

CASE STUDY



HUMAN RIGHTS AT SEA

THE PUSH BACK SITUATION IN AUSTRALIA: A CASE STUDY ON HUMAN RIGHTS ABUSES FOR INDONESIAN MIGRANTS AND REFUGEES TRYING TO SEEK REFUGE IN AUSTRALIA

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INTRODUCTION



Prime Minister Tony
Abbott

“This is a test of wills and Australia has lost. What counts is what the Australian government does, not what it says. It is time for Australia to adopt turning the boats as its core policy.”¹

– Tony Abbott, Australian Prime Minister.

Australia has one of the world’s strictest detention regimes. This is despite it being one of the wealthiest nations in the world, and the relatively small fraction of asylum seekers seeking refuge there (approximately 4%²). Over the past decade Australia’s policies relating to the treatment of asylum seekers have progressively tightened, coming to light most recently under the current Abbott Government’s **‘Operation Sovereign Borders’** mandate with its strong focus on ‘border protection’. The result is a deep-seated attitude of dehumanization and alienation of asylum seekers who are portrayed as a threat to Australia³. Most troubling is Australia’s controversial policies to **‘stop the boats’**, turning boats of asylum seekers away, particularly back to Indonesia

¹ <http://www.theaustralian.com.au/national-affairs/ill-turn-back-every-boat-says-tony-abbott/story-fn59niix-1226249863706>

² <http://www.bbc.co.uk/news/world-asia-28189608>

³ <http://www.globalpolicyjournal.com/blog/19/11/2013/asylum-seeker-and-refugee-policy-australia-under-abbott-government>

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which has become a hothouse stopping ground for people seeking refuge in Australia. Those that do successfully reach Australia are sent to third country processing detention centres in Manus Island, Nauru Island and Christmas Island, where individuals seeking refuge endure atrocious health (both mental and physical) and sanitation conditions in overcrowded and inadequate accommodation facilities.

“Everyone has the right to seek and to enjoy in other countries asylum from persecution” – Article 14

The UN Refugee Agency (UNHCR) has recognized the institution of asylum from persecution, as enshrined in Article 14 of the Universal Declaration of Human Rights, to be among the most basic mechanisms for the protection of refugees⁴. Moreover, many of the other international obligations to which Australia is party to, such as the ICCPR, ICESCR and the CRC have been held by the International Court of Justice as being applicable to acts done by a State in the exercise of its jurisdiction even outside its own territory⁵, if it has effective control over the situation⁶. Yet Australia’s policies and treatment of asylum seekers continue to violate its international obligations, most notably the principles of non-refoulement, inhuman or degrading treatment, and economic and social rights. It is important to note, however, that whilst Australia is party to a number of international human rights treaties, they have not been implemented by legislation.

⁴ <http://www.unhcr.org/3ae68c6e30.html>

⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136 at [111]

⁶ Al-Skeini v United Kingdom, 55721/07, 7 July 2011.

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POLICY

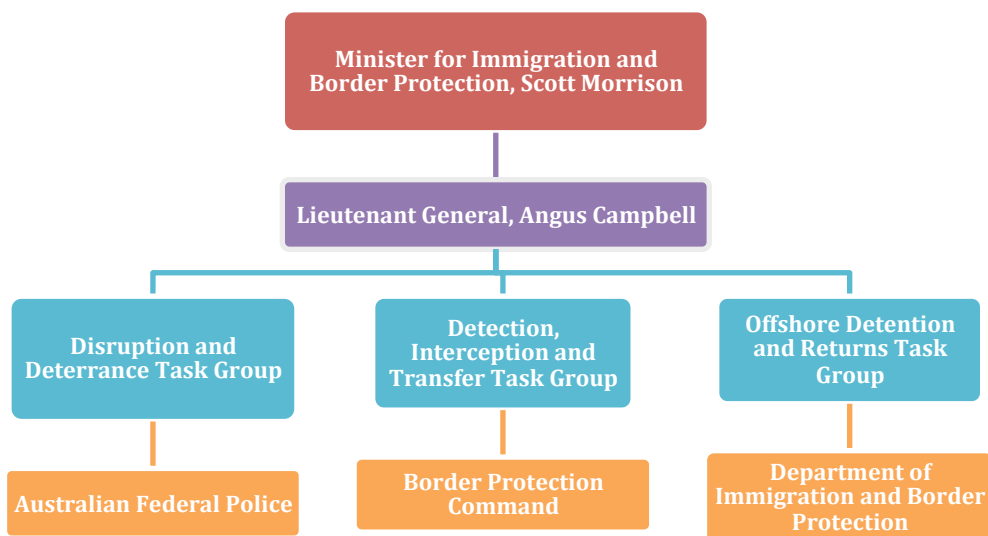


Figure 1: Operation Sovereign Borders chain of command, adapted from the Australian Customs and Border Protection website

‘Operation Sovereign Borders’ is the term coined by Tony Abbott in his initiative to restrict immigration into Australia by what has been officially described as a ‘military-led, border security operation supported and assisted by a wide range of federal government agencies’⁷. Heading the operation is three star Lieutenant General Angus Campbell, reporting to Immigration Minister Scott Morrison.



Lieutenant General Angus Campbell and Immigration Minister Scott Morrison at a press briefing. Image credits: Quentin Jones/AAP

The rationale for the militarization of the operation was stated in the government’s policy document as being to ‘treat the border protection crisis as a national emergency and tackle it with the focus and

⁷ <http://www.customs.gov.au/site/operation-sovereign-borders.asp>

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energy that an emergency demands⁸. This was confirmed at the inception of the operation in a Sydney press conference on 23 September 2013, whereby Morrison stated:

“Our resolve to implement what we have promised the Australian people, to stop the boats, is absolute. Those seeking to come on boats will not be getting what they have come for. They will be met by a broad chain of measures end to end that are designed to deter, to disrupt, to prevent their entry from Australia and certainly to ensure they are not settled in Australia”⁹.

The attitude taken by the government has been the subject of great controversy due to its seeming ignorance of asylum seekers as a humanitarian issue rather than a security emergency¹⁰. Of significance are the combative language used in titles given to the various task groups in the chain of command, which send a clear message that asylum seekers are the enemy to be intercepted, detained, and deterred. Notably, the former Department of Immigration and Citizenship (DIAC) was renamed the Department of Immigration and Border Protection (DIBP), indicating a clear move towards the portrayal of asylum and refugee seekers as a threat to Australian territory.

Asylum seekers who arrive in Australia by boat without a valid visa are subject to a system of third country processing¹¹, whereby they are transferred to an offshore detention centre. Those arriving by boat are therefore penalised significantly, despite the truth being that many escaping from the direst of situations would find it virtually impossible to obtain travel documents or to travel by plane. As at 31 July 2014, DIBP statistics indicated that 3091 people arriving by boat were held in immigration detention.

⁸ http://paweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf

⁹ <http://www.minister.immi.gov.au/media/sm/2013/sm208387.htm>

¹⁰ http://www.asrc.org.au/wp-content/uploads/2013/07/Operation-Sovereign-Borders_FINAL-Sept-2013.pdf

¹¹ Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012 (Cth)

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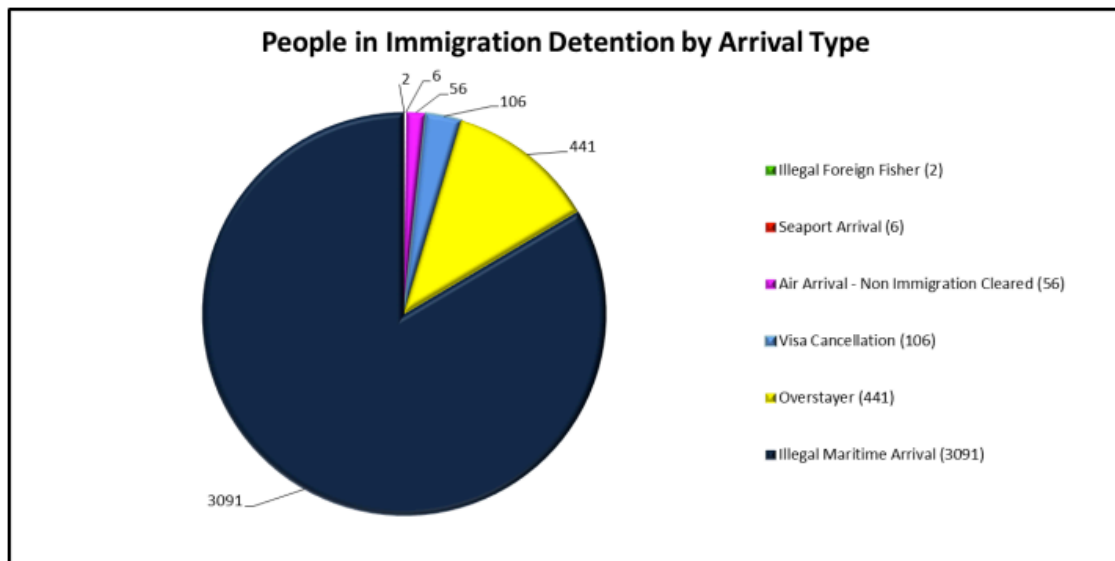


Figure 2: DIBP statistics as at 31 July 2014

Of those, the DIBP reported a total of 1146 at the Nauru Island detention centre; 695 men, 268 women, and 183 children. At Manus, 1127 men were held.¹²

The Australian government's stated goal is to make this transfer within 48 hours of arrival. The mandatory nature of this detention regime arguably violates the ICCPR and the CRC which state that detention should not be arbitrary; rather, each person should be individually assessed as to whether they pose an unacceptable risk to the community and whether less restrictive means could be used. Further, such a short time frame has been criticised as being insufficient to carry out adequate health checks or screen for communicable diseases, thereby amplifying the appalling health conditions in the detention centres¹³.

¹² https://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-july2014.pdf

¹³ <http://www.globalpolicyjournal.com/blog/19/11/2013/asylum-seeker-and-refugee-policy-australia-under-abbott-government>

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Figure 3: Map of Australia's offshore processing centres, taken from ABC News AU

Manus Island houses men who do not arrive with their families, including some unaccompanied boys under the age of 18, many of whom are transferred there from Christmas Island. A study by Amnesty International published in December 2013 found that such removals are carried out with little or no notice and limited explanation. Asylum seekers have reportedly been pressured into signing statements that the transfer is voluntary. Further, the study found that since the Manus Island facility opened in November 2012, no asylum seeker held there had yet received a Refugee Status Determination¹⁴. The rampant failure of the Australian government to provide effective judicial remedy, along with its arbitrary and indefinite detention process was found by the UN Human Rights Committee in 2013 to amount to “cumulatively inflicting serious psychological harm upon them”. These findings were largely ignored by Australia.¹⁵ The recent violence in Manus Island in 16-18 February 2014 which resulted in the death of one asylum seeker and serious injury of many others highlighted the discomfort faced by those detained for long periods of time; there, it had been almost 18 months since the first transfers to Manus took place with no refugee status determinations or resettlements¹⁶.

¹⁴http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf

¹⁵<http://thediplomat.com/2014/02/australias-troubling-asylum-seeker-policy/?allpages=yes>

¹⁶<http://hrc.org.au/inquiry-into-manus-violence-must-address-root-causes-of-unrest-hrlc-submission/>

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On 19 July 2013 and 3 August 2013, the Australian Government entered resettlement agreements with the Governments of Papua New Guinea¹⁷ and Nauru¹⁸ respectively, to the effect that asylum seekers transferred there will remain there while their claims are processed and will later be resettled in those countries if their refugee claim is successful¹⁹. Such resettlement has been argued to be wholly at odds with the principles of *refoulement* due to the indefinite time period for the Refugee Status determination process, poor living conditions, and the poor human rights record existing in these countries.²⁰ At present, a similar agreement is close to being concluded between Australia and Cambodia, which would allow the Australian government to move those who have been granted refugee status on Nauru to Cambodia. This has been criticised by the United Nations Refugee Agency (UNHCR) and the Cambodian Human Rights Committee (CHRA), both of whom have expressed concerns about the lack of rights of refugees and asylum seekers in Cambodia, and the fact that Cambodia is still recovering from civil war.²¹

Indonesia has become the transit point for people-smugglers who ferry asylum seekers to Christmas Island. Asylum seekers, mostly from Iraq, Afghanistan, Pakistan, Sri Lanka and Myanmar, first face reportedly dire conditions in Indonesia's immigration detention centres. Many of these centres are funded by Australia.²² However, their plight does not end there. Under the Abbott government's Operation Sovereign Borders, the Australian Navy have been ordered to turn asylum seeker boats back to Indonesia when it is deemed 'safe'. In February 2014, footage was released of a lifeboat being towed by an Australian vessel back to Indonesia²³. The Australian government has reportedly been stated to pay Indonesians to act as informants on people-smuggling operations.²⁴ This policy brings into question Australia's compliance with the laws of the sea where boats are unseaworthy causing risk to passengers' lives, and to its non-*refoulement* obligations under the UN Refugee Convention.

¹⁷ Regional Resettlement Arrangement (RRA) - <http://www.refworld.org/docid/51f61a504.html>

¹⁸ Memorandum of Understanding - <http://www.dfat.gov.au/issues/people-smuggling-mou.html>

¹⁹ <https://www.humanrights.gov.au/asylum-seekers-and-refugees-guide>

²⁰ http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf

²¹ <http://www.theguardian.com/world/2014/aug/12/australia-close-to-refugee-resettlement-deal-with-cambodia-reports-claim>

²² <http://reliefweb.int/report/indonesia/poor-conditions-indonesian-immigration-detention-centres-fuel-violence>

²³ <http://www.bbc.co.uk/news/world-asia-26062891>

²⁴ <http://www.thejakartaglobe.com/news/a-call-on-australia-for-asylum-seekers-human-rights/>

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Further, the Australian government has allegedly returned asylum seekers having assessed and rejected their claims at high seas by a videoconference, bringing into question the lack of fair opportunity for an individual to fully present their case²⁵. The secret screening and detention processes taking at sea in this regard have further attracted grave concern as to the human rights violations and treatment of the asylum seekers found on the boats. Reports by ABC on 22 January 2014 showed asylum seekers being treated for burns on their hands, which were allegedly caused by being forced to hold a hot exhaust pipe on the boat as punishment for protesting about access to the toilet²⁶.



A boat at Christmas Island. Image credits: DIBP/Flickr

Currently, Australia's Immigration Minister Scott Morrison has dictated a refusal to process refugee claims of around 30,000 asylum seekers until the Senate

²⁵ <http://www.dw.de/australias-asylum-policy-at-sea-may-violate-international-law/a-17779277>

²⁶ <http://www.smh.com.au/federal-politics/political-news/witness-details-burns-claims-20140206-324pw.html>

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allows Temporary Protection Visas (TPVs). Meanwhile, the majority of these asylum seekers will be forced to remain in detention facilities for an indefinite period²⁷.

At present, two class actions are pending against the Australian government. Sick and injured asylum seekers detained in Christmas Island are suing Australian Government for failing to provide medical care. At the centre of the action is a girl aged six by the name 'AS', who has been detained for more than a year and was suffering ongoing dental infection, allergies, separation anxiety and bed wetting after being separated from her mother for an extended period²⁸. Further, a special case hearing is to be held in the High Court in October 2014 to determine whether the Abbott government acted lawfully under the Maritime Powers Act when it detained a vessel with 157 Tamil asylum seekers, transferred them to an Australian vessel and held them outside Australia's territorial waters while seeking Indian cooperation to repatriate them.²⁹

LIFE IN DETENTION CENTRES

Concerns have been expressed about the accommodation at Regional Processing Centres, which consist of tents reportedly being used to house up to 14 detainees each. Such accommodation has been deemed wholly unsuitable to tropical conditions, with no air conditioning exposing inhabitants to infectious mosquitoes.³⁰ Australia's detention policies moreover fail to put into place adequate infection control measures, and in fact Manus Island is rife with malaria and other serious diseases³¹.

Reports have further criticized the lack of safe drinking water in Nauru and Manus Island. Inhabitants are allegedly without water for essential daily

²⁷ <http://www.asrc.org.au/2014/08/22/temporary-protection-visas-will-leave-asylum-seekers-in-permanent-limbo/>

²⁸ <http://www.theguardian.com/world/2014/aug/26/asylum-seekers-sue-scott-morrison-medical-care-christmas-island>

²⁹ <http://www.theaustralian.com.au/national-affairs/immigration/high-court-to-test-detention-of-asylumseekers-at-sea/story-fn9hm1gu-1227031652014?nk=72edf5434b3ef94ad5f93005106c22ca>

³⁰ <http://rightnow.org.au/topics/asylum-seekers/human-rights-and-the-pacific-solution-mark-ii>

³¹ <http://rightnow.org.au/topics/asylum-seekers/human-rights-and-the-pacific-solution-mark-ii>

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activities further amplifying the already unsanitary conditions³². Australia's failure to provide adequate water to the inhabitants of its offshore detention centres has been heavily condemned, with the Human Rights Council emphasizing that water is an essential right for the full enjoyment of life and human rights, and delegation of water obligations to a third party does not exempt states from human rights obligations³³. Further, this arguably breaches its international obligations of health equity³⁴ and economic and social rights, which extend to extraterritorial situations over which it exercises authority or effective control³⁵.

A recent news report on 3 September 2014 highlighted the abhorrent health conditions rampant in these detention centres³⁶. A 24 year old Iranian asylum seeker Hamid Kehazaei was declared brain dead, after developing septicemia from cutting his foot approximately 3 weeks earlier at the Manus Island offshore processing centre. It is stated that he sought medical attention for days for the pain and infection, yet was only taken into intensive care in a Brisbane hospital 2 weeks later. Refugee Action Coalition spokesman Ian Rintoul said authorities took too long to act and Kehazaei suffered a heart attack before being declared brain dead on 2 September 2014.



Accommodation at Manus Island. Image credits: DIBP/Flickr

An area of particular concern has been the treatment of women and children within the detention centres. Children face mandatory

³²http://www.humanitarianresearchpartners.org/uploads/9/9/1/0/9910899/asylum_seeker_access_to_water_in_offshore_processing_centres.pdf

³³ Human Rights and Access to Water and Sanitation, A/HRC/15/6/14, 24 September 2010

³⁴ Rio Political Declaration on Social Determinants of Health

³⁵ Principle 9(a) Maastricht Principles

³⁶ <http://www.abc.net.au/news/2014-09-03/asylum-seeker-hamid-kehazaei-brain-dead-in-brisbane-hospital/5716292>

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detention in these locations contrary to Australia's obligations under the Convention on the Rights of the Child (CRC), which states that children should only be detained as a last resort and for the shortest possible time. Mental illnesses and suicide attempts are rife amongst this demographic. Approximately 500 children who arrived in Australia after 19 July 2013 remain in indefinite detention, with deteriorating mental health.³⁷ Dr Young, former director of IHMS mental health services has stated that the conditions faced by detainees are akin to torture.³⁸

An inquiry led by the Australian Human Rights Commission in July 2013 highlighted the atrocious conditions endured by women and children in Christmas Island. In their report³⁹, they found 13 women on high-level risk monitoring in Christmas Island, 10 of which required 24-hour watch by a guard who sits outside their room with the door open. Women were observed at all times including when they breastfed and slept. Babies were confined in 3x3 metal containers in extreme heat with no clean, open or safe areas to learn to crawl⁴⁰. Most children were reportedly ill with chest or gut infections. Internationally respected Professor Elizabeth Elliott stated that Christmas Island's proximity to a phosphate mine means that the physical environment was 'totally unsuitable and children suffer from recurrent asthma and irritation of the eyes and skin is common'.⁴¹

³⁷ <https://www.humanrights.gov.au/news/stories/media-statement-children-immigration-detention>

³⁸ <http://www.aljazeera.com/indepth/opinion/2014/08/australia-child-refugees-moral--201481884653708708.html>

³⁹ National Inquiry into Children in Immigration Detention (2014)

⁴⁰ <https://www.humanrights.gov.au/news/stories/new-mothers-suicide-watch-christmas-island>

⁴¹ <http://www.aljazeera.com/indepth/opinion/2014/08/australia-child-refugees-moral--201481884653708708.html>

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Submission No.194 to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention 2014 from a child (unnamed) detained in Nauru

A damning example of the uninhabitable conditions at Nauru Island was seen in reports of three pregnant asylum seekers who had been transferred to offshore detention on Nauru requesting abortions, citing conditions in detention and the longevity of the time held there as reasons.⁴²

During the period January 2013 to 31 March 2014, the study found that 128 out of the 2000 children in detention, and 89 adults self-harmed⁴³. Abbott's response, when asked about mother's self-harming, was that: "...this is not going

⁴² <http://www.theguardian.com/world/2014/jun/20/pregnant-asylum-seekers-nauru-transferred-australia-abortion>

⁴³ <https://www.humanrights.gov.au/news/opinions/detention-shame-children-mothers-self-harming>

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to be a government which has our policy driven by people who are attempting to hold us over a moral barrel. We won't be driven by that"⁴⁴.

ISSUES CONCERNING TRANSPARENCY AND ACCOUNTABILITY

Alarmingly, the statistics relating to detention centre conditions may represent merely a small fragment of the real picture. The Australian government now actively blocks journalist from Manus Island detention centre and deletes journalists' photos. Asylum seekers on Manus Island are denied internet and phone connections. The Australian Human Rights Commission and Immigration Ombudsman have been denied access to Manus and Nauru⁴⁵. Dr Young has himself admitted that the Immigration Department asked him not to report on the rates of mental disorders amongst young children⁴⁶. Moreover, fundamental ethical problems are presented for doctors, with HMS staff possessing the dual role of treating detainees but also reporting to the department⁴⁷. The lack of transparency and accountability raise grave concerns of the behaviour of the Australian government in a democratic society, and the difficulties in enforcing any international standards in this regard.

Contrary to democratic principles, the Abbott government appears to be unrelenting in their policy of secrecy surrounding its treatment of asylum seekers and operations at sea. Initially, weekly press briefings on Operation Sovereign Borders were held, albeit with limited comment from those heading the operation. In January 2014, these briefings were stopped altogether for reasons of public interest. Abbott has defended this by likening Operation Sovereign Borders to war: *"If we were at war, we would not be giving out information that is of use to the enemy."*⁴⁸ Meanwhile, Campbell has justified the operation's veil of secrecy by stating: *"My efforts with regard to the management of information are singularly focused on...dealing with avoiding advantage to people smugglers, manipulation of potential clientele of people smugglers, the*

⁴⁴ <http://www.abc.net.au/news/2014-07-09/mothers-self-harm-wont-influence-coalition-asylum-policy/5583170>

⁴⁵ <http://www.smh.com.au/comment/we-need-to-see-manus-island-20140224-33bk1.html>

⁴⁶ <http://www.aljazeera.com/indepth/opinion/2014/08/australia-child-refugees-moral-201481884653708708.html>

⁴⁷ <http://www.theguardian.com/world/2014/aug/05/-sp-australias-detention-regime-sets-out-to-make-asylum-seekers-suffer-says-chief-immigration-psychiatrist>

⁴⁸ <http://www.abc.net.au/news/2014-01-13/maccallum-operation-sovereign-borders/5196708>

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safety of our people and the management of bilateral and regional relationships and their sensitivities.”⁴⁹

Yet, what the Abbott government fails to appreciate is the fact that those fleeing persecution and abhorrent situations in their home countries are in fact an important humanitarian matter rather than a national emergency. Accordingly, it is difficult to fathom why the government would consider the matter one requiring public interest immunity. Moreover, the fusion between the military and the government, with Campbell directly to Morrison rather than to the Chief of Defence through the traditional chain of command, arguably places him under undue political influence. These concerns were expressed by the Australia Defence Association, who emphasised the fact that border control is a civil law enforcement problem rather than a military problem, and stated doubts over dragging the Defence forces into party-political controversy.⁵⁰

CONCLUSION

The current policies of the Australian Government’s Operation Sovereign Borders to ‘stop the boats’, along with the mandatory transfer of boat people to deplorable conditions within the offshore detention centres pose a monumental lack of regard for human rights and international instruments. The veil of secrecy surrounding the operation is unnecessary, and casts doubt over the actions taken under the Abbott government both at sea and within detention centres. Such secrecy is at odds with the principles of democratic governance and accountability, and highlights the erroneous portrayal by the government of asylum seekers being a national emergency akin to a war situation. What is clear, however, is that flagrant human rights abuses are occurring both at sea, and within detention centres. Health and sanitary conditions, indefinite detention periods, the treatment of children, are all matters of prime concern. There is therefore a pressing need for Australia to re-evaluate their current policies to create a clear and transparent humanitarian agenda in line with international human rights values and its non-refoulement obligations.

⁴⁹ <http://www.canberratimes.com.au/national/public-service/operation-sovereign-absurdity-is-destroying-the-militarys-credibility-20140330-35rh1.html>

⁵⁰ <http://ada.asn.au/commentary/formal-comment/2013/coalitions-new-plan-to-combat-people-smuggling.html>

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Refugee Action Protest in Melbourne on 27 July 2013. Image credits: Takver/Flickr

Disclaimer:

The content and detail within this case study has been obtained from open-source material and has been checked, as best as is possible, for accuracy by the authors at the time of writing. All quotes, pictures and diagrams have been acknowledged where able and any omissions or factual inaccuracies may be alerted by writing to: enquiries@humanrightsatsea.org. The opinions, perspectives and comments are those of the authors.

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Human Rights at Sea (HRAS) is a Registered Charity in England and Wales No. 1161673. The organisation has been independently developed for the benefit of the international community for matters and issues concerning human rights in the maritime environment. Its aim is to explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.

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