

Stopping the hordes: a critical account of the Labor government's regional approach to the management of asylum seekers

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In October 2009 an Australian customs boat, the *Oceanic Viking*, sat in an Indonesian port for three weeks waiting for a decision to be made about the fate of the 78 Sri Lankans on board. The Australian Prime Minister had asked, and the Indonesian President had agreed, that the asylum seekers be processed in Indonesia. Neither side anticipated the response of local authorities, who vehemently opposed the arrangement, accusing their own and the Australian governments of using their province as a dumping ground. This development added an extra level of complexity to an already complicated situation in which senior Indonesian bureaucrats had obstructed the implementation of the agreement and asylum seekers refused to disembark. This paper chronicles the unfolding of the crisis, arguing that its resolution depended on interplay of both Australian and Indonesian processes and exploring the implications of the crisis for the regional elements of the Rudd government's policy on asylum seekers, which relied on the co-operation of countries where asylum seekers transit en route to Australia. Highlighting the limitations of bilateral co-operation in this area, this essay reveals the pressure on Australia's political leadership to find for alternative solutions in the region.¹

Whither with the Oceanic Viking

The *Oceanic Viking* rescued a group of Sri Lankan asylum seekers on 18 October 2009 in Indonesia's search and rescue zone. The distress call was picked up by Indonesian authorities who then asked Australia to assist. Australia's *HMAS Armidale* instructed the *Oceanic Viking*, a ship contracted to Customs in the area at the time, to inspect the vessel. Upon arrival, Australian customs officials found that the crew had deserted the boat and its passengers. Reports suggest that the crew had drilled holes in the hull and damaged the rudder before leaving the ship. In accordance with its bilateral search and rescue agreement with Indonesia, the Australian government transferred the passengers to the *Oceanic Viking* and began

deliberations on where the passengers should be set ashore. Amendments to the Safety of Life at Sea and Search and Rescue conventions require the country with responsibility for the search and rescue zone to ensure that a 'place of safety' is provided.² However, Indonesia is not a signatory to this convention, and Australian governments have not always been successful in convincing the Indonesian government that it is responsible for asylum seekers who depart from Indonesian ports and are subsequently rescued at sea.

In the absence of a solid international framework, Australia has sought greater clarity about Indonesia's role in the Indian Ocean through bilateral agreements such as the 2004 Arrangement for Coordination of Search and Rescue Services, which demarcates the spaces for which Australia and Indonesia are responsible. Acknowledging the presence of Australian territory in the Indonesian zone, the treaty also requires Australia to assist Indonesia in its efforts to perform search and rescue operations. Australian authorities provide information to Indonesian authorities about the location of vessels in distress, help secure the commitment of privately owned vessels to render assistance, and have also reportedly repaired boats at sea. In line with the stipulations of the Search and Rescue Convention, Indonesia's Ministry of Transport permits these vessels to dock in Indonesian territory. In addition, Australian and Indonesian authorities have agreed that Indonesia will allow those rescued in its search and rescue area to alight in Indonesian territory regardless of their migration status. It was thus never a question for the Australian government about whether or not the 78 Sri Lankans on board the *Oceanic Viking* should be landed in Indonesia. Rather, it was a question of which port.

However, the *Oceanic Viking* was not just any boat. It was an Australian government vessel. This meant that Indonesia's Ministry of Transport could not issue port clearance, which required permission from the Ministry of Foreign Affairs. As a result, the *Oceanic Viking* remained in the rescue area for almost three days while Australian and Indonesian authorities negotiated the fate of the asylum seekers. When Prime Minister Rudd attended the Presidential inauguration of Susilo Bambang Yudhoyono on 20 October in Jakarta, he met with Yudhoyono to discuss how the case should be handled and obtained a verbal agreement that the Sri Lankans could disembark in Indonesia. In return, he promised to cover the cost of accommodating and processing them as well as providing more funding for intelligence, interceptions and the construction of facilities to bolster Indonesia's capacity to control people smuggling within its territory. Rudd announced the agreement to the Australian Parliament on 21 October as Yudhoyono instructed the Indonesian Ministry of Foreign Affairs to co-ordinate the roles each state body should play in the reception and processing of the asylum seekers.

Some senior officials in the Indonesian Ministry of Justice and Human Rights disapproved of the Rudd–Yudhoyono agreement, but the *Oceanic Viking* was given clearance to dock in Merak Port on 22 October. In response, the regional office of the Ministry in Merak made public statements about the limited capacity of the area’s detention facilities to accommodate more asylum seekers. The District Head also raised this issue in the media. Criticisms centred on the central government’s failure to take into account that there were 255 asylum seekers in the port who had refused to disembark until they met with the United Nations High Commissioner for Refugees (UNHCR) to discuss the prioritisation of their claims. Their boat, the *Jaya Lestari*, had been intercepted in Indonesian waters by Indonesia on instruction from Australia under the bilateral framework for controlling Australia-bound people smuggling. Under this agreement, Indonesia was responsible for detaining ships that do not fulfil legal requirements for passage through, or carriage of passengers within, Indonesian territory. However, the Indonesian and Australian governments at this time had not yet discussed the possibility of transporting asylum seekers picked up in international waters to Indonesian ports on Australian-flagged ships.

The *Oceanic Viking* remained anchored in Merak Port for two days but on 24 October was redirected by Indonesia to the Riau Islands, east of Sumatra and south of Singapore, where the Australian government had partially funded the construction of detention facilities for unlawful migrants. When it became clear that they were going to be processed in Indonesia, male asylum seekers went on a hunger strike. A large number of passengers already held UNHCR documents attesting their claim to refugee status and, frustrated by the lengthy resettlement process, had attempted to pursue those claims in Australia. Indonesia and Malaysia do not accord asylum seekers a unique migration status, treating them instead as unlawful migrants. Unlawful migrants risk arrest and detention, and in Malaysia also fines and corporal punishment. By contrast, Australia is signatory to the refugee conventions and – although asylum seekers are detained and often treated badly – has mechanisms in place to prevent asylum seekers from being treated as unlawful migrants. Partly motivated by the influential discourse about ‘queue jumpers’, which dominates the debate around asylum seekers in Australia, the Rudd government refused to entertain the demands of the *Oceanic Viking* asylum seekers to be processed in Australia, but promised that Australia would intervene to expedite the resettlement process if the hunger strike ended.

The *Oceanic Viking* arrived in the Riau Islands on 26 October. The weather was poor, preventing Indonesian officials from boarding the boat. The following day, health practitioners, senior officials from the Ministry of Foreign Affairs, the Ministry of Justice and Human Rights, the National Police, and Customs inspected the ship. However, the asylum seekers refused to co-operate, rejecting health checks and requests for personal details. Indonesian officials made it clear that they were prepared to

accommodate the asylum seekers but that Australia had to get them to disembark. Australian officers reportedly used force in the 2001 transfer of asylum seekers to Nauru, actions which resulted in the temporary cessation of operations by its government. When questioned in parliament, Prime Minister Rudd refused to rule out a similar use of force on the *Oceanic Viking*. The Indonesian Minister for Foreign Affairs announced that the method for removal was still being negotiated at this time, and the National Police commented that the use of force was still an option. It was under this cloud of uncertainty that the *Oceanic Viking* sailed into Sri Bintan Port in the Riau Islands' provincial capital, Tanjung Pinang.

The issue of how the asylum seekers were to be removed was quickly overshadowed by other events. The Governor of the Riau Islands, Ismeth Abdullah, publicly rejected the decision to allow the *Oceanic Viking* to berth, accusing Australia of treating his province like a dumping ground. The Chair of the Regional People's Representative Council also criticised the arrangement, stating that it was 'humiliating' for Indonesia. Members of the provincial government claimed that they had not been consulted, and warned that the President needed to formally inform them of his plans for the disembarkation to proceed. The Ministry of Internal Affairs responded by attempting to allay concerns about the implications of the arrangement for the Riau Islands. During the negotiations that followed, the Governor conceded to the demands of the central government after receiving assurances that the asylum seekers would leave the *Oceanic Viking* voluntarily; that they would not be allowed to live in the community; and that they would not be permitted to stay longer than four weeks. Australia had to agree to these arrangements if the 78 asylum seekers were to disembark in Indonesia.

Indonesia and Rudd's regional strategy for combating people smuggling

Indonesia is a strategic embarkation point for asylum seekers attempting to enter Australian territory.³ The Keating government coined the term 'secondary movers' for asylum seekers who do so, noting that they do not fear political persecution in Indonesia, and so should be seen differently to asylum seekers coming directly to Australia. However, it imposed mandatory detention for both secondary movers and other unauthorised arrivals while their claims to refugee status were processed. The Howard government maintained this policy, and introduced temporary protection visas for those who qualified, sending a message to other 'queue jumpers' that asylum seekers needed to apply for visas in third countries or enter Australia through an immigration checkpoint to have any chance of obtaining permanent residence or citizenship. This policy was changed by the Rudd government in recognition of the principle that asylum seekers, if found to be refugees, should have access to permanent protection visas regardless of the method by which they entered Australian territory.

Prime Minister Rudd decided to maintain the Howard government's excision of Australian territory from the migration zone in order to minimise the attractiveness of the sea route through Indonesia. That excision removes all islands that form part of northern Queensland, the Northern Territory and Western Australia, as well as island territories in the Indian Ocean. Any asylum seekers who land in these excised territories are deemed to be 'offshore entry persons'. The express purpose of the excision is to deny people landing in these areas automatic access to Australian systems for processing claims for settlement under the Refugee and Humanitarian Program, and to the Australian courts, where applicants can challenge rejected applications. Offshore entry persons are required to undergo the non-statutory Refugee Status Assessment which determines whether they will be granted access to the onshore system. While onshore applicants are held in detention centres on the mainland, offshore asylum seekers are detained on Christmas Island, an offshore territory host to an AUD 400 million detention facility. Decisions concerning both groups should be made within 90 days of arrival. Unsuccessful asylum seekers are deported and successful applicants typically receive permanent protection in Australia.

Indonesia's participation in Australia's regional response to asylum seekers was key to the Rudd government's border protection program and a cornerstone of its asylum seeker policy. The Rudd government earmarked aid in the form of patrol boats, surveillance aircraft and communications equipment to expand Indonesia's ability to detect and disrupt people smuggling within its jurisdiction. Australia also provided financial assistance to expand the capacity of Indonesia's detention facilities to hold secondary movers. The densest concentration of these detention facilities can be found along the Strait of Malacca and on the north coast of Java. The majority of detainees in these areas come from Afghanistan, Iraq and Sri Lanka; have arrived via Malaysia; and plan either to stay in Indonesia or move onto Australia. Immigration law in Indonesia stipulates two months' imprisonment for unlawful entry. However, asylum seekers spend much longer in detention facilities partly because of the time it takes to establish their identities. An official at the Indonesian Embassy in Kuala Lumpur explained that immigration authorities were formerly relaxed about the detention of asylum seekers, allowing them to move and even make a living in the local community despite it being illegal under Indonesian law. As a condition for Australian funding, however, officials responsible for operating Indonesia's detention facilities are required to guarantee the detention of asylum seekers until they have either been resettled by the UNHCR or deported.

The Australian government has identified the lack of specific laws that apply to people smuggling as a core weakness to Indonesia's ability to control the practice within its territory. The handling of the *Jaya Lestari's* owner, Captain Bram, has been cited as evidence that tougher laws are needed to eradicate people smuggling in the region.⁴ Indonesian courts returned the

Jaya Lestari to Bram in spite of the fact that the vessel was used in an attempt to smuggle unlawful migrants to Australia. The Rudd government viewed this kind of 'soft response' to people smuggling as contributing to the scale of the practice in the region. As part of its program to address this issue, the Australian Federal Police pushed for the establishment of an anti-people smuggling unit within the Indonesian National Police, through which they can make recommendations for policies to deal with people smugglers more harshly. Importantly, however, Australian policy recommendations are not always adopted. For example, the Indonesian National Police have resisted Australian pressure to use provisions in the anti-trafficking law to discipline people smugglers, arguing that people smuggling and human trafficking are different crimes.⁵

To 2009, Australia had co-ordinated 90 operations to disrupt people smuggling in Indonesia, including the *Jaya Lestari's* last voyage, which received intense coverage during the *Oceanic Viking* affair. Acting on information provided by the Australian Federal Police, Indonesian authorities intercepted the vessel while it was still in Indonesian territorial waters and forced it to dock. The fact that asylum seekers had refused to disembark was considered an internal issue for Indonesia and Rudd ignored calls by those on board for Australia to intervene and ensure that their claims for refugee status were processed in a timely manner. By contrast, the asylum seekers on board the *Oceanic Viking* were subject to Australian processes within Indonesian territory. In deciding to use the regional framework built to disrupt people smuggling, the Rudd government was attempting to avert further criticism at home that its 'soft' approach to asylum seekers was responsible for a rise in unauthorised arrivals; but in doing so, made the *Oceanic Viking* case a bilateral issue whose outcome would ultimately be decided by both Australian and Indonesian processes.

Having sought to transfer asylum seekers to Indonesian territory, the Australian government was forced to engage with Indonesia to solve the problem. Asylum seekers' refusal to disembark without assurances that they would be processed in a timely way, combined with Indonesia's ultimate refusal to permit forced removal, meant that the Rudd government had to negotiate in ways that it would not have countenanced in other circumstances. Rudd affirmed that he would not allow asylum seekers to choose where they were processed. However, he promised that the Australian government would guarantee maximum processing times to entice the asylum seekers to disembark. Asylum seekers holding UNHCR documents would be resettled in four weeks – meeting the demands of the provincial government in the process. In addition, he guaranteed that asylum seekers not yet registered would be processed within twelve weeks, in line with international and Australian best practice. Government officials in Indonesia have confirmed that by January 2010 almost all asylum seekers had been moved on. A few were accepted by Australia, but the majority were sent to a UN transit facility in Romania where they awaited

resettlement in third countries. Commending Australia for keeping its word, Indonesian officials added that the Sri Lankan asylum seekers who had been admitted to the same facility nine months before the arrival of the *Oceanic Viking* were still there.

Conclusion

The *Oceanic Viking* incident demonstrated that it is necessary to have firm guidelines concerning the provision of a 'place of safety' to asylum seekers rescued in the Indian Ocean. The case highlighted a grey area in the de facto agreement which has hitherto seen asylum seekers picked up in the Indonesian search and rescue zone by privately owned vessels delivered to Indonesian ports. Australia's attempt to do land asylum seekers using a government vessel was met with intense resistance by public officials who interpreted it as an affront to Indonesian sovereignty. The ensuing crisis strained bilateral relations with Indonesia and provided the Liberal-National Coalition with ammunition for their claims that the government's asylum seeker policy was flawed. Prime Minister Rudd may have had an agreement with the Indonesian President, but the fact remains that Indonesia is not signatory to the Search and Rescue Convention, and so had no national legal provision to compel the state to offer a 'place of safety'.

The Rudd government's experience with the *Oceanic Viking* revealed the limits of bilateral co-operation to protect Australia's borders against unauthorised arrivals. The Indonesian government recognises the high premium that Australia puts on border protection in the bilateral relationship, and has gone to considerable lengths to respond to Australian calls to internally manage people smuggling. However, the events that followed the decision to allow the *Oceanic Viking* to land asylum seekers in Indonesia demonstrated that consent of the President alone may not always be sufficient to ensure the accommodation of Australian demands. They also added pressure on the Australian government to pursue an alternative regional policy which did not rely so heavily on Indonesia for regional processing.

Ultimately the impasse was resolved when the two governments agreed to use a combination of Indonesian, Australian and international processes in order to ease the strain this case had put on the bilateral relationship. But cases of ambiguous jurisdiction are not always so easily solved. As Indonesian bureaucrats involved in the handling of the *Oceanic Viking* explained, in their experience, the term 'international issue' is a euphemism for 'nobody's problem'. Regional solutions do offer a way in which to address this ambiguity, and will remain a primary strategy in the Australian government's attempts to 'stop the boats'. However, as the reaction to Prime Minister Gillard's pre-2010 federal election proposal to seek the establishment of a UNHCR facility in Timor-Leste signalled, this route promises to be anything but smooth sailing.

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Endnotes

1. This account was constructed using interview data, parliamentary minutes, articles from the Australian and Indonesian press and government documents.
2. A place of safety is defined as a 'location where rescue operations are considered to be terminated, and where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the survivors' next or final destination.' It is not necessarily the closest port. Resolution MSC.167 (78) was adopted in May 2004 by the Maritime Safety Committee of the International Maritime Organization.
3. The Australian Federal Police and the Indonesian Embassy in Malaysia have identified the Port Klang area to the west of Kuala Lumpur as a major transit point for individuals attempting to seek asylum in Australia without authorisation to enter.
4. With the assistance of Australian intelligence, Bram was arrested in 2001 and 2007 by the governments of Cambodia and Indonesia for involvement in people smuggling. In Cambodia he was released on a technicality. In Indonesia he was sentenced to two years' imprisonment for transporting people he knew to have entered the country illegally.
5. A senior Indonesian police officer explained that the Australian Federal Police are starting to understand the distinction Indonesia makes between these crimes, adding that they do indeed need a law that focuses on people smuggling, but that it is just one of many laws under consideration in parliament.