employer from which employees are paid. There is then no problem of tracing assets through an insolvent company nor delays in pursuing claims through an external administration, such as liquidation. Another benefit is that the insurance scheme uses existing administrative structures such as the ISC. However, it should be noted that there are different models of wage earners protection institutions. The Harmer Inquiry into insolvency in 1988[3] mooted that employers could pay into a Fund at the time of payment of tax, and that payouts to employees could be administered by the already appointed insolvency practitioner (such as the liquidation). In another paper, this author has suggested a fund to be paid by employers.[4] Administration of the fund could be undertaken by the ATO on a cost neutral basis because of the possibility of investment income received from the employer contributions. The levy that was suggested was an equal contribution across all industries and levied per employee. Perhaps a levy could be paid at the time of payment of the company's annual return to the Australian Securities and Investment Commission.

In many other countries these wage earner protection funds or other institutions are commonplace and have been successful in getting employees' entitlements met upon insolvency.

The Crosio Bill has not been supported by the Government and the Opposition has indicated it will want to make amendments. However, it is likely that the Bill could lapse if the Government calls an election. Should Australia have a Labor Government in the near future then there is a strong likelihood of similar legislation being enacted, as guarantee funds form part of the stated policy of both the ALP and ACTU.

Christopher Symes teaches law at Flinders University, South Australia.

References

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2. These are based on the figures referred to by Brennan, McHugh, Gummow, Kirby and Hayne JJ in *Patrick Stevedore v MUA* 72 ALJR 783 at 889.
3. ALRC, 'General Insolvency Inquiry', Report No. 45, para. 723.
4. Symes, C.F., 'The Protection of Wages When Insolvency Strikes', (1997) 5 *Insol.LJ* 196.

INTERNATIONAL LAW

Embassies, asylum-seekers, international law and politics

MYINT ZAN reports and comments on a recent refugee incident in Malaysia.

A British Broadcasting Corporation (BBC) report of 11 April 1998 stated that several people, ostensibly from the Indonesian province of Aceh, had apparently entered the compounds of the Embassies or diplomatic missions of Brunei, France, Switzerland and the United States in Kuala Lumpur, Malaysia. The Indonesians (Achenese) did so with the intention of seeking asylum in those countries. However (at the time of writing), all of the embassies, with the exception of the United States, had expelled the would-be asylum-seekers and handed them over to the Malaysian authorities. It is expected (if it has not already occurred) that they will, in turn, be handed over to the Indonesian authorities. The United States Embassy (at the time of writing) has provided the Achenese refugees temporary protection inside the Embassy compound and is apparently in the process of considering the Indonesians' applications for asylum.

The same BBC news report also mentioned a separate incident in which 500 Indonesians had entered the compound of the United Nations High Commissioner for Refugees (UNHCR) Office in Kuala Lumpur. About 45 out of the 500 have been determined by the UNHCR to have refugee status. In the same broadcast, during an interview with Ms Sidney Jones of Asia Watch of New York, Jones alleged that the Malaysian authorities had sent back *all* of the Indonesians to Indonesia, *including those who have been determined by the UNHCR office in Kuala Lumpur as refugees*. The sending back of the UNHCR-recognised refugees, Jones claimed, violated the international legal principle of *non-refoulement*, which in effect prohibits the expulsion (*refouler*) of those refugees to the frontiers or territories of those countries in which their lives or freedoms are endangered.

A few (selected) international legal and political issues can be extrapolated from the above events and statements.

Are the premises of an embassy a 'suitable' or 'proper' place for asylum or refugee seekers to seek protection? A pragmatic or functional answer would be only if the asylum-seekers are very desperate and have really genuine fears of persecution. In most cases embassies concerned would be very wary of letting the would-be asylum-seekers stay in their compound even for a short period as the actions of the Bruneian, French and Swiss diplomatic authorities in Kuala Lumpur shows.

Right of safe passage

In international law is there a 'right of safe passage' from the embassy premises through the host country's territory to the territory of the asylum-granting state?

In 1950, in a case between Colombia and Peru known as the *Asylum* case,[1] the International Court of Justice (ICJ) stated in effect that as far as South American countries are concerned there is no regional customary international law right wherein a foreign Embassy (in the *Asylum* case Colombia) in a host state (Peru) can demand from the host state that a national of the host state (a Peruvian) who had taken refuge in the foreign Embassy (Colombia) be accorded safe passage through Peruvian territory to Colombia. Lack of consistent and uniform state practice (regional custom) on the subject among South American countries at that time was the major reason for the Court's decision.

Several years after the *Asylum* case was decided, and in the aftermath of the failed Hungarian uprising against Communist and Soviet rule in October 1956, the Hungarian resistance leader Imre Nagy sought and was granted asylum in the Embassy compound of Yugoslavia. Nagy and the Yugoslav Embassy further sought and were promised by the Soviets and Soviet-installed Hungarian puppet government, Nagy's 'safe passage' through Hungary to Yugoslavia. As soon as Nagy left the compound of the Yugoslav Embassy, the Soviets arrested him and later tried and executed him.[2]

However, there was also the case of another Hungarian priest who was granted asylum and had spent more than two decades inside a United States Embassy compound in Budapest since he was unable to get safe passage outside the Embassy compound for settlement in the United States.

Based on both international law and practice, the Bruneian, French and Swiss authorities can be said to have acted perfectly within their sovereign rights to return the Indonesians to the custody of the Malaysian authorities in Kuala Lumpur.

Non-refoulement

A more controversial issue in the situation is whether Malaysia arguably violates international law in apparently sending back to Indonesia those Indonesians who have already been determined by the UNHCR office in Kuala Lumpur as refugees. The principle of *non-refoulement*, mentioned above is stated in the 1951 Convention on Refugee and Displaced Persons. Malaysia is not a party to the Convention and therefore ordinarily is not bound by it. However, it has been claimed by some international lawyers and virtually all refugee-activists that the principle of *non-refoulement* has now become customary international law and that particular provision of the Refugee Convention should 'bind' even non-parties to the Refugee Convention such as Malaysia.

It would be 'sitting on the fence' but it would perhaps not be wrong to state that perhaps the metaphorical jury is still 'out' on the technical or legal issue of whether or not the principle of *non-refoulement* has become customary international law. Many countries including some, who are state parties to the Refugee Convention, such as the United States, have been alleged to have violated the *non-refoulement* principle.[3]

What if some or all of the applications for 'asylum' of the Indonesians in the US Embassy compound are accepted by the United States? It is unlikely that the United States itself will accept them as refugees for 'resettlement' in the United States. If the Indonesians' 'applications' are accepted it is perhaps more likely that they would be handed over to the UNHCR in Kuala Lumpur.

If the UNHCR also concurs that those who were inside the US Embassy are refugees whose lives or freedoms would be endangered if they were sent back to the 'territories or frontiers that they came from', then it should ensure that all proper protection be accorded to them so that *refoulement* of these refugees does not take place.

In the intricate web of the 'triangular' relationships and political equations of the three countries (Indonesia, Malaysia and the United States) which are involved in this 'refugee' incident, genuine Indonesian refugees would, it is hoped, not become 'political footballs'. Instead they should be accorded the minimum protections which are based both on legal and humanitarian principles.

Myint Zan teaches law at Deakin University.

References

1. *Colombia v Peru* , ICJ Reports 1950, p. 266.
2. For an account of events concerning the treacherous arrest, trial and execution of Imre Nagy see (1957-58) 11 *Keesings Contemporary Archives*, pp.15667–15669, 16231–16232.
3. For a decision by the Supreme Court of the United States, that the acts of the United States coast guard in interdicting the Haitian boat people in the High Seas and sending them back to Haiti did not amount to a violation of the 'non-refouler' principle, see *Sale* v *Haitian CTRS Council Inc*, 509 US 155 (1993).

Postscript

On 28 July 1998 the author confirmed by phone with Mr James Warren, Information Officer at the United States Embassy in Kuala Lumpur that the eight Achenese refugees are still inside the United States Embassy Compound in Kuala Lumpur. They have been there since 10 April 1998 and have been given temporary protection and provided with food, shelter and medical treatment by the authorities of the United States Embassy in Kuala Lumpur, obviously with the acquiescence of and authorisation from the Department of State in Washington DC. (To pursue further and in context the theme raised earlier as to whether an Embassy compound is a suitable or advisable place for seeking asylum, it seems that the eight Achenese in this case — in contrast to the 14 others who had unsuccessfully sought protection in Embassy premises elsewhere in Kuala Lumpur — have taken a calculated and, so far, not counter-productive risk. And the United States authorities deserve credit for their humanitarian act in providing temporary protection and sustenance to the refugees.)

According to Warren, the eight Achenese — as well as the 14 who had been expelled from the Bruneian, French and Swiss diplomatic premises — had already been determined by the UNHCR as being entitled to protection as refugees which would include the principle of non-refoulement. Warren stated that the UNHCR is currently liaising with possible 'third countries' which might be willing to take the eight Achenese refugees for resettlement.

If and when third party resettlement is found for the Achenese refugees by the UNHCR, one surmises that they will have to be taken out of the United States Embassy compound (presumably in a vehicle belonging to the UNHCR) to an airport or other point of departure in Malaysia. It is hoped that if and when this occurs Malaysian authorities will not interfere in the process by arresting and sending them back to Indonesia as they had apparently done with the 14 others (see above). Such 'non-interference' with the UNHCR process by the Malaysian authorities is perhaps an 'irreducible minimum obligation' required of Malaysia under international law. **MZ**

INSURANCE

'I'm sorry, your policy doesn't cover that'

DAVID NIVEN discusses some exclusion clauses in insurance contracts.

One of the principal grounds for rejecting insurance claims is that the claim is not covered by the terms of the policy, or is specifically excluded. When considering this issue it is important for insurers to be mindful of the limitations imposed by the *Insurance Contracts Act 1984 (Cth)* on an insurer's ability to reject such a claim.