intercepted at sea are taken to Guantanamo Bay, where they are screened and returned to Cuba only if they are found not to have a protection claim.[45] On the other hand, intercepted Haitians are subjected to a 'shout test': they are not advised of their right to seek asylum, and only those who express a fear of returning receive a shipboard screening.[46] Those who are found to have a 'credible fear' are then transferred to Guantanamo Bay in Cuba for refugee status determination.[47] Although the US policy in relation to identifying and processing asylum claims has been criticized as far from adequate,[48] Operation Relex contained no safeguards at all to identify potential protection claims (and nor do the Coalition's current proposals).

In the European Union, Frontex (the EU's border management agency) has coordinated a number of joint missions to intercept and return boats. For example, Frontex has worked with Spain to return boats to Cape Verde, Mauritania and Senegal, countries with which Spain has agreements in place.[49] There is little data publicly available about Frontex operations, including whether any asylum claims have been made in the course of interceptions, which raises the concern that Frontex operations may involve breaches of international law.[50]

From May 2009, Italy began intercepting and returning boats to Libya pursuant to an agreement with that country.[51] The policy contained no safeguards to identify and protect refugees, and was suspended after the European Court of Human Rights ruled in 2012 that it violated the European Convention on Human Rights (ECHR) and the principle of *non-refoulement*.[52] In particular, the Court held that Italy had breached its obligation to protect the applicants from torture and inhuman or degrading treatment or punishment (ECHR Art 3). By returning the applicants to Libya without assessing whether they were in need of protection, Italy exposed the applicants to the risk of direct *refoulement* (due to the risk of harm contrary to ECHR Art 3 in Libya) and also indirect *refoulement* (due to the risk that Libya would expel the applicants to their countries of origin, where there was a risk of harm contrary to ECHR Art 3).[53] Importantly, the Court held that the principle of *non-refoulement* applied extraterritorially (that is, on the high seas) and not just on Italian soil or within Italian territorial waters.[54]

In 2013, Thailand turned back boats of Rohingya people fleeing Burma following the conflict between Buddhists and Muslims in the state of Rakhine in Burma.[55] UNHCR expressed grave concern about these pushbacks and also about reports that shots were fired at Rohingya people during the interception of a boat.[56]

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