SOVEREIGN BORDERS: ASSESSING AUSTRALIA'S OFFSHORE DETENTION CENTRES AGAINST INTERNATIONAL OBLIGATIONS

Inigo Kwan-Parsons

'Anyone who attempts an illegal maritime journey to Australia will be turned back, or taken to Nauru for processing. They will *never* settle in Australia.'

— Minister Karen Andrews, 24 September 2021

1. Introduction

Australia's 'Operation Sovereign Borders' has been described by Australia's then Minister for Home Affairs as promoting a 'strong border protection' policy by seeking to have 'people who attempt to travel to Australia illegally by boat [be] turned back, or transferred to a regional processing country for assessment of asylum claims'.[1] In practice, it is a policy that sends those seekers who arrive in Australia by boat (unauthorised maritime arrivals or 'UMAs') to extraterritorial detention centres on Manus Island, Papua New Guinea (now closed) and Nauru ('Offshore Detention Centres'). UMAs are detained in these centres while their asylum claims are processed, and a third country resettlement option is made available. In short, the Australian immigration policy is centred on two practices in dealing with UMAs at sea: (1) 'pushbacks'; and (2) referring persons to Offshore Detention Centres. The policies have drawn strong criticism for falling short of Australia's international law obligations.[2] The fact that over 2,000 deaths have been recorded of persons 'in custody'[3] of Australian border authorities between 2000 and 2023 is furtherance of the same.[4]

The legal issues associated with Australia's Operation Sovereign Borders, are well-traversed.[5] The policy, at its core, captures the tension between concessions that a coastal state should (not could) make towards foreign ships, resulting in the diminution of their own state sovereignty,[6] whilst acting in accordance with their obligation under international law. This tension is not limited to circumstances surrounding Australia, but is also regularly seen in European waters.[7]

This paper aims to contribute to the debate by specifically addressing Australia's practice of referring of UMAs to Offshore Detention Centres, as opposed to considering the legality of Australia's practice of 'pushbacks'.[8] This paper argues that under Australia's Operation Sovereign Borders, the detention of UMAs at Offshore Detention Centres, breaches several of Australia's international obligations, warranting the immediate halt to such practices (or a drastic improvement of the conditions detainees are exposed to at these facilities). This paper will analyse: (1) the factual scenario, in which consideration of Australia's international obligations are triggered; (2) the international instruments from which Australia's obligations at international law arise; (3) Australia's practices in executing its Operation Sovereign Borders; (4) potential avenues for recourse; and (5) concluding remarks on the legality of Australia's practices in executing its Operation Sovereign Borders.

2. Background

[1] Minister for Home Affairs, 'Joint media release with the Hon. Lionel Rouwen Aingimea - New agreement to secure our region from maritime people smuggling' (Media Release, 24 September 2021) <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/maritime-people-smuggling.aspx>.

[2] See, eg, Felipe González Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, UN Doc A/HRC/47/30 (12 May 2021) [100]-[106].

[3] 'In custody' is defined as circumstances 'where they occur in custodial detention settings, during apprehension by police or immigration authorities on the mainland, or during interdiction at sea where border protection personnel have taken control of a vessel': Border Crossing Observatory, Monash University, *Australian Border Deaths Database* (Web Page) <https://www.monash.edu/__data/assets/pdf_file/0008/1531727/border-deaths-database-additional-information.pdf>.

[4] Ibid.

[5] See, eg, Felipe González Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, UN Doc A/HRC/47/30 (12 May 2021) [100]-[106].

[6] See, *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1964) art 2. *Cf* art 33.

[7] See for example, the United Kingdom's recent decision of *R v The Secretary of State for the Home Department* [2023] EWCA Civ 745.

[8] For an original and comprehensive analysis of this issue, see Natalie Klein, 'Assessing Australia's 'push back the boats' policy under international law: legality and accountability for maritime interceptions of irregular migrants' (2014) 15(2) *Melbourne Journal of International Law* 414.

The situation which gives rise to the legal issues considered in this paper, is when an Australian flagged vessel intercepts a foreign vessel (often situated beyond the territorial sea and likely in Australia's contiguous zone) that has become, or is, *in distress* (by virtue of an over populated vessel; the vessel being unseaworthy; and/or lacking necessary navigation equipment to reach land safely), that contains asylum seekers; UMAs. This scenario enlivens Australia's rescue obligations at international law in respect of the foreign vessel's passengers and crew.

At the heart of this scenario, which Australian authorities commonly encounter, are two competing interests, being: (1) providing assistance to UMAs, who are in distress, in accordance with international obligations where necessary; and (2) protecting Australia's domestic security. Given Australia's geographical location and form as an island, this scenario engages both Australia's international maritime and humanitarian obligations.

In this scenario, UMAs commonly claim to have a well-founded fear of persecution if they were to return to their home country. In principle, this would qualify them as a refugee under the *Convention Relating to the Status of Refugees* ('Refugees Convention').[9] Conversely, officers in charge of the Australian flagged vessel often assume a suspicion of self-proclaimed asylum seekers, on grounds that the vessel was traversing in contravention of the *Migration Act 1958* (Cth).[10]

2.1. Interception of refugees

There thus appears to be a tension between the obligations of Australian authorities to assist UMAs in unseaworthy vessels, in the contiguous zone, who are in conditions of distress and danger, and the objectives derived from the *Migration Act,* reflected in the practices under the Sovereign Borders policy (i.e. the prioritisation of the interests of those individuals who seek to rely upon the non-refoulement obligations under the *Refugees Convention* in Australia, rather than in another neighbouring country). The Explanatory Memorandum of the *Migration Act* explicitly identifies the existence of this tension but fails to resolve it, noting that:[11]

> [I]n order for an action taken under s 72 (legislative provision relating to the detainment of persons) to be compliant with such obligations, procedures relating to the consideration of refoulement risks would *need* to be in place … the Bill will take effect within 12 months of Royal Assent which will allow time for enforcement agencies to revise the necessary operational practices and procedures for the exercise of maritime powers under the Bill.

Further the above passage envisions the possibility that the Bill (that subsequently was passed into legislation as the *Migration Act*) may fall short of Australia's non-refoulement obligations, which are discussed in more detail in this paper below.

An alternative interpretation, is to instead draw upon section 36(2)(aa) of the *Migration Act*, which allows for the provision of a protection visa. Pursuant to this provision, a maritime officer who has detained au UMA aboard a vessel can act consistently with Australia's non-refoulement obligations. However, section 36(2)(aa), as currently drafted, does not provide a full solution. In determining satisfaction of the criteria to be eligible for a protection visa, it is for the Minister (the decision does not reside with the individual maritime officer)[12] to have 'substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'. This leaves significant discretion in the hands of the Minister to make a case, either way.

2.2. Detention of refugees

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[9] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). See below.

[10] Eg, s 189.

[11] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 6 (emphasis added).

[12] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, in which six separate reasons delivered by the HCA, but all concluded that s 72(4) of the *Maritime Powers Act* does *not* require a maritime officer to make an independent decision, emphasising that maritime officers are subject to the command of their superiors within the hierarchical structures of organisation, and ultimately subject to the decisions of Executive. At [291]: 'The maritime officers on navy vessels and Australian custom vessels perform their duties and exercise their powers, including their powers under the Maritime Powers Act, in the context of a chain of command in which they are governed by orders and instructions from superiors or senior officers'.

Section 36(2B) of the *Migration Act* provides further broad discretion to the Minister to justify deportation to a Detention Centre, whereby the Minister is satisfied that there is no 'real risk' that 'significant harm' will be suffered that the UMA could locate to an area of the country where harm won't be suffered.

The detention and the taking of passengers, is justified by the exercise of maritime powers to place those persons outside Australia pursuant to section 72(4) of the *Maritime Powers Act 2013* (Cth): 'A maritime officer may detain the person and take the person, or cause the person to be taken, to a place (the destination)'. Section 72(4A) of the *Maritime Powers Act* provides that the 'destination may be: (a) in the migration zone; or (b) outside the migration zone (including outside Australia)'. The ambit of these powers is clearly broad. Further, the Explanatory Memorandum acknowledges that section 72(4) 'may engage Australia's non-refoulement obligations'.[13]

However, section 74 provides a welfare based limit on the Minister's power to detain UMAs under the *Maritime Powers Act*: 'A maritime officer must not place or keep a person in a place, *unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place*'. The concept a safe place is discussed further below, in considering Australia's international obligations requiring a similar standard.

In December 2014, Australia's Federal Government introduced several significant amendments to the *Maritime Powers Act*,[14] including provisions that drastically increased the scope of the Minister's powers to detain UMAs and explicitly exonerate the Minister's actions under Australia's domestic laws from being contrary to international obligations. Some key amendments are extracted below:

A. Section 72A, headed 'Additional provisions relating to taking a person to a destination under subsection 72(4)':

(1) A person may be detained under subsection 72(4):

(a) for any period reasonably required:

(i) to decide which place should be the destination; or

(ii) to consider whether the destination should be changed to a different place under subsection 72(4B), and (if it should be changed) to decide what that different place is; and

(b) for any period reasonably required for the Minister to consider whether to make or give a determination or direction under section 75D, 75F or 75H in relation to

(i) a matter referred to in subparagraph (a)(i) or (ii); or

(ii) any other matter relating to the exercise of powers in relation to the person; and

(c) for the period it actually takes to travel to the destination; and

(d) for any period reasonably required to make and effect arrangements relating to the release of the person.

…

(3) The person must not be detained under subsection 72(4) for any longer than is permitted by subsection (1) of this section.

…

(5) Subsection (3) does not prevent:

(a) the arrest of the person; or

[13] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 6.

[14] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

(b) the detention of the person under another Australian law; or

(c) the exercise of any other power in relation to the person.

B. Section 75A, headed 'Failure to consider international obligations etc. does not invalidate exercise of powers':

(1) The exercise of a power under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H is not invalid:

(a) because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or

(b) because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or

(c) because the exercise of the power is inconsistent with Australia's international obligations.

(2) Subsection (1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraph (1)(a), (b) or (c).

C. Section 75B, headed 'Rules of natural justice do not apply to exercise of powers':

(1) The rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H.

(2) Subsection (1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.

D. Section 75C, headed 'Additional provisions about destination to which a vessel, aircraft or person may be taken':

(1) To avoid doubt:

(a) the destination to which a vessel, aircraft or person is taken (or caused to be taken) under section 69 or 72:

(i) does not have to be in a country; and

(ii) without limiting subparagraph (i)—may be just outside a country; and

(iii) may be a vessel; and

(b) a vessel, aircraft or person may be taken (or caused to be taken) to a destination under section 69 or 72:

(i) whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it), or the person; and

(ii) irrespective of the international obligations or domestic law of any other country.

E. Section 75E, headed 'Powers are not limited by the *Migration Act 1958*':

(1) Powers under sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H are not in any respect subject to, or limited by, the *Migration Act 1958* (including regulations and other instruments made under that Act).

(2) Subsection (1) of this section is not to be taken to imply that other powers under this Act are subject to, or limited by, the *Migration Act 1958* (including regulations and other instruments made under that Act).

The above amendments clearly indicate the Australian Federal Government's intentions to justify its actions in fulfilment of its Operation Sovereign Borders policy, while at the same time protecting itself from any claims regarding the legality of those actions in Australian courts. In doing so, Australia appears to have acknowledged that its practices under its Operation Sovereign Borders, conflict with its obligations under international law (specifically, s 75A).

Despite the competing interests identified above, this paper argues that Australian domestic law should conform with Australia's obligations at international law (in keeping with the usual practice of states ratifying the international instruments they are signatories to).

3. Australia's Obligations at International Law

Australia has several obligations under international law relevant to Australia's treatment of persons detained at Offshore Detention Centres. These obligations are briefly discussed below: firstly, international maritime obligations relevant to Australian vessels intercepting UMAs; and secondly, international humanitarian obligations relevant to treatment of UMAs in circumstances where they are claiming asylum.

3.1. Obligation to rescue

Australia's geography as an island state, leads to the situation where UMAs frequently attempt to enter Australia's territory by water. By virtue of this form of attempted arrival, Australia's maritime laws become applicable and relevant.

The obligation to render assistance at sea in international waters, is a longstanding and well-established principle of maritime international law. When a vessel is at sea, the master of the ship is under a duty to render assistance to any person who is either: (1) in distress; or (2) in danger of being lost; at sea, and must proceed as fast as practicable to the assistance of the person.

Article 98 of the *United Nations Convention on the Law of the Sea* ('UNCLOS') provides:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to *render assistance to any person found at sea in danger of being lost*;
>
> (b) to *proceed with all possible speed to the rescue of persons in distress*, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
>
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 2. *Every coastal State shall 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.[15]

Australia is a signatory to UNCLOS having signed on 10 December 1982 and ratified its obligations therein on 5 October 1994. Accordingly, Australia has formally consented to be bound to the obligations contained in UNCLOS, and pursuant to article 98 above, ensure its flagged vessels render assistance to persons at risk of being lost, and rescue persons in distress.

The obligation to rescue is also reflected in Australia's domestic legislation and applies to regulated Australian vessels, which is defined to capture Australian customs vessels.[16] Section 181(1) of the *Navigation Act 2012* (Cth) mirrors that wording of UNCLOS:

[15] *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1964)

[16] *Navigation Act 2012* (Cth) s 15(2).

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(1) The master of a vessel contravenes this subsection if:

(a) the vessel is at sea; and

(b) the master has reason to believe that one or more persons are in distress at sea; and

(c) the master does not both:

(i) cause the vessel to proceed as fast as practicable to the assistance of the person or persons; and
(ii) inform the person or persons that the master is doing so.[17]

However, the obligation to rescue is not without limitation, and section 181(2) stipulates exceptions:

(2) Subsection (1) does not apply if:

(a) the master is unable to comply with paragraph (1)(c); or

(b) in the special circumstances of the case, it is unreasonable or unnecessary for the master to comply with paragraph (1)(c); or

(c) the master of the vessel is informed by the person or persons in distress, or by the master of another vessel, that assistance is no longer necessary; or

(d) the master is informed that another vessel has been requisitioned and is complying with the requisition.

Accordingly, the *Navigation Act* imposes the obligation to rescue on any vessels in Australian waters and Australian regulated vessels,[18] to render assistance to any person 'in distress at sea' (thus including asylum seekers). The scope of the obligation to assist in broad, and responsibility strict. The Explanatory Memorandum explicitly provides that the obligation to render assistance 'is to proceed with *all speed* to the assistance of persons in distress, upon receiving a signal from any source that the ship, aircraft or survival craft is in distress',[19] again reflecting the wording in UNCLOS.

However, s 10 of the *Navigation Act* provides a blanket carve out to the application of the Act for vessels, 'under the command of a member of the Australian Defence Force'[20] or a 'Government vessel that is used only on government non-commercial service as a naval auxiliary'.[21] Accordingly, these vessels are not required to adhere to the obligation of rescue under Australia's domestic laws. It is questionable as to whether this exception is appropriate given article 98 of UNCLOS does not make an exception for state government vessels.

As to providing assistance to those in distress, regulation 15(a) of Chapter V of the *International Convention for the Safety of Life at Sea* ('SOLAS') is also relevant:

> Each Contracting Government undertakes to ensure that *any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts*. These arrangements should include the *establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary* having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, *afford adequate means of locating and rescuing such persons*.[22]

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[17] *Navigation Act 2012* (Cth) s 181.
[18] See ibid s 180, which stipulates which vessels s 181 applies to.
[19] Explanatory Memorandum, Navigation Bill 2012 (Cth) 48 (emphasis added).
[20] *Navigation Act 2012* (Cth) s 10(1)(b).
[21] *Navigation Act 2012* (Cth) s 10(2).
[22] *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) (emphasis added).

3.2. Obligation to care for rescuees

Once assistance has been rendered and UMAs have been taken on board of a vessel, that vessel then has the responsibility to deliver the rescuees to a 'place of safety', with the assistance of the state to ensure 'minimum further deviation from the ships' intended voyage'. This obligation is confirmed in the two following international instruments.

Chapter V, regulation 33 of SOLAS, relevantly provides:

> 1. The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.
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>> 1.1. *Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea*. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that *survivors assisted are disembarked from the assisting ship and delivered to a place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.
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> …
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> 6. Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship.[23]

Australia is also a party to the *International Convention on Maritime Search and Rescue* ('SAR'), that stipulates that all State parties undertake to 'adopt all legislative or other appropriate measures necessary to give *full* effect to the Convention'.[24] Rule 3.1.9 of SAR largely mirrors Chapter V, regulation 33.1.1 of SOLAS, and requires that:

> *Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships´ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea*. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that *survivors assisted are disembarked from the assisting ship and delivered to a place of safety*, taking into account the particular circumstances of the case and *guidelines* developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.[25]

[23] Ibid (emphasis added).
[24] *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) art 1 (emphasis added).
[25] *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) (emphasis added).

The above obligation must be read in light of the International Maritime Organization ('IMO') Guidelines (referred to as the 'Guidelines' in SOLAS), which stipulates that:

> The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees covered at sea.[26]

Again, Australia is a party state to both SOLAS and SAR, imposing the above obligations upon Australian vessels, meaning that once a vessel renders assistance to a person who is at risk at sea, that vessel must then ensure that the survivors are 'delivered to a place of safety' with 'minimum further deviation from the ships intended voyage'.

However, 'a place of safety' is not defined in either SOLAS or SAR. This leaves a degree of ambiguity as to what type of place can be considered to be 'a place of safety', that results in difficulty in considering whether a state has complied with its international obligations or not.[27]

In 2004, the IMO, issued its *Guidelines on the Treatment of Persons Rescued at Sea*, which provides some clarification on the scope of 'a place of safety' under SOLAS.[28] While the *Guidelines on the Treatment of Persons Rescued at Sea* do not provide a set definition for 'a place of safety' they do provide a broad description of what such a place requires:

> A place of safety … is a location where rescue operations are considered terminate; *where the survivors' safety of life is no longer threatened and their basic human needs can be met*; and is a location from which transportation arrangements can be made for their next or final destination.

The *Guidelines on the Treatment of Persons Rescued at Sea* also acknowledge the contextual analysis in determining whether or not any given location is a place of safety' and identifies several factors, without limitation, which could be considered in undertaking such analysis:

> The Conventions, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case. *These circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units.* Each case is unique, and selection of *a place of safety and may need to account for a variety of important factors.*

As exemplified by the extracts from the *Guidelines on the Treatment of Persons Rescued at Sea* identified above, the determination of what is 'a place of safety' as defined under the SAR is factually dependent and specific to each situation of maritime rescue, which in each case requires its own careful analysis of circumstances.

3.3. Human Rights Obligations

While there is ambiguity regarding the application of the obligation to deliver UMAs to a place of safety, Australia's status as a party state to several international conventions aimed at securing human rights, arguably imposes a higher threshold to ensure such place is indeed safe for UMAs to be placed.[29]

A significant international instrument relevant to the issues identified in this paper, is the *Refugees Convention*, that at its core affirms the principle of non-refoulement; that a refugee should not be returned to a country where they face serious threats to their life or freedom.[30] Specific articles of the Refugees Convention are also prima facie relevant to Australia's practice of referring person to Detention Facilities:

> 1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

[26] *Guidelines on the treatment of persons rescued at sea*, MSC Res 167/78, MSC Doc MSC 78/26/Add.2 (adopted on 20 May 2004) [6.17].
[27] See Martin Ratowich 'International Law and Rescue of Refugees by Sea' (PhD Thesis, Stockholm University, 2019).
[28] *Guidelines on the treatment of persons rescued at sea*, MSC Res 167/78, MSC Doc MSC 78/26/Add.2 (adopted on 20 May 2004) [6.12].
[29] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
[30] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33.

> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.
>
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.[31]
>
> …
>
> 1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
>
> 2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.[32]
>
> …
>
> 1. 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, 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.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[33]

Although the *Refugees Convention* concerns and applies to scenarios other those arising from Australia's Sovereign Borders policy, it does overlap with Australia's practice of referring person to Offshore Detention Centres. Accordingly, the treatment of UMAs claiming to asylum seekers is triggered if they are found 'in distress' at sea under SOLAR and SAR, or alternatively by the *Refugees Convention*, claiming fear of persecution if returned to their home state. Naturally, the objectives and principles in these international instruments complement each other.

In addition to its obligations of non-refoulment under the *Refugees Convention*, Australia has implied non-refoulement obligations under Articles 6 and 7 of the International Covenant on Civil and Political Rights ('ICCPR') and under the Second Optional Protocol to the ICCPR. The ICCPR further contains provisions relevant to the practice of referring UMAs to Detention Centres, such as:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[34]
>
> …
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[35]
>
> ...

[31] Ibid art 16.
[32] Ibid art 22.
[33] Ibid art 31.
[34] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6.1.
[35] Ibid art 7.

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[36]
>
> …
>
> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[37]

Australia's commitment to such international conventions regarding human rights arguably support arguments regarding Australia's obligations under UNCLOS, SOLAS and SAR that:

> a. the obligation to render assistance at sea, prevents Australian vessels to 'push back' asylum seekers, unless the Australian vessel is absolutely certain that asylum seekers can make their return journey safely; and
>
> b. the obligation to deliver rescuees to a place of safety, imposes a heavier burden upon Australian vessels to ensure that Offshore Detention Centres provide detainees with adequate conditions that meet the requirements for 'a place of safety'.

The application of the various obligations referenced above, are discussed against Australia's practice of delivering UMAs to Offshore Detention Centres in the sections below.

3.4. Pushbacks[38]

As expressed above, Australia's policy regarding foreign vessels attempting to illegally enter Australia's waters without appropriate authority is for such vessels to be 'turned back or transferred to a regional processing country for assessment of asylum claims'.

In the UN Special Rapporteur's report on means to address the human rights impact of pushbacks of migrants on land and at sea, he expressed that pushbacks 'greatly increase the chance of a maritime disaster resulting in loss of life'.[39] In that same report, the Special Rapporteur also noted Australia's practice of frequently turning back illegal vessels in Australian waters.[40]

If it is true that in every situation Australian naval and coastal authorities did turn back every illegal vessel attempting to enter Australia's waters, where such illegal vessel is in distress, then Australia would likely be in breach of its obligations to render assistance to vessels in distress (pursuant to article 98 of UNCLOS, regulation 15(a) of Chapter V of SOLAS, and section 181 of the *Navigation Act,* the vessel *must* be in distress).

Thus, in order to comply with international obligations under UNCLOS, SOLAS and SAR, as confirmed in the *Navigation Act*, some form of individualised assessment must be undertaken by Australian authorities of the safety of the illegal vessel and its passengers, in every encounter, before deciding to turn back the illegal vessel.[41]

4. Offshore Detention Centres

The 'regional processing country' referred to in Australia's Operation Sovereign Borders has historically been an extraterritorial processing facility located in Papua New Guinea. It is this aspect of Operation Sovereign Borders, which this paper will focus its attention.

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[36] Ibid art 9.1.
[37] Ibid art 10.1.
[38] As indicated above, this article does not intend to address in specific detail 'pushbacks' against Australia's international obligations, as this topic is already comprehensively addressed, see: Natalie Klein, 'Assessing Australia's "push back the boats" policy under international law: legality and accountability for maritime interceptions of irregular migrants' (2014) 15(2) *Melbourne Journal of International Law* 414.
[39] Felipe González Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, UN Doc A/HRC/47/30 (12 May 2021) [52].
[40] Ibid [72].
[41] As confirmed by the Special Rapporteur in ibid [104].

Records indicate that since 2013, approximately 3,000 UMAs have been forcibly transferred by Australia to the facility in Papua New Guinea, where detainees are held in 'circumstances and conditions that have had sever impacts on health, and particularly significantly the mental health of asylum seekers'.[42] Further, as at 6 October 2021, at least 12 people have reportedly died at the Offshore Detention Centre in Papua New Guinea and some 124 persons remained there (until its closure on 31 December 2021).[43] Since closing the Centre, the Australian Federal Government no longer reports in the statistics of persons who still reside in Papua New Guinea.

While Australia has indicated that its arrangement to send UMAs intercepted at sea to Papua New Guinea ceased on 31 December 2021, Australia has replaced the Centre at Papua New Guinea with a Centre in Nauru.[44]

4.1. Assessment Against Search and Rescue Obligations

With specific reference to Australia's obligations to ensure that UMAs are 'delivered to a place of safety' under both SOLAS and SAR,[45] and keeping in mind the treatment of persons held at Offshore Detention Centres, it is questionable whether or not such Centres are indeed 'a place of safety' for which UMAs can be delivered to.

Drawing upon the guidance provided in the IMO's *Guidelines on the Treatment of Persons Rescued at Sea*, the question arises of whether the extraterritorial processing facilities where UMAs are held after being intercepted at sea are places 'where the survivors' safety of life is no longer threatened and their basic human needs can be met'. As identified in this paper above, the IMO Guidelines note that in determining a place of safety, 'each case is unique' and needs to 'account for a variety of important factors'.

Addressing the high-level description of a place of safety, as a place where the UMAs' safety of life no longer threatened and their basic human needs can be met, the following questions arise:

a. by UMAs being held indefinitely at Offshore Detention Centres in the conditions reported, is their safety of life threatened?

b. by UMAs being held indefinitely at Offshore Detention Centres in the conditions reported, are their basic human needs being met?

Adopting this broad definition for a place of safety, both of the above questions need to be answered in the affirmative to be classified as a place of safety. Further, in answering these questions, 'basic human needs' must be defined.

4.1.1. Basic Human Needs

The phrase 'basic human needs' has been indirectly addressed by the United Nations in commenting on poverty, as 'including food, safe drinking water, sanitation facilities, health, shelter, education and information'.[46]

Despite this, 'basic human needs' is not specifically defined in SOLAS or SAR, or any other international instrument, and is troublesome due to its lack of normative standard, for which the phrase has drawn criticism.[47] Notably, it is argued that human needs are different to human rights, as human *needs* form the basis for which human *rights* are derived.[48] In light of this, what constitutes 'basic human needs' varies depending on the context of what is needed (e.g. emotional needs, psychological needs, physical needs, social needs etc).[49] Given the context of the

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[42] Ibid [68].
[43] 'Australia to stop processing asylum seekers in PNG but government's refugee policy unchanged', *Australian Broadcasting Corporation* (Web Page, 6 October 2021) <https://www.abc.net.au/news/2021-10-06/australia-stop-processing-asylum-seekers-in-png-manus/100517926>.
[44] Minister for Home Affairs, 'Joint media release with the Hon. Westly Nukundj MP - Finalisation of the Regional Resettlement Arrangement' (Media Release, 7 October 2021) <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx>.
[45] See *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) art 33.1.1; *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) art 3.1.9.
[46] *Programme of Action of the World Summit for Social Development*, UN Doc A/CONF/166/9 (14 March 1995) [19]. This definition has also been referenced in various Australian judgments, see for example: *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, [34].
[47] Martin Hapla, 'Theory of Needs as Justification of Human Rights: Current Approaches and Problems with Uncertainty and Normativeness' (2018) 10 *The Age of Human Rights Journal* 1, 12-13.
[48] Ibid 13-14.
[49] Ibid 12.

obligation arising under SOLAS, it could reasonably be assumed that 'basic human needs' is to be framed in the context of survival, i.e. what is required in order for humans to survive.

Drawing on the United Nation's description of basic human needs regarding poverty as the applicable definition under SOLAS, the conditions required to be provided at 'a place of safety' must include:

a. food;

b. safe drinking water;

c. sanitation facilities, such as toilets and showers;

d. health;

e. shelter; and

f. education.

Most notably from the list above, there is significant ambiguity as to the degree of health and education which is to be provided in order to meet 'basic human needs'. The ambit of 'health' is not prescribed and leaves a question as to how broad health needs must be provided to detainees at the Offshore Detention Centres; does this go as far as to include psychological, emotional and social? If so, to what extent these needs are to be met also remains ambiguous; do detainees require counselling sessions and social events to be provided? The degree to which education must be provided to detainees is similarly ambiguous; must all detainees be provided with access to education or only children? What level of education must be made available?[50]

While the above-mentioned factors remain unclear, the remaining factors are less opaque. Food, safe drinking water, sanitation facilities and shelter are targets which are more easily identifiable, albeit undefined with their exact scope uncertain. Relevantly, basic human needs is a phrase that has been referenced in several Australian court decisions regarding human rights and refugees, defined as including:

a. 'food, housing, health and education';[51]

b. 'access to food, education and health';[52] and

c. 'personal dignity and physical and mental integrity'.[53]

In applying these factors to the conditions reported at Australia's Offshore Detention Centres, even with the ambiguity as to exact definitions, there is cause for concern that such basic human needs are not being met.

4.1.2. Threats to 'Safety of Life'

The Special Rapporteur, when commenting on Australia's Operation Sovereign Borders, noted that: 'circumstances and conditions that have had severe impacts on health, and particularly significantly the mental health, of asylum seekers' held at the Offshore Detention Centres in Papua New Guinea and Nauru.[54] These concerns have resulted in human rights groups calling for the immediate medical evacuation of all UMAs, in response an alleged 78 instances of attempted suicide, suicidal thoughts and self-harm over a period of 11 months, in addition to 14 deaths of detainees being recorded.[55]

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[50] Such factors become increasingly important the longer UMAs are held at Offshore Detentions.
[51] *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, [34].
[52] *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501, [10].
[53] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, [244].
[54] Felipe González Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, UN Doc A/HRC/47/30 (12 May 2021) [68].
[55] 'Australia to stop processing asylum seekers in PNG but government's refugee policy unchanged', *Australian Broadcasting Corporation* (Web Page, 6 October 2021) <https://www.abc.net.au/news/2021-10-06/australia-stop-processing-asylum-seekers-in-png-manus/100517926>.

In light of the reported health concerns of the detainees at the Offshore Detention Centres, it is questionable whether by leaving those rescued at sea at these Centres, Australia is meeting its obligations under SOLAS and SAR to deliver rescuees to a place of safety.

4.2. Assessment against human rights obligations

As identified above, the articles contained in the Refugees Convention and the ICCPR, support the argument that Offshore Detention Centres must provide detainees with services associated with 'basic human needs' such as health and education.

The Refugees Convention, specifically requires state parties to provide refugees with free access to courts,[56] education,[57] as well as ensuring that they do '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'.[58]

In assessing the conditions in which rescues are detained at Offshore Detention Centres against the above factors imposed by the Refugees Convention, a stronger argument appears for requiring those Centres to provide services to detainees. Access to courts and education are specifically identified, as they are by through the definition of 'basic human needs' under SOLAS. Further, and a far wider obligation imposed by the Refugees Convention, is to not impose penalties on refugees even though they have entered a state illegally. Although it is unclear on what was intended to be captured by the phrase 'penalties', a plain reading of the phrase could reasonably capture the denial of education, healthcare, and access to courts as penalties imposed on those in Offshore Detention Centres.

Similarly, the ICCPR imposes the obligation that refugees be free from 'cruel, inhuman or degrading treatment',[59] and having the right to liberty.[60] Again, these obligations appear to support the argument that Offshore Detention Centres should provide services to detainees (specifically those captured as being basic human needs). The reported conditions at Offshore Detention Centres could be considered as cruel, inhuman or degrading, in instances where detainees are not given basic human needs. Further, to indefinitely detain refugees at Offshore Detention Centres without a set deadline for Australian authorities to process their immigrations status, adds weight to the classification of such treatment as cruel, inhuman or degrading.

When read together, there is a strong argument that the Refugees Convention and ICCPR reinforce a definition of 'a place of safety' that basic human needs are met, which when considered against the reported conditions at Offshore Detention Centres, is a standard that does not appear to be met.

Although the Offshore Detention Centre in Papua New Guinea ceased to operate at the end of 2021, if Australia's new processing facility in Nauru results in the same or similar treatment of detainees as reported at the Papua New Guinea, then the same criticisms above would equally apply to the new facility in Nauru.

5. Recourse

Australia's municipal courts have considered similar issues in:

a. the Full Federal Court's judgment, *Tampa*;[61]

b. the High Court's judgment, *CPCF v Minister for Immigration and Border Protection* ('CPCF');[62] and

c. the High Court's judgment, *Plaintiff M68 v MIBP* ('M68').[63]

Each of the above judgments are briefly discussed below.

[56] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 16.
[57] Ibid art 22.
[58] Ibid art 31.
[59] Ibid art 7.
[60] Ibid art 9.1.
[61] *Ruddock v Vadarlis* (2001) 110 FCR 491.
[62] *CPCF v Minister for Immigration and Border Protection & Anor* (2015) 255 CLR 514.
[63] *Plaintiff M68 v MIBP* (2016) 257 CLR 42.

In *Tampa*, several UMAs headed for Australia, were rescued from their sinking vessel by a Norwegian flagged vessel, the MV Tampa, in international waters 140 kilometres north of an Australian territory, Christmas Island. Some of the UMAs required medical attention, so the Tampa proceeded to the nearest port, at Christmas Island in accordance with its rescue obligations under international law. The Tampa stopped at the boundary of Australia's territorial sea (twelve nautical miles offshore), requesting permission to enter Australian waters and unload the UMAs. Australian authorities refused permission. Upon hearing Australia's refusal, the Tampa declared a state of emergency and entered Australian waters to proceeded to discharge the UMAs. Before reaching the Australian mainland, the Tampa stopped and boarded by Australian border forces, who took control of the vessel and detained the UMAs onboard the Tampa.

Initial proceedings were commenced in the Victorian Federal Court by a human rights advocacy group, seeking a *haebeus corpus* orders (i.e. that the rescuees be released).[64] The Court granted the orders holding that the *Migration Act* was intended to comprehensively regulate the removal of non-citizens, leaving the Minister with no authority pursuant to prerogative powers to exclude the UMAs aboard the Tampa from entering Australia. The decision was immediately appealed to the Australian Full Federal Court. The Full Court granted the appeal, with French J delivering the majority judgment, that the *Migration Ac*t did not limit the Minister's prerogative powers to extent that it could not prevent non-citizens from entering Australia.[65] French J highlighted the importance of the Minister's power being central to Australia's sovereignty:

> The power to determine who may come into Australia is so central to its [Australia's] sovereignty that it is not to be supposed that the Government of the nation would lack the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community [*sic.*], from entering.[66]

As a result of the majority's findings, they concluded that there could not have been any unlawful detention of the UMAs.

Notably, Black J issued a strong dissent, traversing a multitude of domestic and foreign caselaw, finding that 'it is, at best, doubtful that the asserted prerogative [to prevent non-citizens from entering Australia], continues to exist at common law'.[67] Black J further dissented, finding that the regime under the *Migration Act* 'is comprehensive in its coverage of powers of apprehension and detention' and thus abrogated any existence of such prerogative power.[68]

In *CPCF*, a Sri Lankan national without a visa allowing entry into Australia ('Mr S'), was travelling on an Indian vessel that was intercepted by an Australian border protection vessel in the Indian Ocean within Australia's contiguous zone. The Indian vessel became unseaworthy, and subsequently transferred the passengers to the Australian vessel. Pursuant to a decision made by the National Security Committee of Cabinet, which included the Minister for Immigration and Border Protection, the Australian vessel sailed to India (for which there was no agreement between the states to allow Mr S to disembark in India). Once in Indian waters, Mr S detained for a further period until the Minister decided that it was not practicable to discharge him in India within a reasonable time and the Australian vessel sailed to the Australian Territory, the Cocos (Keeling) Islands, where Mr S was taken into an immigration detention, pursuant to section 72(4) of the *Maritime Powers Act*. Mr S sued the Minister alleging that his detention on the Australian vessel was unlawful and claiming damages for wrongful imprisonment. The Minister argued that it had the relevant power to detain Mr S either under: (1) the *Maritime Powers Act*; or alternatively (2) its prerogative powers.

The Court's decision was split four-three, with the narrow majority rejecting Mr S's claim and finding that his detention was authorised by the *Maritime Powers Act*, as those powers extended the contiguous zone,[69] and so did not proceed to address the Minister's alternate argument.[70] In doing so, it explicitly acknowledged Australia's international obligations under UNCLOS and the Refugees Convention.

The minority's decision found that the Minister did not have the power to detain Mr S under neither (1) the *Maritime Powers Act*, as the power to surrender a person to another state requires a statutory basis; [71] nor (2) its prerogative

[64] *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] 110 FCR 452.
[65] *Ruddock v Vadarlis* (2001) 110 FCR 491, [204] (French J).
[66] Ibid [193] (French J).
[67] Ibid [29] (Black J).
[68] Ibid [64] (Black J).
[69] *CPCF v Minister for Immigration and Border Protection & Anor* (2015) 255 CLR 514, [29] (French CJ).
[70] Ibid [50] (French CJ).
[71] Ibid [270]–[271] (Kiefel J).

as, in a similar vein to Black J's dissent in *Tampa*, any power under the prerogative was abrogated by the regime under the *Maritime Powers Act*.[72]

It is worthwhile to note that the High Court's decision in *CPCF* was issued one month after the Australian Federal Government's amendments to the *Maritime Powers Act* took effect in December 2014. In light of this, and given the significance of the amendments in increasing the Ministers powers under the *Maritime Powers Act*, it is very likely that a court would reach the same conclusion in similar factual circumstances.[73]

M68, concerned a constitutional challenge to the Federal Government's arrangements in sending Offshore Detention Centres, commenced by a Bangladeshi national who was detained and taken to Australia's Offshore Detention Centre in Nauru, the subsequently brought to Australia for medical treatment. The plaintiff then disputed her being returned to the Offshore Detention Centre and sought declarations that her past detention was unlawful on the basis that it was not authorised by any valid law of the Commonwealth nor based upon a valid exercise of the executive power of the Commonwealth under section 61 of the Constitution.

The High Court's majority (of six-one) judgment found that the power to make the arrangements did fall within the executive power of the Commonwealth under section 61.[74] Notably, the justices were divided on the factual position of whether the Australian Federal Government was in control of the Offshore Detention in Nauru.

Notably, none of the Australian court decisions noted above rule on issues regarding the *conditions* in which detainees are kept in Offshore Detention Centres, only whether the *act* of detainment was lawful.

Proceeding on the basis that act of detainment is lawful, an argument exists that the conditions in which detainees are kept in Offshore Detention Centres is unlawful. This argument is based on section 74 of the *Maritime Powers Act*, that stipulates: 'A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place'. Accordingly, the requirement to 'not place or keep a persons [rescued at sea]' at a place that is not safe for that person, is an obligation found in Australia's domestic law, as well as international conventions.

Section 74 was considered by the High Court in *CPCF*, rejecting the Minister's argument that finding that section 74 'deals only with what happens between detention (presumably detention of a vessel) and the discharge from detention'[75], and instead held that:

a. 'section 74 may be engaged in a very wide variety of circumstances';[76]

b. '[t]he reference in s 74 to a person being "safe" in a place must be read as meaning safe from risk of physical harm';[77]

c. '[a] decision-maker who considers whether he or she is satisfied, on reasonable grounds, that it is safe for a person to be in a place must ask and answer a different question from that inferentially posed by the Refugees Convention';[78]

d. regarding the proper construction of the *Maritime Powers Act*, '[f]irst, the s 72(4) power to detain and take to a place outside Australia permits detention and taking only to a place which the person has, at the time the destination is chosen, a right or permission to enter. Second, s 74 requires that a maritime officer may take a person to a place outside Australia only if satisfied, on reasonable grounds, that the person will be safe in that place';[79] which then require

e. 'that a maritime officer be satisfied that it is safe to place a person in the place to which that person is taken, the answer which is given to Question 1 should reflect the conclusion reached about s 74 but

[72] Ibid [277], [283] (Kiefel J).
[73] See for example French CJ's finding that the Maritime Powers Act in s 7 provides that the powers therein must be exercised '[i]n accordance with international law, the exercise of powers is limited in places outside Australia.': ibid [7]. Cf *Maritime Powers Act 2013* (Cth) s 75A, as inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).
[74] *Plaintiff M68 v MIBP* (2016) 257 CLR 42, [31], [46].
[75] *CPCF v Minister for Immigration and Border Protection & Anor* (2015) 255 CLR 514, [106]–[107] (Hayne and Bell JJ).
[76] Ibid [108] (Hayne and Bell JJ).
[77] Ibid [109] (Hayne and Bell JJ).
[78] Ibid.
[79] Ibid [113] (Hayne and Bell JJ).

otherwise decline to deal with whether, or to what extent, questions of non-refoulement are mandatory relevant considerations or otherwise bear upon the construction of the powers given by s 72(4)'.[80]

Ultimately, in the factual context of *CPCF*, the Court found that Mr S had failed to establish a risk to his safety that meant the Minister had breached the obligation in section 74.[81] Nevertheless, Hayne and Bell JJ's findings in *CPCF* are clearly relevant and applicable to assessing the conditions at Australia's Offshore Detention Centres.

Whilst Hayne and Bell JJ interpreted the meaning of safe in section 74 as 'meaning safe from risk of physical harm', consideration of Australia's international obligations identified in this paper above arguably extend the definition of section 74 to be read more in line with UNCLOS, SOLAS and SAR, and by association, the IMO Guideline, that a safe place or a place of safety, must provide for basic human needs. It is trite that domestic law must be construed consistently with international law obligation.[82] The Explanatory Memorandum also acknowledges the importance of the provision as 'a safeguard against persons being compelled to remain in unsafe situations'.[83]

Returning to the reported conditions of Australia's Offshore Detention Centres, even taking the interpretation section 74 of the *Maritime Powers Act* as expressed by Hayne and Bell JJ, it is questionable if detainees are being protected from physical harm in 'circumstances and conditions that have had sever impacts on health [of detainees]',[84] and a significant number of deaths have been reported.[85]

6. Concluding Remarks

Australia's practices pursuant to its Operation Sovereign Borders raise concerns as to whether Australia is upholding its international obligations under relevant maritime conventions (UNCLOS, SOLAS and SAR) as well as conventions regarding the protection of human rights (ICCPR and Refugees Convention). These concerns also potentially apply to Australia's domestic statutory regime.[86]

Australia's obligations to deliver UMAs to a place of safety (under either maritime or human rights conventions, and the *Maritime Powers Act*) may also be at risk of being breached where migrants and asylum seekers are sent to Offshore Detention Centres where the condition and treatment of detainees at those facilities are dire.

At the beginning of this paper, a tension between competing interests was identified between Australia's national security and meeting its international obligations to ensure rescues are kept safe. However, this tension can be appropriately resolved by Australia ensuring that its Offshore Detention Centres provide adequate 'safety' for those detained, which at a bare minimum, requires that detainees are free from physical harm (under both international and domestic law). Additionally, a more liberal interpretation of safety would also ensure that Offshore Detention Centres provide detainees with services for education, health and access to courts (as per Refugees Convention and factors from IMO Guidelines for place of safety) and without indefinite detention. Failing such a resolution (or similar), Australia risks being in breach of its international obligations as well as potentially its own domestic laws.

Careful consideration of Australia's international obligations must be had when dealing with UMAs rescued at sea, applied on a case-by-case basis to ensure that such UMAs are protected to the degree provided for by international conventions.

[80] Ibid [126] (Hayne and Bell JJ).
[81] Ibid [124] (Hayne and Bell JJ).
[82] As confirmed by the High Court in *CPCF v Minister for Immigration and Border Protection & Anor* (2015) 255 CLR 514, [8] (French CJ).
[83] Explanatory Memorandum, Maritime Powers Bill 2012 (Cth) 52.
[84] Felipe González Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, UN Doc A/HRC/47/30 (12 May 2021) [68].
[85] 'Australia to stop processing asylum seekers in PNG but government's refugee policy unchanged', *Australian Broadcasting Corporation* (Web Page, 6 October 2021) <https://www.abc.net.au/news/2021-10-06/australia-stop-processing-asylum-seekers-in-png-manus/100517926>.
[86] Specifically, the *Maritime Powers Act 2013* (Cth) s 74, regarding delivery of rescues to a place 'that it is safe for the person'.