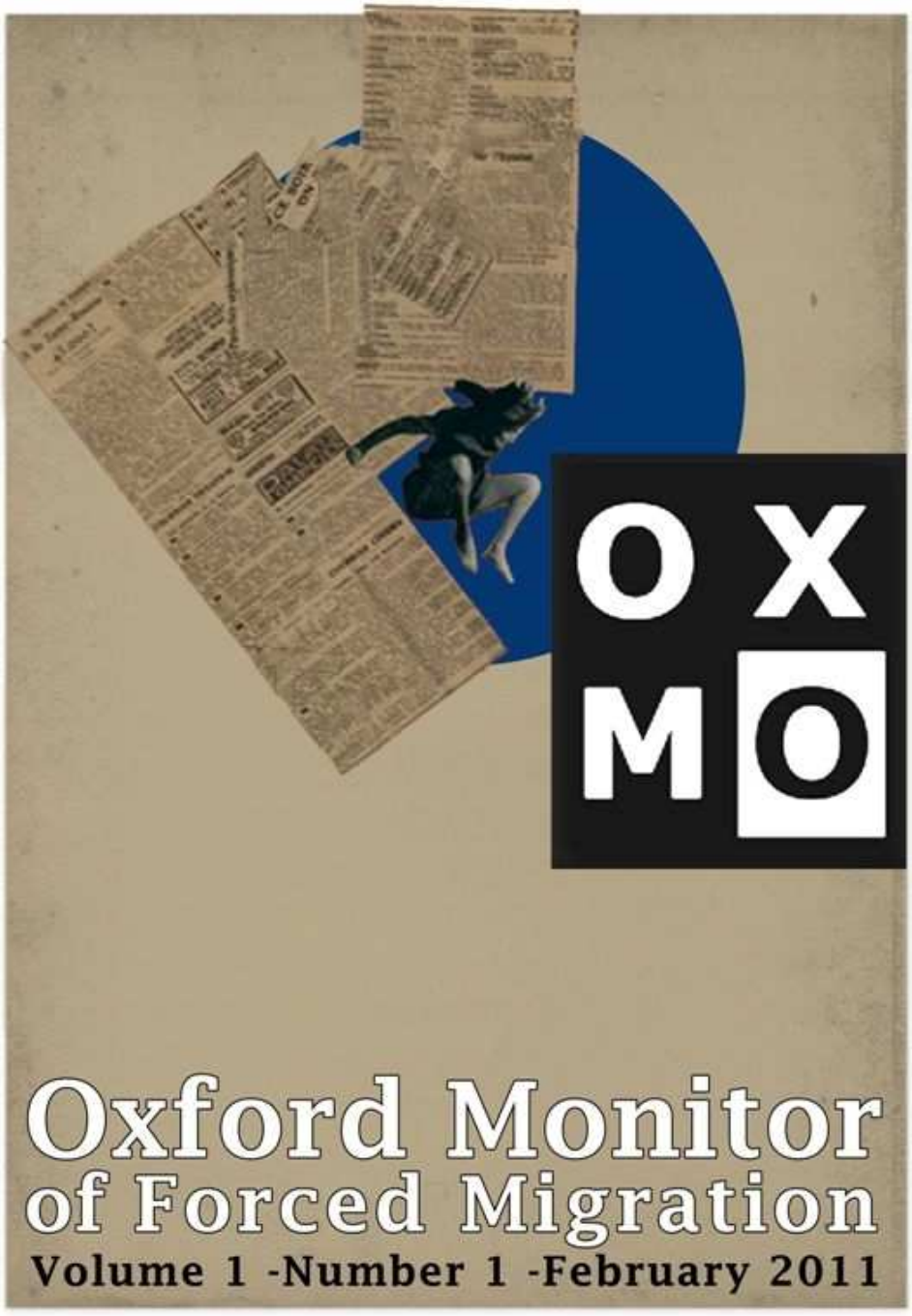


**Living up to Human Rights in Australia: Observations on Granting Asylum**

Sara Ramey

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# Living up to Human Rights in Australia: Observations on Granting Asylum

Sara Ramey

On October 24, 2010, sixty-two people arrived by boat on Christmas Island, (ABC News 2010a) an isolated piece of Australian territory that the Howard government removed from the Migration Zone (the area within which a person can apply for a visa) in the Migration Amendment (Excision from Migration Zone) Act 2001. Under this legislation, asylum seekers who land in the excised territory – the majority of Australian islands off the mainland – or are intercepted at sea no longer qualify for protection under Australian immigration law, including the 1951 Convention relating to the Status of Refugees (Refugee Convention). Furthermore, by passing this legislation, the Australian government gave itself the power to transfer asylum seekers to detention facilities in other countries for processing, countries that have not made the same legal commitment to be bound by human rights norms.

This essay will review a number of these immigration policies and practices that continue to raise serious concerns for the human rights of asylum seekers in Australia today. Because many of these policies directly conflict with Australia's international legal obligations as a party to the Refugee Convention, it is of utmost importance that the current government reform them with all due speed so that the rights of every person arriving in Australia are fully protected.

## The Politics of Unauthorised Boat Arrivals: Arriving Outside the Migration Zone

On 26 August 2001, after the arrival of a record number of asylum seekers (1,212 that month alone), the Norwegian freighter *Tampa* intercepted a sinking boat carrying 438 refugees. Due to the political climate in Australia, the government would not give the *Tampa* permission to enter its waters.

During the preceding months, the Australian press had been full of nationalist fervor, deriding the 'illegals' who were 'queue jumping' and 'overwhelm[ing] the country'. To many Australians, these uninvited arrivals began to seem increasingly threatening, (Jupp 2007) never mind the fact that the majority of them were fleeing the authoritarian regimes in Afghanistan and Iraq that Australia would soon join in overthrowing.

In light of popular sentiment, and with national elections only a few months away, then Prime Minister John Howard mobilised his diplomatic resources in search of a third country to which he could send the *Tampa* asylum seekers. After a generous aid package was agreed upon, the island country of Nauru accepted Howard's proposal. Sending asylum seekers to third countries became part of the Pacific Solution, a series of measures designed to address the immigration 'crisis.' This 'solution' excluded those who landed 'off-shore' from the full protection of Australian immigration law (those outside the so-called Migration Zone)

**Transferring Asylum Seekers to Third Countries where they Risk *Refoulement***

Nauru, not being a party to the Refugee Convention, offers significantly less legal protection than Australia. For example, Article 33(1) of the Refugee Convention lays out the principle of *non-refoulement*, which stipulates that it is illegal to forcibly remove a person to a country where that person risks being subjected to serious human rights violations on the basis of race, religion, nationality, political belief, or membership of a particular social group. The United Nations High Commissioner for Refugees (UNHCR) has also interpreted Article 33(1) to mean that States must not forcibly remove someone to a third country where effective and durable protection is not guaranteed (UNHCR 1997).[1]

Due in part to the concern that asylum seekers sent to Nauru were being denied basic human rights protection under both Australian and international law, the processing centre Nauru was closed in 2008 when Labor succeeded the Liberal government. While the Liberal Party has renewed attempts to push for Nauru to be reopened, Prime Minister Julia Gillard's Labor government has not supported the proposal. Nevertheless, Australia continues to process hundreds of asylum seekers on Christmas Island and other excised territories.

**Australian Immigration Law in the Excised Territories: How Rights are Limited**

On 11 November 2010, the High Court of Australia recognised that asylum seekers on Christmas Island are denied 'procedural fairness' in processing their claims. In a unanimous decision by the seven-member court, the justices ruled that two Sri Lankan asylum seekers on Christmas Island must be given the opportunity to appeal a denial of refugee status in Australian courts. Before the High Court's decision, Refugee Status Assessments were only reviewable by an Independent Merits Review.

The government released their interpretation of the decision on 7 January 2011 in which Minister for Immigration and Citizenship Chris Bowen said that the current two processes would be collapsed into one and that appeals would go directly to two new Federal Magistrates, appointed to ensure any appeals are carried out swiftly (Bowen 2011).[2] Although the full extent of the ruling is currently the subject of much debate, the High Court's decision should be seen as a clear and authoritative statement that Australian law must be applied to all persons under the government's control regardless of where they are located and that the law, and its related policies and practices, must fully comport with Australia's international and human rights obligations.

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[1] The principle of *non-refoulement* is also codified in the International Covenant on Civil and Political Rights and the Convention against Torture. Similarly worrisome, as of 27 September 2001, Australia has implemented a 'seven-day rule' regarding 'secondary movement' or 'onward movement'. Under the regulations, refugees who have spent more than seven days in a country where they could have sought and obtained effective protection are unlikely to be eligible for permanent protection in Australia. Only the Immigration Minister can waive this prohibition.

[2] It also appears that appeals from the Federal Magistrates Court would go directly to the High Court, bypassing the Federal Court.

**Mandatory Detention and International Refugee Law**

Article 31(1) of the Refugee Convention has been interpreted to mean that asylum seekers can only be held if just cause is first established in each individual's case (Goodwin-Gill 2001).[3] It states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1 [definition of a refugee],[4] enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[5]

By requiring the detention of all people who arrive without documentation, including children, and not conducting a prompt and thorough review of that detention, Australia has chosen to interpret the Refugee Convention in the narrowest terms possible and in contradiction to several authoritative interpretations.

For example, although Australia argues that mandatory detention is necessary to limit absconding, the UNHCR has concluded that, as a rule, detention is not necessary for this purpose and that it is thus a disproportionate limitation on a person's freedom of movement (Field 2006).[6] In line with this finding, the United Nations Human Rights Committee has concluded that Australia's mandatory detention policy, by not providing evidence in each individual case that that detained person is likely to abscond, is in breach of Article 9(1) of the International Covenant on Civil and Political Rights, of which Australia is a party (Australian Human Rights and Equal Opportunity Commission 2006).

**Detention Centres' Deplorable Conditions**

The conditions in detention centres have also violated the human rights of asylum seekers. Through inadequate consideration of detention centre conditions, the Australian government has, among other things, denied detainees the chance to notify family members of their safe arrival, and have denied them access to newspapers, television, and radio. Detention centres are usually located in remote areas of the country where immigration lawyers and the press find it difficult to access.

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[3] The UN Human Rights Committee found that mandatory detention was arbitrary and a breach of Article 9 of the ICCPR; a similar conclusion was reached by the Australian Human Rights and Equal Opportunity Commission.

[4] Article 1 (2) of the Refugee Convention states that a refugee is any person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owning to such fear, is unwilling to avail himself of the protection of that country.'

[5] The Refugee Convention can be found online at: http://www.unhcr.org/3b66c2aa10.html.

[6] Statistics suggest that restrictive alternatives involving close supervision or monitoring, for the purpose of ensuring compliance with asylum procedures, are seldom if ever required in destination countries since asylum seekers hope to remain permanently … and are unlikely to abscond because their vested interest in remaining makes compliance with the asylum procedures desirable.

Poor conditions have been attributed in part to the private, for-profit companies that have run many of the detention centres (Jupp 2007), principally GEO Group (formerly Australasian Correctional Management) and G4S. In November 2009, the government contracted with Serco Australia Pty Ltd, another private company, to take charge of the operations of various detention centres, including the centre on Christmas Island. The principle problem with private companies is that they have a tendency to cut corners to reduce costs to increase their profits, resulting in some of the troubling conditions mentioned above (Jupp 2007).

On 16 November 2010, 200 detained asylum seekers on Christmas Island began protesting their conditions of confinement. Sparked by the suicide of an asylum seeker at the Villawood detention centre outside Sydney, 10 detainees sewed their lips together and a number began a hunger strike. Dr. Louise Newman, who heads the government's health advisory panel on detention, has indicated that these instances of protest are reflective of the growing distress and despair in detention centres (ABC News 2010b).

According to Australia's Human Rights Commission, there is no psychiatrist on Christmas Island and, more generally, there is an insufficient number of mental health staff for the number of people seeking help. Furthermore, according to the Department of Immigration and Citizenship, there were 53 incidents of self-harm among detained asylum seekers from 1 July to 25 October 2010 — an increase from 39 the previous year and 10 the year before that. It is believed that the increases in self-harm and suicides are linked to the increase in detention centre populations. As of 17 November 2010, Christmas Island alone held 2,976 people, although the facility has the capacity to hold 2,500.

**Conclusion**

Although it is the duty of every government to protect its citizens from potential threats, and a sophisticated immigration regime is a crucial part of that protection, governments should under no circumstances abrogate the rule of law in the name of security. Nor should any government submit to its citizens' exaggerated fear of the undocumented asylum seeker, but should instead show leadership in informing the public about the true costs and benefits of immigration.

The Australian government has persistently failed to meet its legal obligations under the Refugee Convention and other international treaties, as well as failed to adequately design immigration policies that fully respect human rights. It is the Australian government's duty to ensure that its domestic and incorporated international law has full force in all the territories under its jurisdiction, that people are not sent to a country where they may face torture or other degrading treatment, that their asylum claims are processed fairly and quickly, and that during processing they are in humane conditions.

Furthermore, Australia, along with every other country, should work towards the protection and promotion of all human rights, including those not incorporated into law, as each person, regardless of their circumstances, deserves to be treated with respect and dignity. Thus, while addressing the migratory realities of our interconnected world, it is imperative that the Australian government aligns its policies and practices with fundamental human rights principles and ensures that they are applied to all people.

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