

4-15-2014

# From 'Boat People' to Refugees: Analyzing the Plight of Asylum Seekers in Australia and the Country's Violations of International Law

Emily Eileen Mankowski

*Southern Methodist University*, [emily.mankowski@gmail.com](mailto:emily.mankowski@gmail.com)

Follow this and additional works at: [http://scholar.smu.edu/upjournal\\_research](http://scholar.smu.edu/upjournal_research)

---

## Recommended Citation

Mankowski, Emily Eileen, "From 'Boat People' to Refugees: Analyzing the Plight of Asylum Seekers in Australia and the Country's Violations of International Law" (2014). *Engaged Learning Collection*. 46.  
[http://scholar.smu.edu/upjournal\\_research/46](http://scholar.smu.edu/upjournal_research/46)

This document is brought to you for free and open access by the Engaged Learning at SMU Scholar. It has been accepted for inclusion in Engaged Learning Collection by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# From 'Boat People' to Refugees: Analyzing the Plight of Asylum Seekers in Australia and the Country's Violations of International Law

---

Emily Mankowski  
Mentor: Dr. Rick Halperin  
Engaged Learning Final Report  
April 15, 2014

---

---

---

---

# Table of Contents

---

- I. Abstract/Executive Summary
- II. Introduction
- III. Historical Background
- IV. The Problem of “Boatpeople” in Contemporary Politics
  - i. The Howard Government Sets the Stage
  - ii. The *Tampa* Incident and a New Solution
  - iii. Temporary Protection Visas and The Glimmer of Reform
  - iv. Gillard’s Solution
  - v. Rudd and Abbott: Politics over Policies
- V. Public Perception
  - i. Political Pressure to Label “Legitimacy”
  - ii. Humanitarian Outlook
  - iii. “Boat People” Becomes a Trend
  - iv. Current Sensationalizing of Asylum Seekers
- VI. International Legal Obligations
  - i. The 1951 UN Refugee Convention
  - ii. Non-Refoulement
  - iii. Law of the Sea
  - iv. Human Rights Law
- VII. Current Issues in Australian Immigration Law
  - i. Mandatory Detention
  - ii. Third Country Processing
- VIII. Pressure to Reform
  - i. Domestic Pressure
  - ii. Domestic Human Rights Groups
  - iii. International Pressure
- IX. Recommendations
- X. Conclusion
- XI. Bibliography

# **I. Abstract/Executive Summary**

---

The government of Australia has violated international human rights laws regarding to refugee and asylum seeker rights. Asylum seekers fleeing to Australia by boat, or by any “irregular maritime arrival,” are denied basic human rights outlined under the 1951 Refugee Convention and its 1967 Protocol, both of which Australia has signed and ratified into its domestic legal code. The public perception of these colloquially deemed, “boatpeople,” changes depending on the political party in office. The transitional nature of this immigration issue allows for human rights abuses to go uncontested. This paper outlines the history of asylum seeker issues in Australia, the flip-flopping political stances regarding “boatpeople,” the direct violations of Australia’s international law obligations, the most heinous, current policy concerns under Tony Abbott’s administration, and possible sustainable solutions that can be applied with the help of domestic and international pressure.

## II. Introduction

---

On August 13, 2012, former Prime Minister of Australia, Kevin Rudd, announced a major shift in the country's refugee and asylum seeker policies. Rudd determined that any refugee or asylum seeker arriving by boat would no longer have the right to work.<sup>1</sup> In addition, on July 19, 2013, Rudd proclaimed that any refugee or asylum seeker arriving by boat would no longer be resettled in Australia, even if refugee status were determined. A country hailed internationally on the forefront of respecting human rights, Australia currently faces a dilemma between maintaining its progressive, humanitarian reputation, or continuing to violate international law with its treatments of refugees. Over the past year, the Australian government reintroduced offshore detention centers located on Christmas Island, Nauru, and Manus, Papua New Guinea, in order to process asylum seekers.<sup>3</sup> An international, for-profit corporation, called Serco, manages these detention centers, along with eighteen other mainland facilities, in addition to several prisons around the country. The people kept in the Immigration Detention Centers are not criminals, however their living conditions would propose otherwise.

Under the United Nations Convention relating to the Status of Refugees, of which Australia is a signatory, a person seeking refugee status is not a criminal and he or she should be granted the same rights as citizens within the state.<sup>4</sup> On August 22, 2013, the United Nations Human Rights Committee in Geneva found that Australia had committed 143 violations under international law; the worst complaint ever made against the country. Citing forty-six cases of

---

<sup>1</sup> Refugee Council of Australia, *Enough is Enough: It's Time For A New Approach*. August 13, 2013, 1-6.

<sup>2</sup> *Id.*

<sup>3</sup> *Visa, Immigration, and Refugees: By Boat, No visa*, Dep't of Immigration and Citizenship (Sept. 13, 2013) (Austl.).

<sup>4</sup> UN Convention and Protocol Relating to the Status of Refugees art. 31, 1951, U.N.T.S.

<sup>5</sup> Jan Govett, *UN Claims Australia Has Violated International Law*, THE COURIER (Sept. 12, 2013).

“illegal detention,” the United Nations urged Australia to release these persons, and remedy its migration laws for refugee/asylum seekers.<sup>5</sup>

The new Australian Prime Minister, Tony Abbott, plans to handle the country’s refugee problem by “turning back the boats,” and increasing military action to forcibly return boats to their port of origin.<sup>6</sup> Unfortunately, the new Australian Prime Minister does not appear to be changing any of the standing policies. This paper will argue that Australia has committed grave violations in international and human rights law by refusing “boat people” refugees the right to work and the right to family reunification, by unlawfully detaining individuals, by denying resettlement in Australia, and by forcibly returning asylum seekers to their countries of origin. Australia is a wealthy, democratic country with the resources available to properly process and rehabilitate refugees, especially since the number of refugees seeking asylum in Australia is comparatively low to other nations around the globe. In conclusion, this paper will suggest sustainable and constructive policy solutions, which adhere to international human rights standards, for the Australian government to implement in order to rectify refugee and asylum seeker human rights.

---

<sup>6</sup> *Visa, Immigration and Refugees, supra* note 3

### III. Historical Background

---

Historically, Australia has been highly praised for its efforts in refugee resettlement. Since World War II, Australia has resettled around 800,000 refugees.<sup>7</sup> Australia was also one of the first countries to sign and ratify both the 1951 UN Refugee Convention and its 1967 Protocol.<sup>8</sup> Today, Australia continues to be ranked among the world's top three resettlement countries, along with the United States and Canada.<sup>9</sup> However, Australia's policies towards asylum seekers are appalling.

Over the past twenty years, Australian prime ministers have tried to grapple with the best policies to dealing with the increasing number of asylum seekers arriving in the country. During this period mandatory immigration detention and offshore processing have been key policies in attempts to reduce and deter the number of asylum seekers arriving by boat, or Irregular Maritime Arrivals (IMAs). Australia's mandatory immigration detention system was introduced in 1992.<sup>10</sup> In addition, amendments to the Australian *Migration Act 1958* (Cth) in 1992 prevented the access of detainees to judicial review.<sup>11</sup> In 1994 the mandatory detention regime was expanded to apply to all non-citizens in Australia without a valid visa, not just boat arrivals.<sup>12</sup>

While a significant increase in asylum seekers seeking protection in Australia exists, Australia's share of asylum applications remains a very small fraction of the global total (about

---

<sup>7</sup> Australian Human Rights Commission, *Asylum seekers, refugees, and human rights: Snapshot Report*, 4, 2013 (Austl.).

<sup>8</sup> William Kirtley, *The Tampa Incident: The Legality of Ruddock v. Vadarlis Under International Law and the Implications of Australia's New Asylum Policy*, 41 Colum. J. Transnat'l L. 251, 257 (2002-2003).

<sup>9</sup> Australian Human Rights Commission, *supra* note 7

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

2.2%).<sup>13</sup>The current top five source countries for IMAs include Afghanistan, Sri Lanka, Iran, Pakistan, and Iraq.<sup>14</sup>

## IV. The Problem of “Boatpeople” in Contemporary Politics

---

### 1. The Howard Government Sets the Stage

During the 1980s, Australia’s immigration policy went through a major shift toward accepting more migrants on humanitarian grounds.<sup>15</sup> Refugees and asylum seekers received active support from citizens as more traveled to Australia’s shores. By 1996, and the election of Prime Minister John Howard, immigration policies became highly politicized with 71% of the population stating that too many migrants were coming into Australia.<sup>16</sup> The Howard government made many restrictions to Australia’s immigration policies, but specifically regarding humanitarian migrants. Howard restricted their access to welfare, increased focus on skilled migrants, decreased family reunifications, and reduced the number of permanent visas given.<sup>17</sup> In addition, the concept of “boatpeople” first gained media attention under the Howard government.<sup>18</sup> Howard’s immigration policies towards “boatpeople,” the offensive colloquialism for IMAs, included the implementation of mandatory detention as stipulated under the *Migration Amendment Act* (Cth) of 1992, the post-*Tampa* policy of “turning the boats around,” and the processing of immigration claims outside of the Australian migration zone.<sup>19</sup>

---

<sup>13</sup> *Id.* at 5

<sup>14</sup> *Id.*

<sup>15</sup> Katharine Betts, *Immigration Policy Under the Howard Government*, 38.2 *Austral. Jo. of Social Issues* 169 (2003).

<sup>16</sup> *Id.* at 176

<sup>17</sup> *Id.* at 178

<sup>18</sup> *Id.* at 183

<sup>19</sup> *Id.* at 185



Australia received a massive influx in the number of IMAs in the late 1990s. From 1998 to 1999 alone, the annual number of IMAs jumped from 200 to 3,740.<sup>20</sup> The huge jump of incoming asylum seekers brought a lot of attention to how the country was assessing the claims of the IMAs. One aspect of the process that received scrutiny from the public, as well as some political factions, was that an Immigration Detention Center (IDC) also held illegal immigrants and non-citizens awaiting deportation, some due to criminal offenses.<sup>21</sup> This meant women and children, along with any other IMA, were held in the same facilities as potential criminals. As the number of asylum seekers increased, so did the number of detention centers, which were placed in remote areas of the country.<sup>22</sup> Both domestic and international human rights groups criticized Australia's IDCs because of their alleged poor conditions drawn to attention by detainee hunger strikes, protests, riots, and breakouts from the centers.<sup>23</sup>

## **2. The *Tampa* Incident and a New Solution**

The Howard government's strict immigration policies towards refugee and asylum seekers were tested in August 2001 with the *Tampa* incident. A Norwegian freighter, *MV Tampa*, rescued 433 mainly Afghani asylum seekers in the waters between Indonesia and North Australia when their fishing vessel began to sink.<sup>23</sup> After intercepting the vessel, the *MV Tampa* crew tried to deliver the asylum seekers to Australia, but the Australian government stated that they would not be permitted entry into the country.<sup>24</sup> Subsequently, the Howard government quickly pushed through multiple bills that would allow the Australian Navy to intercept any boats found to be

---

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 33

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

heading to Australia and transfer them back to the boat's point of origin, or to an Australian migration zone where their asylum claims would be processed.<sup>25</sup> As a result, the 433 persons rescued by the *Tampa* freighter were taken to Nauru or Papua New Guinea and placed in detention centers until the Australian government processed their statuses as refugees.<sup>26</sup> This "Pacific Solution" allowed the Australia government to transfer unauthorized arrivals to these Offshore Processing Centers (OPCs) where the detainees were not provided with legal assistance or access to judicial review.<sup>27</sup> Instead, immigration or UNHCR officials were in charge of processing the claims.

The amendments made to the *Migration Act 1958* (Cth) following the *Tampa* affair legitimized the Australian government's ability to require separate visa application for "onshore" and "offshore" arrivals, and to allow the transfer of "offshore entry persons," or IMAs, "to third countries for processing and resettlement."<sup>28</sup> The "Pacific Solution" was meant to deter future asylum seekers coming by boat. However, over those seven years, 1,637 people had been detained in these facilities, with only 61% of the 70% of people granted asylum resettled in Australia.<sup>29</sup> The "Pacific Solution" was widely criticized by human rights and refugee groups as not upholding the standards of international refugee law, being overly expensive to operate, and having psychologically damaging effects to the detainees.<sup>30</sup> On February 8, 2008, the "Pacific Solution" formally ended when Prime Minister Kevin Rudd called for the closing of the OPCs

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Janet Phillips and Harriet Spinks, Parliament of Australia, Dep't of Parliamentary Services, *Boats arrivals in Australia since 1976* (July 23, 2013) (Austl.).

<sup>28</sup> Peter Billings, *Irregular Maritime Migration and the Pacific Solution Mark II: Back to the Future for Refugee Law and Policy in Australia?*, 20 Int'l J. on Minority and Group Rights 279, 283 (2013).

<sup>29</sup> Janet Phillips and Harriet Spinks, *supra* note 27.

<sup>30</sup> *Id.*

on Manus, Papua New Guinea and Nauru, and the final 21 detainees were resettled in Australia.<sup>31</sup>

### **3. Temporary Protection Visas and the Glimmer of Reform**

Another aspect of the Howard government that had prolonged effects on the immigration policies of Australia was the creation of Temporary Protection Visas (TPVs). In 1999, the Australian government implemented TPVs for unauthorized asylum seekers that were valid for three-year terms, and then their status as refugees would be reassessed.<sup>32</sup> TPV holders were given the right to work and access to medical care and welfare, but they had reduced access to settlement services, no right to family reunification through the government, and no travel rights.<sup>33</sup> Approximately, 11,000 people were issued TPVs from 1999 to 2007, and almost 90% of those were eventually granted permanent residency.<sup>34</sup>

When Kevin Rudd of the Labor Party took power in 2008, he abolished various aspects of “Pacific Solution,” and called for a more humane treatment of asylum seekers.<sup>35</sup> In addition, The UNHCR praised the Australian government for terminating this controversial policy.<sup>36</sup> Rudd abolished TPVs and most of the OPCs as part of the new government, but the detention center on Christmas Island, a remote island in the waters between Indonesia and Australia, remained open. Even though Australia’s immigration policies improved significantly on humanitarian terms, the public opinion still feared the fact that the number of IMAs continued to climb. Public pressure on government immigration reform escalated in December of 2010, when a boat sank off the

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> UNHCR, UNHCR welcomes close of Australia’s Pacific Solution (Feb. 8, 2008).

coast of Christmas Island and up to fifty asylum seekers perished.<sup>37</sup> This incident was the largest recorded loss of life in Australian waters in 115 years.<sup>38</sup> By the time Rudd's first term ended in 2010, around 100 boats had been intercepted in Australian waters.<sup>39</sup> The December 2010 tragedy combined with the continuance of IMAs seeking asylum led the Australian government to tighten its immigration policies once again.

#### 4. Gillard's Solution

When Julia Gillard took office in June of 2011, she revised the Labor party's policies to focus more on deterring the IMAs.<sup>40</sup> Gillard first proposed opening a regional detention center in East Timor, called the "Timor Solution," but when the East Timorese government rejected the plan, Gillard eventually decided to reopen the OPCs on Manus, Papua New Guinea and Nauru, in addition to the one still in operation on Christmas Island.<sup>41</sup> Gillard also implemented a "co-operative bilateral transfer" agreement with the Malaysian government, which stated that both countries would work together to address the IMA issue and combat people smuggling.<sup>42</sup> Malaysia is not a signatory to the 1951 Refugee Convention, but by participating in the "refugee swap," the UNHCR was permitted to assist Malaysia with the IMA resettlement process to ensure that the government was adhering to international law standards.<sup>43</sup> Gillard's attempt to require OPCs produced political impasse that required reforms to IMA laws.

The publication of the *Report of the Expert Panel on Asylum Seekers* on August 13, 2012, commonly known as the "Houston Report," asserted that asylum seekers arriving by boat should

---

<sup>37</sup> Billings, *supra* note 28 at 286.

<sup>38</sup> *Id.*

<sup>39</sup> Janet Phillips and Harriet Spinks, *supra* note 21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Billings, *supra* note 37 at 287.

<sup>43</sup> *Id.*

not receive advantages over refugees waiting for resettlement that arrived by legal means.<sup>44</sup> From this report, the Gillard government drew justification for its policy shifts. The Australian Parliament swiftly passed the *Migration Legislation Amendment Act*, or *Regional Processing Act* (Cth), which led the way for the “Pacific Solution Mark II.”<sup>45</sup> The *Regional Processing Act* only punished asylum seekers coming by boat. Even if a person arrived by air undocumented, their claims would be processed normally and they would be given “bridging visas” that allow them to work in the community.<sup>46</sup> However, IMAs were no longer permitted to apply for valid visa applications.<sup>47</sup> In addition, on August 13, 2012, the Gillard government imposed the “no advantage principle” on asylum seekers coming by boat through places like Christmas Island.<sup>48</sup> The “no advantage” principle stated that the government would continue to send people to offshore processing centers; it would prevent anyone found to be a refugee from attaining a permanent protection visa; and it would strip immigrants of their right to work.<sup>49</sup> The “no advantage” principle adopted the “Houston Report” recommendation that all IMAs, despite landing on Australian territory or not, should not be allowed the same rights as “legally” arriving asylum seekers.<sup>50</sup> The “no advantage” principle attempted to reward migration through regular humanitarian or refugee visa channels, and “disincentivise” irregular migration.<sup>51</sup>

The reopening of offshore processing centers garnered more international criticism by human rights groups. Human Rights Watch alleged that the forcible transfer of irregular

---

<sup>44</sup> *Id.* at 280

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Billings, *supra* note 42 at 280.

<sup>48</sup> Dep’t of Immigration and Border Protection, Australian Gov’t, *Fact Sheet 65- Onshore Processing Arrangements: Bridging Visas for Irregular Maritime Arrivals* (May 2013).

<sup>49</sup> *Id.*

<sup>50</sup> Billings, *supra* note 47 at 281.

<sup>51</sup> *Id.* at 293

maritime arrivals to Australia was in violation of refugee protection under international law.<sup>52</sup> The August 13<sup>th</sup> date was an unfair, arbitrary deadline that severely limited asylum seekers and refugees in their abilities to integrate into Australian society. Human Rights Watch also claimed that Gillard expected asylum seekers could be sent to Nauru as early as within a month, where they would have to sleep in tents, and their claims might not be processed for up to five years.<sup>53</sup> The Gillard government was not empathetic to IMAs seeking a better life, but rather more concerned with deterrence efforts to keep the “boatpeople” out.

## **5. Rudd and Abbott: Politics over Policies**

Gillard’s methods of deterrence proved unsuccessful. Under the introduction of the “no advantage” principle on August 13, 2012, the date of the “Houston Report,” Gillard reintroduced mandatory regional offshore processing. The number of IMAs briefly fell between the September-December quarters (2,513-1,622 IMAs), and then increased by the March 2013 quarter (7,464 IMAs).<sup>54</sup> The influx of IMAs did not proportionally correspond to the number of granted protection visas, which dropped from 3,685 in the Sept. 2012 quarter to 1,778 by the March 2013 quarter, even though the majority of IMAs were still found to be refugees.<sup>55</sup>

The reelection of Kevin Rudd on June 27, 2013 brought renewed hopes that refugee and asylum seeker legislation would be revised with a humanitarian focus since Rudd opposed most of Howard’s policies in his previous term. Those hopes were dashed quickly when, not four weeks into term, Rudd announced that all IMAs coming to Australia would be processed and

---

<sup>52</sup> *Australia: ‘Pacific Solution’ Redux: New Refugee Law Discriminatory, Arbitrary, Unfair, Inhumane*, Human Rights Watch, Aug. 17, 2012.

<sup>53</sup> Human Rights Watch, Aug. 17, 2012, *supra* note 33.

<sup>54</sup> Dep’t of Immigration and Citizenship, Australian Gov’t, *Asylum Statistics-Australia: Quarterly Tables-March Quarter 2013* (March 2013).

<sup>55</sup> *Id.*

resettled in Papua New Guinea, one of the poorest countries in the Pacific.<sup>56</sup> The Regional Settlement Arrangement (RSA) with the Papua New Guinea government also outlined that any IMA not found to be a “genuine refugee” would be returned to their country of origin.<sup>57</sup> Rudd’s “PNG Solution” was not only an attempt to deter people coming by boat, but it was a political method to combat conservative opposition leader, Tony Abbott, who was gaining more popularity.<sup>58</sup>

The upcoming elections for prime minister in September kept both Rudd and Abbott feuding to “out-conservative” the other by advocating strict border policies. Both Abbott and Rudd firmly believed that by restricting the rights of immigrants coming by boat, fewer people would try to come to Australia by that method, and therefore the number of asylum seeker deaths at sea would diminish. Over 1,000 people are believed to have drowned on the way to Australia due to unsafe boat vessels,<sup>59</sup> with 805 confirmed deceased men, women, and children between 2009-July 2013 alone.<sup>60</sup> Rudd and Abbott campaigned behind the idea of preventing deaths at sea to justify severe immigration policies. Amidst campaigning, Rudd passed a New Memorandum of Understanding with Nauru that provides that the Nauruan government will resettle “legitimate” asylum seekers within its borders.<sup>61</sup> (AHRC 5) The third country regional processing centers on Papua New Guinea and Nauru were firmly established.

Tony Abbott was elected Prime Minister on September 10, 2013, and one of his first policy moves was the implementation of “Operation Sovereign Borders.” Abbott’s policy priority to develop stronger borders and protect the sovereignty of Australia plans to: renew

---

<sup>56</sup> *Australia’s Boat People: The PNG Solution*, The Economist, July 27, 2013.

<sup>57</sup> Australian Human Rights Commission, *supra* note 7 at 4

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Lenore Taylor, *Kevin Rudd’s boat fix shows good sense has sailed*, The Guardian, July 19, 2013.

<sup>61</sup> Australian Human Rights Commission, *supra* note 57 at 5

cooperation with Indonesia against people smugglers, reintroduce Temporary Protection Visas, use the Australian Navy to return boats from their point of origin (mainly Indonesia or Sri Lanka) when safe to do so, diminish priority of applications for IMAs, prevent IMAs from obtaining permanent residency in Australia, and establish presumption against refugee status for IMAs that have discarded identification papers.<sup>62</sup> Furthermore, IMAs released into the community on bridging visas post-August 13, 2012 have no right to work and must rely on insufficient welfare support; thus creating arbitrary “two-tiers” of asylum seekers.<sup>63</sup>

“Operation Sovereign Borders” has already received vast criticisms from domestic and international human rights groups claiming that Abbott is not only violating Indonesia’s sovereignty by forcing the country to receive the IMA boats, but the policy foists burdens onto Papua New Guinea and Nauru that have far less capacity to process claims and integrate refugees than Australia.<sup>64</sup> On September 27, 2013, just weeks after Abbott’s policy went into effect, at least 31 asylum seekers died off the coast of Java en route to Australia.<sup>65</sup> Even though Abbott maintains that he will not budge in his policies, it is evident that the threat of not attaining refugee status in Australia is not deterring IMAs. As long as the situation in their country of origin creates the necessity to flee, the IMAs will continue to come to Australia, because the smallest hope of a better life outweighs the probable consequence of persecution or death.

## V. Public Perception

---

### 1. Political Pressure to Label “Legitimacy”

---

<sup>62</sup> Tony Abbott, The Coalition Parliament of Australia, *Our Plan: Real Solutions for all Australians: 20. Delivering stronger borders and a more secure nation* 47-48 (Jan. 2013).

<sup>63</sup> Billings, *supra* note 50 at 305.

<sup>64</sup> Elaine Pearson, *Dispatches: Australia- News Government, New Boats*, Human Rights Watch, Sept. 10, 2013.

<sup>65</sup> Karishma Vaswami, *Australian PM says ‘united’ with Indonesia on migrants*, BBC News: Asia, Sept. 30, 2013.



The Howard government's "Pacific Solution" profoundly affected not only the political climate, but also the public opinion towards asylum seekers. Howard's nationalism generated massive support among constituents who valued Australia's "sovereign rights," as an independent nation, to protect its borders.<sup>66</sup> The *Tampa* crisis and the attacks on 9/11 further crystallized negative public sentiment regarding IMAs and the increased desire for border security.<sup>67</sup> The people of Australia wanted to know who was coming to this country, when, and by what means.<sup>68</sup> The *Tampa* incident in 2001 also put pressure on the government and media to define these asylum seekers coming by boat, resulting in labeling based on stereotypical and deceptive languages to convey particular sentiments.<sup>69</sup> By implementing binary terms, such as legal v. illegal and refugees v. asylum seekers, the media automatically alienated and categorized one as a subgroup.

## 2. Humanitarian Outlook

In 2007, the Labor Party adopted a more humanitarian outlook on policies regarding IMAs. The party removed mandatory immigration detention, promised to keep children out of IDCs, and shifted the focus of disdain to the problem of people smugglers.<sup>70</sup> The public opinion of asylum seekers also shifted from wanting to deter IMAs based on protection of sovereign borders to "saving lives at sea."<sup>71</sup> The Labor party hoped that strengthening the nation's anti-smuggling laws would deter human smuggling and exploitation.<sup>72</sup> On a positive note, Australia

---

<sup>66</sup> Billings, *supra* note 63.

<sup>67</sup> Elizabeth Rowe and Erin O'Brien, *Constructions of asylum seekers and refugees in Australian political discourse*, 2 Crime and Justice Research Center, QLD U. of Technology, 173, 176 (2013).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Billings, *supra* note 66 at 280.

<sup>71</sup> *Id.* at 304.

<sup>72</sup> *Id.* at 280.

increased its refugee intake from 13,750 to 20,000 per annum, as referenced by the UNHCR.<sup>73</sup> This marks a positive humanitarian shift toward the treatment of refugees and asylum seekers. However, the Labor party eventually retreated from its humanitarian policies towards ones more similar to the “Pacific Solution” due to the sharp increase of boat arrivals.<sup>74</sup>

### **3. “Boat People” Becomes a Trend**

Under the Gillard government and her proposed “Malaysia Deal,” the term “boat people” first emerged in the media.<sup>75</sup> “Boat people” is the derogatory definition of asylum seekers arriving by boat, legally defined as Irregular Maritime Arrivals (IMAs). Other terms used by the media during the discussion of the “Malaysia Deal” included: “illegal arrivals,” “genuine refugees,” and “queue jumpers.”<sup>76</sup> These terms misled the public into believing that IMAs equate to illegal immigrants, despite the right to seek asylum from persecution that is guaranteed by the 1951 Refugee Convention. Unfortunately, the term “boatpeople” is frequently used by Australian citizens, despite its negative stereotypes, due to the frequent use of the word by media moguls and politicians, including current Prime Minister Tony Abbott.

### **4. Current Sensationalizing of Asylum Seekers**

Rudd and Abbott were highly successful at creating an anti-refugee sentiment directed towards boatpeople that permeated throughout Australia during their campaigns. Both sides used language including “national security,” “illegal,” and “border protection” when referring to

---

<sup>73</sup> *Id.* at 281.

<sup>74</sup> *Id.* at 280

<sup>75</sup> Elizabeth Rowe and Erin O’Brien, *supra* note 67 at 175.

<sup>76</sup> *Id.* at 177.

IMAs, which incited a threatening feeling in the minds of Australians.<sup>77</sup> Last year, about 90% of IMAs were found to be genuine refugees,<sup>78</sup> but the political strategy of sensationalizing the need to “stop the boats” kept the majority of Australians believing that this was the best strategy. Both Abbott and Rudd also hinged on the humanitarian need to “stop people from drowning” as support for their policies.<sup>79</sup> If boats were deterred by the “no advantage” principle, then logically fewer people would be at risk of death at sea. Rudd and Abbott employed the tactic of dichotomous characterization where asylum seekers are either “legitimate humanitarian refugees” or “illegitimate boat arrivals.”<sup>80</sup> The “no advantage” principle also intensified public sentiment that IMAs are “queue jumpers,” taking the place of valid, “legal” refugee applicants.<sup>81</sup> However, no “queue” of asylum seekers typically exists in processing centers overseas.<sup>82</sup> Asylum seekers by land, air, or sea eventually end up in similar processing situations.

The key flaw to the “no advantage” principle is the assumption that IMAs will comply with deterrence measures. Boats headed for Australia will most likely not settle in transit countries like Malaysia or Indonesia, nor will they be satisfied with waiting in the United Nations’ “endless queue” of resettlement applicants.<sup>83</sup> Asylum seekers are already in a desperate situation if they are fleeing their home country in search for a better life. Australia is a bellwether country for quality of life compared to others in the Southeast-Asian region.<sup>84</sup> Australia is the “land of opportunity” on social and economic levels.<sup>85</sup> Even with the possibility of not having a

---

<sup>77</sup> Lenore Taylor, *supra* note 41

<sup>78</sup> *Id.*

<sup>79</sup> Richard Bailey, *Reviews*, 24 *Current Issues Crim. Just.* 289, 294, (2012-2013).

<sup>80</sup> Elizabeth Rowe and Erin O’Brien, *supra* note 75 at 174.

<sup>81</sup> Billings, *supra* note 70 at 304.

<sup>82</sup> *Id.*

<sup>83</sup> Bailey, *supra* note 79 at 295.

<sup>84</sup> Interview with J.J. Messner, Senior Associate, Fund For Peace, in Washington, D.C. (Sept. 18, 2013).

<sup>85</sup> *Id.*

right to work or not being settled in Australia, asylum seekers will still risk their lives for the chance to prosper.

According to J.J. Messner at Fund For Peace, it is easier for politicians to create anti “boat people” sentiments because of their non-Western and “otherness.”<sup>86</sup> Australia has a history of discriminating against “non-white” citizens, particularly regarding the White Australia Policy that lasted until the 1970s.<sup>87</sup> The White Australia Policy limited the migration of non-Western European immigrants for over seventy years.<sup>88</sup> The residue of racist immigration policies is evident in the deterrence measures taken to prevent IMAs since the majority of IMAs come from racially, culturally, and geographically “non-Western” backgrounds.<sup>89</sup> Current Australian immigration policies reflect the historical techniques of “exceptional governance” which are characterized by partial suspension of laws to specific subjects. Groups affected by “exceptional governance” have included indigenous aboriginals, indentured servants from Pacific Islands, migrant workers, prisoners of war, and now asylum seekers.<sup>90</sup> Ironically, today’s “Western” Australians are the descendents of European Irregular Maritime Arrivals that came to a country already inhabited by the native Aboriginals. If the “no advantage” policy had existed circa 18<sup>th</sup>-19<sup>th</sup> century Australia, Western Europeans would be subjected to the same mandatory detention practices. Messner also highlighted the fact that “visa overstayers” from predominately European countries are a bigger problem for the Australian economy.<sup>91</sup> Politicians have relied on the pervading “Us v. Them” mentality in Australian society to gather support for their restrictive immigration policies.

---

<sup>86</sup> *Id.*

<sup>87</sup> Elizabeth Rowe and Erin O’Brien, *supra* note 80.

<sup>88</sup> *Id.*

<sup>89</sup> Messner, *supra* note 84.

<sup>90</sup> Billings, *supra* note 81 at 282.

<sup>91</sup> Messner, *supra* note 89.

## VI. International Legal Obligations

---

### 1. The 1951 Refugee Convention

Australia is legally bound, from its ratification of the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, to protect the rights of asylum seekers and refugees within its territory.<sup>92</sup> In addition, the 1951 Convention and its Protocol have been incorporated into Australian national legislation via the *Migration Act 1958* (Cth) and the *Migration Regulations 1994*.<sup>93</sup> Therefore, if Australia violates the Refugee Convention, the country is not only failing to adhere to international law but also to the standards set forth in its own constitution. However, the 1951 Convention does not address the procedures for determining refugee status, leaving state parties to choose the means of implementation.<sup>94</sup>

According to the Convention, a refugee is a person who fears persecution for reasons of “race, religion, nationality, membership of a particular social group or political opinion,” and seeks habitual residence outside of the persecuting country.<sup>95</sup> In Australia, refugees are entitled access to health care, social security, English class, housing services, subsidized accommodations, free primary and secondary schooling, in addition to employment assistance.<sup>96</sup> However, the Australian government’s binary treatment of asylum seekers, based solely upon

---

<sup>92</sup> Kirtley, *supra* note 8 at 257.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 259

their mode of arrival, violates aspects of the Refugee Convention. Penalizing asylum seekers that enter “illegally” violates Article 31 of the convention<sup>97</sup>

## 2. Non-refoulement

The Australian government has argued that since most of the asylum seekers come by boat via Indonesia, Indonesia should be responsible for granting legitimate asylum status to the IMAs.<sup>98</sup> Indonesian authorities do allow asylum seekers to remain within its borders while the UNHCR processes their claims, however, Indonesia is neither a signatory to the 1951 Convention nor its 1967 Protocol, so its national law does not guarantee the rights permitted through attaining refugee status.<sup>99</sup> If Australia returned IMAs back to Indonesia, it would not be violating the customary law of *non-refoulement*, even though the country is not bound by international laws, since the arrival would not be tantamount to returning the asylum seekers to a place of persecution.<sup>100</sup> The principle of *non-refoulement* is fundamental to refugee law. In Article 33 of the 1951 Refugee Convention, it states that no refugee shall be returned to any country “where he or she is likely to face persecution or torture.”<sup>101</sup> The principle, now considered by most states to be a rule of customary international law, applies to both refugees and asylum seekers.<sup>102</sup> Therefore, Abbott’s policy of “turning the boats around,” which he proposed in his campaign, would violate the principle of *non-refoulement* by returning IMA vessels to either their point of origin or host country.<sup>103</sup> Forced resettlement of refugees on Nauru and Manus, Papua New Guinea, could be argued as a violation of *non-refoulement* since the

---

<sup>97</sup> Also, note the right to equality and non-discrimination in Article 26 of the ICCPR and Article 2 of the CRC.

<sup>98</sup> Kirtley, *supra* note 92 at 260.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 262

<sup>102</sup> *Id.* at 263

<sup>103</sup> Australian Human Rights Commission, *supra* note 61 at 20.

countries' governments and economies have limited capacity to provide adequate resources to IMAs in detention and can barely sustain their own population with the resources available.<sup>104</sup> Nauru is also not a party to the 1951 Refugee Convention or its 1967 Protocol, making the forced relocation of IMAs to its shores highly controversial, even with Australia obliging to fund the offshore processing centers.<sup>105</sup>

### 3. Law of the Sea

Another argument providing evidence to Australia's obligation to accept asylum seekers arriving by sea refers to the customary international laws of the sea. The UN Convention on the Law of the Sea, ratified by Australia in 1994, states that each nation's sovereign territorial waters extends up to 12 nautical miles, or 22 km, beyond its coasts.<sup>106</sup> As a historically accepted principle under international law, every state has the responsibility to protect the basic human rights of all persons within its territory, including maritime asylum seekers. By rejecting the entrance of IMAs on Australian soil, the country is in violation of customary law. Furthermore, the definition of Australia's "migration zone" under the *Migration Act 1958* (Cth), that was not formally decided until after the *Tampa* incident, purposefully restricts the country's territorial obligations to accept IMAs to the mean low water mark, or shoreline.<sup>107</sup> Therefore, any IMAs intercepted before Australia's shores, even if they are in its territorial water, are not legally granted rights to asylum. The Australian government has also passed legalization that exempts Christmas Island and other northern Australian islands from its "migration zone," so IMAs do not have the right to apply for protection visas. Australia's national laws have effectively

---

<sup>104</sup> Billings, *supra* note 90 at 305.

<sup>105</sup> Kirtley, *supra* note 98 at 284.

<sup>106</sup> *Id.* at 264

<sup>107</sup> *Id.* at 266

circumvented norms of international law to corroborate the country's self-interested policies of IMA deterrence.

#### **4. Human Rights Law**

The 1948 Universal Declaration of Human Rights declares that every individual has the right to seek and enjoy asylum from persecution.<sup>108</sup> Australia does have the right to determine asylum status under its national laws and rights as a sovereign nation, but the caveat of required IMA offshore processing centers (OPCs), and denial of IMA refugee settlement, breaches international human rights laws. Australia's policy of "mandatory detention" for all IMAs defies Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, in that, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay" the legality of his detention.<sup>109</sup> In addition, Article 9(1) of the ICCPR and Article 37(b) of the Convention on the Rights of the Child (CRC) mandate that no one should be subjected to arbitrary detention.<sup>110</sup> The UN Human Rights Committee has repeatedly found Australia to be in breach of Article 9(1) of the ICCPR. The UNHCR and other human rights groups have criticized Australia's mandatory detention of asylum seekers, in both offshore and onshore immigration detention centers (IDCs), for the past decade.

## **VII. Current Issues in Australian Immigration Law**

---

<sup>108</sup> *Id.* at 268.

<sup>109</sup> *Id.* at 272.

<sup>110</sup> Australian Human Rights Commission, *supra* note 103 at 6.



## 1. Mandatory Detention

There are currently 24 Immigration Detention Centers (IDCs) spread across mainland Australia, including four on Christmas Island.<sup>111</sup> Detainees are held under close watch in “closed detention” in the centers without freedom of movement.<sup>112</sup> Under the *Migration Act 1958* (Cth), a non-citizen without a valid visa must be detained until they are granted a visa or removed from Australia.<sup>113</sup> The enforcement of mandatory detention was introduced in 1992 as a temporary measure in response to an increasing number of Indo-Chinese asylum seekers arriving by boat, however, it still remains a core element to Australia’s immigration policies.<sup>114</sup> Of the 9,375 people in immigration detention as of September 5, 2013, 6,579 (or 70%) of these people were held in IDCs, and the remaining 2,796 were in community detention.<sup>115</sup> Australia’s arbitrary system of mandatory detention of IMAs deemed “unlawful non-citizens” prohibits detainees from access to judicial review and, under the *Migration Act* amendments, there is no time limit to how long a person can be detained.<sup>116</sup> Therefore, any asylum seeker that arrives by boat can, according to current Australian immigration law, be held indefinitely and without explanation. Indefinite, prolonged detention can have detrimental effects on the detainees’ mental health. In the past year, there were 846 reported incidents of self-harm across Australia’s immigration detention network.<sup>117</sup>

The New Directions policy announced in 2008 began the use of community detention for IMAs, which was seen by many critics as an improvement in detention policies. Since mid-2010, the Australian Government has made significant progress in moving asylum seekers into

---

<sup>111</sup> *Id.*

<sup>112</sup> Prabha Nandagopal, *Mandatory Detention Revisited: 2013*, 22 Hum. Rts. Defender 18, 19 (2013).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Australian Human Rights Commission, *supra* note 110 at 6.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3

community-based arrangements to await assessment.<sup>118</sup> As of September 2013, 2,796 individuals live in community detention.<sup>119</sup> Even though community detention gives asylum seekers access to Australian services and the freedom of movement, IMAs arriving after August 13, 2012 are kept on bridging visas that deny them the right to work.<sup>120</sup> As of September 2, 2013, over 21,000 asylum seekers are living on bridging visas in Australia.<sup>121</sup> The bridging visas, despite allowing the asylum seekers to live in community detention, prohibit the right to work and force many individuals and families into poverty.<sup>122</sup> Denying IMAs the right to work specifically violates Article 6 of the International Covenant on Economic, Social, and Cultural rights (ICESCR), which ensures “the right of access to employment, especially for disadvantaged and marginalized individuals and groups.”<sup>123</sup> Asylum seekers automatically fit the criteria of disadvantaged and marginalized individuals. The denial of the right to work is one of the most obvious abuses of international law that Australia has committed.

## 2. Third Country Processing

International law does not prohibit third country processing of asylum seeker claims, but Australia’s new policies of mandatory third country processing for any IMA violate its responsibilities under the 1951 Refugee Convention.<sup>124</sup> Requiring third country processing allows Australia to avoid its duties as a party to the Refugee Convention to accept refugee claims when they are presented.<sup>125</sup> As of September 23, 2013 there were 710 asylum seekers detained

---

<sup>118</sup> Nandagopal, *supra* note 112 at 20.

<sup>119</sup> Australian Human Rights Commission, *supra* note 115 at 11.

<sup>120</sup> Dep’t of Immigration and Border Protection, Australian Gov’t, *Fact Sheet 65- Onshore Processing Arrangements: Bridging Visas for Irregular Maritime Arrivals* (May 2013).

<sup>121</sup> Australian Human Rights Commission, *supra* note 119 at 3.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 13

<sup>124</sup> *Id.* at 15

<sup>125</sup> *Id.*

on Nauru and 798 on Manus, Papua New Guinea.<sup>126</sup> The number of detainees in third country processing centers continues to increase, with 1,300 detainees being held on Manus Island as of February 2014.<sup>126.2</sup> The longer asylum seekers continue to be held in mandatory, offshore processing centers, the more tensions between detainees and camp security will increase, as well as tension between Australia and the rest of the international community.

## VIII. Pressures to Reform

---

### 1. Domestic Pressure

An issue surrounding an aspect of mandatory detention for asylum seekers is the prohibition of a detainee's access to judicial review. In the *M61* case, two Sri Lankan detainees claimed that they had been denied "natural justice," because they were barred from applying for protection visas, and they did not consider themselves bound to the *Migration Act 1958* (Cth). The *M61* decision extended Australian judicial review to IMAs processed at OPCs by reinforcing the norms of international human rights law that prohibits arbitrary detention.<sup>127</sup> Therefore, current detainees that have been denied the right of due process could bring a case to the High Court of Australia (HCA). The HCA has the legal jurisdiction resolved under the *M61* case to prosecute detention law violations.

However, the Australian government could argue that detention cases cannot be brought against the country since its current policies mandate that detainees must adhere to the laws and

---

<sup>126</sup> *Id.*

<sup>126.2</sup> Amnesty International, *Document-Australia: Manus Island Asylum Seekers Still At Risk*. (February 27, 2014).

<sup>127</sup> M. Crock and D. Ghezelbash, *Due Process and the Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers*, 18:2 *Austl. J. of Admin. L.* 109 (2011).

procedures of the processing countries.<sup>128</sup> This practice would thereby eliminate Australia's responsibility to protect detention violations. However, Australia is still bound to its international obligations to protect asylum seeker and refugee rights under the 1951 Refugee Convention, and the *M61* case could permit the HCA review powers of Australian officials, and private contractors employed by the Australian government, in foreign countries.<sup>129</sup> Therefore, Australia has both responsibilities under international and domestic law to investigate and prosecute violations against the detainees held in offshore processing centers.

## **2. Domestic Human Rights Groups**

In response to the Australian government's maltreatment of asylum seekers, human rights groups across the country have voiced their outrage. Since the enactment of John Howard's "Pacific Solution," the Australian Human Rights Commission (AHRC) has spoken out against the government's international human rights violations. Most recently, the AHRC released a report in October 2013 regarding the significant gap between the country's treatment of asylum seekers and refugees, and its obligations under international law.<sup>130</sup> The AHRC report details its observations of mandatory immigration detention and third country processing of IMAs on Nauru and Manus, Papua New Guinea.<sup>131</sup> The AHRC also found that arbitrary mandatory detention inflicted "serious psychological harm" upon the detainees, thereby amounting to cruel, inhuman or degrading treatment.<sup>132</sup>

The Refugee Council of Australia (RCOA) is another domestic human rights organization that tirelessly works to change the discriminating policies, to help members of the

---

<sup>128</sup> Billings, *supra* note 104 at 286.

<sup>129</sup> *Id.* at 294.

<sup>130</sup> Australian Human Rights Commission, *supra* note 121 at 1.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.*

refugee/asylum seeker community in Australia, and to educate communities on the refugee/asylum seeker rights violations. The RCOA is made up of 180 different organizations and 700 members across Australia.<sup>132.1</sup> In November 2013, Paul Power, CEO of RCOA, addressed the Southern Migrant and Refugee Center at their Annual General Meeting discussing the current policy concerns instated by Tony Abbott's Coalition Government.<sup>132.2</sup> Power emphasized several major problems domestic human rights groups should be advocating against.

Firstly, Australia is cutting the Refugee and Humanitarian Program by 6,250 permanent places for refugees each year.<sup>132.3</sup> Secondly, the IMAs sent to Papua New Guinea and Nauru will experience "indefinite detention," without any information regarding long-term protection, on the basis of their mode of arrival by boat.<sup>132.4</sup> Thirdly, Australia's "enhanced screening" process has led to over 1,000 asylum seekers forcibly returned to their country of origin where many will face persecution.<sup>132.5</sup> Fourthly, the Australian government is in cohorts with Sri Lanka, a country with an abhorrent human rights record and one that has been a major source of refugees, to prevent people from fleeing Sri Lanka.<sup>132.6</sup> Fifthly, not only are many IMAs living in Australia without the right to work if they arrived after August 13, 2012, IMAs do not have funded legal advice and face the potential of no longer having access to independent case review by the Refugee Review Tribunal.<sup>132.7</sup> IMAs found to be genuine refugees are also denied permanent protection status and reunification rights with separated family members.<sup>132.8</sup> Finally, there are 50 refugees permanently detained in Melbourne and Sydney IDCs because of adverse security

---

<sup>132.1</sup> Paul Power, *Looking Beyond Australia's Narrow Debate About Asylum*, Refugee Council of Australia, Nov. 21, 2013, 3-5.

<sup>132.2</sup> *Id.* at 3.

<sup>132.3</sup> *Id.*

<sup>132.4</sup> *Id.*

<sup>132.5</sup> *Id.*

<sup>132.6</sup> *Id.*

<sup>132.7</sup> *Id.*

<sup>132.8</sup> *Id.*

assessments, which they are not allowed to contest because of their IMA status.<sup>132.9</sup> All of these concerns present enormous policy hurdles the human rights community must overcome, however, instead of dwelling in pessimism, activists must remain optimistic and work tirelessly to find sustainable, constructive solutions.

### 3. International Pressure

Australia's current treatment of asylum seekers has garnered widespread criticism from the international community. When the country reintroduced offshore processing of IMAs, the UNHCR voiced its concerns and refusals to assist in administering the process of resettlement.<sup>133</sup> According to the Vienna Convention of the Law of Treaties, Australia's mandatory detention and offshore processing of IMAs breaches its international obligations to the 1951 Refugee Convention and contradicts its responsibility to adhere to the "good faith" of treaty ratification.<sup>134</sup> Additionally, in December of 2012, the UNHCR Mission to the Republic of Nauru reported that the reception conditions on Nauru and Manus, Papua New Guinea violate international standards.<sup>135</sup> Even though the "Houston Report" has been criticized from requiring mandatory OPCs, the report did necessitate appropriate treatment and accommodation of the IMAs.<sup>136</sup> However, the UNHCR found the living conditions on Manus and Nauru to be "cruel, inhumane, and degrading".<sup>137</sup> If Australia refuses to improve the living conditions at the OPCs and refuses to remove mandatory offshore processing, it will be subject to inspection for

---

<sup>132.9</sup> *Id.*

<sup>133</sup> A. Kirk, *UNHCR tells Government it won't be involved in Pacific Solution Mark 2*, ABC News ABC, Aug. 24, 2012.

<sup>134</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 *UNTS* 331, Jan. 27, 1980, Articles 26 and 31.

<sup>135</sup> Billings, *supra* note 128 at 296.

<sup>136</sup> *Id.*

<sup>137</sup> See Amnesty International, *Nauru camp a human rights catastrophe with no end in sight*, Nov. 23, 2012 (Media Release).

breaking international treaty and human rights laws. According to a representative from UNHCR in Geneva, the conservative governments in Australia have played a major role in the increase of asylum seeker rights abuses in the country.<sup>137.1</sup> UNHCR's power to affect change is limited to publishing policy recommendations because of the political nature of the United Nations. Therefore, UNHCR must find the "balance between human rights and diplomacy," when it comes to putting pressure on nation's to repair asylum seeker and refugee laws.<sup>137.2</sup>

Controversy also surrounds Australia's failure to process visa applications in a timely, organized fashion. One example concerns an Iraqi refugee, Mohammed Sagar, who was transferred to Nauru in 2002 for processing.<sup>138</sup> Australia denied Sagar entry in 2005, and he remained there until Sweden stepped in to resettle him.<sup>139</sup> Sagar sought access to the reasons why Australia refused to process his status, but the Federal Court of Australia refused.<sup>140</sup> Denying Sagar's right to natural justice blatantly violates his human rights. As of August 31, 2013, 6,136 people (75%) had been detained for 3 months or less; 1,881 people (23%) had been detained between 3 and 12 months; and 189 people (2%) had been detained for over a year, with some still detained after 4 years.<sup>141</sup> Keeping an asylum seeker detained for more than a year, especially since the detainees have no knowledge of when their detainment will cease, has enormously detrimental mental effects. The UN Human Rights Committee found that Australia had violated "the right not to be subjected to cruel, inhuman or degrading treatment or

---

<sup>137.1</sup> Interview with Lawrence Fioretta, Senior Communications Director, UNHCR, in Geneva, Switzerland (Nov. 5, 2013).

<sup>137.2</sup> *Id.*

<sup>138</sup> Billings, *supra* note 135 at 300.

<sup>139</sup> *Id.*

<sup>140</sup> *Sagar and anor v O'Sullivan*, Mar. 4, 2011, Fed. Ct. of Austl., [2011] FCA 182; *Parkin v O'Sullivan*, 30 September 2009, Fed. Ct. of Austl., [2009] FCA 1096 (Austl.).

<sup>141</sup> Australian Human Rights Commission, *supra* note 130 at 6.

punishment,” and “the right of people detained to be treated with dignity” by keeping people detained for long periods of time with full knowledge of the adverse mental effects.<sup>142</sup>

## IX. Recommendations

---

The Australian government needs to adjust its policies regarding mandatory immigration detention so that the policies adhere to international law. Cases of detention should be considered on an individual basis if deemed necessary to his or her case.<sup>143</sup> The current method of detaining all asylum seekers that arrive by boat generalizes the entire group and prolongs the refugee assessment process. Furthermore, the Australian *Migration Act 1958* (Cth) must be amended to enforce a time limit for detention and access to judicial oversight.<sup>144</sup> The Australian government needs to grant legal permission to IMAs so they are allowed to remain in Australia while their refugee status is determined, and, furthermore, to be allowed to live in Australia if they are found to be refugees. Currently, domestic policy has excised Australia’s mainland and outlying territories, including Christmas Island, from the boundaries allowed to accept IMAs.<sup>144.1</sup> By implementing these changes, Australia will be upholding its obligations to international human rights law.

Additionally, Australia should continue to transfer IMAs into community detention. Community detention aligns more closely with Australia’s international human rights obligations that detention in onshore or offshore processing centers do.<sup>145</sup> Developing alternatives to IDCs, such as community detention or bridging visas, is critical to building a sense of safety and

---

<sup>142</sup> *Id.* at 10.

<sup>143</sup> *Id.* at 7.

<sup>144</sup> *Id.*

<sup>144.1</sup> Kirtley, *supra* note 107 at 266.

<sup>145</sup> *Id.* at 11.



security for recent immigrants.<sup>145.1</sup> Bridging visas also mark a positive step away from mandatory detention, but in order for the visas to be successful, Australian IMAs arriving after August 13, 2012 must be reinstated with the right to work. The majority of refugees living in the Asia-Pacific region live in cities and towns rather than camps making it necessary for them to have the right to work.<sup>145.2</sup> Refugees in cities like Kuala Lumpur and Bangkok fill major gaps in the labor market and significantly contribute to their host country's economy, but because they are not allowed to work, they are liable to arrest at any time.<sup>145.3</sup> The IMAs who arrived in Australia after August 13, 2012 and were resettled in community detention centers are not given the right to work either. The only help this group of asylum seekers receives comes from NGOs who help with emergency assistance, health care, education, and legal representation all without government support.<sup>145.4</sup>

If Australia is not currently willing to resettle IMAs, there are other alternatives to in-country resettlement. Three traditional durable solutions are: assisted voluntary repatriation to the country of origin if it does not interfere with *non-refoulement*, integration in the country where the refugee has been given asylum, or resettlement to a third country.<sup>145.5</sup> At the moment Australia has chosen to resettle all IMAs to third country, OPCs on Nauru and Papua New Guinea. A substitute to these options would allow some refugees to remain or to go to another country under migrant worker arrangements.<sup>145.6</sup> Since Australia is a resettlement country for asylum seekers/refugees arriving by all other means except by boat, it should remove its excision policy and not discriminate against a singular type of asylum seeker. Australia is a successful and

---

<sup>145.1</sup> Power, *supra* note 132.1.

<sup>145.2</sup> *Id.*

<sup>145.3</sup> *Id.*

<sup>145.4</sup> *Id.*

<sup>145.5</sup> *Id.* at 4.

<sup>145.6</sup> *Id.*

powerful state whose role in the international community could considerably affect neighboring countries' refugee/asylum seeker policies. As a member of the United Nations and having ratified the 1951 UN Refugee Convention, Australia is formally bound to cooperate with UNHCR in facilitating "its duty of supervising the applications of the provisions" in the Convention and its Protocol.<sup>146</sup> Australia must adhere to its international law obligations by taking away mandatory detention, eliminating all offshore and third country processing centers, and reinstating the right to work.

## **X. Conclusion**

---

The Australian government's blatant violation of the rights of asylum seekers and refugees is a major concern for its reputation in the international community. If Australia continues to forcibly resettle irregular maritime arrivals outside of its borders, the United Nations will have to address Australia's breach of the UN convention regarding the rights of refugees, and take action to prevent further human rights abuses from occurring. Preventing refugees that come by boat from becoming Australian citizens, and forcing them to live like criminals in detention centers in countries that lack the resources to properly accommodate their needs, is a blatant violation of Australia's commitment to international law. Arguably, Tony Abbott's current immigration policies restrict and violate more rights of asylum seekers than those administered by the Howard government. These strict policies, however, are not having the expected outcome of "stopping the boats" since the number of IMAs has not declined. Australia

---

<sup>146</sup> Kirtley, *supra* note 105 at 286.

has long been viewed as a modern, democratic country that has worked diligently to respect the human rights of its citizens. However, the direction the country is currently taking is exactly opposite of their reputation in regards to the rights of asylum seekers and refugees. At this crossroads in foreign policy, the Abbott government must choose the path of being a bellwether country for its region by treating all asylum seekers, regardless of mode of arrival, as equal people, deserving of the same rights and protections as any other citizen of the world.

## **XI. Bibliography**

---

1. A. Kirk, *UNHCR tells Government it won't be involved in Pacific Solution Mark 2*, ABC News ABC, Aug. 24, 2012.
2. Australian Human Rights Commission, *Asylum seekers, refugees, and human rights: Snapshot Report*, 4, 2013 (Austl.).
3. *Australia's Boat People: The PNG Solution*, The Economist, July 27, 2013.
4. *Australia: 'Pacific Solution' Redux: New Refugee Law Discriminatory, Arbitrary, Unfair, Inhumane*, Human Rights Watch, Aug. 17, 2012.
5. Dep't of Immigration and Border Protection, Australian Gov't, *Fact Sheet 65- Onshore Processing Arrangements: Bridging Visas for Irregular Maritime Arrivals* (May 2013).
6. Dep't of Immigration and Citizenship, Australian Gov't, *Asylum Statistics-Australia: Quarterly Tables-March Quarter 2013* (March 2013).
7. Dep't of Immigration and Citizenship, *Visa, Immigration, and Refugees: By Boat, No visa*, Australian Gov't (Sept. 13, 2013).
8. *Document-Australia: Manus Island Asylum Seekers Still At Risk*, Amnesty International, February 27, 2014.
9. Elaine Pearson, *Dispatches: Australia- News Government, New Boats*, Human Rights Watch, Sept. 10, 2013.
10. Elizabeth Rowe and Erin O'Brien, *Constructions of asylum seekers and refugees in Australian political discourse*, 2 Crime and Justice Research Center, QLD U. of Technology, 173, 176 (2013).
11. Hugo Graeme, *From compassion to compliance? Trends in refugee and humanitarian migration in Australia*, 56.1 GeoJournal: Geography and Refugees 27-37 (2002).
12. Interview with J.J. Messner, Senior Associate, Fund For Peace, in Washington, D.C. (Sept. 18, 2013).
13. Interview with Lawrence Fioretta, Senior Communications Director, UNHCR, in Geneva, Switzerland (Nov. 5, 2013).
14. Jan Govett, *UN Claims Australia Has Violated International Law*, The Courier (Sept. 12, 2013).
15. Janet Phillips and Harriet Spinks, Parliament of Australia, Dep't of Parliamentary Services, *Boats arrivals in Australia since 1976* (July 23, 2013).

16. Karishma Vaswami, *Australian PM says 'united' with Indonesia on migrants*, BBC News: Asia, Sept. 30, 2013.
17. Katharine Betts, *Immigration Policy Under the Howard Government*, 38.2 Australian Journal of Social Issues 169-192 (2003).
18. Lenore Taylor, *Kevin Rudd's boat fix shows good sense has sailed*, The Guardian, July 19, 2013.
19. M. Crock and D. Ghezelbash, *Due Process and the Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers*, 18:2 Austl. J. of Admin. L. 109 (2011).
20. Paul Power, *Looking Beyond Australia's Narrow Debate About Asylum*, Refugee Council of Australia, Nov. 21, 2013, 3-5.
21. Prabha Nandagopal, *Mandatory Detention Revisited: 2013*, 22 Hum. Rts. Defender 18, 19 (2013).
22. Refugee Council of Australia, *Enough is Enough: It's Time For A New Approach*. August 13, 2013, 1-6.
23. Richard Bailey, *Reviews*, 24 Current Issues Crim. Just. 289, 294, (2012-2013).
24. *Sagar and anor v O'Sullivan*, Mar. 4, 2011, Fed. Ct. of Austl., [2011] FCA 182; *Parkin v O'Sullivan*, 30 September 2009, Fed. Ct. of Austl., [2009] FCA 1096 (Austl.).
25. Tony Abbott, The Coalition Parliament of Australia, *Our Plan: Real Solutions for all Australians: 20. Delivering stronger borders and a more secure nation* 47-48 (Jan. 2013).
26. UN Convention and Protocol Relating to the Status of Refugees art. 31, 1951, U.N.T.S.
27. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, Jan. 27, 1980, Articles 26 and 31.