



BY HOOK OR BY CROOK

AUSTRALIA'S ABUSE OF ASYLUM-SEEKERS AT SEA

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*Cover photo: Photograph of the 32,000USD which crew members told Amnesty International was paid to them by Australian officials who intercepted and boarded the boat carrying 65 asylum seekers. The payment was made around 24 May 2015 as confirmed by eyewitnesses. The money was found in the possession of the crew when they were apprehended by the Indonesian Police.
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EXECUTIVE SUMMARY

“What we are doing is saving life at sea. We are defending our national sovereignty, we are protecting our country from the evil trade of people smuggling, and by hook or by crook we will do what is necessary to keep our country safe and to keep this evil trade stopped.”

Former Australian Prime Minister Tony Abbott, 12 June 2015¹

INTERCEPTIONS AT SEA BY AUSTRALIAN AUTHORITIES

On 5 May 2015, a boat departed Pelabuhan Ratu in Indonesia, with the aim of reaching New Zealand. On board were six crew and 65 passengers. The passengers, who were from Sri Lanka, Bangladesh and Myanmar, included 58 men, four women (one of whom was pregnant), two seven-year-old children, and a one-year-old child. All of the adult passengers described themselves as asylum-seekers. They had paid unnamed private individuals an average of 4,000 USD for the voyage.

The boat never reached New Zealand. On 17 and 22 May it was intercepted by Australian Navy and Border Force ships, and ultimately all on board had to return to Indonesia. The ships were part of Australia's Operation Sovereign Borders, which is one in a series of measures implemented by successive Australian governments to control the entry of foreign nationals into Australia. The Australian authorities later described the interception as necessary because the boat was in distress, and stated that they were acting to preserve the safety of life of those on board. However, the encounter with the Australian Navy and Border Force, which lasted several days, involved abuse and put the lives of the asylum-seekers at risk.

In August 2015 Amnesty International conducted research in Indonesia into these events, including interviews with all 62 adult passengers and six crew. At the time of the interviews,

¹ Quoted in Daniel Hurst, “Tony Abbott Refuses to Rule out Paying People Smugglers to Turn Back Boats,” *The Guardian*, 12 June 2015, available at <http://www.theguardian.com/australia-news/2015/jun/12/tony-abbott-refuses-to-rule-out-paying-people-smugglers-to-turn-back-boats>.

the crew were in police custody on Rote Island, and have since been charged with people-smuggling. Those who had been passengers on the boat were in immigration detention in Kupang. To Amnesty International's knowledge, the two groups have not had any interaction since 31 May. The testimonies of both groups about the events of May 2015 were remarkably consistent.

Both groups described their journey, the boat and their treatment by Australian officials in detail, and their testimony was augmented by photographs taken by some of the passengers on cell phones while at sea, as well as a video. The 62 adults who left Indonesia on 5 May described the boat they travelled on as well-provisioned, with a cabin that could hold everyone on board. It had an indoor kitchen, indoor toilet, sufficient life jackets for everyone, at least one satellite phone, a large GPS device, and maritime maps. The six crew members were experienced – at least one had international seafaring experience.

The boat was intercepted in international waters, on 17 May, by two Australian ships: one Navy and one Border Force. Six Australians wearing the dark blue uniforms of Australian Border Force personnel boarded the boat, took photographs and then disembarked, leaving the passengers and crew with a leaflet in multiple languages saying that they can never enter Australian waters, either for the purpose of reaching Australia or *en route* elsewhere. According to both the crew and passengers, the two Australian ships continued to follow the boat for several days, until, on 22 May, a second interception took place.

The precise location of the second interception is difficult to establish. The boat crew members believed they were in Indonesian waters but said the Australian officials claimed the interception took place on the high seas. Australian Navy personnel boarded the boat and remained there. That night all the men were kept outside the cabin by armed Australian personnel. It rained hard for several hours, and salt spray was blown on board. Nevertheless, all 58 men were forced to stay outside with no protection from the elements. The pregnant woman told Amnesty International that she was in a great deal of pain that night – an Australian doctor examined her but just told her to drink water. None of the passengers was given food on the evening of 22 May. On 23 May, they were allowed to eat and the men were permitted to enter the cabin. Australian ships then escorted the boat to Greenhill Island, an Australian territory near Darwin.

While anchored at Greenhill Island, the Australian officials told the passengers that they would be able to bathe if they went on board the Border Force ship. Fifty passengers decided to transfer to the Border Force ship; 15 remained on the original boat. It was at this point, on the original boat, that the crew claim the Australian officials gave them money. The crew told Amnesty International that two of them received 6,000 USD each, and four received 5,000 USD apiece, making a total of 32,000 USD. One of the 15 asylum-seekers who had remained on board described how he saw the captain meeting with the Australians in the boat's kitchen and saw the captain put a thick white envelope in his shorts' pocket.

Meanwhile the fifty people who went to the Border Force ship, who included the three children and the pregnant woman, were put into cells and held there for approximately seven days. The cells were cramped and without air conditioning. While on board the Australian ship a number of people developed health problems. One woman said that she fainted three times from the heat and the stress, hitting her head on one occasion. An Australian doctor

examined her but said he did not have permission to give her medicine. Another woman who has blood pressure problems claims that she was not allowed to take her own medicine, which had been taken away from her by the Australians. Similarly, a man who suffers from asthma said that he was not permitted to access his inhaler, which had been confiscated, and he suffered asthma attacks while confined to the cell.

On the evening of 30 May, an Australian officer informed the asylum-seekers that they, along with the original crew members, would be transferred onto two new boats. The two boats were not as well-equipped as the original boat on which they had left Indonesia. The crew was worried because there was very little fuel. Australian officials also provided fire extinguishers, life jackets, one small GPS device, and one or two rudimentary maps. One of the maps was of Rote Island in Indonesia and Australian officials had circled three potential landing locations. The crew told Amnesty International that the Australian officials gave them verbal instructions on where to land at Rote Island.

According to the crew, they had initially been told – through an interpreter working with the Australians – that the asylum-seekers would be taken to Australia and they would be flown back to Indonesia with the money they had been given by the Australians. They were later told, again via the interpreter, that they had to take the asylum-seekers to Indonesia. The crew told Amnesty International that they did not feel in a position to refuse.

On the way back to Indonesia, the two boats were initially escorted by two Australian Navy ships, two Border Force ships, and six speedboats. The Australians left the boats at around 11 a.m. on 31 May. A few hours later, one of the boats ran out of fuel. The crew members successfully transferred all the passengers onto the other boat, which was then dangerously over-crowded. Video taken by one of the asylum-seekers shows the transfer operation. The crew told Amnesty International that, at this point, the situation was dangerous and the passengers were panicking. The crew managed to steer the boat to Landu Island, an island near Rote Island, where it struck a reef in the late afternoon on 31 May 2015. Local people helped rescue them.

The May 2015 incident described to Amnesty International constitutes people-smuggling. Amnesty International has not examined the culpability – if any – of the six crew members for people-smuggling or any other criminal offences. However, the evidence does suggest that the crew might have been acting under duress when they followed the instructions of Australian officials.

The Australian Government has denied that Australian officials paid a boat crew to take people to Indonesia. The denials, made by two Australian government ministers, are challenged by all of the available evidence. Amnesty International has documented the first-hand testimony of the men who received the money. Amnesty International has also documented the testimony of an eye-witnesses to the Australian officials handing over money to the crew. The police who detained the crew members confirm they were found with approximately 32,000 USD and showed Amnesty International the money they confiscated from the crew.

On 24 June 2015, the matter of the payments was referred to the Legal and Constitutional Affairs References Committee of the Australian Senate. The Committee is due to report back

in early 2016.

Amnesty International also conducted research into a second turnback incident; researchers interviewed 15 people, from Bangladesh, Pakistan and Myanmar, who had attempted a boat journey to Australia in July 2015 but had also been pushed back to Rote Island in Indonesia following encounters with Operation Sovereign Borders. In this case the boat left Kupang, crewed by two Indonesian men, on 22 or 23 July. According to those interviewed by Amnesty International, the boat was not in good condition, and soon started taking on water. Passengers were reduced to bailing with mugs and baskets, and were afraid that the boat would sink.

On the morning of 25 July, they saw two Australian ships on either side of them. The passengers tried to get the ships' attention and indicated that they were in distress by waving red shirts. They claim that they spent a full day showing that they were in distress, from 10 or 11 a.m. to 5 or 6 p.m.; the two Australian ships followed on either side during the entire period. In the evening, four speedboats approached the boat, and 10-12 Australian officials boarded. They gave the passengers lifejackets and transferred them, three at a time, to a Navy ship. A day later they were moved to cells on a Border Force ship; the two Indonesian crew members were accommodated separately. On 1 August, Australian officials told the passengers that they had to leave the Australian ship. They, and the two Indonesian crew members, were then transferred into another boat that was similar to their original vessel. The passengers described how Australian officials provided them with life jackets, two mobile phones, a walkie-talkie, three or four pages of maps, and a GPS device.

According to the passengers, when they first left Kupang for Australia their relationship with the two crew members had been friendly. But, after a week apart on the Australian ship and everyone's subsequent transfer onto the other boat, the crew's attitude changed. Several passengers also said that the crew had two bags that they had not had before being intercepted by the Australian authorities.

At this point the passengers had still not been informed of their destination. Once they spotted the maps, which indicated Rote Island, they became angry. They had paid for a journey to Australia, and did not want to return to Indonesia. After the passengers threatened to search the two new bags in the crew's possession, the crew agreed to drive back to the Navy ship. Once the boat reached the Navy ship, the passengers claim that the Australian officials were more aggressive than they had been previously, warning them several times not to touch the crew's bags, and threatening to shoot them if they returned. They were given a small amount of fuel and told by the Australians that they should go to Rote Island and not try to go anywhere else because they did not have the fuel to do so.

The boat ran out of fuel before reaching land, but was intercepted by Indonesian police officers and taken to Tablolong, Indonesia. It is unclear if the two crew members are currently in the custody of Indonesian police, but the passengers told Amnesty International that they were interviewed by members of the local Crime Investigation Division. The 25 asylum-seekers are now in the custody of Indonesian immigration officials in Kupang, and – like the passengers on the boat that was turned back in May 2015 – are very concerned about their future.

BREACHES OF INTERNATIONAL LAW

Based on the information gathered by Amnesty International, Australia has breached a number of international laws, including international law on transnational crime and international human rights law.

INTERNATIONAL LAW ON TRANSNATIONAL CRIME

The *UN Convention against Transnational Organized Crime (Convention)* sets out states' legal obligations to cooperate to prevent and combat transnational organized crime. The *Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)*, which supplements the *Convention*, requires states to prevent and combat the smuggling of migrants and protect the rights of smuggled persons. Australia has ratified both the *Convention* and the *Smuggling Protocol*. The *Smuggling Protocol* requires that signatories criminalize the smuggling of migrants, which is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

People-smuggling is a transnational crime, though people who are smuggled are not criminals, and international law forbids states from penalizing asylum-seekers solely for the manner of their entry into a country.

Under the *Smuggling Protocol*, the modes of commission – in other words, the ways in which someone can be found responsible – of a smuggling offence include committing an offence, attempting to commit an offence, participating as an accomplice in an offence, and organizing or directing others to commit an offence.

The evidence collected by Amnesty International about the events of May 2015 indicates that on or about 24 May 2015 Australian officials appear to have organized or directed the crew to commit a people-smuggling offence. It was under Australian officials' instruction and with their material assistance (including two boats, fuel, maps, and GPS) that the offence of smuggling people into Indonesia took place. The mode of entry to Indonesia that, according to the crew, the Australian officials directed them to follow – landing at identified points in Rote Island rather than presenting themselves to Indonesian border officials and complying with procedures for entry by boat to Indonesia – amount to illegal entry within the terms of the *Smuggling Protocol*. The 32,000 USD constitutes a financial benefit to the crew to procure the illegal entry. The Australian officials who paid the smugglers and instructed them to land on Rote Island in May 2015 may also have participated as accomplices in the transnational crime of people-smuggling.

Additionally, under the *Smuggling Protocol*, aggravating circumstances to a smuggling offence are those "that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants." The way in which the May 2015 turnback was carried out – in overcrowded vessels with insufficient fuel – would qualify as an aggravating circumstance because it endangered lives and involved ill-treatment.

Australian officials may also have breached the people-smuggling provisions in the *Australian Criminal Code*. However, certain categories of public officials may have immunity from liability under Australian law. Such exemptions from liability are inconsistent with the *UN*

Convention on Transnational Organized Crime, which requires states parties to prevent transnational organized crime and to promote the development of standards and procedures designed to safeguard the integrity of public entities.

The nature of the agreement between the Australian authorities and the two Indonesian crew in the July 2015 incident is less clear. In this case the crew had bags that the passengers think were given to them by Australian officials. The account of the passengers – in particular Australian officials' warnings to the passengers not to open the bags – raises sufficient concern to warrant further investigation.

An Operation Sovereign Border Joint Agency Task Force submission to the Australian Senate Committee investigating the payments stated that the May 2015 operation was intended to save lives following a distress call. The evidence collected by Amnesty International contradicts the Joint Agency Task Force's submission to the Senate Committee. The crew and asylum-seekers – interviewed separately – consistently told Amnesty International that the boat was not in distress at the time of either interception on 17 or 22 May. Moreover, the post-interception conduct of Australian officials, as described by passengers and crew, does not fit the definition of a rescue operation. The *International Convention on Maritime Search and Rescue*, ratified by Australia, defines a rescue operation as: "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety." By contrast, the evidence gathered by Amnesty International suggests that the operation in May actually put the lives of people at risk. In the circumstances described by the crew and asylum-seekers, it is remarkable that no lives were lost and no one was injured.

INTERNATIONAL HUMAN RIGHTS LAW

Australia's international human rights law obligations are engaged whenever it has effective control over someone, including on the high seas. From the moment a state establishes effective control over a boat, all persons on it are within the state's jurisdiction, and that state is responsible for securing and protecting their human rights. During the May 2015 turnback incident, the crew and passengers were under Australia's effective control for about nine days. During the July 2015 incident, the passengers and crew were under Australia's effective control for at least six days. During this time the officials breached several provisions of human rights law.

Non-refoulement is an international legal principle that prohibits the transfer of individuals to another country or jurisdiction where they would face a real risk of persecution or other serious human rights violations or abuses. This principle is the cornerstone of international refugee protection. States are obliged to give individuals the opportunity to challenge their transfer (to another country or jurisdiction) on the grounds that such a transfer would put them at real risk of serious human rights violations or abuses.

In the cases documented by Amnesty International, Australia turned back people, at least some of whom were asylum-seekers, without any assessment of each person's individual situation, including the risk of serious human rights violations or abuses, either in the country to which they were being returned or in another country to which they might be sent. By collectively expelling asylum-seekers, without any apparent procedural fairness, Australian officials violated the prohibition on *refoulement*.

During the turnback episodes documented by Amnesty International people were locked for days inside rooms, which appeared to be cells, on board Australian ships. Such a restriction on their personal liberty amounts to detention. Australian officials breached the *International Covenant on Civil and Political Rights* because the asylum-seekers detained on-board Australian ships were not informed of the grounds for their detention and had no avenues to challenge it. While detained by Australian officials several people became unwell, in some cases due to the crowded conditions under which they were detained. Several people were denied access to medicine and a pregnant woman appears to have been denied appropriate medical care. In one case 58 men were forced to spend a night outside in the driving rain.

CONCLUSION

The actions and omissions of Australian Navy and Border Force officials, who are organs of the state, are attributable to the Government of Australia. The evidence collected by Amnesty International indicates that Australian officials breached Australia's obligations under the *UN Convention on Transnational Organized Crime* and international human rights law. The actions and omissions that gave rise to these breaches, which are discussed in detail in this report, therefore trigger the international responsibility of the Government of Australia.

Amnesty International is calling for a Royal Commission into Operation Sovereign Borders, to investigate and report on allegations of criminal and unlawful acts committed by Australian government officials. In addition, Australia must ensure that those whose rights were violated by the conduct of Australian officials have access to an effective remedy and reparation.

The organization is also calling on Australia to overhaul its approach to asylum-seekers and refugees arriving by boat, including by implementing the following recommendations:

- Allow independent monitoring of all activities undertaken by Operation Sovereign Borders, including any operations to intercept and turn back boats, in order to enable public scrutiny and ensure transparency and accountability;
- Amend the Australian Criminal Code to remove exemptions from liability that are inconsistent with the UN Convention against Transnational Organized Crime;
- Engage in effective regional dialogue to negotiate improved regional protections for vulnerable refugee and migrant populations in the Asia-Pacific region;
- Engage in genuine search and rescue operations, conducted with full respect for international human rights law, followed by safe disembarkation in Australia;
- End the prohibition on maritime arrivals claiming asylum;
- End the practice of turnbacks at sea;
- Reverse policy on non-resettlement of refugees who registered with UNHCR-Indonesia after 1 July 2014;
- Increase resettlement options for refugees in the Asia-Pacific region, in particular for refugees in Indonesia and unaccompanied minors; and
- Expand safe and legal routes for people to reach safety in Australia, for instance by significantly increasing family reunification, student visas, and humanitarian admissions of refugees.

METHODOLOGY

This report is based on research conducted by Amnesty International researchers in Indonesia in August 2015, as well as desk research and follow-up communications by phone and email in September and October 2015. Delegates travelled to Cisarua, Jakarta, Kupang and Rote Island.

Amnesty International conducted three interviews (in English, Tamil and Bahasa Indonesia) with all 62 adults on board a boat intercepted by Australia in May 2015, two interviews (in English, Tamil and Bahasa Indonesia) with all six crew members from that boat, and one interview (in English) with 15 of the 25 people on board a boat intercepted by Australia in July 2015. The passengers from the May 2015 boat shared with Amnesty International dozens of photographs from their journey, as well as a video. In Cisarua and Jakarta, researchers interviewed (in English and Rohingya) six people who had been turned back to Indonesia by Australian officials on five occasions between late 2013 and mid-2014.

Researchers spoke with local police officers in Rote Island, Indonesia's Directorate General of Immigration (*Direktorat Jenderal Imigrasi Republik Indonesia*), and the Ministry of Foreign Affairs. Amnesty International also spoke to staff at the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).

The names and identifying information of all interviewees have been withheld for their protection.

Amnesty International would like to thank all those who assisted with this research, in particular local partners who provided tremendous support and expertise, as well as the interviewees who were so generous with their time and testimonies.



CHAPTER 1: OPERATION SOVEREIGN BORDERS

Operation Sovereign Borders is Australia's military-led border control operation.² It began in late 2013 and involves a number of agencies including the Australian Federal Police, Australian Defence Force, Australian Border Force³ and Department of Immigration and Border Protection.⁴ This report discusses seven incidents at sea that occurred as part of Operation Sovereign Borders, between 2013 and 2015.

Operation Sovereign Borders is one recent initiative in a series of measures implemented over many years by successive Australian governments to control the entry of foreign nationals into Australia. These programs and policies, including the offshore processing of all irregular maritime arrivals, have been the subject of critiques from Amnesty International,⁵ UN bodies and agencies,⁶ Australian courts,⁷ Australian civil society,⁸ as well as Australian statutory bodies and government inquiries.⁹

² Australian Department of Immigration and Border Protection, "Operation Sovereign Borders," 2015, available at <https://www.border.gov.au/about/operation-sovereign-borders>.

³ The Australian Border Force was established on 1 July 2015 after the Australian Customs and Border Protection Service were merged with some parts of the Department of Immigration and Border Protection. For the sake of consistency, Amnesty International will refer to Customs officials (as they were called during some of the events described in this report) as Border Force officials.

⁴ Australian Department of Immigration and Border Protection, *Organisational Chart*, July 2015, available at <https://www.border.gov.au/OperationSovereignBorders/Documents/osb-organisational-chart-july-2015.pdf>.

⁵ Amnesty International, *This is breaking people: Human rights violations Australia's asylum seeker processing centre on Manus Island, Papua New Guinea*, December 2013, ASA 12/002/2013, available at <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>; Amnesty International, *This is still breaking people: Update on human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea*, May 2014, ASA 12/002/2014 available at <https://www.amnesty.org/en/documents/asa12/002/2014/en/>.

⁶ *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez, 6 March 2015 (A/HRC/28/68/Add.1), available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Add_2_ENG.doc, p. 7-9; UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013*, available at <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013*, available at <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>.

⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; *Al Masri v Minister for Immigration, Multicultural and Indigenous Affairs* (2002) 192 ALR 609; *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1.

⁸ See for instance Human Rights Law Centre, "Damning Evidence of Serious Child Harm in Detention," 11 February 2015, available at <http://hrlc.org.au/damning-evidence-of-serious-child-harm-in-detention/>.

⁹ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2015, available at <http://www.humanrights.gov.au/our-work/asylum-seekers-and->

The mandate of Operation Sovereign Borders is to stop anyone – including asylum-seekers and refugees – from reaching Australia irregularly by boat. In operations that are called “pushbacks” or “turnbacks,” Australian officials intercept boats of asylum-seekers and prevent them from landing in Australia. The Minister for Immigration and Border Protection, Peter Dutton, reported in August 2015 that since December 2013, Operation Sovereign Borders had returned 633 “potential illegal arrivals” from 20 vessels to their countries of departure.¹⁰ His predecessor, Scott Morrison, stated in 2014: “It is the policy and practice of the [Australian] Government to turn boats back where it is safe to do so, by intercepting and safely removing vessels, and their passengers who are seeking to illegally enter Australia, to outside Australia’s contiguous zone.”¹¹

The military character of Operation Sovereign Borders is evident, and the Navy ships used in Operation Sovereign Borders are armed warships with sophisticated search equipment. The ships are Armidale Class Patrol Boats, equipped with one 25 mm Rafael M242 Bushmaster and two 12.7 mm machine guns.¹² The former ordnance, which is Israeli-made, has a standard rate of fire of 200 rounds per minute, and a range of 2 km.¹³ It has been described as “capable of defeating the majority of armored vehicles it is likely to encounter, up to and including some main battle tanks. The M242 25-mm, fully automatic, externally powered gun can destroy lightly armored vehicles and aerial targets such as helicopters and slow-flying aircraft.”¹⁴ Australian Navy patrol boats are also equipped with “high-definition navigational radar, high and ultra high frequency communications equipment, gyro compasses and echo sounder.”¹⁵ The Israeli-made TOPLITE, for instance, enables the “search and tracking of naval and airborne targets during the day, at night and in all weather conditions.”¹⁶

The Australian government has frequently claimed that the priority of Operation Sovereign Borders is to save lives. In July 2015, the Commander of the Operation Sovereign Borders Joint Agency Task Force, Major General Andrew Bottrell, stated to the Australian Senate Legal and Constitutional Reference Committee: “I wish to again emphasise that the primary concern of Operation Sovereign Border is, and always has been, safety of life at sea.”¹⁷

[refugees/publications/forgotten-children-national-inquiry-children](#); Phillip Moss, *Independent Review – Regional Processing Centre on Nauru*, March 2015, available at <http://www.border.gov.au/about/reports-publications/reviews-inquiries/independent-review-regional-processing-centre-in-nauru>; Australian Senate, *Report: Incident at the Manus Island Detention Centre from 16 to 18 February 2014*, 11 December 2014, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report.

¹⁰ Peter Dutton MP, “Minister – OSB Marks Milestone – Year with No Boats,” 6 August 2015, available at <http://www.minister.border.gov.au/peterdutton/2015/Pages/osb-marks-milestone-year-with-no-boats.aspx>.

¹¹ Quoted in George Roberts and Mark Solomons, “Transcript: Asylum Seekers on Board ‘Burns’ Boat Speak Out,” 24 March 2014, available at <http://www.abc.net.au/7.30/content/2014/s3970527.htm>.

¹² Royal Australian Navy, “HMAS Larrakia II,” available at <http://www.navy.gov.au/hmas-larrakia-ii>.

¹³ Global Security, “M242 Bushmaster 25mm Automatic Gun,” available at <http://www.globalsecurity.org/military/systems/aircraft/systems/m242.htm>.

¹⁴ Global Security, “M242 Bushmaster 25mm Automatic Gun,” available at <http://www.globalsecurity.org/military/systems/aircraft/systems/m242.htm>.

¹⁵ Royal Australian Navy, “HMAS Larrakia II,” available at <http://www.navy.gov.au/hmas-larrakia-ii>.

¹⁶ Rafael Advanced Defence Systems, “TYPHOON, TOPLITE deployed on Australian Patrol Boats,” 7 July 2005, available at <http://www.rafael.co.il/Marketing/444-1157-en/Marketing.aspx?pageNum=1>.

¹⁷ Operation Sovereign Borders Joint Agency Task Force, *Submission to the Senate Legal and Constitutional Affairs References Committee*, 30 July 2015, available at

Former Prime Minister Tony Abbott has also stated of Operation Sovereign Borders: "What we are doing is saving life at sea."¹⁸

Verifying these types of statements and obtaining details about what happens to people who interact with Australian officials at sea is challenging, due to the dearth of publicly available information about the activities carried out under the authority of Operation Sovereign Borders. Australian officials consistently refuse to disclose information about "on-water matters."¹⁹ Furthermore, recent legislative changes in the *Border Force Act*, which came into effect on 30 June 2015, have further deepened the secrecy surrounding border control matters in Australia.²⁰

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Submissions, p. 2.

¹⁸ Quoted in Daniel Hurst, "Tony Abbott Refuses to Rule out Paying People Smugglers to Turn Back Boats," *The Guardian*, 12 June 2015, available at <http://www.theguardian.com/australia-news/2015/jun/12/tony-abbott-refuses-to-rule-out-paying-people-smugglers-to-turn-back-boats>.

¹⁹ See for instance Shalailah Medhora, "Coalition Defies Senate by Refusing to Hand over People Smuggler Documents," *The Guardian*, 17 June 2015, <http://www.theguardian.com/australia-news/2015/jun/17/coalition-defies-senate-by-refusing-to-hand-over-people-smuggler-documents>; Daniel Hurst, "Peter Dutton Invokes 'On-Water' Secrecy over Claim of Payments to Boat Crew," *The Guardian*, 10 June 2015, available at <http://www.theguardian.com/australia-news/2015/jun/10/peter-dutton-invokes-on-water-secrecy-over-claim-of-payments-to-boat-crew>; Agence France Presse, "Former Navy Chief Slams Australia Government for Policy of Secrets," *The National*, 24 September 2013, available at <http://www.thenational.ae/world/asia-pacific/former-navy-chief-slams-australia-government-for-policy-of-secrets>. See also in this regard Peter Dutton MP statement to Senate Committee, http://www.aph.gov.au/~media/02%20Parliamentary%20Business/22%20Chamber%20Documents/Dynamic%20Red/17%20june15_OPD%20re%20asylum%20seekers.

²⁰ George Newhouse, "Let Me Clear up the Government's Clarification of the Border Force Act," *The Guardian*, 8 July 2015, available at <http://www.theguardian.com/commentisfree/2015/jul/08/let-me-clear-up-the-governments-clarification-about-the-border-force-act>.

CHAPTER 2: PAYMENT AND ABUSIVE TREATMENT IN 2015

**“Please do something for our painful life an[d]
give us a chance for living a peaceful life.”**

Letter to Amnesty International from the 65 asylum-seekers turned back by Australia in May 2015



Asylum seekers in immigration detention in Kupang, East Nusa Tenggara after their boat was intercepted and turned back by Australian officials, August 2015 © Amnesty International

This chapter describes a turnback incident that took place at sea in May 2015, when – as part of Operation Sovereign Borders – Australian ships twice intercepted (on 17 and 22 May) a boat of asylum-seekers who had left Indonesia and were trying to reach New Zealand. Beginning on 22 May, over the course of about nine days, Australian officials escorted the asylum-seekers' boat to Australian waters, paid the crew 32,000 USD, detained most of the passengers on an Australian ship, transferred all the passengers and crew into two small boats, and directed the crew to bring everyone back to Indonesia. The boat landed in Indonesia on 31 May. Indonesian officials took the asylum-seekers into immigration detention, and confined the crew to police custody. Australia's treatment of the asylum-seekers, as described below, appears abusive.

The chapter is based mainly on testimony gathered in August 2015 from passengers and crew, over the course of five interviews lasting several hours each.²¹ The passengers were being held in immigration detention in Kupang, East Nusa Tenggara. The crew were in police custody on Rote Island in East Nusa Tenggara, and were being charged with people-smuggling.²² The testimony of the two groups, who were interviewed separately, was remarkably consistent.

MAY 2015 INCIDENT

On 5 May 2015, a boat departed Pelabuhan Ratu, West Java, in Indonesia, with the aim of reaching New Zealand. On board were six crew and 65 passengers: 54 Sri Lankans, 10 Bangladeshis and one Rohingya from Myanmar. The crew of six were all men. The passengers included 58 men, four women (one of whom was pregnant), two seven-year old children, and a one-year old child. The boat never reached New Zealand. On 17 and 22 May it was intercepted by Australian ships, under the authority of Operation Sovereign Borders, and the crew and passengers were made to return to Indonesia.

The passengers identified themselves to Amnesty International as asylum-seekers. Each person paid an average of 4,000 USD for the voyage. They described their journey, their boat and the Australians' treatment of them in detail, and their testimony was augmented by photographs they had taken of the Australian ships they encountered, as well as a video, as discussed below.

The asylum-seekers told Amnesty International that the boat on which they left Indonesia was well-provisioned; they said it was a two-deck vessel, 25 metres (82 feet) long, which was more than large enough to accommodate the passengers – even the cabin on the top deck could hold everyone on board.²³ Asylum-seekers said that their boat had an indoor kitchen, indoor toilet, sufficient life jackets for everyone, at least one satellite phone, a large GPS device, and high quality maritime maps. According to a police officer on Rote Island – speaking on condition of anonymity – the captain had international seafaring experience, and he and the five other crew members had been hired by what the police officer called two

²² Private communication with lawyer in Indonesia, 19 October 2015.

²³ Kupang Interview, 18 August 2015.

“agents” in Jakarta, to undertake the journey.²⁴ The asylum-seekers said that the six crew were not armed.²⁵ Police officers told Amnesty International that five of the crew were Indonesian, and a sixth was Sri Lankan.²⁶



Photo taken by an asylum-seeker on the two-deck boat which had departed from Indonesia. The photo was taken prior to interception and transfer onto two smaller boats by Australian Border Force May 2015 © Amnesty International

The boat was first intercepted in international waters, on 17 May, near East Nusa Tenggara, Indonesia, by two Australian ships: one Navy and one Border Force. Six Australians – one woman and five men, wearing the dark blue uniforms of Australian Border Force personnel – arrived in two speedboats, and told the crew to stop the boat. The crew members, who said they thought from their GPS that they were located in international waters, told the Australian officials that they did not have the right to board. Nevertheless, the Australian officials boarded and spent about half an hour inspecting the boat's equipment and food supplies. The purpose of this inspection was not clear. They took photographs and then disembarked, leaving the passengers and crew with a leaflet in multiple languages saying that they could never enter Australian waters, either for the purpose of reaching Australia or *en route* elsewhere. The leaflet described to Amnesty International by the boat's crew and passengers²⁷ is similar to the leaflet used by Australia's Operation Sovereign Borders as part of its “Counter People Smuggling Communication.”²⁸

The two Australian ships continued to follow the boat for several days, until – on 22 May – a second interception took place. In the mid-afternoon, a Navy ship identified by the asylum-seekers as #92 (that is, HMAS Wollongong (III)²⁹), approached the boat, along with a Border

²⁴ Rote Island Interview, 19 August 2015.

²⁵ Kupang Interview, 21 August 2015.

²⁶ Rote Island Interview, 19 August 2015.

²⁷ Rote Island Interview, 19 August 2015.

²⁸ Department of Immigration and Border Protection, “Counter People Smuggling Communication,” available at <https://www.border.gov.au/about/operation-sovereign-borders/counter-people-smuggling-communication>.

²⁹ Royal Australian Navy, “HMAS Wollongong (III),” available at <http://www.navy.gov.au/hmas->

Force ship. Eight Australian personnel boarded the vessel via speedboats, took the captain back to their vessel, and left the five remaining crew members with a walkie-talkie, instructing them to use it if they needed anything. Amnesty International has seen two photographs of a man on a boat with a walkie-talkie, although they are not date-stamped so it is not possible to verify the date as being 22 May.³⁰

The captain of the boat said he spent several hours on the Australian ship on 22 May, and spoke to a number of people. He told Amnesty International that a man who appeared to be "half-Australian and half-Indonesian" provided interpretation between himself and an officer from the Australian Border Force ship (although the captain of the asylum-seekers' boat also spoke English). Through the interpreter, the Australian officer told the captain that the Australians were worried about the people on the boat and wanted to help. He offered to take the passengers to Australia and send the crew by plane to Indonesia.



Australian border force ships, viewed from the deck of the asylum-seekers' boat, May 2015 © Amnesty International

The precise location of the second interception is difficult to establish. Crew members said it took place in the Arafura Sea, between Northern Australia and the Indonesian province of Papua. The crew members believed that they were in Indonesian waters but they said the Australian officials challenged them on this, saying that the interception took place on the high seas. According to one crew member: "The Australian officer told us: 'A lot of refugees

[wollongong-iii](#).

³⁰ Photographs provided to Amnesty International by asylum-seekers in Kupang, Indonesia, on 22 August 2015 and 4 September 2015.

are dying at sea, the navy is finding bodies.”³¹

In the early evening of May 22, after a few hours on board the Border Force ship, the captain returned to the original boat, accompanied by eight Navy personnel.

That night, passengers said, the adult male passengers were kept outside the cabin by armed Australian personnel. It rained very hard for several hours, and salt spray was blown on board. Nevertheless, all 58 men were forced to stay outside with no protection from the elements. One man told Amnesty International:

“Some of us were not feeling well, and asked to go inside. Some people were sick from the fumes from the boat – we were vomiting and shivering and the rain was getting heavy. We tried to go inside the cabin but we were blocked.”³²

The women were permitted to stay in the cabin. The pregnant woman told Amnesty International researchers that she was in a great deal of pain that night – an Australian doctor examined her but, she says, just told her to drink water. None of the passengers were given food on the evening of 22 May. On 23 May, they were allowed to eat and the men were permitted to enter the cabin.

Starting on the evening of 22 May, the asylum-seeker boat was escorted by the Australian ships to Greenhill Island, an Australian territory near Darwin. The crew described the journey as approximately twenty-four hours (i.e. reaching Greenhill Island on 23 May), but the passengers thought the journey was longer, and that they arrived on 24 May. The Navy officers instructed the crew to drop anchor in shallow water near the island. All the passengers and crew members were then interviewed and photographed by Australian officials. The purpose of these interviews and photographs was not clear to the people with whom Amnesty International spoke. However, based on the accounts of the asylum-seekers, it does not appear that any of the interviews involved an assessment of their claims for asylum.

Later that day, the asylum-seekers were told that if they went on board the Border Force ship, they would be permitted to refresh themselves and bathe. Fifty passengers were transferred to the Border Force ship, but 15 remained on the original boat.

It was at this point, on the original boat – which was anchored off Greenhill Island – that Australian officials gave the crew money. The crew told Amnesty International that two of them received 6,000 USD each, and four received 5,000 USD apiece, making a total of 32,000 USD. It was not clear why the amounts differed. The payment was witnessed by at least one of the 15 passengers who had remained on the original vessel, who told Amnesty International that he saw the Australian officers, the English-Bahasa interpreter, and the captain meeting in the kitchen of the original boat, and that he saw the captain put a thick white envelope in his shorts' pocket. After this meeting, this asylum-seeker said, the crew were very happy, and joking with the Australian officers, whereas beforehand they had seemed frightened and nervous.

³¹ Rote Island Interview, 19 August 2015.

³² Kupang Interview, 18 August 2015.

The Indonesian police who detained the crew have confirmed publicly and to Amnesty International that the men had approximately 32,000 USD in their possession when they were apprehended. The police confiscated the money, and as of 19 August 2015, it was still in their possession. While on Rote Island in August 2015 Amnesty International researchers saw the money that was found on the crew, which consisted of dozens of new-looking 100 USD bills (see photograph), as well as a document listing the serial numbers of all the bills.



32,000USD which crew members told Amnesty International was paid to them by the Australian officials around 24 May 2015
© Amnesty International

The circumstances of Amnesty International's interviews with the crew members – who were in police custody – made it challenging to determine the precise understanding, that was reached at some point between May 22 and 24, between the boat captain and the Australian officials who had paid him and his crew. The captain told Amnesty International that he explained to the English-Bahasa interpreter that none of the crew had been paid by the agent

in Jakarta: “‘How can we go back?’ I said.”³³ When he first received the money, he said he believed that it would enable him and his crew to start a new life. He claims that the interpreter told him that the asylum-seekers would stay in Australia, and the crew would be flown back to Indonesia.

Irrespective of what the captain believed or said he believed at the time, it does not seem credible – given Operation Sovereign Borders’ mandate to stop anyone from reaching Australia by boat – that Australian officials ever intended to take the asylum-seekers to Australia.

While Australian officials were paying the crew on the original boat, the fifty passengers who had gone aboard the Border Force ship, who included the children and the pregnant woman, were subjected to various forms of ill-treatment. They had believed they were boarding the ship so they could bathe. But once there, they were detained and not allowed to return to their boat. Describing the conditions in which they were held, they said: “it was like a jail, with cells.”³⁴ They estimate that they were detained for seven days. All their belongings, including their phones³⁵ and food, were confiscated. The asylum-seekers told Amnesty International that the rooms they were held in were extremely hot, with no windows or fans. They claimed that the cells’ air-conditioning was switched off when they entered, and only switched on again as they left a week later. There were 25 people in each cell, which had only enough room for four triple bunk-beds; asylum-seekers said that there was no space to walk.

While on board the Australian ship, a number of people developed health problems and were denied access to medical care, despite the presence of a doctor on board. One woman said that she fainted three times from the heat and the stress, hitting her head on one occasion. She told Amnesty International that an Australian doctor examined her but said he did not have permission to give her medicine. Another woman who has blood pressure problems was not allowed to take her own medicine, which had been taken away from her by Australian personnel. Similarly, a man who suffers from asthma said that he was not permitted to access his inhaler, which had been confiscated, and he suffered asthma attacks while confined to the cell. One asylum-seeker told Amnesty International: “When we asked for medicine they told us to just relax ourselves and drink water.”³⁶

Eight of the fifteen asylum-seekers, all men, who had remained on the original boat were transferred, in the early morning on 25 May, to a ship they identified as #84 (that is, HMAS Larrakia II³⁷), where, they said, the conditions were poor. The men said that they spent three days on deck, and had to use an open toilet with no privacy. They were then transferred to another ship which they identified as #88 (that is, HMAS Maitland³⁸), and then to another

³³ Rote Island Interview, 19 August 2015.

³⁴ Kupang Interview, 18 August 2015.

³⁵ The asylum-seekers told Amnesty International that some of them had removed the card on which the photographs were stored, before the phones were confiscated by Australian officials. Later the Australians returned at least some of their phones to them. This is how they were able to share with Amnesty International dozens of photographs as well as a video from their journey.

³⁶ Kupang Interview, 18 August 2015.

³⁷ Royal Australian Navy, “HMAS Larrakia II,” available at <http://www.navy.gov.au/hmas-larrakia-ii>.

³⁸ Royal Australian Navy, “HMAS Maitland,” available at <http://www.navy.gov.au/hmas-maitland>.

ship (unidentified). It was unclear why these multiple transfers took place.

According to crew members, the original boat anchored off Greenhill Island for about a day, and Navy personnel then instructed the crew to follow their ship. After a journey of two days, the crew told Amnesty International that the convoy of ships and the boat reached Ashmore Reef, which is Australian territory.³⁹

At a certain point between 24-31 May, the crew said that a Navy officer informed them that instead of flying back to Indonesia and the asylum-seekers staying in Australia, everyone would be returning to Indonesia, and in two different boats. The crew told Amnesty International that Australian officials instructed them to go to Rote Island, Indonesia.

On the evening of 30 May, according to the asylum-seekers, an Australian officer informed them that they would be transferred onto two different boats. They described how, at around 5 a.m. on 31 May, they were woken up, given a breakfast of an egg and apple each, and provided with life jackets. A crew member explained to Amnesty International that Border Force personnel instructed him to put half the passengers in a boat called Kanak, and half in a boat called Jasmine, and that the Bahasa interpreter told him to split the crew as well.⁴⁰ Thirty-two asylum-seekers boarded one boat, and 33 were on the other. One of the asylum-seekers told Amnesty International that when they asked an Australian officer where they were going: "He told us: 'You will have a good life and good future. Safe journey.'"⁴¹

Kanak and Jasmine were not as well-equipped as the original boat on which the asylum-seekers had left Indonesia. The crew described the boats' condition as "okay,"⁴² but added that they were small, with no toilets. The asylum-seekers also said that the boats were too small to fit the number of people on board, and that no food was provided. The crew said they were worried because there was very little fuel – only one drum per boat. Australian officials also provided fire extinguishers, life jackets, one small GPS device between the two boats, and one or two rudimentary maps. One of the maps was of Rote Island, Indonesia; the crew and asylum-seekers said that Australian officials had circled three potential landing locations for the boats.⁴³ Crew members sketched the map for Amnesty International. The crew members also said that Australian personnel gave them verbal instructions to land on Rote Island.

The asylum-seekers and crew told Amnesty International that the two small boats were initially escorted by two Navy ships, two Border Force ships, and six speedboats. The Australians left the boats at around 11 a.m. on 31 May. At this point, the crew told Amnesty International that they were in international waters. A few hours later, Jasmine ran out of fuel. The crew members successfully transferred all the passengers on to Kanak. Amnesty International has seen a video, taken on a cell phone, which is date-stamped 31 May 2015. In the short clip, shouting can be heard as two men help people jump, one at a time, from Jasmine (the name is clearly visible, and the boat is bobbing in the water) down into another

³⁹ Rote Island Interview, 19 August 2015.

⁴⁰ Rote Island Interview, 19 August 2015.

⁴¹ Rote Island Interview, 19 August 2015.

⁴² Rote Island Interview, 19 August 2015.

⁴³ Rote Island Interview, 19 August 2015; Kupang Interview, 21 August 2015.

boat. One crew member told Amnesty International:

*"Everyone is panicking, I am panicking too. I tried to advise the passengers: keep calm. The refugees are crying and shouting – the situation is very bad."*⁴⁴

Once everyone came on board Kanak, which was then even more overcrowded, the crew managed to steer the boat to Landu Island, another Indonesian island near Rote Island, where it struck a reef in the late afternoon on 31 May 2015. No one was injured or killed. Local people helped rescue them, and gave them food and dry clothes. Amnesty International delegates saw Kanak and Jasmine, which had been towed to Rote Island by Indonesian officials (see photographs).



'Jasmine' (left) and 'Kanak' (right) having been towed to Rote Island by Indonesian officials, August 2015 © Amnesty International

When Amnesty International researchers spoke with the crew and asylum-seekers, it had been nearly three months since they had returned to Indonesia. At the time of the interviews, the crew were in police custody on Rote Island, and the asylum-seekers were in immigration detention in Kupang, East Nusa Tenggara. To Amnesty International's knowledge, the two groups had not had any interaction since 31 May.

The crew are being charged with a number of offences under Indonesian law. All six men face charges of people-smuggling and attempted people-smuggling. Under these charges, they face imprisonment for a minimum of five years and a maximum of 15 years, and a fine of a minimum of 500 million Indonesian Rupiah and a maximum of 1.5 billion Indonesian Rupiah (between approximately 37,000 and 110,000 USD).⁴⁵ The captain is also charged under Indonesia's shipping law, for sailing without authorization from the "Harbor Master."⁴⁶ Their trial is due to begin on 28 October 2015.⁴⁷

⁴⁴ Rote Island Interview, 19 August 2015.

⁴⁵ Republic of Indonesia, *Indonesia: Law No. 6 of 2011 about Immigration*, 5 May 2011, available at <http://www.refworld.org/docid/54eedf814.html>, Art. 120 (1), (2).

⁴⁶ Republic of Indonesia, *Indonesia: Law No. 17 about Shipping*, 7 May 2008, available at <http://www.indolaw.org/UU/Law%20No.%2017%20of%202008%20on%20Shipping.pdf>, Art. 323.

⁴⁷ Private communication with lawyer in Indonesia, 19 October 2015.

The asylum-seekers are in detention and are understandably worried about their future. In a letter to Amnesty International, signed "the 65 asylum-seekers," they said:

"We [left] our country, our family only because of the political violence, mass killings and not safety of our life."⁴⁸

They were seeking a safe life in another country. Some had been waiting in Indonesia for several years and had already registered with the UN Refugee Agency (UNCHR), but the very slow asylum and resettlement process in Indonesia compelled them to risk an irregular journey to New Zealand. Asylum-seekers' deep frustration with having their lives put on hold indefinitely – particularly for children and young families – is something that Amnesty International heard consistently in recent research on asylum-seekers in many parts of Indonesia, including Aceh, Cisarua, West Java.⁴⁹ The Australian policy that ended the resettlement⁵⁰ of any refugees who registered with UNHCR-Indonesia after 1 July 2014⁵¹ has further reduced the options for refugees to find places of safety where they can resume their lives.

AUSTRALIAN POSITION ON MAY 2015 INCIDENT

The Australian government has denied that Australian officials paid a boat crew to take asylum-seekers back to Indonesia. In statements to the media, Immigration Minister Peter Dutton⁵² and Foreign Minister Julie Bishop⁵³ denied the payments. However, former Prime Minister Tony Abbott did not confirm or deny the payments.⁵⁴

On 24 June 2015, the matter of the payments was referred to the Legal and Constitutional Affairs References Committee of the Australian Senate (the Senate Committee); as of late October 2015, the Senate Committee was due to report back to the Senate in February

⁴⁸ Letter to Amnesty International from the 65 asylum-seekers, August 2015.

⁴⁹ Amnesty International, *Deadly journeys: Southeast Asia's refugee and trafficking crisis*, October 2015, ASA 21/2574/2015, available at <https://www.amnesty.org/en/documents/ASA21/2574/2015/en/>, p. 32.

⁵⁰ "Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country." UNHCR, *UNHCR Resettlement Handbook*, 2011, available at www.unhcr.org/46f7c0ee2.pdf, p. 3.

⁵¹ Australian Embassy Thailand, "Changes to Resettlement Another Blow to People Smugglers," 18 November 2014, available at http://thailand.embassy.gov.au/bkok/PR2014_resettlement_people_smugglers.html.

⁵² Daniel Hurst, "Peter Dutton Invokes 'On-Water' Secrecy over Claim of Payments to Boat Crew," *The Guardian*, 10 June 2015, available at <http://www.theguardian.com/australia-news/2015/jun/10/peter-dutton-invokes-on-water-secrecy-over-claim-of-payments-to-boat-crew>.

⁵³ George Roberts, "Julie Bishop Denies Claims Australian Customs Officers Paid People Smugglers to Take Back Asylum Seekers," 12 June 2015, available at <http://www.abc.net.au/news/2015-06-10/bishop-denies-claims-customs-officials-paid-people-smugglers/6536474>.

⁵⁴ Shalailah Medhora, "Tony Abbott Sticks to 'Stop the Boats' in Face of Claims People Smugglers Paid," 14 June 2015, available at <http://www.theguardian.com/australia-news/2015/jun/14/tony-abbott-sticks-to-stop-the-boats-in-face-of-claims-people-smugglers-paid>.

2016.⁵⁵

In the Operation Sovereign Borders' Joint Agency Task Force's submission to the Senate Committee it made no reference to payments, but rather stated that the operation was intended to save lives following a distress call:

*"In late May 2015, a vessel was observed by, then, Border Protection Command assets north of Australia operating in poor weather conditions, which were rapidly deteriorating. The Master of the vessel indicated they were experiencing difficulty and requested assistance. Border Protection Command assets rendered immediate assistance in accordance with our international safety at [sic] life at sea obligations and assisted the safe return of the people to Indonesia. I believe our actions to assist this vessel were necessary to preserve the safety of life of those on board. The officers on board the Border Protection Command vessels operated in dangerous sea conditions to render assistance to the distressed vessel."*⁵⁶

The search for and rescue of vessels in distress is an international legal obligation binding upon Australia. States Parties to the *United Nations Convention on the Law of the Sea* must "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."⁵⁷

However, the available evidence is inconsistent with the testimony of the Operation Sovereign Borders' Joint Agency Task Force's submission to the Senate Committee.

The crew and asylum-seekers – interviewed separately – consistently told Amnesty International that the boat was not in distress at the time of either interception on 17 or 22 May.⁵⁸ The captain explicitly told Amnesty International: "No, we never made a distress call."⁵⁹ An asylum-seeker who was a fisherman and who told Amnesty International that he had 10 years of seafaring experience said:

⁵⁵ Parliament of Australia, "Payment of Cash or Other Inducements by the Commonwealth of Australia in Exchange for the Turn Back of Asylum Seeker Boats," available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs.

⁵⁶ Operation Sovereign Borders Joint Agency Task Force, *Submission to the Senate Legal and Constitutional Affairs References Committee*, 30 July 2015, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Submissions, p. 2.

⁵⁷ *UN Convention on the Law of the Sea*, UN Doc. A/CONF.62/122, entered into force 16 November 1994, Art. 98(2). Scholars have said that "Although this provision [Article 98] is located in the Part of UNCLOS concerning the high seas, it is generally accepted that the duty in question applies in all maritime zones." Douglas Guilfoyle and Efthymios Papastavridis, *Background Paper: "Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea,"* 4 March 2014, available at <http://www.refworld.org/docid/5346438f4.html>, p. 5.

⁵⁸ Rote Island Interview, 19 August 2015; Kupang Interview, 21 August 2015.

⁵⁹ Rote Island Interview, 19 August 2015.

*"I don't know why [the Australians] stopped us. We didn't enter Australian territory, we had enough fuel, food, and everything to reach New Zealand – the boat was in good condition."*⁶⁰

He said he was confident that they could have reached their destination, and none of the asylum-seekers heard the crew members express any doubts about this either. When asked if the interception was a rescue operation, the asylum-seeker was categorical: "No, we were simply caught."⁶¹ The other asylum-seekers agreed with him.

Moreover, the post-interception conduct of Australian officials, as described by passengers and crew, does not fit the definition of a rescue operation. The *International Convention on Maritime Search and Rescue*, ratified by Australia, defines a rescue operation as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."⁶² By contrast, the evidence gathered by Amnesty International suggests that the operation in May actually put the lives of people at risk. As described above, the crew and passengers were put onto boats that were less well-equipped than the boat they set off in, and had too little fuel. As a direct consequence of giving the asylum-seekers so little fuel, half the passengers and crew had to transfer onto Kanak, and then all 65 passengers and six crew travelled on one over-crowded boat. In the circumstances described by the crew and asylum-seekers, it is remarkable that no lives were lost and no one was injured. As a crew member pointed out to Amnesty International researchers: "If Australia is concerned about our lives, they should take us to Australia."⁶³

⁶⁰ Kupang Interview, 21 August 2015.

⁶¹ Kupang Interview, 21 August 2015.

⁶² *International Convention on Maritime Search and Rescue*, Annex Chap. 1, para. 1.3.2, cited in International Maritime Organization, Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, available at: <http://www.refworld.org/docid/432acb464.html>, p. 10.

⁶³ Rote Island Interview, 19 August 2015.

CHAPTER 3: PATTERNS OF ABUSIVE TREATMENT 2013-2015

“Australia: please be a bit kind to the people. And if they are about to die, please protect them.”

Asylum-seeker turned back by Australia in July 2015, interviewed in Indonesia on 21 August 2015

This chapter describes a number of events that took place at sea between late 2013 and July 2015, as part of Operation Sovereign Borders. The first incident involves an interception by Australian officials in late July 2015, of a boat that was in distress. Beginning on about 25 July, over the course of about six days, Australian officials detained the 25 passengers, transferred all those on board onto another boat, and directed the two crew members to take everyone back to Indonesia. The boat arrived in Indonesia on 1 August 2015. The chapter also describes five turnbacks of boats by Australian officials, which occurred between late 2013 and early 2014. Australia's treatment of the passengers in these six incidents, as described below, appears abusive.

The chapter is based largely on testimony gathered by Amnesty International researchers in August 2015 from asylum-seekers from the boats that were turned back during these six incidents, during interviews conducted in Cisarua, Jakarta and Kupang.

JULY 2015 INCIDENT

On 16 July 2015, a boat left South Sulawesi province in Indonesia with the aim of reaching Australia. There were 25 passengers on board: 23 men from Bangladesh, one man from Pakistan and a Rohingya woman from Myanmar. The passengers had paid between 42 and 45 M Indonesian Rupiah (approximately 3,100 to 3,300 USD) for the journey. The vessel did not reach its intended destination; Australian ships intercepted the boat on 25 July 2015, and all the passengers and crew were made to return to Indonesia.

In August 2015 Amnesty International interviewed 15 of the 25 passengers.⁶⁴ Unlike the May 2015 incident, described in the previous chapter, there was no international media

⁶⁴ Unless otherwise indicated, all information from this section derives from interviews with people in immigration detention in Kupang on 21 August 2015. All those interviewed were male; researchers were unable to interview the Rohingya woman.

coverage of this event.⁶⁵

After the boat's departure from South Sulawesi province on 16 July, all the passengers transferred into another boat in Kupang, which was crewed by two Indonesian men. They departed on 22 or 23 July for Australia. According to those interviewed by Amnesty International, the boat was not in good condition, and soon started taking on water. Passengers were reduced to bailing with mugs and baskets, and told Amnesty International that they were afraid that they would sink.

On the morning of 25 July, they saw two Australian ships on either side of them. The passengers tried to get the ships' attention and indicated that they were in distress by waving red shirts. They claim that they spent a full day showing that they were in distress, from 10 or 11 a.m. to 5 or 6 p.m.; the two Australian ships followed on either side during the entire period. One man said:

*"If the Australian Navy can see anyone dying at sea, in a leaky boat, they should intercept them at that time."*⁶⁶

In the early evening, a Navy ship identified by passengers as #84 (that is, HMAS Larrakia II⁶⁷) approached the boat, along with a Border Force ship.

This testimony calls into question claims that the primary concern of Operation Sovereign Borders is saving lives at sea. Asylum-seekers said they spent six to eight hours trying to get the attention of two Australian ships. It is not clear how far away the Australian ships were, but they were visible to the naked eye. Given the highly sophisticated equipment⁶⁸ on board the ship identified by asylum-seekers as #84 (that is, HMAS Larrakia II⁶⁹), it is doubtful that the delay was caused by the vessel not being detected by Australian officials.

During this first interaction with Australian officials at sea on 25 July, passengers said that four speedboats approached the boat, and 10-12 Australian personnel boarded. They gave the passengers lifejackets and transferred them, three at a time, to a Navy ship identified by passengers as #84 (that is, HMAS Larrakia II⁷⁰). On 26 July, Australian officials took the passengers' pictures and on 27 July, asked them questions about where they were from, who organized the voyage, why they wanted to go to Australia, and whether they had any relatives in Australia. The passengers did not know why they were interviewed.

They were then transferred to and detained on board a Border Force ship; the two Indonesian crew members were accommodated separately. The passengers' description of their

⁶⁵ As far as Amnesty International is aware, the only article is local: Hermina Pello, "25 Imigran Gelap Ditangkap di Kupang Barat," *Pos Kupang*, 3 August 2015, available at <http://kupang.tribunnews.com/2015/08/03/25-imigran-gelap-ditangkap-di-kupang-barat>.

⁶⁶ Kupang Interview, 21 August 2015.

⁶⁷ Royal Australian Navy, "HMAS Larrakia II," available at <http://www.navy.gov.au/hmas-larrakia-ii>.

⁶⁸ See for instance Rafael Advanced Defence Systems, "TYPHOON, TOPLITE deployed on Australian Patrol Boats," 7 July 2005, available at <http://www.rafael.co.il/Marketing/444-1157-en/Marketing.aspx?pageNum=1>.

⁶⁹ Royal Australian Navy, "HMAS Larrakia II," available at <http://www.navy.gov.au/hmas-larrakia-ii>.

⁷⁰ Royal Australian Navy, "HMAS Larrakia II," available at <http://www.navy.gov.au/hmas-larrakia-ii>.

accommodation was similar to the detention facilities described by the people on board the boat that was intercepted in May. There were 12 men per cell in two cells; the Rohingya woman was detained separately. The men's cells were locked and crowded, with four triple bunk-beds per room and no room to walk or stand. One passenger said:

*"They never gave us medicine. There were many people vomiting – four or five people – but they just said 'Drink water.'"*⁷¹

It was unclear why people were ill. They were confined to the cells for seven days. Unlike in the May incident, the passengers told Amnesty International that the air conditioning remained on.

According to the passengers later interviewed by Amnesty International, before sunrise on 1 August, Australian officials woke up all of the passengers and told them that they had to leave the Australian ship. They were not provided with breakfast. They, and the two Indonesian crew, were then transferred into another boat, called Harum, which was similar to their original vessel. They described how Australian officials provided them with life jackets, two mobile phones, a walkie-talkie, three or four pages of maps, and a GPS device, which was set to Rote Island in Indonesia. Two Australian officials accompanied them to Harum, instructed everyone to go in the boat's cabin and, at around 8 a.m., they closed the cabin door and left by speedboat. The passengers told Amnesty International that the door was locked from the outside, and that they had to kick it down to exit.

According to the passengers, when they first left Kupang for Australia, their relations with the two crew members had been friendly. But after a week apart on the Australian ship, and following everyone's subsequent transfer onto the other boat, there was a change of attitude: "Before they were like brothers – we shared everything – cigarettes, food. But they became fully different,"⁷² one man said. Several people also said that the crew had two bags that they had not had before being intercepted by the Australian authorities.

At this point the passengers had still not been informed of their destination. Once they spotted the maps, which indicated Rote Island, they became angry. The passengers had paid for a journey to Australia, and did not want to return to Indonesia. After the passengers threatened to search the two new bags in the crew's possession, the crew agreed to drive back to the Navy ship.

Once the boat reached the Navy ship, Australian officials were more aggressive than they had been prior to 1 August. The passengers told Amnesty International that when Australian personnel came on board, they were angry and shouting at the passengers, asking why they returned. According to one man:

"Their behaviour was very inhuman. [...] They were very badly behaved. Then we requested them – we prayed to them – don't push us back, we will die if your government doesn't take us. [But] they didn't let us talk – [they were] just shouting very cruelly: 'If any of you touch the crew or baggage, you will be punished.' They warned us

⁷¹ Kupang Interview, 21 August 2015.

⁷² Kupang Interview, 21 August 2015.

two or three times.”⁷³

The passengers told Amnesty International that all the Australians were armed. The Australians then left the boat and the Australian ships escorted the vessel close to Kupang. The Australians then left. According to one of the passengers:

“The Australians said ‘Don’t touch the crew’s baggage. We gave you just enough fuel to reach land – if you have problems, we won’t come again and save you. We are leaving you here near Indonesia – don’t try to go anywhere else because you don’t have fuel.’ They also said: ‘If you come back, we’ll shoot you.’”⁷⁴

The vessel ran out of fuel before reaching land, but was intercepted by Indonesian police officers in a boat and taken to Tablolong, Indonesia. It is unclear if the two crew are currently in the custody of Indonesian police, but the passengers told Amnesty International that they had been interviewed by members of the local Crime Investigation Division.

The 25 people are now in the custody of Indonesian immigration officials in Kupang, and – like the passengers on the boat that was turned back in May 2015 – are very concerned about their future.

LATE 2013 AND EARLY 2014 INCIDENTS

In Cisarua and Jakarta, Amnesty International interviewed six people who had been turned back to Indonesia by Australian ships in five separate incidents that took place between December 2013 and mid-2014. Although these testimonies are not as detailed as the 2015 incidents, they are consistent with the *modus operandi* of the May and July 2015 turnbacks, as well as the testimonies as well as video and photographic evidence collected by investigative journalists.⁷⁵

In three of the five incidents described to Amnesty International, passengers said they experienced and/or witnessed physical and/or verbal abuse.

A husband and wife from Myanmar were on a boat that was turned back in late December 2013. Australian officials boarded their boat. They said that they saw a male Somali refugee being kicked by Australian personnel, and bleeding. The asylum-seekers also told Amnesty International that after a few of the passengers jumped into the sea in panic, they were brought back on board, their hands were tied – in front if they were cooperative, and behind if they struggled – and they were injected with something that they said made them sleep.⁷⁶

A 17-year old Somali boy said he witnessed beatings on board a vessel that was turned back

⁷³ Kupang Interview, 21 August 2015.

⁷⁴ Kupang Interview, 21 August 2015.

⁷⁵ See for instance George Roberts, Mark Solomons and Lesley Robinson, *Passengers describe drama of turning asylum seeker boats back*, ABC, 17 March 2014, available at <http://www.abc.net.au/7.30/content/2014/s3965617.htm>; George Roberts and Mark Solomons, *Asylum seekers on board 'burns' boat speak out*, ABC, 24 March 2014, available at <http://www.abc.net.au/7.30/content/2014/s3970527.htm>.

⁷⁶ Jakarta Interviews, 18 August 2015.

in January 2014. He told Amnesty International that people began jumping overboard: "They were losing their minds as they had spent so long at sea." He said that Australian Navy personnel used pepper-spray to control the passengers, and they also tied some people's hands.⁷⁷ An 18-year old Somali man who was on the same boat said that Australian officials tied some people's legs as well. He also told Amnesty International that people he thought were Navy personnel kicked people to make them sit still, and threatened to break people's legs if they did not sit. When some asylum-seekers refused to be photographed by the Navy personnel, he said that they were pepper-sprayed and kicked.⁷⁸

A 16-year old Somali boy told Amnesty International researchers that in late June 2014, his boat had come close enough to see the Australian mainland. Ten Australians, who were described as Navy personnel, boarded his vessel and began beating and slapping the refugees and migrants on board with their hands, and verbally abusing them. He said:

"They abused me with words and someone threw chewing gum at me. I don't know why the government is doing these things to us. I do not believe the government is doing these things. It is shameful] to be someone doing these things."⁷⁹

He was 14 years old at the time.

⁷⁷ Jakarta Interview, 21 August 2015.

⁷⁸ Jakarta Interview, 21 August 2015.

⁷⁹ Cisarua Interview, 19 August 2015.

CHAPTER 4: LEGAL ANALYSIS OF AUSTRALIA'S TREATMENT OF ASYLUM-SEEKERS AT SEA

This chapter provides a legal analysis of the incidents at sea described in Chapters 2 and 3. As discussed below, based on the available evidence, Amnesty International believes that Australia is complicit in the transnational crime of people-smuggling, and has violated several tenets of international human rights law, including the ban on *refoulement*, collective expulsions, unlawful detention, ill-treatment, and excessive use of force.

VIOLATIONS OF INTERNATIONAL LAW ON TRANSNATIONAL CRIME

The *UN Convention against Transnational Organized Crime* (the *Convention*) sets out states' legal obligations to cooperate to prevent and combat transnational organized crime.⁸⁰ The *Protocol against the Smuggling of Migrants by Land, Sea and Air* (*Smuggling Protocol*), which supplements the *Convention*, requires states to prevent and combat the smuggling of migrants and protect the rights of smuggled migrants.⁸¹ Australia has ratified both the *Convention* and the *Smuggling Protocol*.

The *Smuggling Protocol* requires that signatories criminalize the smuggling of migrants, which is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."⁸² People-smuggling is a transnational crime.⁸³

Although the smuggling of persons is a transnational crime, it is important to emphasize that smuggled people are not criminals. The *Smuggling Protocol* intends to "prevent and combat

⁸⁰ *United Nations Convention Against Transnational Organized Crime*, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, UN Doc. A/45/49 (Vol. I) (2001), entered into force 29 September 2003 [*Convention*].

⁸¹ *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, UN Doc. A/45/49 (Vol. I) (2001), entered into force 28 January 2004, Art. 2 [Smuggling Protocol].

⁸² *Smuggling Protocol*, Art. 3(a).

⁸³ *Convention*, Art. 3(2) provides that an offence is transnational in nature if it is committed in more than one state; is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State, is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State, or is committed in one State but has substantial effects in another State.

the smuggling of migrants [...] *while protecting the rights of smuggled migrants*,”⁸⁴ and explicitly states that “[n]othing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 *Convention* and the 1967 *Protocol relating to the Status of Refugees* and the principle of *non-refoulement*”⁸⁵ as contained therein.”⁸⁶

The 1951 *Convention (Refugee Convention)* forbids states from penalizing asylum-seekers solely for the manner of their entry into a country.⁸⁷ The drafters of the *Refugee Convention* recognized that people fleeing conflict and persecution in different parts of the world often resort to paying people-smugglers to cross borders irregularly, when they cannot find any legal route to reach safe countries.⁸⁸ Australia's recent ban on the resettlement of asylum-seekers who have registered with UNCHR-Indonesia after 1 July 2014⁸⁹ is one example of the ways in which governments limit people's options to find places of safety where they can resume their lives.

COMPLICITY IN THE TRANSNATIONAL CRIME OF PEOPLE-SMUGGLING

The evidence collected by Amnesty International suggests that the events of May 2015, as discussed in Chapter 2, qualify as an incident of people-smuggling, which is a transnational crime and a criminal offence under both Australian⁹⁰ and Indonesian⁹¹ laws. The evidence indicates that on or about 24 May 2015, Australian officials gave six men 32,000 USD. Although the crew claim that they were initially told by the interpreter that the Australians would take the asylum-seekers to Australia, at some point between 24 and 31 May, the Australian officials instructed the crew to take the people to Indonesia. While some of the passengers may have had asylum certificates or other documents giving them status in Indonesia, others were not in possession of such documents. The mode of entry to Indonesia that the Australian officials directed the crew to follow – landing on identified points in Rote Island rather than presenting themselves to Indonesian border officials and complying with procedures for entry by boat to Indonesia – amount to illegal entry within the terms of the *Smuggling Protocol*.⁹² Members of the crew, who are currently detained by Indonesian police on charges of people-smuggling, told Amnesty International that Australian officials provided them with the following: two boats and a range of equipment including GPS device set to

⁸⁴ *Smuggling Protocol*, Art. 2.

⁸⁵ This principle, which forbids transfers to a risk of serious human rights violations, is discussed further in this chapter.

⁸⁶ *Smuggling Protocol*, Art. 19(1).

⁸⁷ *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, [1969] Can. T.S. No. 6 Art. 31(1), [*Refugee Convention*].

⁸⁸ In the context of the Mediterranean refugee crisis, for instance, Amnesty International considers that the large majority of people using boats to reach Europe are smuggled. See for instance Amnesty International, *Libya is full of cruelty: Stories of abduction, sexual violence and abuse from migrants and refugees*, MDE 19/1578/2015, 2015, available at <https://www.amnesty.org/en/documents/mde19/1578/2015/en/>, p. 12.

⁸⁹ Australian Embassy Thailand, “Changes to Resettlement Another Blow to People Smugglers,” 18 November 2014, available at http://thailand.embassy.gov.au/bkok/PR2014_resettlement_people_smugglers.html.

⁹⁰ *Migration Act 1958* (Cth), Section 233A; *Criminal Code Act 1995* (Cth), Division 73.

⁹¹ Republic of Indonesia, *Indonesia: Law No. 6 of 2011 About Immigration*, 5 May 2011, available at <http://www.refworld.org/docid/54eedf814.html>, Art. 120.

⁹² *Smuggling Protocol*, Art. 3(b).

Rote Island, as well as a rudimentary map of Rote Island on which the officials had circled three potential landing locations for the boats. Australian officials also gave verbal instructions to land the boats on Rote Island.

Under the *Smuggling Protocol*, the modes of commission – in other words, the ways in which someone can be found responsible – of a smuggling offence include committing an offence,⁹³ attempting to commit an offence,⁹⁴ participating as an accomplice in an offence,⁹⁵ and organizing or directing others to commit an offence.⁹⁶

Australian officials may be responsible under at least two of these modes of commission. First, the Australian officials appear to have organized or directed the crew to commit a people-smuggling offence, for it was under Australian officials' instruction and with their material assistance (including two boats, fuel, maps, and GPS) that the offence of smuggling people into Indonesia took place. The crew told Amnesty International about the conversation with the Bahasa interpreter: "[he] is discussing with us – we just follow his instructions. [...] [He] instructed us to go to Rote Island."⁹⁷ Second, and on the basis of the same evidence gathered by Amnesty International, the Australian officials who paid the smugglers and instructed them to land on Rote Island in May 2015 may also have participated as accomplices in people-smuggling.

Amnesty International's research has not established the degree – if any – of the six crew members' culpability in people-smuggling or any other criminal offence. However, the evidence does suggest that they might have been acting under duress when they followed the instructions of Australian officials. One crew member from the boat told Amnesty International: "We had no choice. We were exhausted and couldn't make any decisions, so we went with the plan."⁹⁸

Additionally, under the *Smuggling Protocol*, aggravating circumstances to a smuggling offence are those "that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants."⁹⁹ The dangerous way in which the May 2015 turnback was carried out – in overcrowded vessels with insufficient fuel – seems to qualify as an aggravating circumstance because it endangered lives. Another aggravating circumstance is the ill-treatment of asylum-seekers while they were in Australian custody in May 2015: Australian officials forced asylum-seekers to stay for hours in the rain with no shelter, detained them in overcrowded and unventilated cells, denied them medical treatment, and transferred them onto boats with no toilets.

Australian legal academics and the Law Council of Australia, in their submissions to the Senate Committee,¹⁰⁰ have pointed out that Australian officials may also have breached

⁹³ *Smuggling Protocol*, Art. 6(1)(a).

⁹⁴ *Smuggling Protocol*, Art. 6(2)(a).

⁹⁵ *Smuggling Protocol*, Art. 6(2)(b).

⁹⁶ *Smuggling Protocol*, Art. 6(2)(c).

⁹⁷ Rote Island Interview, 19 August 2015.

⁹⁸ Rote Island Interview, 19 August 2015.

⁹⁹ *Smuggling Protocol*, Art. 6(3).

¹⁰⁰ Ben Saul, *Submission: Inquiry into Payments of Cash or Other Inducements by the Commonwealth in*

people-smuggling provisions in the *Australian Criminal Code*:

- Section 73.1: which makes it an offence for a person to intentionally organize or facilitate the entry of another person into a foreign country (whether or not via Australia) if the person smuggled is not a citizen or permanent resident of that country and if the person's entry does not comply with the foreign country's law.
- Section 73.2: aggravated offence of people smuggling because of the danger of death or serious harm or because the victim is subjected to cruel, inhuman or degrading treatment.
- Section 73.3: aggravated offence of people smuggling involving at least five people.
- Section 73.3A: supporting the offence of people smuggling by providing material support or resources to another person to engage in conduct constituting the offence of people-smuggling.

However, Section 73.5 of the *Australian Criminal Code* provides that the Attorney-General's written consent is required to begin proceedings for an offence of people-smuggling. Certain categories of public officials, such as Australian Secret Intelligence Service officials, may also have immunity from liability under Australian law.¹⁰¹ Such exemptions from liability are inconsistent with the *UN Convention on Transnational Organized Crime*, which requires states parties to prevent transnational organized crime and to promote the development of standards and procedures designed to safeguard the integrity of public entities.¹⁰² The *Convention* also asks states to ensure that discretionary legal powers under its domestic law relating to prosecutions for *Convention* offences are exercised to maximize the effectiveness of law enforcement measures and with due regard to the need to deter the commission of such offences.¹⁰³

The nature of the agreement between the crew and the Australian authorities was less clear in the July 2015 incident, where crew had bags that the passengers think were given to them by Australian officials. However, the incident – in particular Australian officials' repeated warnings to asylum-seekers not to open the bags – raises sufficient concerns to warrant investigation.

OTHER FAILURES TO MEET OBLIGATIONS UNDER THE *SMUGGLING PROTOCOL*

The evidence gathered by Amnesty International also suggests that Australian Navy and Border Force officials, through their action and omissions, breached Article 7 of the

Exchange for the Turn Back of Asylum Seeker Boats, 8 July 2015; Law Council of Australia, *Submission: Payments of Cash or Other Inducements by the Commonwealth in Exchange for the Turn Back of Asylum Seeker Boats*, 24 July 2015; The Andrew & Renata Kaldor Centre for International Refugee Law, *Submission: Payments of Cash or Other Inducements by the Commonwealth in Exchange for the Turn Back of Asylum Seeker Boats*, 22 July 2015. All submissions available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Submissions.

¹⁰¹ Section 14(1) of the *Intelligence Services Act 2001* provides that a staff member or agent of the Australian Secret Intelligence Service is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.

¹⁰² *Convention*, Arts. 31(1), (2)(b).

¹⁰³ *Convention*, Art. 11(2).

Smuggling Protocol, which obliges states parties to “cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea.”¹⁰⁴ In May 2015, far from cooperating with Indonesia to prevent and suppress smuggling, Australian officials themselves may have organized or directed, or participated in, the transnational crime of people-smuggling to Indonesia, and moreover in a manner which endangered the safety, lives and human rights of the passengers.

Additionally, Articles 9 and 16 of the *Smuggling Protocol* require states parties to ensure the safety and humane treatment of people on board, to take due account of the need not to endanger the security of the vessel, and to protect people's rights under international law.¹⁰⁵ The evidence suggests that Australian officials breached these requirements through their treatment of smuggled people in all seven of the incidents described to Amnesty International by passengers from boats intercepted between late 2013 and mid-2015.

VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Australia's international human rights law obligations are engaged whenever it has effective control over someone, including on the high seas. From the moment a state establishes effective control over a boat, all persons on it are within the state's jurisdiction, and that state is responsible for securing and protecting their human rights.¹⁰⁶

During the May 2015 turnback incident, the crew and passengers were under Australia's effective control for about nine days, from mid-afternoon on 22 May to 11 a.m. on 31 May 2015. During the July 2015 turnback incident, the passengers and crew were under Australia's effective control for at least six days, from the early evening of 25 July to the morning of 1 August 2015. The relevant durations of effective control are less clear in the incidents that took place in 2013 and 2014.

REFOULEMENT AND COLLECTIVE EXPULSIONS

Non-refoulement is an international legal principle that prohibits the transfer of individuals to another country or jurisdiction where they would face a real risk of persecution or other serious human rights violations or abuses. This principle was initially articulated in the *Refugee Convention*;¹⁰⁷ it is the cornerstone of the international refugee protection system,¹⁰⁸ and is also a key concept in international human rights law.¹⁰⁹ International and regional

¹⁰⁴ *Smuggling Protocol*, Art. 7.

¹⁰⁵ *Smuggling Protocol*, Arts. 9, 16. Article 16 states: “In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

¹⁰⁶ See for instance Human Rights Committee, *Munaf v Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006 (2009), para. 14.2; *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (Eur. Ct. H.R. Grand Chamber), 2012, paras. 74-75, 79-82; *Medvedyev and Others v. France*, App. No. 3394/03, (Eur. Ct. H.R. Grand Chamber), 2010, paras. 62-67.

¹⁰⁷ *Refugee Convention*, Art. 33(1).

¹⁰⁸ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007, para. 5.

¹⁰⁹ See for instance *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] 1465 U.N.T.S. 113, p. 85, Art. 3(1); *International Convention*

human rights bodies have consistently found that *non-refoulement* obligations apply wherever a state exercises effective control. This includes situations where a state exercises *de facto* or *de jure* control over people aboard a vessel at sea.¹¹⁰

States are obliged to give individuals the opportunity to challenge their transfer (to another country or jurisdiction) on the grounds that such a transfer would put them at real risk of serious human rights violations or abuses. This is a procedural corollary to the principle of *non-refoulement*. Under the *International Covenant on Civil and Political Rights*, non-nationals lawfully present in a state's territory cannot be expelled unless a decision to do so has been reached "in accordance with law."¹¹¹ This obligation applies in the territorial waters of a state and also when foreign nationals are intercepted on the high seas and brought onto a ship registered to the state.¹¹² As it entitles foreign nationals to an individual decision, Article 13 is violated by laws or decisions providing for collective or mass expulsions,¹¹³ which prevent the proper identification of individuals entitled to international protection, including refugees.

In seven incidents between late 2013 and mid-2015, as documented by Amnesty International, Australia turned back boats transporting asylum-seekers without any assessment of each of the passengers' individual situation, including the risk of serious human rights violations or abuses, either in the country of return or upon a subsequent return to a third country. Although some passengers describe being interviewed and photographed by Australian officials, Amnesty International is unaware of anyone being given an effective opportunity to claim asylum. The evidence collected by Amnesty International suggests that Australian officials did not examine the individual circumstances of people before expelling them. By collectively expelling asylum-seekers, without any apparent procedural fairness, Australian officials violated the prohibition on *refoulement*.

for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Art. 16(1).

¹¹⁰ Douglas Guilfoyle and Efthymios Papastavridis, *Background Paper: "Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea,"* 4 March 2014, available at <http://www.refworld.org/docid/5346438f4.html>, p. 8. Also see UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2007, para. 24; Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion," in Ericka Feller et al (eds.), *Refugee Protection in International Law* (2001) 87, 162; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), Advisory Opinion of 9 July 2004, paras. 109-112; *Lopez Burgos v Uruguay*, Human Rights Committee, UN Doc. A/36/40, 29 July 1981, 176, para. 12.1; ECtHR, *Loizidou v Turkey* (Merits), Grand Chamber (1996), paras. 52-56; ECtHR, *Al-Saadoon and Mufdhi v United Kingdom*, Application No. 61498/08, Order of 30 June 2009; Committee Against Torture, *PK et al v Spain* Decision (21 November 2008) UN Doc. CAT/C/41/D/323/2007 para. 8.2; Committee Against Torture, *General Comment No 2* (24 January 2008) UN Doc. CAT/C/GC/2, para. 16.

¹¹¹ *International Covenant on Civil and Political Rights*, UNTS, vol. 999, p. 171, 6 December 1966, Art. 13.

¹¹² United Nations High Commissioner for Human Rights, Intervener Brief, *Hirsi et al v Italy*, European Court of Human Rights, Application No. 27765/09, available at www.ohchr.org/Documents/Issues/Migration/AmicusBriefInHirsi.doc, p. 1.

¹¹³ Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, 1986, para. 10.

UNLAWFUL DETENTION, ILL-TREATMENT AND EXCESSIVE USE OF FORCE

During several of the turnback episodes documented by Amnesty International, the passengers were locked for days inside rooms on board Australian ships. Such a restriction on their personal liberty amounts to detention. In order not to be arbitrary, arrest and detention must be (a) prescribed by law, (b) necessary in the specific circumstances and (c) proportionate to the legitimate aim pursued.¹¹⁴ With respect to immigration-related detention, even when arrest and detention are carried out to facilitate the expulsion of individuals who entered the country irregularly, “[s]trict legal limitations must be observed and judicial safeguards be provided for.”¹¹⁵ The person concerned should be provided with a reasoned decision in a language that they understand and have the right to challenge the lawfulness of their detention before a court. Australian officials breached the *International Covenant on Civil and Political Rights* because the asylum-seekers detained on board Australian ships were not informed of the grounds for their detention and had no apparent avenues to challenge it.¹¹⁶

Furthermore, the testimony of passengers and crew provides evidence of Australian officials’ systemic disregard for the prohibition on ill-treatment.¹¹⁷ During the 2013 and 2014 turnbacks, passengers claim that they or others on the boats were beaten and kicked. No physical assaults were reported in the May and July 2015 incidents, but there was nonetheless ill-treatment: people were compelled to stay for hours in the rain with no shelter, unlawfully detained in overcrowded and unventilated cells, denied access to appropriate medical care, and then transferred to poorly equipped boats with no toilets. Additionally, in July 2015, passengers said that Australian officials locked them in the boat cabin before departing.

In addition, internationally recognized norms on the use of force require that law enforcement officials “shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”¹¹⁸ The use of pepper-spray on unarmed individuals (at one point merely for refusing to be photographed), restraints on people’s hands or legs, combined with physical and verbal abuse or threats, all give rise to concerns that Australian officials used excessive force against passengers on boats that were turned back in late 2013 and early 2014.

¹¹⁴ See for instance Human Rights Committee, Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2.

¹¹⁵ *Report of the Working Group on Arbitrary Detention to the Human Rights Council*, UN Doc. A/HRC/13/30, 18 January 2010, para. 59.

¹¹⁶ *International Covenant on Civil and Political Rights*, UNTS, vol. 999, p. 171, 6 December 1966, Art. 9(1).

¹¹⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] 1465 U.N.T.S. 113, p.85, Art. 2; *International Covenant on Civil and Political Rights*, UNTS, vol. 999, p. 171, 6 December 1966, Art. 7.

¹¹⁸ *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, General Provision 4.

CONCLUSION

The actions and omissions of Australian Navy and Border Force officials, who are organs of the state, are attributable to the government of Australia.¹¹⁹ The evidence collected by Amnesty International suggests that Australian officials breached Australia's obligations under the *UN Convention on Transnational Organized Crime* and key instruments of international human rights law. The actions and omissions giving rise to these breaches, as discussed in detail in this report, trigger the international responsibility of the Government of Australia.

¹¹⁹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at <http://www.refworld.org/docid/3ddb8f804.html>, Art. 4.

RECOMMENDATIONS

RECOMMENDATIONS TO THE GOVERNMENT OF AUSTRALIA

- Launch a Royal Commission into Operation Sovereign Borders, to investigate and report on allegations of criminal and unlawful acts committed by Australian Government officials, including allegations of payments made to crew and ill-treatment at sea;
- Ensure that people on boats that were turned back, and whose rights were violated by the conduct of Australian officials, have access to an effective remedy and reparation;
- Allow independent monitoring of all activities undertaken by Operation Sovereign Borders, including any operations to intercept and turn back boats, in order to enable public scrutiny and ensure transparency and accountability;
- Amend the *Australian Criminal Code* to remove exemptions from liability that are inconsistent with the *UN Convention against Transnational Organized Crime*.
- Engage in effective regional dialogue to negotiate improved regional protections for vulnerable refugee and migrant populations in the Asia-Pacific region;
- Engage in genuine search and rescue operations, conducted with full respect for international human rights law, followed by safe disembarkation in Australia;
- End the prohibition on maritime arrivals claiming asylum;
- End the practice of turnbacks at sea;
- Reverse policy on non-resettlement of refugees who registered with UNHCR-Indonesia after 1 July 2014;
- Increase resettlement options for refugees in the Asia-Pacific region, in particular for refugees in Indonesia and unaccompanied minors; and
- Expand safe and legal routes for people to reach safety in Australia, for instance by significantly increasing family reunification, student visas, and humanitarian admissions of refugees.



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TO LIGHT A CANDLE
THAN TO CURSE
THE DARKNESS**

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BY HOOK OR BY CROOK

AUSTRALIA'S ABUSE OF ASYLUM-SEEKERS AT SEA

Operation Sovereign Borders is Australia's military-led border control operation. It includes a significant maritime dimension with Naval and Border Force ships patrolling the seas off Australia. In operations called turnbacks, Australian officials intercept boats of asylum-seekers and prevent them from landing in Australia.

This report examines the legality and human rights impact of Operation Sovereign Border turnbacks, based on testimonies from people who had been on board boats that Australian officials intercepted between 2013 and 2015.

In May 2015, Operation Sovereign Borders intercepted a boat carrying 65 asylum-seekers and six crew, who were attempting to reach New Zealand. According to Amnesty International's evidence, Australian officials escorted the asylum-seekers' boat to Australian waters, paid the crew 32,000 USD, transferred all the passengers and crew into two small boats, and directed the crew to take everyone to Indonesia. In a second case, in July 2015, Operation Sovereign Borders stopped a boat carrying 25 people. Again, according to Amnesty International's evidence, Australian officials put passengers and crew onto another boat and directed them to Indonesia. In five other turnbacks in 2013 and 2014, passengers' testimonies suggests a pattern of physical and/or verbal abuse of asylum-seekers by Australian officials.

Amnesty International is calling for a Royal Commission into Operation Sovereign Borders, to investigate and report on allegations of criminal and unlawful acts committed by Australian government officials. The organization is also calling on Australia to ensure that those whose rights were violated by the conduct of Australian officials have access to an effective remedy and reparations.