



ARTICLES

‘Turning Back the Boats’: Australia’s Interdiction of Irregular Migrants at Sea

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ABSTRACT

At the end of 2013, the Australian Government reintroduced a policy to turn around or tow back vessels carrying irregular migrants, many of them asylum seekers. This policy is designed to prevent their arrival in Australia and return them to the place from where the vessels departed. A similar policy was in operation in late 2001 when, in the aftermath of the so-called ‘Tampa Affair’, four vessels were returned to Indonesia. This article examines the context, objectives, and controversies of this policy and explores the known successful and attempted ‘turn-backs’. The article critically evaluates the rationale and operation of the past and present policies and reflects on the question of whether to retain or repeal this approach.

1. INTRODUCTION

The arrival of vessels carrying irregular migrants to Australia has been a prominent and controversial issue in Australian politics and public discourse for the past sixteen years. Over this period, several thousand irregular migrants, mostly asylum seekers from Afghanistan, Iran, Iraq, Pakistan, and Sri Lanka, have arrived in Australia, usually travelling from Indonesia by boat with the aid of migrant smugglers. In 2013 alone, 20,587 persons travelling on 300 boats – officially referred to as ‘suspected illegal/irregular entry vessels’ (SIEVs) – were apprehended in Australia, most of them near the Australian offshore territories of Christmas Island and Ashmore Reef, which are in relatively close proximity to the southern parts of Indonesia.¹

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¹ Janet Phillips and Harriet Spinks, ‘Boat arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013) 22.

These arrivals generated mostly negative publicity in the Australian media. The asylum seekers on board these vessels have often been described as 'queue-jumpers' or 'economic migrants', and fears have been raised about potential threats to national security and border protection.² The rhetoric and responses from the Australian Government have been similarly hostile and have involved a range of measures to prevent and deter further boat arrivals.³

Among the most contentious of these measures is the policy to stop vessels carrying irregular migrants from entering Australian waters and turning or towing them back to the place from where the vessels departed. This policy was first introduced in October 2001 in the aftermath of the so-called 'Tampa Affair'. In an effort to prevent further boat arrivals of this kind, the Royal Australian Navy was ordered to steer vessels carrying irregular migrants back to Indonesia or to take the vessels in tow and release them outside Indonesia's territorial sea. In September 2013, a similar policy was introduced and multiple vessels have been returned since this policy came into operation in late December 2013. Few details have been released about these 'turn-backs', as the Government maintains that information about 'on water' matters needs to be classified for 'operational reasons'.⁴

This article analyses the rationale and effects of the policy to return irregular migrant vessels from Australia to the place of embarkation. It gives insight into the operation of this policy and provides an overview of the known vessels that have been turned or towed back since the policy was first adopted in 2001. In order to provide the fullest possible account, and to displace common myths and misrepresentations, each vessel that has been returned is documented individually in some detail. This is also done with a view to shed light on the circumstances of the passengers and crew, and the experience of those involved in effecting the 'turn-backs' and 'tow-backs'. These accounts also provide evidence to evaluate the effectiveness and feasibility of this policy, assess the policy against the requirements of international refugee law, and reflect upon the feasibility and sustainability of this policy in the short, medium, and long term.

2. THE PACIFIC SOLUTION 2001

Measures to return vessels bringing irregular migrants from Indonesia to Australia were first instituted as part of a number of policies implemented by the Australian Government in 2001 to deny asylum seekers arriving by boat entry into Australia and to deter others from making the same journey.⁵ These policies, developed under then Prime Minister John Howard, became collectively known in Australia as the 'Pacific

² Matthew Cameron, 'From "Queue Jumpers" to "Absolute Scum of the Earth": Refugee and Organised Criminal Deviance in Australian Asylum Policy' (2013) 59 *Austr J Polit Hist* 241, 243–44; Matt McDonald, 'Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School' (2011) 46 *Aust J Pol Sci* 281; Jane McAdam, 'Editorial: Australia and Asylum Seekers' (2013) 25 *IJRL* 435, 436; Phillips and Spinks, *ibid.*, 6.

³ Andreas Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14 *IJRL* 302, 302–03; Phillips and Spinks, *ibid.*, 6–7, 9; Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 *IJRL* 583, 586.

⁴ Jon Donnison, 'Asylum policy: "No comment"' (*BBC News*, 9 Jan 2014) <<http://www.bbc.com/news/world-asia-25649085>>; Jonathan Swan, 'Tony Abbott compares secrecy over asylum seekers to war time' *The Sydney Morning Herald* (10 Jan 2014) <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-compares-secrecy-over-asylum-seekers-to-war-time-20140110-30lyt.html>>.

⁵ Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, 'A Certain Maritime Incident' (2002) (Senate Select Committee Report), 13–14; Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 *Griffith LR* 238, 264–65. See also Stephen H Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) 14 *Geo Immigr LJ* 619, 627.

Solution.⁶ The catalyst for the introduction of these measures was the 'Tampa Affair' that involved a Norwegian cargo ship, the MV *Tampa*. On board the MV *Tampa* were 433 asylum seekers who had been rescued after their vessel sank on the way from Indonesia to Australia. The Australian Government refused to allow the asylum seekers to disembark at Christmas Island and the MV *Tampa* was seized by armed Australian Special Air Service (SAS) troops after its captain refused to turn away from Christmas Island.⁷

2.1 Operation Relex

The Australian Government's interdiction program called 'Operation Relex' was initiated on 28 August 2001 as one aspect of the Pacific Solution. It ended in early 2002. Initially, Operation Relex involved the Royal Australian Navy attempting to persuade vessels to voluntarily return to Indonesia through a 'show of force', issuing warnings against continuing to Australia, and redirecting vessels out of Australian waters.⁸ When this was unsuccessful, a policy of 'active return' was adopted, which involved steering or towing the vessels to Indonesia when it was considered 'safe to do so'.⁹ The Navy determined whether a vessel could be safely returned based on the state of the vessel's engine, the state of its hull, the presence of life-saving, radio, and navigational equipment, and the skills of the crew,¹⁰ although the ultimate decision to turn-back individual boats was made by the Australian Government.¹¹

During Operation Relex, twelve vessels, or SIEVs, were detected attempting to reach Australia between 7 September and 16 December 2001. The first four of these vessels, SIEVs 1–4, could not be persuaded to return to Indonesia. SIEV 4 ultimately sank. Four vessels, SIEVs 5, 7, 11, and 12, were successfully returned to Indonesia after the policy of 'active return' was adopted. Two vessels, SIEVs 6 and 10 sank during the return process. Returns were not attempted on the remaining two vessels, SIEVs 8 and 9, when their engines failed. The passengers on board those vessels who were not returned to Indonesia were taken to Christmas Island or Nauru and placed in immigration detention. A further vessel, dubbed SIEV X, sank in international waters south of Java on 19 December 2001, killing 353 people.¹² In 2003, one further vessel, SIEV 14, was returned to Indonesia under 'Operation Relex II'. Table 1 below lists each of these vessels and some information about their interception, crew, and passengers.

⁶ Later renamed the 'Pacific Strategy'.

⁷ See generally, Ernst Wilhelm, 'MV *Tampa*: The Australian Response' (2003) 15 IJRL 159, 159–63; Chantal Marie-Jeanne Bostock, 'The International Legal Obligations owed to the Asylum Seekers on the MV *Tampa*' (2002) 14 IJRL 279, 279–82; Ryszard Piotrowicz, 'The case of MV *Tampa*: state and refugee rights collide at sea' (2002) 76 ALJ 12, 12–13.

⁸ Marian Wilkinson, 'Secret file: Operation Relex', *The Sydney Morning Herald* (28 Oct 2002) <<http://www.smh.com.au/articles/2002/10/27/1035683303429.html>>.

⁹ David Marr and Marian Wilkinson, *Dark Victory* (2nd edn, Allen & Unwin 2004) 287–88; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 19 Oct 2011, 110 (Vice Admiral Ray Griggs); Senate Select Committee Report, above n 5, 14–15.

¹⁰ Evidence to Senate Foreign Affairs, *ibid*; Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 Apr 2002 (Evidence to Senate Select Committee, 11 Apr 2002), 662 (Rear Admiral Geoff Smith).

¹¹ Marr and Wilkinson, above n 9, 287.

¹² See generally, Senate Select Committee Report, above n 5, 195–290; Marr and Wilkinson, *ibid*, 301–17; Susan Metcalfe, *The Pacific Solution* (Australian Scholarly Publishing 2010) 48–49.

Table 1. Suspected Irregular Entry Vessels (SIEVs), intercepted in Australia during Operations Relex and Relex II

SIEV #	Name of vessel	Date of interception	Number of passengers	Number of crew	Outcome
SIEV 1	<i>Aceng</i>	7 Sept 2001	229		Not persuaded to return to Indonesia; passengers taken to Nauru
SIEV 2	<i>KM Ratna Mujia</i>	9 Sept 2001	132		Passengers taken to Nauru
SIEV 3	<i>KM Sumber Bahagia</i>	11 Sept 2001	129	5	Not persuaded to return to Indonesia; passengers taken to Nauru
SIEV 4	<i>Olong</i>	6 Oct 2001	219	4	Attempt to return to Indonesia; later towed to Christmas Island
SIEV 5	<i>Harapan Indah</i>	12 Oct 2001	238		Returned to Indonesian waters near Kupang, West Timor
SIEV 6	<i>Mulya Jaya</i>	19 Oct 2001	222	5	Attempt to return to Indonesia; passengers later taken to Christmas Island
SIEV 7	<i>Mirnawati</i>	22 Oct 2001	88	4	Returned to Indonesian waters near Roti Island; 3 people presumed dead
SIEV 8		27 Oct 2001	31		Passengers taken to Christmas Island
SIEV 9	<i>Sinar Bontano III</i>	31 Oct 2001	152		Engine unsuccessfully repaired by Navy; passengers taken to Christmas Island
SIEV 10	<i>Sumber Lestari</i>	8 Nov 2001	160	4	Explosion occurred on board; 2 migrants dead, others taken to Christmas Island

Table 1. *Continued*

SIEV #	Name of vessel	Date of interception	Number of passengers	Number of crew	Outcome
SIEV 11		11 Dec 2001	14	4	Returned to Indonesian waters near Roti Island
SIEV 12	<i>Sinar Sultra II</i>	16 Dec 2001	133		Returned to Indonesian waters near Roti Island
SIEV 13	<i>Hao Kiet</i>	3 Jun 2003	54	3	Passengers taken to Christmas Island
SIEV 14	<i>Minasa Bone</i>	4 Nov 2003	14	4	Returned to Saumlaki on the island of Yamdena, Indonesia

2.2 Turn-backs under Operation Relax

2.2.1 SIEV 4, 6 October 2001

The Indonesian vessel *Olong*, a 25-metre fishing vessel referred to as SIEV 4 by Australian authorities, left from the southern part of Sumatra, Indonesia, on the night of 5 October 2001. The vessel was carrying 219 mostly Iraqi migrants, as well as four crew.¹³ When SIEV 4 was intercepted by the Australian Navy on 6 October 2001, passengers reportedly displayed 'visible and oral aggression'.¹⁴ Navy officials issued warnings against entering Australia's contiguous zone¹⁵ and attempts were made to persuade the vessel to return to Indonesia, including firing warning shots across the bow of the vessel.¹⁶

When these attempts went unheeded, Navy personnel boarded SIEV 4. At that time, some of the passengers became 'irate, aggressive and to some extent hysterical'.¹⁷ Fourteen passengers jumped overboard and had to be recovered from the water. It has also been reported that several passengers made suicide threats, vandalised the vessel, attempted to set fire to the vessel, and attempted to sabotage the vessel by disabling its steering and engines.¹⁸ The steering of SIEV 4 was eventually repaired and the vessel was directed to return to Indonesia, but shortly thereafter some passengers again attempted to sabotage the vessel. SIEV 4 was again boarded by Navy officials, assessed as 'most likely unreparable', and towed towards Christmas Island.¹⁹

¹³ Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), 'Fact Sheet 74a. Boat Arrival Details' (6 Oct 2004) 7; Senate Select Committee Report, *ibid.*, 27, app III.

¹⁴ Senate Select Committee Report, *ibid.*, 32.

¹⁵ A zone extending 12 nautical miles around Australia's territorial sea. Maritime zones are explained further below.

¹⁶ Debi McLachlan, 'A Certain Maritime Incident' (2003) 3 *Counterpoints* 89, 90–91; Liz Jackson, ABC, 'Too Good to be False' (*Four Corners*, 4 Mar 2002) <<http://www.abc.net.au/4corners/stories/s496427.htm>>.

¹⁷ Senate Select Committee Report, above n 5, 33.

¹⁸ *ibid.*, 33–34; McLachlan, above n 16, 89, 91.

¹⁹ Senate Select Committee Report, *ibid.*, 35–36.

After twenty-four hours in tow, the bilge pumps on board SIEV 4 failed and, when the vessel was 16 nautical miles northwest of Christmas Island, it began to rapidly take on water. As the vessel started to sink, passengers and crew were rescued and taken on board the Navy vessel. The passengers and crew were later transferred to Manus Island, Papua New Guinea, for immigration processing.²⁰

2.2.2 SIEV 5, 12 October 2001

SIEV 5, the *Harapan Indah*, was the first vessel successfully returned to Indonesia under Operation Relex. It was carrying 238 Afghan and Iranian migrants when it was intercepted near Ashmore Reef on the morning of 12 October 2001.²¹ Warnings and attempts by Navy personnel to redirect the vessel out of the Australian contiguous zone were not successful. On advice that it would be possible for the Navy to return SIEVs to the edge of the Indonesian territorial sea, 'subject to a range of caveats [...] about seaworthiness and a series of other issues',²² orders were given to 'intercept, board and return [SIEV 5] to Indonesia.'²³ On the night of 17 October 2001, the Navy began to tow the vessel back to Indonesia. To prevent disturbances, the passengers were not informed of this.²⁴ Two days later, they reached the edge of the Indonesian territorial sea and the passengers were told that they were being returned to Indonesia.²⁵

Before the return, the vessel's ignition key and fuel transfer pump had been thrown overboard. When the passengers realised that they would be returned, a riot broke out, and the engine room of the vessel was stormed by a group of passengers who disabled the engine. One passenger lit a fire on board the vessel; others threatened to harm themselves if they were returned to Indonesia.²⁶ Once SIEV 5 was towed to Indonesian waters, and after the engine had been repaired, the vessel was left drifting outside the Indonesian territorial sea near Kupang, West Timor. Approximately ten hours later, the vessel reached the shore.²⁷

2.2.3 SIEV 6, 19 October 2001

HMAS *Arunta*, a Navy vessel, intercepted SIEV 6 north of Christmas Island on 19 October 2001. The vessel was carrying 222 mostly Afghan migrants and five crew.²⁸ Naval officers gave warnings against entering Australian territorial waters and boarded the vessel after it continued into the Australian contiguous zone.²⁹

²⁰ *ibid.*, 27; Marr and Wilkinson, above n 9, 257–58; Metcalfe, above n 12.

²¹ DIMIA, Fact Sheet 74a, above n 13.

²² Evidence to Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, Canberra, 16 Apr 2002, 917, 919 (Jane Halton).

²³ Evidence to Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, Canberra, 5 Apr 2002 (Evidence to Senate Select Committee, 5 Apr 2002), 508 (Rear Admiral Geoff Smith); Metcalfe, above n 12, 51.

²⁴ Evidence to Senate Select Committee, 11 Apr 2002, above n 10, 661 (Rear Admiral Geoff Smith).

²⁵ SIEV 05 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith).

²⁶ SIEV 05 Event Summary *ibid.*; Statement in the Matter of SIEV 05, tabled in Evidence to Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, Canberra, 9 Apr 2002 (Lieutenant Commander Simon Paul Gregg).

²⁷ SIEV 05 Event Summary, *ibid.*; Jessica Howard, 'To Deter and Deny: Australia and the Interdiction of Asylum Seekers' (2003) 21 *Refugee* 35, 41; Sue Hoffman, 'Fear, Insecurity and Risk: Refugee journeys from Iraq to Australia' (PhD Thesis, Murdoch University 2010) 248–49.

²⁸ DIMIA, Fact Sheet 74a, above n 13; Senate Select Committee Report, above n 5, 27, app III.

²⁹ SIEV 06 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith), cited in Senate Select Committee Report, *ibid.*, 541–42.

SIEV 6 was then taken to Christmas Island where it stayed until 22 October 2001. On that day, officials from HMAS *Warramunga*, a Navy vessel, who sought to take SIEV 6 back to Indonesia, boarded the vessel. At that point, extensive sabotage to the vessel was discovered. Attempts to repair SIEV 6 were met with aggression from the passengers who lit fires, tore up deck boards, kicked out hull planks and ripped the bilge area of the vessel apart. The passengers ceased these activities when they were informed that they were being recorded on video and that their actions would jeopardize their asylum claims. Other acts of sabotage continued for several days.³⁰

By 28 October 2001, SIEV 6 was finally repaired, but shortly into the turn-back the bilge pumps developed problems due to the vessel's poor condition. When water levels in the vessel began to rise, the passengers had to be transferred to HMAS *Warramunga*. Passengers and crew were then taken to Christmas Island and later to Nauru and placed in immigration detention.³¹

2.2.4 SIEV 7, 22 October 2001

The second vessel to be returned to Indonesia was SIEV 7, the *Mirnawati*, which was intercepted near Ashmore Reef on 22 October 2001. The vessel was carrying 88 migrants and four Indonesian crew.³² Naval officers described the vessel as, 'overcrowded, unhygienic, and without food or drinkable water.'³³ Warnings were again issued, but the vessel continued towards Australia. When Navy personnel boarded the vessel, several passengers caused disturbances, apparently because they were aware that SIEV 5 had been returned to Indonesia.³⁴ Fifteen passengers, most of them wearing life jackets, jumped overboard.³⁵

On 28 October 2001, HMAS *Arunta* commenced towing SIEV 7 back to Indonesia. The passengers were only informed of their destination the following morning. At this point, the situation on board the vessel deteriorated and threats were made to throw children overboard and commit self-harm. One passenger did jump overboard, and others pierced a fuel drum with an anchor and doused themselves in fuel.³⁶ The hold of SIEV 7 was set on fire. A number of passengers also attempted to overpower some of the Navy officers and pepper spray was used to force them to desist.³⁷

On 29 October 2001, SIEV 7 was released outside Indonesian water. The vessel headed for land near the village of Pepela on Roti Island, but twelve hours later the engine died, approximately 300–400 metres from shore. The passengers had to swim or wade to

³⁰ Senate Select Committee Report, *ibid*, 542; SIEV 06 Event Summary, *ibid*; Marr and Wilkinson, above n 9, 321; David Corlett, *Following Them Home: The Fate of the Returned Asylum Seekers* (Black Inc 2005) 102–06.

³¹ Senate Select Committee Report, *ibid*, 27, 542; SIEV 06 Event Summary, *ibid*; Marr and Wilkinson, *ibid*, 324–25; Metcalfe, above n 12, 51–52; Corlett, *ibid*, 106–07.

³² Evidence to Senate Select Committee, 5 Apr 2002, above n 23, 512, 555–56 (Rear Admiral Geoff Smith); cf DIMIA, Fact Sheet 74a, above n 13.

³³ Debbie Whitmont, ABC, 'To Deter and Deny' (*Four Corners*, 15 Apr 2002) <<http://www.abc.net.au/4corners/stories/s531993.htm>>.

³⁴ Senate Select Committee Report, above n 5, 542–43.

³⁵ *ibid*; Evidence to Senate Select Committee, 5 Apr 2002, above n 23, 510 (Rear Admiral Geoff Smith); SIEV 07 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith).

³⁶ Evidence to Senate Select Committee, *ibid*, 559 (Rear Admiral Geoff Smith); Marr and Wilkinson, above n 9, 326.

³⁷ Senate Select Committee Report, above n 5, 542–43; SIEV 07 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith); Marr and Wilkinson, *ibid*, 326.

shore. There were reports that three passengers did not make it to shore and, presumably, drowned.³⁸

2.2.5 SIEV 10, 8 November 2001

SIEV 10, the *Sumber Lestari*, was intercepted near Ashmore Reef on 8 November 2001. SIEV 10 was carrying four crew and 160 mostly Afghan migrants.³⁹ When Customs officials boarded the vessel, there was an explosion in the engine room that set fire to the vessel and forced the passengers to jump overboard. Customs personnel tried to extinguish the fire but were unsuccessful. Most of the passengers could not swim but were equipped with simple life jackets. Australian personnel broke pieces of wood and threw them to passengers to hold on to, and pulled people from the water.⁴⁰ Two women were dragged from the water unconscious and could not be revived. The survivors were taken to Christmas Island and later to Nauru, and placed in immigration detention.⁴¹

In 2002, the incident was investigated by the Western Australian Coroner. Evidence was presented alleging that the fire in the engine room of SIEV 10 was deliberately lit. The Coroner's finding, however, left it open as to whether the deaths were caused by an unlawful act of homicide or occurred by accident.⁴²

2.2.6 SIEV 11, 11 December 2001

SIEV 11 was intercepted near Ashmore Reef on 11 December 2001. It was carrying fourteen mostly Iraqi migrants and four Indonesian crew.⁴³ When Navy officials first boarded the vessel the passengers were cooperative and Navy personnel undertook repairs to the vessel's engine and steering.⁴⁴ Only when the vessel was towed back to Indonesia did the passengers become increasingly agitated, some threatening to harm themselves or jump overboard.⁴⁵ SIEV 11 was, however, returned to Indonesia without further incident and released near Pepela, Roti Island, on 13 December 2001.⁴⁶

2.2.7 SIEV 12, 16 December 2001

The last vessel to be interdicted and returned to Indonesia under Operation Relex was SIEV 12, the *Sinar Sultra II*. It was intercepted on 16 December 2001 30 nautical miles northwest of Ashmore Reef.⁴⁷ SIEV 12 was carrying 133 Iraqi, Afghan, and Iranian migrants.⁴⁸ The vessel was boarded on 17 December 2001 by Australian Navy personnel who undertook repairs to the vessel and then began to tow the vessel back

³⁸ ABC, above n 33; Human Rights Watch, "By Invitation Only": Australian Asylum Policy' (Report, vol 14, no 10, Dec 2002) <<http://www.hrw.org/reports/2002/australia/australia1202.pdf>>; Marr and Wilkinson, *ibid*, 328.

³⁹ DIMIA, Fact Sheet 74a, above n 13, 8; Metcalfe, above n 12, 53–54.

⁴⁰ Senate Select Committee Report, above n 5, app II; SIEV 10 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith); Marr and Wilkinson, above n 9, 350–58; Metcalfe, *ibid*.

⁴¹ Senate Select Committee Report, *ibid*, 27, app III; SIEV 10 Event Summary, *ibid*; *Sadiqi v Commonwealth* (2009) 181 FCR 1, 15–17.

⁴² Office of the State Coroner of Western Australia, 'Annual Report 2002/2003' (Report, 20 Nov 2003) 31–33.

⁴³ DIMIA, Fact Sheet 74a, above n 13, 8.

⁴⁴ SIEV 11 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith).

⁴⁵ Senate Select Committee Report, above n 5, 542–43; SIEV 11 Event Summary, *ibid*.

⁴⁶ Howard, above n 27.

⁴⁷ Marg Hutton, 'Boats Carrying Asylum Seekers Returned to Indonesia Under Operation Relex & Operation Sovereign Borders' (SIEVX.com, 19 Mar 2014) <<http://sievx.com/articles/background/PushbackTable.pdf>>.

⁴⁸ DIMIA, Fact Sheet 74a, above n 13, 8.

to Indonesia. During return, several incidents in which passengers attempted to harm themselves, sabotage the vessel, and jumped overboard occurred.⁴⁹ SIEV 12 was ultimately released outside the Indonesian territorial sea near Pepela, Roti Island, on 20 December 2001.⁵⁰

2.3 Operation Relex II

Operation Relex was concluded on 13 March 2002 to enable information about the operation to be given to a parliamentary committee investigating the circumstances of SIEV 4 and false allegations that passengers on this vessel had thrown children overboard.⁵¹ It was replaced with 'Operation Relex II' which continued until 16 July 2006.⁵²

In the nearly five and half years of 'Operation Relex II', only one vessel, SIEV 14, was returned to Indonesia. SIEV 14, the *Minasa Bone*, ran aground at Snake Bay on Melville Island in the Northern Territory on 4 November 2003. It was carrying fourteen Turkish men and four Indonesian crew. Six men disembarked from the vessel onto the beach, where local residents alerted Australian authorities.⁵³ Later that day, Navy officials boarded SIEV 14 and served a detention notice. The passengers and the vessel remained in this spot for the next thirty-seven hours.⁵⁴ During this period, Customs and Immigration closed the airport on Melville Island and declared an air exclusion zone over the island.⁵⁵ It was also reported that the Immigration Department had ordered local residents not to speak to the media.⁵⁶ In judicial proceedings it was later noted:

[T]hat the policy of the government was to operate as clandestinely as possible and to provide [...] no information [...] to the public through the media to the extent that this could be avoided. [...] [A]ttempts to prevent the media from coming anywhere near the vessel were made by the imposition of a 3,000 metre exclusion zone over the Island and the closing of the airport to prevent the media as well as others from getting to the Island. Behaviour of this kind usually implies that there is something to hide.⁵⁷

The following day, Navy personnel found that the engine on SIEV 14 had been damaged and parts of the engine, together with the identity documents of the passengers, were later found in an oil barrel on board the vessel.⁵⁸ Navy personnel 'adequately but

⁴⁹ Evidence to Senate Select Committee, 11 Apr 2002, above n 10, 651–53 (Rear Admiral Geoff Smith); SIEV 12 Event Summary, tabled in Evidence to Senate Select Committee, 5 Apr 2002, above n 23 (Rear Admiral Geoff Smith).

⁵⁰ Senate Select Committee Report, above n 5, 547–48; SIEV 12 Event Summary, *ibid*; Statement in the Matter of Boarding Party Operations SIEV 12, tabled in Evidence to Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, Canberra, Apr 2002 (Lieutenant Damian Casey); Statement in the Matter of SIEV 12, tabled in Evidence to Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, Canberra, Apr 2002 (Lieutenant Richard Casey).

⁵¹ See Senate Select Committee Report, *ibid*; see also AAP, 'Fewer patrols not to blame for asylum boat' *The Age* (Melbourne, 6 Nov 2003) <<http://www.theage.com.au/articles/2003/11/06/1068013310134.html>>.

⁵² Department of Defence, 2006–07 Budget Estimates Hearing: Operation Relex, Parliament of Australia <https://web.archive.org/web/20130814214048/http://www.defence.gov.au/ips/parliament/qons/41st/slc/0607_budget_may06/responses/w19.htm>.

⁵³ *Cox v Minister for Immigration, Multicultural & Indigenous Affairs* [2003] NTSC 111 (20 Nov 2003); Tim Johnston and Sophie Morris, 'We said we were refugees, Kurds tell' *The Australian* (11 Nov 2003) 1.

⁵⁴ *Cox*, *ibid*.

⁵⁵ Sophie Morris, 'Vanstone approved boat plan day before' *The Australian* (8 Nov 2003) 2.

⁵⁶ Sophie Morris, 'New bid to repel asylum seekers' *The Australian* (5 Nov 2003) 1.

⁵⁷ *Cox*, above n 53.

⁵⁸ Sophie Morris and John Kerrin, 'Boatpeople may be sent to Indonesia' *The Australian* (7 Nov 2003) 6.

not fully' repaired the engine, and the vessel was assessed as being seaworthy and as having the required safety gear, food, and water on board.⁵⁹

The passengers on board SIEV 14 later claimed that they told local residents and the police that they were refugees; a claim that was denied by Mr Alexander Downer, the Minister of Foreign Affairs at that time. Immigration Minister Ms Amanda Vanstone, however, admitted that the men might have asked for asylum, contradicting earlier Government versions of the events.⁶⁰ On 13 November 2003, the Government officially conceded that, as documented in Defence Force records, the men on board SIEV 14 had indeed made numerous requests to remain in Australia.⁶¹

On 7 November 2003, SIEV 14 was towed 20 kilometres out to sea, where it anchored. At that point, the Government considered transporting the passengers of the vessel to Christmas Island for processing.⁶² The next day, it emerged that talks had been held with Indonesia regarding the return of the passengers and crew, and that Nauru was also considered as a possible destination.⁶³ The same day, the Northern Territory Legal Aid Commission lodged an application to the Supreme Court in Darwin to have the asylum seekers brought to Australia for processing.⁶⁴ Two days later it was confirmed that the Navy had towed SIEV 14 back to Indonesia where it had arrived on 8 November 2003 in the small port of Saumlaki on the island of Yamdena.⁶⁵

2.4 Initial observations

Mr Tony Abbott, then leader of the opposition, cited the 'success' of Operations Relex and Relex II as justification for proposals to reintroduce similar policies on numerous occasions, stating that '[t]he Navy has done it safely before. [There is] no reason why they can't do it safely again.'⁶⁶ The accounts of the turn-backs detailed above, however, show that the policy posed serious risks to the lives and safety of those involved, and only had limited success in returning vessels to Indonesia.

No vessel was successfully persuaded to return to Indonesia by the use of warning notices. The inefficacy of these notices became immediately apparent to Australian authorities after their failure in the cases of SIEVs 1–3. Under the subsequent policy of 'active return', a total of five vessels were returned to Indonesia. A further three, SIEVs 4, 6, and 10, sank at some point during interdiction or return to Indonesia.

Even when return to Indonesia was accomplished, the operations involved significant risks to the asylum seekers, crew, and Australian Navy and Customs personnel. The events that took place in each of the turn-back operations under Operations Relex and Relex II demonstrate a clear pattern of hostility and sabotage when Australian

⁵⁹ Cox, above n 53; Sophie Morris, 'Vessel towed away but ministers won't say where – Asylum-seekers expelled', *The Australian* (8 Nov 2003), 2, citing then Defence Minister Senator Robert Hill (Lib).

⁶⁰ Sophie Morris, 'Vanstone backflip on asylum claims' *The Australian* (12 Nov 2003) 2.

⁶¹ Mark Forbes and Meaghan Shaw, 'Kurds Did Seek Asylum: Vanstone' *The Age* (Melbourne, 14 Nov 2003) 1.

⁶² Sophie Morris and John Kerrin, 'Storm over boatpeople' *The Australian* (6 Nov 2003) 2; Meaghan Shaw, 'Asylum Boat Sails into Fresh Refugee Furore' *The Age* (Melbourne, 6 Nov 2003) 1.

⁶³ Morris and Kerrin, above n 58; Morris, above n 59, 2; Meaghan Shaw and Mark Forbes, 'Asylum Seekers on Way to Indonesia' *The Age* (Melbourne, 8 Nov 2003) 8.

⁶⁴ Morris, *ibid*; see Cox, above n 53.

⁶⁵ Mark Forbes, 'Boat People in Indonesian Hands' *The Age* (Melbourne, 10 Nov 2003) 2.

⁶⁶ Tom Allard and Kirsty Needham, 'Abbott's "send boats back" policy under attack at home and abroad', *The Age* (Melbourne, 24 Jan 2012) <<http://www.theage.com.au/national/abbotts-send-boats-back-policy-under-attack-at-home-and-abroad>

authorities attempted to return the vessels of asylum seekers to Indonesia. To prevent their return, passengers lit fires, tore apart their vessels, sabotaged their vessels' steering, engine and fuel pumps, attempted to overpower naval officers, made threats to harm themselves, and in several instances actually did commit acts of self-harm. Two women died in the sinking of SIEV 10. Australian authorities were also unable to guarantee the safe passage of released vessels through the Indonesian territorial sea to shore and there were reports that three passengers on board SIEV 7 drowned after being released. To mark the turn-backs under Operations Relex and Relex II as a success is thus a misrepresentation by any standard.

3. THE LABOR GOVERNMENT 2007–13

On 3 December 2007, Mr Kevin Rudd succeeded Mr Howard as Prime Minister of Australia after a federal election held on 24 November 2007. When asked during the election campaign what he would do if further vessels with irregular migrants were to approach Australia, Mr Rudd answered 'you'd turn them back'.⁶⁷ During the nearly six years the Labor Government held office, first under Mr Rudd and later under Ms Julia Gillard – who strongly opposed the turn-back policy – no further vessels were returned to Indonesia.⁶⁸ Australian Navy and Customs officials who intercepted vessels en route to Australia continued the practice of warning crew and passengers about the stiff penalties associated with migrant smuggling offences in Australia and of advising them to return to Indonesia.⁶⁹

3.1 SIEV 36, 15 April 2009

The practice of issuing warnings to vessels about being returned to Indonesia led to a disastrous incident involving SIEV 36, a vessel that was intercepted on 15 April 2009 some 2.5 nautical miles southeast of Ashmore Reef. Upon boarding SIEV 36, Navy officers handed out a notice stating that '[t]he Government of Australia is determined to stop illegal migration to its territory' and '[y]ou should now consider immediately returning to Indonesia with your passengers and not enter Australian territory'.⁷⁰ The notice was wrongly issued because SIEV 36 was already within Australia's territorial sea at that time.⁷¹

The warning notice led passengers to believe that they would be forcibly returned to Indonesia, which caused them to panic and, in order to prevent the vessel's return, to set it alight. The fire ignited petrol vapour under the deck of SIEV 36 causing an explosion. The passengers and crew of SIEV 36, and a number of Navy personnel who had boarded the vessel, were thrown overboard by the explosion or were forced to jump

20120123-1qe3l.html>; see also, eg, Chris Uhlmann, ABC, 'Tony Abbott calls on PM to "name the date"' (7:30, 8 July 2013) <<http://www.abc.net.au/7.30/content/2013/s3798648.htm>>.

⁶⁷ Paul Kelly and Dennis Shanahan, 'Rudd to turn back boatpeople' *The Australian* (23 Nov 2007) <<http://www.theaustralian.com.au/national-affairs/policy/rudd-to-turn-back-boatpeople/story-e6frg8yx-1111114943944>>.

⁶⁸ Crook and Ghezlbash, above n 5, 266.

⁶⁹ David Marr and Lindsay Murdoch, 'Cat and mouse – the deadly game on our borders', *The Sydney Morning Herald* (20 Feb 2010) <<http://www.smh.com.au/world/cat-and-mouse--the-deadly-game-on-our-borders-20100219-olvv.html>>. See also Evidence to Senate Select Committee, 5 Apr 2002, above n 23, 503 (Rear Admiral Geoff Smith).

⁷⁰ Inquest into the death of Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani [2010] NTMC 14.

⁷¹ Inquest report, *ibid*, 19–20.

overboard to safety. Most of them were rescued from the water, but some of the passengers could not swim and five Afghan asylum seekers died, either from injuries sustained in the explosion or from drowning. Another forty persons were injured.⁷²

An inquest into the deaths later found that the vessel had not been properly searched for flammable liquids and that lighters and matches in the possession of the passengers should have been confiscated. It was further found that the explosion probably would not have occurred if the warning notice had not been issued.⁷³ The practice of issuing such notices ceased following this incident.⁷⁴

3.2 Expert Panel on Asylum Seekers, August 2012

From late 2008, the number of irregular boats carrying asylum seekers began to rise again, which led the Australian public and media to blame the Government for the growing numbers and the rising costs associated with detaining and processing asylum seekers in Australia.⁷⁵ The Liberal and National parties of Australia, then in Opposition, also called for 'tougher' government measures to prevent such arrivals. The then Leader of the Opposition, Mr Abbott, promised to re-implement a policy returning vessels of asylum seekers to Indonesia should he be elected.⁷⁶

In response to growing pressure, on 28 June 2012, Prime Minister Gillard commissioned an 'Expert Panel on Asylum Seekers' to provide advice on how to prevent asylum seekers from travelling to Australia by boat.⁷⁷ The Panel released its report on 13 August 2012. In it, the Panel, inter alia, entertained the idea of re-implementing a policy of returning vessels to Indonesia, but stressed that returns could only be effected 'in circumstances where a range of operational, safety of life, diplomatic and legal conditions are met.'⁷⁸ These conditions included consent from Indonesia; compliance with domestic and international law, including the obligation not to return refugees to a place where they face persecution; and obligations to passengers and crew under the International Convention for the Safety of Life at Sea.⁷⁹ The Panel also noted that turn-back decisions could only be made after risks to the safety of Australian personnel and any legal responsibility Australia or Australian personnel would have for the turn-backs had been considered.⁸⁰ The Panel concluded that the conditions for 'effective, lawful and safe' turn-backs were not met at that time and thus opted against the adoption of such measures.

⁷² Inquest report, *ibid*, 38–40; Lindsay Murdoch, 'Navy under fire over deadly asylum boat blast' *The Age* (Melbourne, 25 Jan 2010) <<http://www.theage.com.au/national/navy-under-fire-over-deadly-asylum-boat-blast-20100125-mtsk.html>>.

⁷³ Inquest report, *ibid*.

⁷⁴ Inquest report, *ibid*, 20.

⁷⁵ Andrew Markus, 'Mapping Social Cohesion 2010' (Scanlan Foundation Surveys Summary Report, Monash Institute for the Study of Global Movements, 2010) 39; Phillips and Spinks, above n 1, 8.

⁷⁶ Liberal Party of Australia, 'Restoring Sovereignty and Control to Our Borders' (Policy Directions Statement, 27 May 2010) 5; Phillip Hudson, 'Tony Abbott firm on "turning back the boats" despite risk to sailors' *Herald Sun* (Melbourne, 21 Oct 2011) <<http://www.heraldsun.com.au/archive/news/abbott-firm-on-asylum-seekers/story-fn7x8me2-1226172281713>>; Tony Abbott, 'Kevin Rudd's 50,000 Illegal Arrivals by Boat' (Media Release, 7 Aug 2013); Liberal Party of Australia, 'The Coalitions' Policy for a Regional Deterrence Framework to Combat People Smuggling' (Aug 2013) 10.

⁷⁷ Australian Government, Report of the Expert Panel on Asylum Seekers (Aug 2012) 9.

⁷⁸ *ibid*, 53–54.

⁷⁹ International Convention for the Safety of Life at Sea, opened for signature 1 Nov 1974, 1184 UNTS 2, entered into force 25 May 1980.

⁸⁰ Report of the Expert Panel on Asylum Seekers, above n 77, 53–54.

4. OPERATION SOVEREIGN BORDERS

4.1 Background and summary

On 18 September 2013, eleven days after winning the election, the new Government led by Prime Minister Abbott implemented Operation Sovereign Borders, a 'military-led response to combat people smuggling and to protect [Australia's] borders'.⁸¹ This involved a suite of measures to deny and deter the arrival of irregular migrants by boat,⁸² including the policy of returning vessels to Indonesia when 'safe to do so'.⁸³

Operation Sovereign Border shares many similarities with Operation Relex,⁸⁴ but differs in two important aspects. Firstly, under the new policy a number of lifeboats have been purchased, for the purpose of ensuring the return of migrants in the event that this cannot take on place on the original vessel because of unseaworthiness or sabotage.⁸⁵ Secondly, the policy also involves returning vessels of irregular migrants arriving from Sri Lanka to that country.⁸⁶ In one case, Australian authorities also unsuccessfully sought to return a vessel to India.⁸⁷

In the first three months after Operation Sovereign Borders was first announced, twenty vessels carrying irregular migrants were intercepted in Australia, although none of these were returned to Indonesia.⁸⁸ The first turn-back under Operation Sovereign Borders was effected on 19 December 2013. For ten months, the Australian Government refused to confirm the return of any vessels of asylum seekers, citing the need for 'operational' secrecy.⁸⁹ On 28 January 2015, the Minister for Immigration and Border Protection, Mr Peter Dutton, confirmed that in the period between 19

⁸¹ Liberal Party of Australia, 'The Coalition's Operation Sovereign Borders Policy' (July 2013) 2.

⁸² Liberal Party of Australia, Regional Deterrence Framework, above n 76, 15; see also Tony Abbott, 'Landmark speech: the Coalition's plan for more secure borders' (Speech delivered at the Institute of Public Affairs, Melbourne 27 Apr 2012) <<http://web.archive.org/web/20130419094305/http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/8689/Landmark-Speech--Address-to-the-Institute-of-Public-Affairs-Melbourne.aspx>>.

⁸³ Liberal Party of Australia, *ibid*.

⁸⁴ 'Is it illegal to turn back boats in international waters to Indonesia?' (*ABC Fact Check*, 26 Sept 2013) <<http://www.abc.net.au/news/2013-09-26/government-turn-back-boat-policy/4979898>>.

⁸⁵ The Abbott Government has refused to comment on the purpose of the lifeboats. See generally, Paul Toohey, 'First close-up look at a lifeboat the Abbott Government is using to stop asylum seeker boats' (*news.com.au*, 31 Jan 2014) <<http://www.news.com.au/national/first-closeup-look-at-a-lifeboat-the-abbott-government-is-using-to-stop-asylum-seeker-boats/story-fncynjr2-1226815340238>>; Sarah Whyte, 'Cost of Abbott government's orange lifeboats to tow back asylum seeker [sic] trebles to \$7.5 million' *The Age* (Melbourne, 21 Mar 2014) <<http://www.theage.com.au/federal-politics/political-news/cost-of-abbott-governments-orange-lifeboats-to-tow-back-asylum-seeker-trebles-to-75-million-20140320-355ci.html>>.

⁸⁶ Bianca Hall, 'Navy would have role in turning asylum boats around: Morrison' *The Sydney Morning Herald* (4 Feb 2013) <<http://www.smh.com.au/federal-politics/political-news/navy-would-have-role-in-turning-asylum-boats-around-morrison-20130204-2dtkd.html>>.

⁸⁷ CPCF, 'Plaintiff's Chronology', Submission in *CPCF v Minister for Immigration and Border Protection*, no S169 of 2014.

⁸⁸ 'Operation Sovereign Borders: log of boat arrivals and other asylum seeker incidents' (*ABC News*, 26 Mar 2014) <<http://www.abc.net.au/news/2013-10-25/log-of-boat-arrivals-and-other-asylum-seeker-incidents/5014496>>.

⁸⁹ Emma Griffiths, 'Scott Morrison says Government won't reveal when asylum seekers boats turned back' (*ABC News*, 23 Sept 2013) <<http://www.abc.net.au/news/2013-09-23/government-won27t-reveal-when-boats-turned-back/4975742>>; Alexandra Kirk, ABC, 'Scott Morrison defends secrecy around Operation Sovereign Borders' (*PM*, 31 Jan 2014) <<http://www.abc.net.au/pm/content/2013/s3935974.htm>>; Mark Corcoran, 'ADF's service newspapers reveal border protection "operational matters"' (*ABC News*, 26 Mar 2014) <<http://www.abc.net.au/news/2014-03-26/operation-sovereign-borders/5330392>>; but see Latika Bourke and George Roberts, 'Immigration Minister Scott Morrison acknowledges asylum boat turn-backs as UN interviews asylum seekers' (*ABC News*, 18 Mar 2014) <<http://www.abc.net.au/news/2014-03-18/morrison-acknowledges-asylum-boat-turn-backs/5327802>>.

December 2013 and 28 January 2015 a total of fifteen vessels carrying 429 passengers were returned.⁹⁰ Information is publically available about the circumstances of the return of eleven of these vessels. Since 19 December 2013, only one vessel has been taken to an Australian territory. [Table 2](#) provides a list of these twelve vessels.

Table 2. Interception of 'suspected irregular entry vessels' (SIEVs), 13 December 2013–1 February 2015

Date of interception or return	Place of interception	Number of passengers	Number of crew	Outcome
13 December 2013	Not reported	47		Returned to Indonesian waters near Roti Island
c 24 December 2013	Christmas Island	36 or 42		Returned to Indonesian waters near Sukabumi, West Java
1 January 2014	Melville Island	45		Returned to Indonesian waters near Roti Island
8 January 2014	Christmas Island	25	2	Returned to Indonesian waters near Citarate Satu, West Java
c 9 January 2014	Christmas Island	54	2	Returned to Indonesian waters near Cikepuh, West Java
c 1 February 2014	Christmas Island	34	2	Returned to Indonesian waters near Pangandaran, West Java
21 February 2014	Christmas Island	24, 26 or 28	3	Returned to Indonesian waters near Kebumen, Central Java
1 May 2014	Ashmore Reef	18	3	Returned to Indonesian waters near East Nusa Tenggara

Continued

⁹⁰ Minister for Immigration and Border Protection, 'Operation Sovereign Borders delivers six months without a successful people smuggling venture' (Media Release, 28 Jan 2015) <<http://www.minister.immi.gov.au/media/pd/2015/pd221047.htm>>.

Table 2. Continued

Date of interception or return	Place of interception	Number of passengers	Number of crew	Outcome
c 1 May 2014	Not reported	2	1	Passengers and crew transferred to other vessel intercepted 1 May 2014 and returned to Indonesian waters near East Nusa Tenggara
28 June 2014	Cocos (Keeling) Islands	41	0	Handed over to the Sri Lankan Navy near Batticaloa
29 June 2014 (SIEV 885)	Christmas Island	157	0	Transferred to Curtin Detention Centre, Western Australia, and later Nauru for immigration processing
15 Nov 2014	Cocos (Keeling) Islands	38	0	Handed over to the Sri Lankan Navy

4.2 Turn-backs under Operation Sovereign Borders

4.2.1 13 December 2013

The first known vessel to be returned to Indonesia under Operation Sovereign Borders was intercepted on 13 December 2013 carrying forty-seven mostly Somali and Sudanese asylum seekers.⁹¹ Passengers on board the vessel reported that they had been told by Navy officers that they were being taken to Christmas Island, but were instead towed back to Indonesian waters near Roti Island and released on 19 December 2013.⁹²

4.2.2 24 December 2013

The second vessel was intercepted around 24 December 2013, two days after it departed from Indonesia. It was carrying thirty-six or forty-two Pakistani, Iranian, Bangladeshi, and

⁹¹ George Roberts, 'IndonesiasaysAustraliannavy'pushed'backasylumseekerboatthatranaground' (ABC News, 7 Jan 2014) <<http://www.abc.net.au/news/2014-01-07/indonesia-says-australian-navy-towed-back-asylum-seeker-boat/5187232>>.

⁹² 'Turned-back refugees claimed being tortured by Australian naval officers' (ANTARA News, 8 Jan 2014) <<http://www.antaranews.com/en/news/92138/turned-back-refugees-claimed-being-tortured-by-australian-naval-officers>>; Peter Lloyd, ABC Radio National, 'Asylum seekers describe boat tow back' (PM, 8 Jan 2014) <<http://www.abc.net.au/pm/content/2013/s3922468.htm>>.

Afghan asylum seekers. The vessel ran out of fuel near Christmas Island and the captain phoned Australian authorities for assistance. Australian Navy personnel then refuelled the vessel, repaired its steering, and reportedly told the passengers on board the vessel that they were being taken to either Christmas Island or Darwin.⁹³ While the vessel was being escorted back to Indonesia, two passengers jumped overboard and had to be retrieved from the water. On 27 December 2013, control of the vessel was given back to the crew, four hours south of Indonesia. The engine of the vessel stopped before it reached land, and the passengers swam for one hour to reach shore near Sukabumi, West Java.⁹⁴

4.2.3 1 January 2014

The vessel *Riski 02* departed from Kendari, South Sulawesi on 27 December 2013, carrying forty-five migrants. The passengers were apprehended by the Australian authorities after reaching Melville Island, Northern Territory, on 1 January 2014.⁹⁵

After they were forced to re-embark, a number of passengers attempted to destroy the vessel.⁹⁶ The vessel was then towed back to Indonesia by HMAS *Stuart*. While in tow, passengers held a protest and at least ten passengers jumped overboard. Four men attempted to storm the engine room and were repelled with pepper spray, and there were attempts to sabotage the engine.⁹⁷ On 6 January 2014, the vessel was released near Roti Island.⁹⁸

4.2.4 8 January 2014

On 8 January 2014, a fourth vessel, carrying twenty-five migrants from Bangladesh and Myanmar, including four children, and two crew, was returned to Indonesia. The vessel had departed from Medan, Sumatra, and after ten days at sea was intercepted in sight of Christmas Island.⁹⁹ An Indonesian police officer later said that the vessel was only built to carry approximately ten people.¹⁰⁰ The vessel was released by Australian authorities

⁹³ Michael Bachelard, 'Witness reveals asylum seeker "suicide attempts" on high seas' *The Sydney Morning Herald* (20 Jan 2014) <<http://www.smh.com.au/federal-politics/political-news/witness-reveals-asylum-seeker-suicide-attempts-on-high-seas-20140119-312s1.html>>; Michael Bachelard, 'Towed asylum seekers said to have jumped' *The Sydney Morning Herald* (20 Jan 2014) <<http://www.smh.com.au/action/printArticle?id=5089151>>; Peter Alford, 'Fishing boat was intercepted, refuelled, repaired and steered back: asylum-seeker' *The Australian* (24 Jan 2014) <<http://www.theaustralian.com.au/national-affairs/policy/fishing-boat-was-intercepted-refuelled-repaired-and-steered-back-asylum-seeker/story-fn9hm1gu-1226809036471>>.

⁹⁴ Alford, *The Australian* (24 Jan 2014), *ibid*.

⁹⁵ Peter Lloyd, 'Asylum seekers on boats turned back to Indonesia say Australian Navy mistreated them' *ABC News*, 8 Jan 2014) <<http://www.abc.net.au/news/2014-01-08/asylum-seekers-on-boats-turned-back-to-indonesia-speak/5191024>>.

⁹⁶ Peter Alford, 'Asylum-seekers' real stories revealed' *The Australian* (31 Jan 2014) <<http://www.theaustralian.com.au/national-affairs/policy/asylumseekers-real-stories-revealed/story-fn9hm1gu-1226814426441>>.

⁹⁷ Aubrey Belford, 'Asylum seekers accuse Australia navy of abuse as boat towed to Indonesia' *Reuters*, 10 Feb 2014) <<http://www.reuters.com/assets/print?aid=USBREA1903F20140210>>; George Roberts, ABC, 'Asylum seekers on board "burns" boat speak out' (7:30, 24 Mar 2014); Michael Bachelard, 'Investigation: "burned hands" on the high seas' *The Sydney Morning Herald* (7 Feb 2014) <<http://www.smh.com.au/world/investigation-burned-hands-on-the-high-seas-20140206-hvbd1.html>>.

⁹⁸ Brendan Nicholson, 'Navy now "towing" back the boats', (*The Australian* online, 9 Jan 2014) <<http://www.theaustralian.com.au/national-affairs/policy/navy-now-towing-back-the-boats/story-fn9hm1gu-1226797698285>>; see also, Bachelard, *ibid*; Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Breach of Indonesian Territorial Waters* (2014) 1.

⁹⁹ Michael Bachelard and David Wroe, 'Another asylum boat turned around', *The Sydney Morning Herald* (16 Jan 2014) 8.

¹⁰⁰ Michael Bachelard, 'Australia turns back asylum seeker boat from Indonesia', *The Sydney Morning Herald* (20 Jan 2014) <<http://www.smh.com.au/federal-politics/political-news/australia-turns-back-asylum-seeker-boat-from-indonesia-20140115-30vds.html>>.

near Citarate Satu on the southern coast of Java. Local villagers reportedly rescued the passengers from the water near the shore.¹⁰¹

4.2.5 8 or 9 January 2014

The fifth boat departed Java on 5 January 2014 and was intercepted near Christmas Island three or four days later.¹⁰² It was carrying fifty-four migrants from Pakistan, Afghanistan, Bangladesh, Iran, Iraq, and Palestine, and two Indonesian crew. Upon interception, some of the passengers, aware of previous boats being returned to Indonesia, attempted to scuttle the already leaky vessel by damaging the hull to prevent their return to Indonesia. Persons on board the vessel later claimed that the Navy waited two and a half hours while their vessel sank before they were permitted to embark onto HMAS *Stuart*.¹⁰³ After two days they were transferred to a Customs vessel that took them towards Indonesia.

On 15 January 2014, the passengers and crew were told that they were being taken to Christmas Island and were transferred to a lifeboat. Following the transfer, the passengers were informed that they were, in fact, in the vicinity of Indonesia and only had enough fuel to return to shore.¹⁰⁴ The captain of the original vessel steered the lifeboat to the shore near Cikepuh, West Java. The passengers reportedly wandered through jungle for one or two days after reaching shore.¹⁰⁵ One media report claimed that three of the passengers died attempting to cross a river in the jungle.¹⁰⁶

4.2.6 SIEV 879, c 1 February 2014

SIEV 879 departed from Java on 27 January 2014 and was intercepted near Christmas Island several days later. It was carrying two Indonesian crew and thirty-four Iranian, Pakistani, Bangladeshi, and Nepalese migrants.¹⁰⁷ The vessel began to take on water and the passengers were transferred to ACV *Triton* when the vessel foundered. The passengers said they were on board the Customs vessel for approximately a week, during which a protest occurred. Two passengers from the vessel were brought ashore at Christmas Island for medical treatment and were later

¹⁰¹ Bachelard and Wroe, above n 99.

¹⁰² Michael Bachelard, 'First lifeboat used to return 56 asylum seekers' *The Age* (Melbourne, 17 Jan 2014) <<http://www.theage.com.au/federal-politics/political-news/first-lifeboat-used-to-return-56-asylum-seekers-20140116-30y0d.html>>.

¹⁰³ Step Vaessen, 'Refugees accuse Australian navy of abuse', *Al Jazeera English* (4 Feb 2014) <<https://www.youtube.com/watch?v=LHG8DG8Cr9A>>.

¹⁰⁴ Michael Bachelard, 'Asylum seekers say they were tricked by navy' *The Sydney Morning Herald* (17 Jan 2014) <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-say-they-were-tricked-by-navy-20140116-30xtz.html>>.

¹⁰⁵ Toohey, above n 85; George Roberts, 'Asylum seeker turn-backs: Indonesian spokesman says claims being investigated' *ABC News* (17 Jan 2014) <<http://www.abc.net.au/news/2014-01-17/indonesia-confirms-investigation-in-to-asylum-boat-turn-backs/5204346>>; David Crow, 'Australia apologises to Jakarta for territorial waters breach' *The Australian* (17 Jan 2014) <<http://www.theaustralian.com.au/national-affairs/policy/australia-apologises-to-jakarta-for-territorial-waters-breach/story-fn9hm1gu-1226803863921>>.

¹⁰⁶ Toohey, *ibid*.

¹⁰⁷ George Roberts, 'Lifeboat carrying asylum seekers lands on Indonesian coast' (*ABC News*, 6 Feb 2014) <<http://www.abc.net.au/news/2014-02-06/lifeboat-carrying-asylum-seekers-lands-on-indonesia-coast/5243990>>.

transferred to Nauru and placed in immigration detention.¹⁰⁸ The remaining passengers were eventually transferred to a lifeboat which was towed to Indonesia and released on the morning of 5 February 2014.¹⁰⁹ It reached shore near Pangandaran, West Java.¹¹⁰

4.2.7 21 February 2014

On 21 February 2014, Australian authorities intercepted a vessel carrying between twenty-four and twenty-eight migrants and three crew near Christmas Island. Customs personnel tried to repair the vessel's broken engine for several hours before the passengers were transferred to the Customs vessel and the original vessel was sunk. The passengers were kept on board the vessel before being transferred to a lifeboat on the morning of 24 February 2014. The lifeboat had been given enough fuel to reach Indonesia, and three hours later it ran aground near Kebumen, Central Java, 30 metres from the shore.¹¹¹

4.2.8 Eighth and ninth turn-backs 1–4 May 2014

The KM *Surya* departed Sulawesi on 26 April 2014 and was intercepted in Australian waters near Ashmore Reef on 1 May 2014. It was carrying eighteen Indian and Nepalese migrants and three Indonesian crew. A further vessel carrying two Nepalese asylum seekers and one Indonesian crew left Roti Island the same day and was intercepted sometime between 1 and 4 May 2014. According to Indonesian authorities, the three passengers and crew were transferred to the KM *Surya* on 4 May 2014, which was then released by Australian authorities near East Nusa Tenggara Province. The vessel ran out of fuel and the passengers and crew on board became stranded on the remote Lay Island. They were subsequently

¹⁰⁸ Paige Taylor, 'One asylum-seeker helped ashore from HMAS *Bathurst* with heart trouble' *The Australian* (4 Feb 2014) <<http://www.theaustralian.com.au/national-affairs/policy/one-asylum-seeker-helped-ashore-from-hmas-bathurst-with-heart-trouble/story-f9hm1gu-1226817083074>>; Paige Taylor, 'Mystery of man brought ashore' *The Australian* (1 Feb 2014) <<http://www.theaustralian.com.au/national-affairs/policy/mystery-of-man-brought-ashore/story-f9hm1gu-1226815343727>>; Michael Bachelard, 'Australian navy turns back asylum seeker boat to Indonesia after loading three extra people' *The Sydney Morning Herald* (6 May 2014) <<http://www.smh.com.au/federal-politics/political-news/australian-navy-turns-back-asylum-seeker-boat-to-indonesia-after-loading-three-extra-people-20140506-zr55k.html>>; Australian Customs and Border Protection Service, 'Fact Sheet: Operational Update 7 February 2014' (7 Feb 2014) <<http://newsroom.customs.gov.au/channels/Operation-Sovereign-Borders/releases/operational-update-7-february>>.

¹⁰⁹ George Roberts, ABC, 'Passengers describe drama of turning asylum seeker boats back' (7:30, 17 Mar 2014).

¹¹⁰ Michael Bachelard, 'Australia turns back sixth boat carrying asylum seekers' *The Sydney Morning Herald* (6 Feb 2014) <<http://www.smh.com.au/federal-politics/political-news/australia-turns-back-sixth-boat-carrying-asylum-seekers-20140206-323u7.html>>.

¹¹¹ Michael Bachelard, 'Another turned back boat lands in Indonesia' *The Sydney Morning Herald* (25 Feb 2014) <<http://www.smh.com.au/federal-politics/political-news/another-turned-back-boat-lands-in-indonesia-20140225-33dn7.html>>; George Roberts, 'Another orange lifeboat carrying asylum seekers arrives on Indonesia's Java coast: military source' (*ABC News*, 25 Feb 2014) <<http://www.abc.net.au/news/2014-02-25/another-orange-lifeboat-carrying-asylum-seekers-arrives-in-indo/5281484>>; Michael Bachelard, 'Vomitous and terrifying: the lifeboats used to turn back asylum seekers' *The Sydney Morning Herald* (2 Mar 2014) <<http://www.smh.com.au/national/vomitous-and-terrifying-the-lifeboats-used-to-turn-back-asylum-seekers-20140301-33t6s.html>>; Michael Bachelard, "'We were all sick': returned asylum seekers tell of lifeboat ordeal to Java', *The Sydney Morning Herald* (2 Mar 2014) <www.smh.com.au/federal-politics/political-news/we-were-all-sick-returned-asylum-seekers-tell-of-lifeboat-ordeal-to-java-20140301-33sol.html>.

found by the Indonesian Navy and placed in immigration detention in Kupang, West Timor.¹¹²

4.2.9 28 June 2014

On 6 July 2014, for the first time, a vessel carrying Sri Lankan asylum seekers was returned to Sri Lanka by Australian authorities.¹¹³ The *Sithumina*, a 12-metre fishing boat, departed Batticaloa, Sri Lanka, on 12 June 2014 and was met a few hundred metres away from shore by two smaller boats who ferried the forty-one passengers to the larger vessel.¹¹⁴ The vessel was bound for New Zealand, but after approximately ten days at sea the vessel experienced engine trouble and later ran out of fuel. The passengers called a New Zealand emergency phone number and on 28 June 2014 the vessel was intercepted in the Australian contiguous zone west of Cocos (Keeling) Islands.¹¹⁵

Australian authorities conducted refugee status determinations of the passengers from the ACV *Triton* by satellite phone as part of the Australian Government's 'enhanced screening' process. This process involves asking each of the asylum seekers a set of four questions and determining their refugee status on the basis of their answers to these questions (the asylum seeker's name, country of origin, where they had come from, and why they had left) without a right to appeal a negative decision.¹¹⁶ Some passengers reported that they could not understand the immigration officials with whom they were speaking, or hear them properly over the sound of machinery on the open deck of the ship. One asylum seeker estimated that the satellite phone dropped out between ten and fifteen times during the interview which lasted 30 to 45 minutes. Several passengers

¹¹² Michael Bachelard, 'Asylum seekers from two boats combined onto one for turn-back to Indonesia' *The Sydney Morning Herald* (6 May 2014) <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-from-two-boats-combined-onto-one-for-turnback-to-indonesia-20140506-zrs5kb.html>>; Bachelard, above n 108; Emma Griffiths, 'Indonesia says Australia allegedly adding passengers to asylum seeker boat a "serious development"' (*ABC News*, 6 May 2014) <<http://www.abc.net.au/news/2014-05-06/marty-natalegawa-on-boat-extra-passengers-serious-development/5434540>>; Paul Farrell, 'Report of extra asylum seekers put on turn-back boat a "serious development"' *The Guardian* (6 May 2014) <<http://www.theguardian.com/world/2014/may/06/asylum-boat-turnback-three-extra-passengers-put-on-board>>; Helen Brown, 'Australian Navy "added passengers" to asylum seeker boat during turn-back operation' *Australia Network News* (6 May 2014) <<http://www.abc.net.au/news/2014-05-06/an-indonesia-navy-issues-statement-on-asylum-seeker-boat-turn-b/5432284>>.

¹¹³ Stephanie March, 'Sri Lankan asylum seekers facing criminal investigation after being handed back by Australian authorities' (*ABC News*, 7 July 2014) <<http://www.abc.net.au/news/2014-07-07/morrison-confirms-sri-lankans-returned-after-interception/5575924>>.

¹¹⁴ Matt Stewart, 'No chance for Sri Lankans: Labour says refugees could not reach NZ' *Dominion Post* (Wellington, 12 July 2014) 2.

¹¹⁵ Daniel Hurst, 'Australia returns asylum seekers to Sri Lanka in sea transfer' *The Guardian* (7 July 2014) <<http://www.theguardian.com/world/2014/jul/07/australia-asylum-seekers-sri-lanka-sea-transfer/print>>; 'Sri Lanka to charge asylum-seekers returned to Australia' *Agence France-Presse* (7 July 2014); 'Christmas Island staff prepare for arrival of asylum seekers, according to Labor MP Alannah MacTiernan' (*ABC News*, 28 June 2014) <<http://www.abc.net.au/news/2014-06-28/staff-on-christmas-island-told-to-prepare-for-possible-arrival-/5557548>>; Jason Koutsoukis, 'Sri Lankan asylum seekers tell of sea ordeal' *The Canberra Times* (12 July 2014) 1; '53 Australian lawyers condemn return of asylum seekers to Sri Lanka' *Legal Monitor Worldwide* (7 July 2014); Sarah Whyte, 'Asylum boat "won't be sent to Sri Lanka"' *The Age* (Melbourne, 19 July 2014) 6; Simon Benson, 'Sri Lankan boat now back home' *The Daily Telegraph* (Sydney, 7 July 2014) 9; David Corlett, 'Sinhalese asylum seekers' on-water claims accepted by UN' *The Saturday Paper* (31 Jan 2015) <<http://www.thesaturdaypaper.com.au/news/politics/2015/01/31/sinhalese-asylum-seekers-water-claims-accepted-un/14226228001441>>.

¹¹⁶ Sarah Whyte and Jason Koutsoukis, 'Boats screened at sea' *The Sydney Morning Herald* (3 July 2014) 1; Amanda Hodge and Paige Taylor, 'Ocean transfers of asylum-seekers expected today' *The Australian* (3 July 2014) <<http://www.theaustralian.com.au/national-affairs/policy/ocean-transfers-of-asylumseekers-expected-today/story-fn9hm1gu-1226975765268>>; Paige Taylor, 'Gillard pioneered "screen-out" tactics' *The Australian* (4 July 2014) 2.

also stated that they did not feel they could speak freely to immigration officials because their interviews were conducted in front of other passengers.¹¹⁷ Forty passengers had their asylum claims rejected. One Sinhalese passenger was assessed as being eligible for further assessment. He elected to return to Sri Lanka with the other passengers when informed that he would be transferred to Manus Island, Papua New Guinea or Nauru and be placed in immigration detention pending his refugee status determination.¹¹⁸

On 7 July 2014, the Immigration Minister issued a statement confirming that on the previous day the forty-one passengers had been transferred to the SLNS *Samudura*, a Sri Lankan Navy vessel, in waters outside the Sri Lankan territorial sea.¹¹⁹ The passengers were taken ashore at the port of Galle and handed over to the Sri Lankan Criminal Investigation Department to face charges for leaving Sri Lanka illegally.¹²⁰ The forty-one passengers were brought before the Galle Magistrates' Court on 8 July 2014. Twenty-seven of the passengers were each released on a LKR 5,000 cash bail with a surety to the value of LKR 100,000. Their cases were due to be heard in court in May 2015. Five passengers were remanded in Boossa Prison awaiting charges in relation to the smuggling the other passengers. The nine children were discharged.¹²¹ In September 2014, reports emerged that the migrants had been maltreated and some tortured by Sri Lankan authorities.¹²² It was reported in January 2015 that nine of the passengers on board the vessel were subsequently found to be genuine refugees by the United Nations High Commissioner for Refugees (UNHCR).¹²³

4.2.10 SIEV 885, 29 June 2014

On 13 June 2014, an Indian vessel, later referred to as SIEV 885 by Australian authorities,¹²⁴ left Pondicherry, India, bound for Australia. The vessel was carrying 157 Sri

¹¹⁷ 'Sinhalese asylum seekers' on-water claims accepted by UN', above n 115; Amal Jayasinghe, 'Returned Sri Lanka migrants vent fury at Australia' *Agence France Presse* (8 July 2014); Jason Koutsoukis, 'They threatened me, said they would kill me if I told anyone. Said they would kill my children.' *The Sydney Morning Herald* (12 July 2014) 26; David Corlett, SBS, 'Turned Back to Torture' (*Dateline*, 30 Sept 2014) <<http://www.sbs.com.au/news/dateline/story/turned-back-torture>>.

¹¹⁸ Minister for Immigration and Border Protection, Scott Morrison, 'Australian Government returns Sri Lankan People smuggling venture' (7 July 2014); 'High Court injunction blocks handover of 153 asylum seekers to Sri Lanka' (*ABC News*, 8 July 2014) <<http://www.abc.net.au/news/2014-07-07/high-court-injunction-halts-handover-of-asylum-seekers/5579726>>.

¹¹⁹ Scott Morrison, *ibid*; Alexandra Kirk, ABC Radio National, 'Government confirms 41 asylum seekers have been returned to Sri Lanka' (*AM*, 7 July 2014); Stephanie March, ABC Radio National, 'Sri Lankan military spokesman confirms asylum seekers return' (*PM*, 7 July 2014) <<http://www.abc.net.au/pm/content/2014/s4041018.htm>>.

¹²⁰ 'High Court injunction blocks handover of 153 asylum seekers to Sri Lanka', above n 118.

¹²¹ *ibid*; 'Sri Lanka to charge asylum-seekers returned to Australia' above n 115; Max Blenkin, 'Asylum seekers granted reprieve by govt' *Australian Associated Press General News* (8 July 2014); Martin Parry, 'Australia admits Sri Lankan asylum-seekers in custody' *Agence France-Presse* (8 July 2014); Jane Wardell and Byron Kate, 'Australia ruling could leave Sri Lankan asylum seekers at sea' (*Reuters News*, 8 July 2014) <<http://www.reuters.com/article/2014/07/08/us-sri-lanka-australia-idUSKBN0FD01P20140708>>; Emma Griffiths and others, 'High Court challenge: Government admits holding asylum seekers, pledges 72 hours' notice on any deportation' (*ABC News*, 8 July 2014) <<http://www.abc.net.au/news/2014-07-08/high-court-hearing-on-asylum-seekers/5581766>>; Stefanie Balogh, Dennis Shanahan and Amanda Hodge, 'PM has no plan to send boatpeople to Sri Lanka' *The Australian* (9 July 2014) 1; 'Returned Sri Lanka migrants vent fury at Australia', above n 117; Latika Bourke and AAP, 'Sri Lanka arrests 37 asylum seekers sent back by Australia' *The Sydney Morning Herald* (29 Nov 2014) <<http://www.smh.com.au/national/sri-lanka-arrests-37-asylum-seekers-sent-back-by-australia-20141129-11wj9f.html>>.

¹²² 'Turned Back to Torture', above n 117; 'Sinhalese asylum seekers' on-water claims accepted by UN', above n 115>.

¹²³ 'Sinhalese asylum seekers', *ibid*.

¹²⁴ Michale Safi and Oliver Laughland, 'Asylum seekers leave Cocos Islands after weeks on Australian customs vessel' *The Guardian* (27 July 2014) <<http://www.theguardian.com/world/2014/jul/27/asylum-seekers-landed-cocos-islands-tamils>>.

Lankan Tamil asylum seekers, including some fifty children. About fifty of the passengers had been living in Tamil refugee camps in the Indian state of Tamil Nadu. At least forty passengers had come from Tamil refugee communities outside refugee camps, and a further fifty passengers crossed the Palk Strait from Sri Lanka to board the vessel.¹²⁵ Most of the passengers on board SIEV 885 said that they had fled India to escape persecution.¹²⁶ The Tamil Refugee Council of Australia claimed that at least eleven of the passengers had been tortured by the Sri Lankan army, having been accused of being members of the Liberation Tigers of Tamil Eelam (LTTE).¹²⁷

On 26 or 27 June 2014, when it was 300 kilometres west of Christmas Island, the vessel began to leak fuel and passengers contacted the Australian Maritime Safety Authority and refugee advocates in Australia via satellite phone, concerned that they would run out of fuel before reaching land.¹²⁸ A pump failure also caused the vessel's engine to seize and started a small fire in the vessel's engine house. This caused irreparable damage to the engine and rendered the vessel unseaworthy.¹²⁹ It was reported that the vessel was also low on water and a number of the children on board the vessel, including some as young as two years of age, were sick with vomiting, fevers, and headaches.¹³⁰ On 29 June 2014, the vessel was intercepted by Australian authorities in the Australian contiguous zone, approximately 16 nautical miles from Christmas Island.¹³¹ Upon interception, the passengers sought asylum from the Australian Government.¹³² The passengers were taken on board ACV *Ocean Protector*,¹³³ although at this time the Australian Minister for Immigration and Border Protection continued to refuse to confirm the existence of the vessel.¹³⁴

The *Times of India*, an Indian daily, reported that the Australian Government unsuccessfully sought to reach an agreement for the passengers to be delivered to Sri Lanka,¹³⁵

¹²⁵ 'PM has no plan to send boatpeople to Sri Lanka', above n 121; R Sivaraman, 'CB-CID may move court for custody of two fishermen', *The Hindu* (Chennai, 29 July 2014) <<http://www.thehindu.com/news/cities/puducherry/cbcid-may-move-court-for-custody-of-two-fishermen-in-puducherry/article6260169.ece>>; 'Boats screened at sea', above n 116.

¹²⁶ AAP, 'Refugees shown how to use lifeboats: group' *Australian Associated Press* (4 Aug 2014).

¹²⁷ Karen Barlow, 'Refugee council warns Tamil asylum seekers' lives in danger amid reports Australia handing them back to Sri Lankan navy' (*ABC News*, 4 July 2014) <<http://www.abc.net.au/news/2014-07-04/tamil-asylum-seekers-flee-sri-lankan-after-torture/5573180>>; Sarah Whyte, 'Tamil fears for refugees on high seas' *The Age* (Melbourne, 5 July 2014) 21.

¹²⁸ Jason Om, 'Asylum seekers: a timeline of the case involving 157 Tamil asylum seekers intercepted at sea' (*ABC News*, 5 Aug 2014) <<http://www.abc.net.au/news/2014-08-04/timeline-157-asylum-seekers-intercepted-at-sea/5647852>>; AAP, 'Asylum seeker boat nearing Christmas Is', *Australian Associated Press* (27 June 2014); Emma Alberici, ABC, 'Boat reported off Christmas Island' (*Lateline*, 27 June 2014) <<http://www.abc.net.au/lateline/content/2014/s4035073.htm>>; 'Australian activists say asylum-seeker boat in trouble', *Agence France-Presse* (28 June 2014); Lucy Cormack and Tim Elliott, 'Border challenge looms for Abbott' *The Sunday Age* (Melbourne, 29 June 2014) 5; Trevor Paddenburg, 'Leaky boat fears grow' *The Courier-Mail* (Brisbane, 29 June 2014) 7.

¹²⁹ Mark Dunn, 'Asylum bid blaze twist' *Herald Sun* (Melbourne, 23 July 2014) 17.

¹³⁰ AAP, 'Morrison silent on asylum boat claims' *Australian Associated Press* (28 June 2014).

¹³¹ *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 Jan 2015) [432].

¹³² Rachel Baxendale, 'High Court postpones asylum-seeker case' *The Australian* (29 July 2014) 5.

¹³³ Sarah Whyte and Fergus Hunter, '\$12 million: The High cost of not stopping the boat', *The Sydney Morning Herald* (30 Aug 2014) <<http://www.smh.com.au/federal-politics/political-news/12-million-the-high-cost-of-not-stopping-the-boat-20140829-109lqz.html>>.

¹³⁴ Tim Elliot, 'Morrison dodges boat questions', *The Sunday Age* (Melbourne, 29 June 2014) 5; Ben Doherty *et al*, 'Tamil Asylum seeker boat may be forced back' *The Age* (Melbourne, 1 July 2014) <<http://www.smh.com.au/federal-politics/political-news/tamil-asylum-seeker-boat-may-be-forced-back-20140630-zsrfl.html>>.

¹³⁵ Indrani Bagchi, 'India accepts Australia's request to probe 157 boat refugees' *The Times of India* (23 July 2014) <<http://timesofindia.indiatimes.com/india/India-accepts-Australias-request-to-probe-157-boat-refugees/articleshow/38896328.cms>>; Amanda Hodge and Stefanie Balogh, 'India seeks to widen asylum vessel intake' *The Australian* (25 July 2014) 4.

a statement the Minister for Immigration later denied.¹³⁶ At this time, lawyers for the passengers became concerned that they would be returned to the custody of Sri Lankan authorities and, on 7 July 2014, sought an interlocutory injunction restraining the Australian Government from doing so.¹³⁷ The following day, the Australian Government publicly acknowledged the existence of the vessel for the first time. Whilst denying any plans to return the passengers to Sri Lanka, the Australian Government agreed to give three days' written notice before attempting to do so.¹³⁸

Meanwhile, on 1 July 2014, the National Security Committee of Cabinet decided that the vessel should be taken to India, and between 1 and 10 July 2014, ACV *Ocean Protector* travelled to India with the passengers still in detention.¹³⁹ The passengers were not told that they were being returned to India as the Australian Government claimed that passengers could have posed a security threat to themselves or Australian personnel if they had been informed of their destination.¹⁴⁰ Between 10 and 22 July 2014, ACV *Ocean Protector* remained off the coast of India as the Australian and Indian Governments negotiated over the fate of the 157 asylum seekers on board.¹⁴¹ On 14 July 2014, nine of the passengers were separated from the rest of the passengers and given brief instructions on how to operate three orange lifeboats by Australian personnel. The Australian personnel showed the passengers a map of India's south coast and pointed to the city of Kanyakumari. The passengers were told that after five hours at sea they would be able to see the shore.¹⁴²

Around 23 July 2014, the Australian Government requested Indian officials to interview the passengers to determine their identities and nationality. The Indian Government agreed to accept the return of any Indian nationals among the passengers. The Australian Government sought to have these identity checks take place in India but this was refused by the Indian Government. The Australian Government also considered bringing Indian consular officials to the ship but chose not to do so because of logistical difficulties.¹⁴³ Between 23 and 27 July 2014, ACV *Ocean Protector* travelled to

¹³⁶ Sarah Ferguson, ABC, 'Immigration Minister reserves right to exercise "any and every option" on asylum seekers' (7:30, 30 July 2014) <<http://www.abc.net.au/news/2014-07-30/immigration-minister-reserves-right-to-exercise/5636680>>; CPCF, above n 87, 1.

¹³⁷ Transcript of Proceedings, *JARK v Minister for Immigration and Border Protection* [2014] HCATrans 148 (7 July 2014).

¹³⁸ 'Asylum seekers granted reprieve by govt', above n 121; 'Australia admits Sri Lankan asylum-seekers in custody', above n 121; 'Australia ruling could leave Sri Lankan asylum seekers at sea', above n 121; 'Asylum boat "won't be sent to Sri Lanka"', above n 115.

¹³⁹ CPCF, above n 131, [434], [437].

¹⁴⁰ Jason Om, 'Federal Government says 157 Tamil asylum seekers could have been security threat if told of destination' (ABC News, 1 Aug 2014) <<http://www.abc.net.au/news/2014-08-01/tamil-asylum-seekers-could-have-been-security-threat-gov/5641382>>.

¹⁴¹ CPCF, above n 131, [437].

¹⁴² 'Refugees shown how to use lifeboats: group', above n 126; James Glenday, ABC Radio National, 'Sri Lankan asylum seekers "trained to drive orange lifeboats"' (AM, 4 Aug 2014) <<http://www.abc.net.au/news/2014-08-04/sri-lankan-asylum-seekers-trained-to-drive-orange/5644914>>; Heath Aston, 'Tamils taught how to navigate lifeboats' *The Age* (Melbourne, 4 Aug 2014) 5; James Glenday and Karen Barlow, "'Terrified" Tamil asylum seekers almost sent back to India on orange lifeboats they were taught to operate, advocates say' (ABC Radio Australia, 4 Aug 2014) <<http://www.radioaustralia.net.au/international/2014-08-04/terrified-tamil-asylum-seekers-almost-sent-back-to-india-on-orange-lifeboats-they-were-taught-to-ope/1351870>>; Oliver Laughland, 'Tamil asylum seekers were taught how to "pilot lifeboats back to India"' *The Guardian* (3 Aug 2014) <<http://www.theguardian.com/world/2014/aug/03/tamil-asylum-seekers-taught-pilot-lifeboats-back-india>>.

¹⁴³ Sarah Ferguson, above n 136; Paul Farrell, 'Asylum seekers: Australia asks India to interview Tamils held in WA' *The Guardian* (28 Jul 2014) <<http://www.theguardian.com/world/2014/jul/28/asylum-seekers-australia-asks-india-to-interview-tamils-held-in-wa>>; Lenore Taylor, 'India "never agreed" to accept return of non-citizen Tamil asylum seekers' *The Guardian* (4 Aug 2014) <<http://www.theguardian.com/world/2014/aug/04/india-never-agreed-to-accept-return-of-non-citizen-tamil-asylum-seekers>>.

Cocos (Keeling) Islands from which the passengers were taken by plane to the Curtin Immigration Detention Centre in Western Australia where Indian consular officials were to be granted access to the passengers.¹⁴⁴ By this time, the passengers had spent almost one month detained on ACV *Ocean Protector*.¹⁴⁵

On 2 August 2014, the Australian Minister for Immigration and Border Protection issued a media release to say that the asylum seekers had refused to meet with Indian consular officials and had been transferred overnight from the Curtin Immigration Detention Centre to Nauru.¹⁴⁶ The Minister also labelled the passengers as 'economic migrants' although their asylum claims had not been assessed by Australian authorities.¹⁴⁷

One of the 157 detained passengers commenced proceedings against the Minister for Immigration and Border Protection in the High Court of Australia, claiming that his detention at sea had been unlawful and seeking damages for wrongful imprisonment. On 28 January 2015, the High Court dismissed his claim by a majority of 4:3.¹⁴⁸ The High Court's decision turned on the domestic statutory framework under which the power had been exercised to detain the plaintiff and take him towards India. The High Court did not consider or decide upon the content of the Australian Government's obligations to the plaintiff under international refugee law.

4.2.11 15 November 2014

On 15 November 2014, a vessel carrying thirty-eight Sri Lankan asylum seekers including six children was intercepted northwest of Cocos (Keeling) Islands.¹⁴⁹ The passengers were transferred to a vessel under the control of Border Protection Command where their asylum claims were assessed through the use of the 'enhanced screening' process. In this instance, these interviews were conducted face-to-face with Australian officials supported by Tamil and Sinhalese interpreters. The asylum claims of thirty-seven passengers were rejected. One passenger was transferred to either Manus Island, Papua New Guinea, or Nauru for further processing.¹⁵⁰ On 26 November 2014, the other thirty-seven passengers were handed over to the Sri Lankan Navy at sea. Upon arrival in Galle on 28 November 2014, the passengers were arrested and charged for departing Sri Lanka unlawfully.¹⁵¹ It was reported on 1 December 2014 that most of the passengers had been released from custody by Sri Lankan authorities. One passenger alleged that he had been tortured by Sri Lankan authorities while in custody.¹⁵²

¹⁴⁴ 'Asylum seekers: a timeline of the case involving 157 Tamil asylum seekers intercepted at sea', above n 128; CPCF, above n 87, 2; Amanda Hodge and Stefanie Balogh, 'India seeks to widen asylum vessel intake' *The Australian* (25 July 2014) 4.

¹⁴⁵ Oliver Laughland, 'Tamil asylum seekers: 80% reported showing signs of torture and trauma' *The Guardian* (31 July 2014) <<http://www.theguardian.com/world/2014/jul/31/tamil-asylum-seekers-80-reported-showing-signs-of-torture-and-trauma>>.

¹⁴⁶ Minister for Immigration and Border Protection, 'Transfer of 157 IMAs from Curtin to Nauru for offshore processing' (Media Release, 2 Aug 2014).

¹⁴⁷ Chris Uhlmann, ABC Radio National, 'Asylum seekers just arrived in WA to be returned to India where possible: Morrison' (AM, 28 July 2014) <<http://www.abc.net.au/news/2014-07-28/asylum-seekers-just-arrived-in-wa-to-be-returned/5628276>>; George Newhouse, 'Asylum: my 157 clients' ordeal highlights Scott Morrison's hypocrisy', *The Guardian* (8 Aug 2014) <<http://www.theguardian.com/commentisfree/2014/aug/08/asylum-my-157-clients-ordeal-highlights-scott-morrison-hypocrisy>>.

¹⁴⁸ CPCF, above n 131.

¹⁴⁹ Bourke and AAP, above n 121; Simon Benson, 'Asylum boat is turned around' *The Daily Telegraph* (Sydney, 29 Nov 2014) 3.

¹⁵⁰ Minister for Immigration and Border Protection, Scott Morrison, 'People smuggling venture returned to Sri Lanka' (29 Nov 2014).

¹⁵¹ 'Sri Lanka arrests 37 asylum seekers sent back by Australia', above n 121; Morag MacKinnon, 'Australia intercepts Sri Lankan asylum seekers, turns back most' (*Reuters News*, 29 Nov 2014).

¹⁵² Amanda Hodge, 'Sri Lankan asylum-seeker in second "torture" case' *The Australian* (1 Dec 2014) <<http://www.theaustralian.com.au/national-affairs/immigration/sri-lankan-asylum-seeker-in-second-torture-case/story-fn9hm1gu-1227140229438>>.

5. ASSESSMENT AND OBSERVATIONS

The two primary objectives of the policy of returning vessels of asylum seekers to their country of embarkation have been to deny them entry into Australia and to deter other asylum seekers from attempting to reach Australia by boat. The policy has also been justified by the Australian Government on the basis that it saves the lives of smuggled migrants. The extent to which the policy achieves these objectives is examined in the following sections. Operational, legal, and diplomatic concerns are also discussed in this context, and brief attention is given to questions about the sustainability and associated costs of the policy.

5.1 Effectiveness of the policy

5.1.1 Denying entry

Operation Relex and Operation Sovereign Borders successfully prevented the arrival of multiple migrant smuggling vessels in Australia. Under Operation Relex, four such vessels were stopped after a policy of 'active return' was adopted and thus some 473 passengers were denied entry into Australia. The policy goal was not achieved with four other vessels, including two that sank, and two with engine failure. As a result, 560 irregular migrants, most of them asylum seekers, were able to enter Australia and were placed in immigration detention; 382 of these were subsequently transferred to Nauru.¹⁵³

Based on the available, open-source information, Operation Sovereign Border has been more successful in denying entry into Australia. Although no vessels were returned during the first three months of operation, once the policy was implemented with full rigour on 19 December 2013, thirteen vessels carrying a total of 420 irregular migrants have been returned, including at least nine to Indonesia, and two to Sri Lanka. Since 19 December 2013, only one vessel, carrying 157 irregular migrants, reached Australia. Two passengers, on one of the vessels returned to Indonesia, were taken ashore in Australia for medical treatment and were not returned with the other passengers. One passenger, on one of the vessels returned to Sri Lanka, was taken to Manus Island or Nauru for further processing.

5.1.2 Deterrence

There is some evidence to show that the so-called Pacific Solution, of which Operation Relex was one component, achieved the objective of deterring further irregular arrivals of asylum seekers into Australia. On the surface, it appears that the Pacific Solution all but eliminated this phenomenon. [Table 3](#) below shows that in the years prior to the implementation of the Pacific Solution the number of irregular maritime arrivals of migrants increased steadily. With the implementation of the Pacific Solution in late 2001, which also included transferring asylum seekers to detention facilities in Nauru and Papua New Guinea, 'excising' some parts of Australian territory from the application of the Migration Act 1958 (Cth), disruption activities in Indonesia, and reducing the benefits offered to refugees in Australia, the number of such arrivals dropped to just one in 2002 and remained negligibly low for several years whilst the Pacific Solution was in place.

¹⁵³ Senate Select Committee Report, above n 5, 27; DIMIA, Fact Sheet 74a, above n 13, 7–8.

Table 3. Numbers of irregular maritime arrivals and boats, 1998–2014¹⁵⁴

Year	Number of irregular maritime arrivals (persons)	Number of boats
1998	200	17
1999	3,721	86
2000	2,939	51
2001	5,516	43
2002	1	1
2003	53	1
2004	15	1
2005	11	4
2006	60	6
2007	148	5
2008	161	7
2009	2,726	60
2010	6,555	134
2011	4,565	69
2012	17,204	278
2013	20,587	300
2014	163	1

The data displayed in [Table 3](#) is frequently used by the Australian Government to show that the abolition of the Pacific Solution – and with it the policy of turning back irregular maritime arrivals – resulted in an immediate decrease in arrivals, and that the reintroduction of turn-back measures under Operation Sovereign Borders in late 2013 brought about a further reduction of the number of boat arrivals.

There are, however, several limitations and, indeed, errors with these assumptions. Importantly, it is not possible to isolate the effect of the turn-back policies under Operation Relex and later under Operation Sovereign Borders from the very many other measures adopted by the Australian Government to stop irregular boat arrivals and greatly reduce the rights and benefits offered to asylum seekers in Australia. That is

¹⁵⁴ Janet Phillips, 'Boat arrivals in Australia: a quick guide to the statistics' (Research Paper, Parliamentary Library, Parliament of Australia, 2014) 2. Figures for 2014 obtained from the Australian Customs and Border Protection Service website: <<http://newsroom.customs.gov.au/channels/operational-updates/releases>>.

not to say that the turn-back policies had no deterrent effect at all, but it is not possible to identify and quantify that effect.

Moreover, the data shown in [Table 3](#) fails to show other important causes, conditions, and circumstances that influence the number of persons setting out by boat to seek asylum in Australia. One such factor is the situation in the main sending countries such as Afghanistan and Iraq, which temporarily improved from 2002/2003 onwards, leading some would-be migrants to refrain from migrating irregularly to Australia and others to return to their home countries.¹⁵⁵ As conditions in these countries deteriorated again in the late 2000s, and as the Sri Lankan Government brutally cracked down on Tamil separatists in early 2009, new waves of migrants, most of them asylum seekers, found their way to Southeast Asia and Australia. What is also not shown here is the effect the turn-back policies had on the large pool of irregular migrants living in transit countries such as Indonesia and Malaysia. While the Australian policies clearly prevented them from reaching Australia, it also meant that many migrants became stranded in transit points and either settled there or looked for opportunities to migrate elsewhere, often with the assistance of migrant smugglers.¹⁵⁶

In a 2010 publication, Crock and Ghezelbash analyse the deterrent effects of a number of policies implemented by successive Australian Governments. Their research found that the only policies that have a significant impact in reducing the number of unauthorised boat arrivals are containment measures, aimed at preventing entry into Australia, such as returning vessels to Indonesia.¹⁵⁷ These measures are contrasted with measures such as mandatory detention and temporary protection visas, which involve attempts to eliminate 'pull' factors to Australia rather than preventing entry. The latter, Crock and Ghezelbash argue, are mostly ineffective.¹⁵⁸

While it is too early to assess the effect of the turn-backs under Operation Sovereign Borders, initial observations are rather ambiguous. On the one hand, the available data clearly shows that the number of irregular maritime arrivals in Australia has dropped considerably since late 2013. On the other hand, there are also indications that the number of such arrivals was already decreasing in the 12 months prior to the reintroduction of the turn-back measures. The month-by-month breakdown of the data, displayed in [Table 3](#), reveals that the number of arrivals had dropped from a peak of 4,236 arrivals in July 2013 to 1,585 arrivals in August 2013, with a continuing downward trend in the later months of 2013.¹⁵⁹ The decrease from July 2013 coincided with the announcement by the then Government that irregular arrivals would be taken to Papua New Guinea where they would be placed in immigration detention with a view to finding regional resettlement alternatives for those found to be refugees. An agreement between the Governments of Australia and Papua New Guinea with that effect was signed on 19 July 2013.¹⁶⁰ A similar agreement with the Government of Nauru followed two weeks later

¹⁵⁵ Crock and Ghezelbash, above n 5, 250–51; Senate Select Committee Report, above n 5, 334–35; see generally Schloenhardt, above n 3, 326–27.

¹⁵⁶ See, in relation to the Pacific Solution, Crock and Ghezelbash, *ibid.*, 267.

¹⁵⁷ Crock and Ghezelbash, *ibid.*

¹⁵⁸ See Australian Government, 'The First 100 Days of Government: Delivering on Our Plan' (Dec 2013); see Crock and Ghezelbash, *ibid.*, 260–62.

¹⁵⁹ 'Immigration Minister Scott Morrison not telling the full story on asylum seeker arrivals' (*ABC Fact Check*, 10 Dec 2013) <<http://www.abc.net.au/news/2013-12-10/scott-morrison-not-telling-full-story-asylum-seeker-arrivals/5119380>>.

¹⁶⁰ 'Asylum seekers arriving in Australia by boat to be resettled in Papua New Guinea' (*ABC News*, 19 July 2013) <<http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-be-expanded-under-rudd27s-asy/4830778>>.

on 3 August 2013.¹⁶¹ The reduction in irregular maritime arrivals since mid-2013 has also been attributed to measures adopted by the Indonesian Government, such as disallowing Iranian nationals to obtain visas on arrival in Indonesia, which made it harder for irregular migrants from Iran to travel to Indonesia in order to be smuggled onwards to Australia.¹⁶²

There are also legal and moral concerns about the objectives and effects of deterring asylum seekers from arriving in Australia that have been raised by international organisations, non-governmental organisations, and academic experts. UNHCR, for instance, has criticised the current turn-back policy on the ground that it is burden-shifting not burden-sharing.¹⁶³

5.1.3 Saving lives

The Australian Government has also promoted the view that turning vessels away from Australia saves lives by reducing the number of drownings or other fatalities amongst migrants making the journey from Indonesia to Australia.¹⁶⁴ Indeed, it has been estimated that between 1998 and 2013 approximately 1,550 people on forty-one vessels died en route to Australia.¹⁶⁵

While the policy objective to save the lives of smuggled migrants and crew is a laudable one, it is not possible to present any evidence to show a causal link between the turn-back policies and any persons who would have drowned or died had the policy not been implemented. By contrast, the reports on vessels that have been returned to Indonesia show that attempts to turn back vessels have frequently resulted in self-harm and threats of suicide by the migrants, and that several turn-backs involved very tumultuous, dangerous, and sometimes violent circumstances. The available evidence also shows that the turn-backs that were effected or attempted during Operation Relex resulted in five persons dying or going missing, believed to be dead.¹⁶⁶ There has also been a report of three passengers perishing in remote Indonesian jungle after their

¹⁶¹ Prime Minister and Minister for Immigration and Border Protection, 'New Arrangement with Nauru Government' (Media Release, 3 Aug 2013).

¹⁶² Helen Brown, 'Indonesia to change visa requirements for Iranians entering the country following request from PM Rudd' (ABC News, 18 July 2013) <<http://www.abc.net.au/news/2013-07-18/indonesia-to-change-visa-requirements-for-iranians/4829434>>; 'Immigration Minister Scott Morrison not telling the full story on asylum seeker arrivals', above n 159.

¹⁶³ Michael Bachelard and Sarah Whyte, 'UN representatives criticise Abbott government's boat tow-back policy' *The Sydney Morning Herald* (23 Apr 2014) <<http://www.smh.com.au/federal-politics/political-news/un-representatives-criticise-abbott-governments-boat-towback-policy-20140423-zqxz1.html>>; AAP, 'UN warns Abbott government boat turnback policy no permanent fix' *The Australian* (23 Apr 2014) <<http://www.theaustralian.com.au/national-affairs/policy/un-warns-abbott-government-boat-turnback-policy-no-permanent-fix/story-fn9hm1gu-1226893072525>>; see generally UNHCR, 'The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees' (Background Paper no 2, UNHCR Global Consultations in Budapest, May 2001) 3.

¹⁶⁴ Rosanna Ryan, 'Tony Abbott, Scott Morrison announce new "regional deterrence framework" to stop asylum seekers' (ABC News, 23 Aug 2013) <<http://www.abc.net.au/news/2013-08-23/coalition-announces-asylum-policy/4908186>>; Sara Davies, 'FactCheck: have more than 1000 asylum seekers died at sea under Labor?' *The Conversation* (23 July 2013) <<http://theconversation.com/factcheck-have-more-than-1000-asylum-seekers-died-at-sea-under-labor-16221>>; Cameron Steward and Paige Taylor, 'Border patrols at breaking point over asylum boats' *The Australian* (18 July 2013) <<http://www.theaustralian.com.au/national-affairs/policy/border-patrols-at-breaking-point-over-asylum-boats/story-fn9hm1gu-1226681034941>>.

¹⁶⁵ Marg Hutton, 'Drownings on the Public Record of People Attempting to Enter Australia Irregularly by Boat since 1998' (SIEVX.com, 2 Feb 2014) <<http://www.sievx.com/articles/background/DrowningsTable.pdf>>.

¹⁶⁶ See SIEV 7 and SIEV 10, above.

vessel was returned under Operation Sovereign Borders.¹⁶⁷ Given the official secrecy surrounding this topic, it is not possible to say with certainty that there have not been further cases of death or injury.

It is conceivable that the turn-backs and the deterrence of asylum seekers may have resulted in further danger to, harm or death of irregular migrants forced to use alternative smuggling routes.¹⁶⁸ Moreover, the turn-back policy risks persons fleeing from persecution being returned to a place where they may face further persecution. This risk is particularly high, given the fact that most irregular migrants who arrive in Australia by boat are found to be refugees.¹⁶⁹

This argument has been frequently raised in the context of the return of a vessel to Sri Lanka in June 2014. News media worldwide aired images of the migrants when they faced police and courts upon return to Sri Lanka.¹⁷⁰ Placing refugees into a situation where they may face further persecution also violates basic principles of international refugee law; a point that is further examined below.

5.2 Operational risks

The documented cases of turn-backs demonstrate that attempts by Australian authorities to effect the turn around, tow back, or otherwise to gain control over a vessel often trigger angry and hostile reactions from irregular migrants on board, who fear their hopes of reaching Australia, gaining protection from persecution, and starting a better life may be dashed. The cases outlined above clearly show that the turn-backs create an inherent risk of violent outbursts, sabotage, serious injury, and death – not just to the crew and migrants on board the vessel, many of whom are minors, but also to the Australian Navy and Customs personnel executing the turn-back policy. Although turn-backs are said to be limited to situations in which it is ‘safe to do so’,¹⁷¹ their execution carries many operational risks that are rarely, if ever, acknowledged in official government statements.

¹⁶⁷ Toohey, above n 85.

¹⁶⁸ William Maley, ‘We know what not to do about refugees’ *The Australian* (11 July 2012) <<http://www.theaustralian.com.au/national-affairs/opinion/we-know-what-not-to-do-about-refugees/story-e6frgd0x-1226422875558>>; William Maley, ABC Radio National, ‘ALP and Greens demand answers about Indonesia relationship’ (*AM*, 7 May 2014) <<http://www.abc.net.au/am/content/2014/s3999391.htm>>; William Maley, ABC News 24, ‘Putting asylum seekers on turned-back boat “an offence under Australian law” says law professor’ (*ABC News*, 7 May 2014) <<http://www.abc.net.au/news/2014-05-07/putting-asylum-seekers-on-turned-back-boat-an/5436030>>.

¹⁶⁹ In the 2012–13 financial year, 88% of irregular maritime arrivals were granted protection visas: Department of Immigration and Border Protection, ‘Asylum Trends Australia: 2012–13 – Annual Publication’ (Report, Department of Immigration and Border Protection, 2013) 30.

¹⁷⁰ UNHCR, ‘Reports of interceptions at sea: UNHCR Statement’ (Media Release, 3 July 2014) <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=440:reports-of-interceptions-at-sea-unhcr-statement&catid=35:news-a-media&Itemid=63>; UNHCR, ‘Returns to Sri Lanka of individuals intercepted at sea’ (Media Release, 7 July 2014) <<http://www.unhcr.org/53baa6ff6.html>>; Jane McAdam and others, ‘Statement by Legal Scholars Regarding the Situation Concerning Sri Lankan Asylum Seekers’ (Media Release, 7 July 2014) <<http://www.kaldorcentre.unsw.edu.au/Statement>>; Gillian Triggs, ABC, ‘Human Rights Commission president talks about the stand-off over Sri Lankan asylum seekers’ (7:30, 8 July 2014) <<http://www.abc.net.au/7.30/content/2014/s4041977.htm>>; Sarah Whyte, ‘Global media turns focus on return of Sri Lankan asylum seekers’ *The Sydney Morning Herald* (8 July 2014) <<http://www.smh.com.au/federal-politics/political-news/global-media-turns-focus-on-return-of-sri-lankan-asylum-seekers-20140708-3bk9y.html>>; Editorial, ‘Australia’s Refugee Problem’ *The New York Times* (4 July 2014) <<http://www.nytimes.com/2014/07/05/opinion/australias-refugee-problem.html>>.

¹⁷¹ Senate Select Committee Report, above n 5, 14–15; Inquiry into the Breach of Indonesian Territorial Waters, above n 98, 16.

5.2.1 Risks to asylum seekers and crew

During Operation Relex, a practice was adopted to warn irregular boat arrivals about the consequences of proceeding into the Australian contiguous zone. These warnings advised the crew that 'it is an offence under the Australian Migration Act to bring to Australia non-citizens who do not have authority to come to Australia', and included information about the harsh penalties for those found guilty of such offences.¹⁷² A Senate Committee report noted that these warnings were ignored '[a]lmost without exception',¹⁷³ and a series of judicial decisions emphasised that these warnings did not provide the crew with a realistic opportunity to desist: 'the attitude of the passengers on the vessel effectively precludes any attempt to return to Indonesia.'¹⁷⁴

The irregular migrants on board the vessels were generally cooperative – even after having been intercepted – so long as they believed that they were proceeding to Australia.¹⁷⁵ Tensions usually arose once the migrants became aware of the fact that they would be returned to Indonesia. To prevent return, they sometimes engaged in acts of sabotage, threats of self-harm, or threats against Navy or Customs officials. During Operation Relex, the Navy observed a 'pattern of conduct' in which passengers engaged in acts of 'moral blackmail' in attempts to prevent return, including jumping overboard and threatening or occasioning self-harm, harm to children, or harm to Australian personnel.¹⁷⁶

(a) Sabotage

Acts of sabotage were particularly common. These included minor acts of damage to the vessel and engines and, in some cases, very serious damage, so that vessels became unseaworthy, sank, or passengers and crew had to be rescued and transferred onto the Australian Navy or Customs vessels. In the case of SIEV 36, in which a deliberately lit fire ignited petrol vapour on board the vessel, five migrants were killed and forty others injured.¹⁷⁷ Attempts to return vessels to Indonesia under Operation Relex resulted in passengers attempting to set fire to their vessel in all but one case.

The limited information about the turn-backs effected to 12 December 2014 under Operation Sovereign Borders suggests that similar patterns of behaviour have emerged. For example, migrants on board the two vessels that were intercepted on 1 and 9 January 2014 attempted to scuttle their vessels to prevent return to Indonesia. Passengers on board the vessel intercepted on 1 January 2014 also attempted to sabotage the engine of their boat. Several other vessels also foundered or had engine failure, although it is not clear whether this was as a result of sabotage.

The unique geographical and legal circumstances in which these vessels are apprehended explain why some migrants on board the vessels may engage in acts of sabotage, even if these acts entail serious risks to the lives and safety of other passengers and to themselves. In the absence of any formal agreement between Australia and Indonesia

¹⁷² Senate Select Committee Report, *ibid.*, 32 (emphasis added).

¹⁷³ Senate Select Committee Report, *ibid.*, 25–26. See also Howard, above n 27, 35, 39.

¹⁷⁴ See further, Andreas Schloenhardt and Connor Davies, 'Smugglers and Samaritans: Defences to People Smuggling in Australia' (2012) 36 UNSW LJ 954, 966–69.

¹⁷⁵ See, eg, 'Sri Lankan asylum seekers tell of sea ordeal', above n 115.

¹⁷⁶ Senate Select Committee Report, above n 5, 535.

¹⁷⁷ Inquest report, above n 70; 'Navy under fire over deadly asylum boat blast', above n 72.

that would permit Australian authorities to return the vessels all the way to Indonesian ports, the vessels must be released outside Indonesia's territorial sea. Australian vessels cannot enter this zone without permission. For this reason, the migrants and crew need to have a working vessel to make the 12 nautical mile journey to the coastline.

These circumstances explain why migrants will attempt to damage or destroy their vessels. Most of them have used their life savings and that of their families to pay the migrant smugglers and fear losing this investment if they return to Indonesia. Those who seek asylum in Australia fear their return, which creates further uncertainty about their safety and future by placing them at renewed risk of persecution. It is thus not surprising that some migrants may disable the vessel's steering or engine or, in the more desperate cases, attempt to sink or set fire to the vessel, despite the resulting danger to their own lives and those of other passengers and crew.

Since the introduction of Operation Sovereign Borders, Australian authorities have adopted two strategies to prevent serious sabotage. The first involves lying to the migrants about the intended destination of the turn-back. In at least three of the returns that have been effected since December 2013, passengers were initially told that they would be taken to an Australian territory, such as Christmas Island or Darwin. The effect of this deliberate misinformation is that the migrants remain calm and cooperative until they realise that they are in fact being returned to Indonesia. Navy and Customs officials will attempt to have neutralised any serious risk of sabotage by that time, securing fuel and confiscating matches and lighters.¹⁷⁸ Secondly, in the event that the original migrant vessel has become unseaworthy, the Australian Government will furnish them with new lifeboats that carry just enough fuel and supplies to take them back to Indonesia. This was the case in four of the thirteen turn-backs executed under Operation Sovereign Borders.¹⁷⁹

(b) *Rescue only as a last resort*

Many of the vessels used to smuggle migrants to Australia are unseaworthy from the start, or become unseaworthy during the journey to Australia, risking sinking.¹⁸⁰ For the most part, the vessels used are small, wooden, Indonesian fishing vessels that are not fit to travel long distances or to carry the number of people that crowd onto them. Supplies of food and water, as well as life jackets, are often insufficient, and hygiene is very poor. The conditions and risks associated with smuggling by sea from Indonesia to Australia are well documented and, as mentioned, have caused significant loss of life.

The risks of serious injury and death are further augmented by the turn-back policies in situations where migrants are not permitted to leave leaky boats to embark onto an Australian vessel. During Operation Relex, Navy Commanders were under clear instructions not to allow migrants, or their crew, to embark onto Australian vessels, unless absolutely necessary to prevent injury or death.¹⁸¹ This was done to maintain control of the situation, because of the risk that, if passengers were to embark onto

¹⁷⁸ This appears to be standard procedure upon boarding a vessel ('sweep and search'): Inquest report, above n 70, 12–17.

¹⁷⁹ Minister for Immigration and Border Protection, 'A year of stronger borders' (Media Release, 18 Sept 2014).

¹⁸⁰ See, eg, the case of SIEV 6 which sank not due to sabotage, but simply due to the vessel's unseaworthy condition: Marr and Wilkinson, above n 9, 324–25.

¹⁸¹ Senate Select Committee Report, above n 5, 27.

Australian vessels, it would be 'impossible' to remove them without the use of force.¹⁸² In the case of the SIEV 4, the migrants were only permitted to transfer onto HMAS *Adelaide* when their vessel was already sinking, forcing them to enter the water first. As a result, Navy personnel had to rescue many of them from the water.¹⁸³

It appears that under Operation Sovereign Borders similar instructions have been given to Navy and Customs personnel, at least in relation to vessels arriving from Indonesia. Of the nine vessels returned to Indonesia discussed above, passengers were only allowed to embark onto Australian vessels in three cases. In each of these cases, the passengers' vessel was sinking when they were rescued. In the case of the vessel intercepted around 8 or 9 January 2014, passengers claimed that the Navy waited two and a half hours while their vessel sank before the passengers were permitted to embark onto HMAS *Stuart*.¹⁸⁴

(c) Risks following release

Further risks to the migrants stem from the fact that Australian authorities cannot return the migrants and their vessels all the way to Indonesia but have to release them outside Indonesia's territorial sea. For this reason, safe return to Indonesia cannot be guaranteed, especially if the migrants cannot steer and navigate the vessel, if they are left with inexperienced crew, or if the vessel experiences difficulties or damage following the release by Australian authorities.¹⁸⁵

In the case of SIEV 7, the vessel's engine failed approximately 300–400 metres from shore, forcing the passengers to swim or wade to shore; some carrying babies and children. There were also reports that three passengers drowned attempting to make it to shore.¹⁸⁶ Since the implementation of Operation Sovereign Borders, there has also been a report of migrants perishing in remote Indonesian jungles after having been released by Australian authorities.¹⁸⁷

5.2.2 Risks to Australian personnel

Threats of harm and sabotage also pose serious risks to Australian Navy and Customs personnel involved in effecting the boat turn-backs. In some cases, some migrants directed their anger towards Australian officials. Navy personnel who had boarded SIEV 7, for instance, were doused with diesel when passengers pierced a fuel drum.

¹⁸² Senate Select Committee Report, *ibid*, 37; David Marr, 'Turn the boats back and people will die – Abbott knows this', *The Sydney Morning Herald* (24 Jan 2012) <<http://www.smh.com.au/federal-politics/political-opinion/turn-the-boats-back-and-people-will-die--abbott-knows-this-20120123-1qe3o.html>>.

¹⁸³ Senate Select Committee Report, *ibid*, 38.

¹⁸⁴ 'Refugees accuse Australian navy of abuse', above n 103.

¹⁸⁵ Rear Admiral Tim Barrett, 'Theme: Turn Back Boats' (Report, Border Protection Command, 2010) released under Freedom of Information laws, 8; Andrew & Renata Kaldor, Center for International Refugee Law, 'Factsheet: "Turning back boats"' (Factsheet, University of New South Wales, 11 Oct 2013) 2 <http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/boats_factsheet.pdf>; Kate Purcell, Submission No 1 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Inquiry into the Breach of Indonesian Territorial Waters, 19 Mar 2014, 10; Inquiry into the Breach of Indonesian Territorial Waters, above n 98, 23; Cameron Stewart, 'Law of the sea versus the dictates of Canberra' *The Australian* (12 Mar 2012) <<http://www.theaustralian.com.au/national-affairs/policy/law-of-the-sea-versus-the-dictates-of-canberra/story-fn9hm1gu-1226295248652>>.

¹⁸⁶ ABC, above n 33; Human Rights Watch, above n 38; Marr and Wilkinson, above n 9, 328.

¹⁸⁷ Toohey, above n 85.

The sailors feared for their lives when passengers lit rags and threatened to set the vessel alight.¹⁸⁸

In other cases, official personnel were placed in danger when vessels began to sink or were set alight. For example, in the case of SIEV 36, Navy personnel who had boarded the vessel were forced to jump or were thrown overboard when petrol vapour under the deck of the vessel exploded. An Australian medic nearly drowned when her life jacket did not inflate and a drowning passenger, who likely could not swim, clung to her.¹⁸⁹

Returning vessels to Indonesia, which often involves the use of force or other coercive measures, also poses significant mental health risks to those effecting the turn-backs. Australian personnel involved in the interdiction of irregular migrants at sea have exhibited similar levels of post-traumatic stress disorder to that observed in Australian personnel engaged in combat. 'Witnessing human degradation or misery on a large scale' was the most frequently reported 'potentially traumatic event' among these personnel, with the risk of personal injury second.¹⁹⁰ Internal Navy reports, written several years before the commencement of Operation Sovereign Borders, also warned that carrying out a turn-back policy would have a negative effect on morale and could lead to greater incidences of post-traumatic stress disorder among Navy personnel due to the way in which on-water situations escalate.¹⁹¹

5.3 Legality and compliance with international refugee law

As party to the Convention and Protocol Relating to the Status of Refugees, Australia owes certain obligations to persons who arrive in Australia seeking asylum, regardless of the way in which they arrive in the country.¹⁹² The principle of *non-refoulement* under article 33 of the Refugee Convention prohibits the expulsion or return ('*refoulement*') of refugees to the frontiers of territories where their life or freedom would be threatened because of their race, religion, nationality, membership of a particular social group, or political opinion.¹⁹³ Several other international human rights instruments to which Australia is a party, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (ICCPR) contain similar obligations.¹⁹⁴ There is also general

¹⁸⁸ Marr and Wilkinson, above n 9, 326.

¹⁸⁹ Inquest report, above n 70, 39.

¹⁹⁰ Directorate of Occupational Psychology & Health Analysis, 'Operation RESOLUTE Mental Health and Wellbeing Questionnaire: Surveillance Report for Jun 11 – Nov 12' (Report, Joint Health Command, Apr 2013) released under Freedom of Information laws. See also Dan Oakes, Alex McDonald and Sam Clark, ABC, 'The emotional toll on navy of Australia's border protection policy' (7:30, 2 Dec 2014); 'John Cantwell raises PTSD fears for Navy crew involved in asylum seeker operations' ABC News (29 Nov 2013) <<http://www.abc.net.au/news/2013-11-29/mental-health-warning-for-navy-crew-in-fight-against-smugglers/5126354>>.

¹⁹¹ Rear Admiral Tim Barrett, above n 185, 5; Deputy Director of Strategic Plans, 'Report of the Deliberate Analysis Activity Implications of a "Turn Back Boats" Policy – 03 August 2010' (Report, Border Protection Command) released under freedom of Information laws, 15.

¹⁹² Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 Apr 1954 (Refugee Convention); Protocol relating to the Status of Refugees, opened for signature 31 Jan 1967, 606 UNTS 267, entered into force 4 Oct 1967.

¹⁹³ Refugee Convention, art 1.

¹⁹⁴ See in particular art 3 of the Convention against Torture, opened for signature 10 Dec 1984, 1465 UNTS 85, entered into force 26 June 1987; and art 7 of the ICCPR, opened for signature 16 Dec 1966, 999 UNTS 171, entered into force 23 Mar 1967.

consensus that the principle of *non-refoulement* forms part of customary international law.¹⁹⁵

The principle does not grant asylum seekers a broad right of entry into a country.¹⁹⁶ A country also does not breach its obligations by mere denial of entry into territorial waters.¹⁹⁷ To ensure protection from *refoulement*, international refugee law does, however, require states parties to provide asylum seekers access to refugee status determination procedures and permit temporary entry for this purpose.¹⁹⁸

A state can transfer asylum seekers to another country for refugee status determination without violating the *non-refoulement* obligation if that other state can guarantee the asylum seeker access to 'effective protection.'¹⁹⁹ This entails guarantees of protection from *refoulement*, fair and efficient procedures for the determination of refugee status, and respect for fundamental human rights.²⁰⁰

The weight of expert opinion suggests that the return of vessels carrying asylum seekers violates international law because effective protection is not available in Indonesia (and because Australia cannot guarantee that it is).²⁰¹ Indonesia is not a party to the Refugee Convention and does not maintain any procedures to apply for and determine refugee status.²⁰² Asylum seekers in Indonesia can contact UNHCR to have their refugee status determined, although recognition by UNHCR does not protect refugees in Indonesia from *refoulement*.²⁰³ Moreover, it is well documented that UNHCR's work in Indonesia is under-resourced, and that refugee status determinations involve

¹⁹⁵ Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Erika Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87, 143–49; UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status and its 1967 Protocol' (Advisory Opinion) (26 Jan 2007) 7.

¹⁹⁶ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 215–16; Seline Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* 205, 208.

¹⁹⁷ Goodwin-Gill and McAdam, *ibid.*, 277.

¹⁹⁸ Goodwin-Gill and McAdam, *ibid.*, 215–16; Andreas Fischer-Lescano and others, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *IJRL* 256, 284–87; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 301; Penelope Mathew, 'International Association of Refugee Law Judges Conference: Address – Legal Issues Concerning Interception' (2003) 17 *Geo Immigr LJ* 221, 232; Reinhard Marx, 'Non-Refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' (1995) 7 *IJRL* 383, 401; Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Year Book of International Law* 87, 90; UNHCR, *Advisory Opinion* 3; Schloenhardt, *above n* 3, 305; UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (18 Mar 2002) (*Background Note*) 5, 7; UNHCR, *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (10 Feb 2005) (*Provisional Comments*) 5.

¹⁹⁹ Executive Committee of the High Commissioner's Programme, *Note on International Protection*, 54th sess, UN doc A/AC.96/975 (2 July 2003) 4–5; Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: the Meaning of Effective Protection' (2003) 15 *IJRL* 567, 570; Goodwin-Gill and McAdam, *above n* 196, 393–94.

²⁰⁰ UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (Lisbon Expert Roundtable, Feb 2003) 3–4; see also 'Summary Record of the 585th Meeting', UN doc A/AC.96/SR.585, 7 (Ms Feller, Director, Department of International Protection, UNHCR).

²⁰¹ Goodwin-Gill and McAdam, *above n* 196, 393.

²⁰² Mathew, *above n* 198, 231–32; Sophie Roden, 'Turning Their Back on the Law? The Legality of the Coalition's Maritime Interdiction and Return Policy' (Report, Centre for Military & Security Law, ANU College of Law, 2013) 29; Purcell, *Submission No 1*, *above n* 185, 6.

²⁰³ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 199 ('*Malaysian Declaration Case*').

significant delays.²⁰⁴ There have been several reports confirming that Indonesia does remove refugees and asylum seekers and, in some cases, returns them to countries where they face serious risks of persecution and torture.²⁰⁵

Australia also cannot guarantee that the fundamental rights and freedoms of persons returned to Indonesia are respected.²⁰⁶ International experts and human rights organisations have pointed to the fact that, under Indonesian law, asylum seekers may be imprisoned for irregular entry or residence for up to five years.²⁰⁷ They may be detained in overcrowded, poorly maintained detention centres for up to ten years without judicial review.²⁰⁸ Physical and psychological abuse by immigration officials has been reported from the detention facilities.²⁰⁹ Also, Indonesian officials also often fail to provide detainees, many of them children, with basic necessities.²¹⁰

At a minimum, Australia's *non-refoulement* obligations arise when asylum seekers enter Australia's territorial sea.²¹¹ While decisions of appellate courts in the United States, the United Kingdom, and Australia do not establish a clear position whether or not these obligations arise extraterritorially,²¹² the weight of academic opinion supports the position that the principle of *non-refoulement* under the Refugee Convention applies wherever a state exercises its jurisdiction, including *de facto* jurisdiction exercised by exercising effective control over asylum seekers in their interdiction at sea.²¹³ It

²⁰⁴ Savitri Taylor and Brynna Rafferty-Brown, 'Difficult Journeys: Accessing Refugee Protection in Indonesia (2010) 36 Monash LR 138, 154–56; Bostock, above n 7, 290.

²⁰⁵ Amnesty International, 'Indonesia Briefing to the UN Committee Against Torture' (Report, 14 Apr 2008) 18–19; Aditva Muaharam, 'Respect the Principle of *Non-refoulement*', *The Jakarta Globe* (21 Feb 2012) <<http://www.thejakartaglobe.com/archive/respect-the-principle-of-non-refoulement/>>. For criticism of Indonesia's ability to guarantee protection from *refoulement*, see UNHCR, 'UNHCR's Views on the Concept of Effect Protection as it Relates to Indonesia' (Effective Protection Update, UNHCR, 2 Dec 2004); Human Rights Watch, "'Not for Export': Why the International Community Should Reject Australia's Refugee Policies' (Report, Human Rights Watch, 26 Sept 2002) <<http://www.hrw.org/legacy/press/2002/09/ausbrf0926.htm>>.

²⁰⁶ Bostock, above n 7, 290–91; Purcell, Submission No 1, above n 185, 6.

²⁰⁷ Law of the Republic of Indonesia, Number 6 of 2011 concerning Immigration (Indonesia) art 119. Indonesia is not party to the Refugee Convention and is therefore not bound by its non-criminalisation provision, art 31. See also, Roden, above n 202, 30.

²⁰⁸ Human Rights Watch, 'Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia' (Report, Human Rights Watch, 2013) 3; Roden, *ibid*; Purcell, Submission No 1, above n 185, 6.

²⁰⁹ Human Rights Watch, *ibid*, 32–44; Jessie Taylor, 'Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia' (Nov 2009) 4; Purcell, Submission No 1, above n 185, 6.

²¹⁰ Human Rights Watch, *ibid*, 44–59; Taylor, *ibid*; Purcell, Submission No 1, *ibid*, 6; Savitri Taylor and Brynna Rafferty-Brown, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution' (2010) 22 IJRL 558, 561.

²¹¹ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 Jan 1980 (Vienna Convention), art 29; Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea' (2002) 14 IJRL 329, 342–43.

²¹² *Sale v Haitian Centers Council*, 509 US 155, 183, 187 (1993) (but see Blackmun J, dissenting); *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, 29–31; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 15.

²¹³ Goodwin-Gill and McAdam, above n 195, 244–46; Lauterpacht and Bethlehem, above n 195, 87, 111; Hathaway, above n 198, 336–40; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 Mich J Int'l L 223, 250–58; Executive Committee of the High Commissioner's Programme, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, UN doc EC/50/SC/CPR.17 (9 June 2002) 4 [23]; UNHCR, Advisory Opinion 11–12; Trevisanut, above n 195, 232; Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 IJRL 53, 71; Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 IJRL 696, 713; see also *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, Grand Chamber, 23 Feb 2012).

has similarly been established that the obligations under treaties such as the Convention Against Torture and the ICCPR, including *non-refoulement* obligations, apply wherever the state exercises its jurisdiction.²¹⁴ Moreover, *non-refoulement* under customary international law prohibits the 'return in any manner whatsoever of refugees to countries where they may face persecution' and applies to state actions whether or not they take place within the state's jurisdiction.²¹⁵ Turn-backs from Australia's contiguous zone and beyond violate these principles.

It is also doubtful that the use of 'enhanced screening' or other processes to determine the refugee status of migrants while these migrants remain at sea meets Australia's *non-refoulement* obligations. Doubt has been expressed about whether it is possible for migrants to be provided with access to effective procedures while they remain at sea.²¹⁶ The case of the *Sithumina* illustrates some of the difficulties involved in processing migrants at sea, especially when determinations take place via video-link rather than in person. Passengers reported that they had difficulty understanding and hearing the immigration officials conducting the determinations.²¹⁷ The refugee status determinations were also conducted in front of other passengers and several passengers reported that this prevented them from speaking freely about the persecution they had suffered in Sri Lanka.²¹⁸ For these reasons, the screening at sea of the asylum seekers on board the *Sithumina* was met with widespread criticism. A statement signed by fifty-three Australian legal academics stated that they were 'profoundly concerned that asylum seekers have been subjected to rapid and inadequate screening interviews at sea and returned to Sri Lanka' where they were at risk of persecution.²¹⁹ UNHCR also expressed its 'profound concern' at the screening and the return of the Sri Lankan asylum seekers,²²⁰ and the Australian Human Rights Commissioner described the screening process as 'seriously inadequate'.²²¹

In reality, the turn-back measures are a way for Australia to evade its international obligations and, in effect, render its signature under the Refugee Convention meaningless. Preventing vessels of asylum seekers from entering Australian territory and finding protection frustrates the intention of the Refugee Convention and places refugees at risk of *refoulement*. Australia's unilateral decision to return asylum seekers to Indonesia also undermines the cooperative spirit of the international protection regime and places an additional burden on a country that has few resources to cope with the influx of irregular migrants.²²²

²¹⁴ UN Committee against Torture, General Comment No 2, Implementation of article 2 by States parties, UN doc CAT/C/GC/2, 24 Jan 2008 [7], [16]; UN Committee against Torture, Conclusions and recommendations of the Committee against Torture, UN doc CAT/C/USA/CO/2, 25 July 2006 [14]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136; UN Human Rights Committee, General Comment No 31, The Nature of the General Obligation Imposed on States Parties to the Covenant, 80th sess, UN doc, CCPR/C/21/Rev.1/Add. 13, 26 May 2004 [10].

²¹⁵ Goodwin-Gill and McAdam, above n 196, 248 (emphasis altered).

²¹⁶ Kilian O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' (2011) 3 *GoJIL* 715, 731; Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 481; Roden, above n 202, 9.

²¹⁷ Amal Jayasinghe, 'Returned Sri Lanka migrants vent fury at Australia', *Agence France-Presse* (8 July 2014).

²¹⁸ 'They threatened me, said they would kill me if I told anyone. Said they would kill my children.', above n 117, 26.

²¹⁹ Jane McAdam and others, above n 170.

²²⁰ UNHCR, above n 170.

²²¹ 'Human Rights Commission president talks about the stand-off over Sri Lankan asylum seekers', above n 170.

²²² Goodwin-Gill and McAdam, above n 196, 390; UNHCR, above n 163, 3.

5.4 The impact on bilateral relations with Indonesia

The return of vessels with irregular migrants to Indonesia has also put considerable strain on Australia's relationship with Indonesia. The Expert Panel on Asylum Seekers, convened in 2012, had warned about the damage the turn-back policy might cause to bilateral relations if it was reintroduced,²²³ and several senior Indonesian government officials also expressed their objection to the policy, its operation, and its rationale on numerous occasions.²²⁴ Mr Marty Natalegawa, then Foreign Minister of Indonesia, emphasised that 'unilateral measures taken by Australia would potentially risk the close co-operation and trust between the two countries [...].'²²⁵ The turn-backs also risk jeopardising the frail regional cooperation to combat migrant smuggling in Southeast Asia, especially the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which serves as a forum, chaired by Australia and Indonesia to discuss matters relating to the smuggling of migrants among sending, transit, and destination countries in Asia and the Pacific.²²⁶

6. CONCLUSION

This article gives insight into the objective, operations, and objections to Australia's policy of turning vessels carrying irregular migrants back to Indonesia and Sri Lanka. It is evident that this policy, along with the rigour with which it has been implemented, has achieved one policy objective: that is, to prevent irregular migrants, most of whom seek asylum, from arriving in Australia. Whether or not the policy has been successful in saving the lives of irregular migrants cannot be established with any certainty. What is clear, is that the policy has not addressed the causes of irregular migration and migrant smuggling and that it has placed a greater burden on transit countries, such as Indonesia.

One of the main effects of the turn-back policy has been a shifting of Australian responsibilities to other countries and a rejection of Australia's obligation under

²²³ Report of the Expert Panel on Asylum Seekers, above n 77, 127.

²²⁴ See, eg, Kirsty Needham, 'Indonesia once more rejects Abbott boats policy' *The Sydney Morning Herald* (15 Mar 2012) <<http://www.smh.com.au/federal-politics/political-news/indonesia-once-more-rejects-abbott-boats-policy-20120315-1v7ly.html>>; George Roberts, ABC, 'Indonesia concerned about Abbott's border protection plan' (*Lateline*, 12 Sept 2013) <<http://www.abc.net.au/lateline/content/2013/s3847782.htm>>; George Roberts, 'Indonesia's government and military close ranks against Australia's boat turn-backs' (*ABC News*, 10 Jan 2014) <<http://www.abc.net.au/news/2014-01-10/indonesia27s-military-chief-says-he-opposes-asylum-boat-turn-b/5193198>>; George Roberts, 'Indonesian foreign minister Marty Natalegawa says Australia's asylum seeker turn-back policy "unhelpful"' (*ABC News*, 24 Jan 2014) <<http://www.abc.net.au/news/2014-01-24/marty-natalegawa-says-pursuing-turnback-policy-unhelpful/5216450>>; Jonathan Swan and Michael Bachelard, 'Marty Natalegawa says turn backs "not helpful", as Greens accuse government of lying about boat arrivals' *The Sydney Morning Herald* (7 Feb 2014) <<http://www.smh.com.au/federal-politics/political-news/marty-natalegawa-says-turn-backs-not-helpful-as-greens-accuse-government-of-lying-about-boat-arrivals-20140207-325hk.html>>; Helen Brown, 'Indonesia to raise Australian asylum seeker policies with United States' (*ABC News*, 14 Feb 2014) <<http://www.abc.net.au/news/2014-02-14/australias-ambassador-in-jakarta-summoned-by-indonesian-governm/5261466>>; Griffiths, above n 112.

²²⁵ Lenore Taylor, 'Tony Abbott should tone down rhetoric and turn back his asylum policy' *The Guardian* (27 Sept 2013) <<http://www.theguardian.com/world/2013/sep/27/tony-abbott-turn-back-asylum-policy>>.

²²⁶ UNHCR, 'Statement by Volker Türk, Director of International Protection' (Special Conference on Irregular Movement of Persons, Jakarta, Indonesia, 20 Aug 2013). See generally, Joseph H Douglas and Andreas Schloenhardt, 'Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process' (Research Paper, Feb 2012); Caroline Millar, 'Combating trafficking in persons through the Bali Process' (2004) 66 *Development Bulletin: People Trafficking, Human Security and Development* 32.

international refugee law so that Australia's signature under the Refugee Convention has become, for the most part, irrelevant. The situation as it is now is that fewer asylum seekers risk their lives trying to reach Australia and instead remain in or are returned to countries where they have no permanent status, where they may have to live in hiding, and where the persecuted face a real risk of being returned to their persecutors.

The execution of the turn-back policies under Operations Relex and Sovereign Borders has also placed passengers and crew on board the vessels, as well as Australian Navy and Customs personnel, at risk of serious injury and death, especially if the vessels are not seaworthy or are sabotaged by desperate migrants. The present situation is such that there is a real incentive for the migrants to sabotage their vessel to try to stop Australian officials from effecting their return. The policy has failed to establish an environment of transparency and understanding in which the migrants collaborate with Navy and Customs officials rather than turning against them. Other risks to the safety and mental health of Australian officials have also been identified.

It has also been shown that the policy violates Australia's obligation under international refugee law and puts the bilateral relationship with Indonesia and regional cooperation against the smuggling of migrants in jeopardy. Returning vessels carrying asylum seekers has severely damaged Australia's already poor human rights record relating to asylum seekers and has tarnished Australia's image in the world. Its reputation as a fair and humane society, welcoming people who flee from persecution and poverty, has been severely damaged. The conclusion to be drawn from this research is that the disadvantages of the turn-back policy greatly outweigh its objectives and any perceived advantages. It is difficult to advocate, support, and sustain this policy in these circumstances.