Human Rights Law Centre

Can't flee, can't stay

Australia's interception and return of Sri Lankan asylum seekers

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About the Human Rights Law Centre

The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building.

It is an independent and not-for-profit organisation and donations are tax-deductible.

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1 Executive summary

In the last two years, more Sri Lankans have attempted to travel to Australia by boat than ever before. More than 8300 Sri Lankan people have arrived in Australia since January 2012 and Sri Lankan authorities claim to have intercepted a further 4500 Sri Lankans attempting to leave.

Since at least 2009 Australia has encouraged, facilitated and resourced Sri Lanka to stop its people leaving the country as part of Australian border control operations. The aim is to stop boats at their source before they can depart Sri Lanka.

Australian Federal Police, Defence, and Australian Customs and Border Protection Service (**Customs**) maintain a presence on the ground in Sri Lanka to share information with, and develop the capacity of, Sri Lankan authorities to intercept boats. Australia provides around $2 million in materiel support for the Sri Lanka Navy every year and has gifted critical resources such as patrol boats for the Sri Lanka Navy and Coast Guard. Sri Lanka Police did not have an "illegal migration" surveillance capacity until Australia established one for them.

To use the Australian Prime Minister's words, Australia now has the "closest possible cooperation" with Sri Lanka.

However, Australia's border protection partners have a chequered human rights record. There are credible allegations of war crimes and crimes against humanity committed by the Sri Lankan military during the final phases of the civil war in 2009. Since then, Sri Lanka has become increasingly authoritarian; the rule of law has been eroded and serious human rights violations continue to occur. Torture and mistreatment in Sri Lankan police and military custody is reportedly widespread.

Recent data on boat arrivals indicates that a majority of Sri Lankans who flee are asylum seekers. Although notionally aimed at combating people smuggling, Australia's efforts at 'stopping boats' are jeopardising the ability of Sri Lankans at risk of persecution to gain access to safety and asylum. These risks are compounded by Australia's domestic policy of forcibly returning Sri Lankan boat arrivals in Australia without conducting proper assessments as to their refugee status or monitoring their safety on return.

Australia cloaks its work in Sri Lanka in the language of border protection and anti-people smuggling. Whilst these are legitimate objectives, they must not be achieved through means that fail to provide protection to asylum seekers. Currently, interceptions and returns of Sri Lankans fail to provide protection and in some cases actually cause harm.

Australia's public accountability, transparency and risk management around this work is hopelessly deficient, depriving the Australian public of the ability to understand the Australian Government's activities in this area and increasing the risks that the Australian Government is supporting activities that violate human rights. The overall impact of this work seriously diminishes Australia's standing in the international community, undermining Australia's ability to promote good governance, human rights and security in our region and beyond.

1.1 Australia's support prevents genuine refugees from accessing safety

On the basis of recent migration flows and research, it is likely that 50% to 90% of people coming to Australia on boats from Sri Lanka are genuine refugees. Although nominally aimed at 'combating people smuggling', Australia's cooperation with the Sri Lankan authorities has effectively erected barriers to prevent all Sri Lankans travelling by boat from seeking asylum, without providing alternative safe pathways. Sri Lankans are unable to make a claim for protection at the Office of the United Nations High Commissioner for Refugees (**UNHCR**) offices inside Sri Lanka and for many their only option when fleeing persecution is to leave their country without first obtaining visas for destination countries.

The Australian Government's framing of the issue as one of criminal transnational people smuggling is simplistic and deliberately ignores the underlying reasons why people are leaving. Sri Lanka remains a source country for refugees. Australia is well aware of the serious human rights situation in Sri Lanka and the brutal record of its Sri Lankan Government border protection partners. Whilst some Sri Lankans travelling by boats may be 'economic migrants', a significant percentage is genuine refugees.

1.2 Australia's support increases the likelihood of torture and mistreatment of Sri Lankans

Australia's support for the Sri Lankan Government's boat interception activities increases the likelihood of people fleeing persecution being exposed to torture and mistreatment. Sri Lankans associated with the Liberation Tigers of Tamil Eelam (**LTTE or Tamil Tigers**) or with scarring on their body are particularly vulnerable to mistreatment on interception.

The Sri Lanka Navy is part of a military marred by credible allegations of war crimes and crimes against humanity committed during the end of Sri Lanka's civil war in 2009. There are also allegations that members of the Sri Lanka Navy are actively involved in the people smuggling trade.

The Sri Lanka Police have a long and well-documented track record of torture and mistreatment in custody, including the rape of men and women. Sri Lankan security forces are extremely well-networked to identify boat passengers of interest to the Sri Lankan authorities, and some have been transferred to executive detention under Sri Lanka's draconian *Prevention of Terrorism Act*.

1.3 Australia increases the risk of people being returned to mistreatment

Australia has also forcibly returned over 1100 Sri Lankans since October 2012. Ignoring the evidence that shows a significant percentage of Sri Lankan boat arrivals are likely to be refugees, Australia bases its treatment of Sri Lankan arrivals on the politically expedient assumption that they are not genuinely seeking protection and are all 'economic migrants.'

Australia's Minister for Immigration and Border Protection Scott Morrison has been clear in his intention to return *all* Sri Lankans. In the context of Sri Lanka recovering from three decades of war and in a climate of ongoing serious human rights abuses, it is disingenuous to cast all Sri Lankan arrivals in Australia as economic migrants.

Sri Lankans are the only national group subject to 'enhanced screening' on arrival in Australia. This process involves interviewing new arrivals without providing them with access to legal advice or information about their rights. Screening is an administrative

shortcut that denies Sri Lankans a proper opportunity to claim asylum and in doing so returns vulnerable Sri Lankans to situations where their lives and safety may be at risk.

Despite the risk of harm on return to Sri Lanka, Australia does not take any proactive steps to monitor the safety of the over 1100 people who have been returned since October 2012. Australia claims that nobody has been harmed upon return, but documents obtained through freedom of information (**FOI**) show that Australia's follow up of complaints about abuse by returnees may be seriously deficient. In one instance where Australia received a complaint that a returnee had been "severely tortured," the Australian Federal Police (**AFP**) officer in Colombo, despite being in the police building where the complainant was being held, declined an invitation to meet with the complainant to assess his well-being.

1.4 Australia violates its international obligations

Australia has a sovereign right to control its borders, but that right is not absolute. Australia must conduct immigration control in accordance with its international law obligations.

There is scant information about exactly what Australian officials are doing on the ground in Sri Lanka or the extent to which they might be directly complicit in any wrongdoing by Sri Lankan military or police. Although Australia asserts its cooperation with Sri Lanka to combat people smuggling is conducted in full compliance with Australia's human rights law obligations, this assertion is difficult to accept.

Australia's close cooperation with Sri Lanka is expressly aimed at resourcing and supporting Sri Lankan interception of boats and preventing Sri Lankans from leaving their country. At times Australia may even share intelligence that leads directly to interceptions. The interceptions frustrate the right that every individual has to leave their country and seek protection. They also expose the intercepted people to the risk of torture and mistreatment.

In these circumstances, there are good arguments that Australia's involvement in interceptions aids and assists Sri Lankan violations of international law and violates Australia's international law obligation to act in good faith in accordance with its treaty obligations. By 'screening out' and returning asylum seekers who do make it to Australian territory without a fair and thorough assessment process, and without

adequate protection on return, Australia also risks violating the fundamental obligation under international law not to return people to harm.

1.5 Australia's cooperation with Sri Lanka is conducted under a shroud of secrecy, without proper oversight or accountability

There is very little transparency about the laws, policies or guidelines that apply to Australian officials acting abroad in supporting boat interceptions.

Australia's cooperation with Sri Lanka to intercept boats is conducted under a shroud of secrecy. Only one Australian government official agreed to speak on the record in the preparation of this report. It is unclear what basic laws, policies and standards apply to Australian officials in their cooperation. Oversight mechanisms such as parliamentary committees provide only limited oversight of the human rights impact of Australia's border security work in Sri Lanka.

Despite serious and credible allegations of torture, war crimes and crimes against humanity against Sri Lanka's security forces, Australia has no legal requirement to comprehensively vet the human rights record of the individuals or units with which it works on border security. Australia does not undertake comprehensive due diligence to ensure that there are not credible allegations of serious human rights abuse (rape or torture), war crimes or crimes against humanity against the individuals or units within Sri Lankan security forces (comprised of both Sri Lankan military and police) that receive Australian assistance.

Australian officials are quick to emphasise that they keep at arms-length from any direct involvement in the boat interceptions and to state the limited role played by their particular agency. Agencies appear to want to avoid responsibility for the potentially negative consequences of Australia's work as a whole.

There are no government mechanisms that properly oversee the impact of Australia's support for interception as a whole on the human rights of Sri Lankans. Parliamentary mechanisms have proved to be of limited value or have not been used.

Some of the border protection work has been funded through Australia's aid budget. The AFP categorises its training of Sri Lanka Police as Official Development Assistance, but admitted that the Australian national interest is the paramount concern

in the training. There is not enough information on the public record to assess how much aid is spent on other cooperative border protection activities in Sri Lanka that effectively contain asylum seekers.

Allegations about the Sri Lanka Navy's direct involvement in people smuggling raise serious questions about the suitability of Sri Lanka as a partner in anti-people smuggling activities that may expose asylum seekers to risk. Senior members of the Sri Lanka Navy are suspected of being key players in the people smuggling operations to Australia, including a Lieutenant Commander who had briefed Australia on the Sri Lanka Navy's anti-people smuggling measures. Australia should conduct a thorough vetting of its partner agencies in Sri Lanka to determine whether these allegations are credible, and to ensure Australia is not providing any support for officials or agencies engaged in people smuggling.

1.6 Australia fails to be a strong regional human rights leader

The overall impact of Australia's actions in this area seriously diminishes Australia's international standing and undermines Australia's ability to promote good governance, human rights and security in Sri Lanka and our region.

Forthright diplomacy by Australia and the international community on governance and human rights in Sri Lanka will help to create the lasting conditions in Sri Lanka necessary to stop the persecution that causes some people to flee on boats. Perversely, our current boat policy in relation to Sri Lanka undermines these diplomatic efforts.

Instead, Australia is increasingly reluctant to criticise Sri Lanka's appalling human rights record. Prime Minister Abbott says that Australia needs to maintain the "best possible relations" with Sri Lanka to ensure that Sri Lanka will continue to accept returnees.

At the Commonwealth Summit held in Sri Lanka, Prime Minister Abbott avoided criticising Sri Lanka's human rights record despite strong statements of concern made by other likeminded states such as Canada, the United Kingdom and India. By contrast, Prime Minister Abbott made a statement, contrary to Australian and international law, that seemed to excuse Sri Lanka's history of torture and suggesting, that in "difficult circumstances, difficult things happen."

2 How this report was prepared

In 2012 and 2013, the Human Rights Law Centre's (**HRLC**) Director of Advocacy and Research, Emily Howie, spent five and a half months in Sri Lanka conducting research as a fellow of Columbia University in New York. Whilst in Sri Lanka, Emily interviewed people who had tried to leave Sri Lanka but had been intercepted by Sri Lankan authorities. The research focused on the motivations behind the surge in boat migration from Sri Lanka and the experiences of those people who were intercepted.

In 2013, upon her return to the HRLC, the HRLC built on Emily's research experience to examine more closely Australia's role in the Sri Lankan interceptions.

This report pieces together information from the public record, documents obtained through freedom of information requests and interviews with Australian government officials in order to understand the nature and extent of Australian Government departments' and agencies' work with Sri Lanka to intercept boats. Despite attempts to interview people across government, only one Australian government official was willing to speak on the record.

The HRLC requested to meet with a range of Australian Government officials in the preparation of this report. The HRLC contacted key people inside the Department of Prime Minister and Cabinet (**PM&C**), the Department of Foreign Affairs and Trade (**DFAT**), Customs, AFP, the Department of Immigration and Border Protection (**DIBP**), the Department of Defence (**Defence**) and Australia's former aid agency, AusAID, offering the opportunity to speak on the record about their agency's work in cooperation with Sri Lanka in relation to interceptions carried out in Sri Lanka. The offer was to speak with that person, or to another person within their department or agency nominated by them.

Only one official, an Assistant Commissioner at AFP, agreed to be interviewed on the record. AFP also provided a written response to questions put following the interview.

At DFAT, the HRLC met with the Ambassador for People Smuggling Issues, although the contents of the meeting were off the record.

The Commander of Border Protection Command advised that Minister Morrison's office asked that the request be referred to Minister Morrison's office.

Minister Morrison agreed to meet with the HRLC in November 2013 but would not provide answers to questions during the meeting or give permission for the HRLC to speak with the Commander of Border Protection Command. Instead he agreed to coordinate answers to any questions that the HRLC put in writing, including through the Foreign Minister's office. Questions were put in writing on 21 November 2013, but no response had been received over three months after that (see Appendix 1).

At the Department of Prime Minister and Cabinet (**PM&C**), the National Security Adviser replied that she had nothing to add to what is on the public record and that nobody else at PM&C would add anything further. The First Assistant Secretary of the International Division (also former High Commissioner to Sri Lanka) did not respond at all to requests for an interview.

The CEO of Customs responded to our request saying that Customs had provided a response to a freedom of information request and would not be providing anything further.

At DIBP, a request was sent to the Assistant Secretary of Border Operations Branch on 7 August 2013. He replied that Assistant Secretary, Immigration Intelligence Branch was the best person to handle the matter. Despite indications that the Assistant Secretary was willing to meet, at the time of publication of this report, 7 months after the initial request, a meeting time had not been made available.

A request sent to the Deputy Secretary of Intelligence and Security at Department of Defence was dealt with by the Director, South Asia. The response provided a one paragraph description of Defence's work and offered to discuss the matters further. It also reiterated the Department's "long standing policy of not commenting on intelligence matters."[1] After a short telephone call discussing the matter, the Director offered to answer questions put in writing. Questions were provided on 16 August 2013 but no response has been received over 7 months after the initial request was put (see Appendix 2).

HRLC also made a range of freedom of information requests; some in partnership with the Guardian Australia.

[1] Letter from Department of Defence to Human Rights Law Centre, 23 August 2013, copy on file with the HRLC.

3 Recommendations

3.1 To the Australian Government

a) Stop encouraging, facilitating and resourcing Sri Lankan authorities to intercept asylum seekers as they try to flee Sri Lanka.

b) Stop using the 'enhanced screening' process to test the protection claims of Sri Lankan boat arrivals. Ensure that all boat arrivals are provided full access to Australia's refugee determination process.

c) Support multilateral efforts, especially through UNHCR and the Office of the High Commissioner for Human Rights (**OHCHR**), to ensure that fundamental human rights standards relating to the treatment of people intercepted in Sri Lanka are observed.

d) Reconfirm Australia's commitment to international refugee protection, premised on burden sharing, not burden shifting. Take measures to provide safe pathways for Sri Lankans to access international protection.

Due diligence

e) Introduce a law to ensure due diligence is conducted in relation to individuals and units within foreign security forces that receive direct aid from Australia. The law should require:

- vetting of all military or police personnel and units overseas who receive Australian training or assistance for credible allegations against them of serious human rights abuses, including rape and torture, war crimes or crimes against humanity;
- that any personnel with such credible allegations made against them cannot be the recipient of Australian assistance;
- that the vetting process include clear, thorough processes DFAT to consult with a range of government agencies and civil society actors in order to investigate whether credible allegations exist;
- annual reporting by DFAT on the number of persons investigated and numbers that were refused assistance; and

- disclosure, where possible, of persons or units who were denied Australia's help.

Public statements

f) Undertake stronger public and private diplomacy that acknowledges serious ongoing human rights abuses in Sri Lanka.

g) Publicly acknowledge that there are asylum seekers among the boat passengers who are intercepted by Sri Lankan authorities, and that they deserve the opportunity to seek protection.

Transparency and accountability

h) Establish an independent audit of the human rights impact of Australia's work on people smuggling and supporting interceptions in source countries for refugees.

i) Make public all agreements between the Australian and Sri Lankan governments, including between the police forces, concerning interception activities and the return of asylum seekers.

j) Make public the laws, policies and guidelines that govern the work of Australian officials abroad in their cooperation on border control.

Monitoring

k) Task DFAT to monitor the safety of Sri Lankans who are forcibly returned. Appoint a full time staff member at the High Commission in Colombo dedicated to monitoring the human rights of returnees. Ensure that returnees are able to report any mistreatment upon return in a safe and confidential process.

Aid

l) Stop using aid money to support or facilitate the Sri Lankan authorities' interception of asylum seekers.

m) Direct development assistance to improve respect for human rights and human dignity in Sri Lanka to address the root causes of forced migration.

3.2 To the Australian Federal Police

n) Make public the protocols and guidelines that govern the AFP's work on the ground in Sri Lanka, especially any limitations on sharing information with the Sri Lanka Police.

o) Ensure that before sharing information with Sri Lanka in support of a custodial interview, the AFP will satisfy itself (including by reasonable inquiry where necessary) that the interviewee is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment.

p) Provide clear guidance on which Australian agencies should be notified where the AFP becomes aware that torture or cruel, inhuman and degrading treatment is used.

q) Publicly report annual statistics on the reporting of any instances of, or knowledge of, torture and cruel inhuman and degrading treatment.

3.3 To the Foreign Minister

r) Establish a Human Rights Advisory Group, comprising experts from NGOs, academia and human rights bodies, to provide advice on foreign policy and options for addressing human rights problems.

s) Appoint an Australian Human Rights Ambassador to play a human rights coordination and leadership role in the region and internationally.

t) Provide such additional resources to DFAT as is necessary for Australia to become a more effective and active human rights-promoting State, including by increasing the number of human rights officers and incorporating human rights in all DFAT training.

4 Background

4.1 Sri Lanka's recent history

In 2009 Sri Lanka emerged from a three decade-long civil war between the Sri Lankan Government and the separatist LTTE, a nationalist organisation fighting for a Tamil homeland in the Tamil-majority areas in the north and east of the country.

For decades the LTTE controlled parts of the north and east, operating a government of sorts for the people in its territory. The LTTE used terrorist tactics throughout Sri Lanka to pursue its cause for Tamil independence, including suicide bombing and targeting civilians.

In 2009 President Mahinda Rajapaksa's Government brought the war to an end in bloody and controversial circumstances. There is credible evidence of serious war crimes committed by both sides of the conflict. An expert United Nations (**UN**) report found credible evidence that Government forces deliberately targeted and shelled thousands of civilians, persecuted the population and intimidated journalists seeking to cover the war.[2] It estimates that 40,000 civilians were killed in the final stages of the war. By the same token, the LTTE are accused of using civilians as a human buffer, forcibly recruiting children for combat and killing people who tried to leave LTTE controlled areas.[3] However, the majority of civilian deaths in the final phases of the war were caused by Government shelling.[4]

Since the war the Sri Lankan Government has gone down an increasingly authoritarian road. Following her visit to Sri Lanka, in August 2013 the United Nations High Commissioner for Human Rights said she was "deeply concerned that Sri Lanka, despite the opportunity provided by the end of the war to construct a new vibrant all-embracing state, is showing signs of heading in an increasingly authoritarian direction."[5]

[2] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, p iii, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

[3] Ibid p iv.

[4] Ibid p 49.

[5] Navi Pillay, UN High Commissioner for Human Rights, 31 August 2013, reported by UN News Centre at a http://www.un.org/apps/news/story.asp/story.asp?NewsID=45743&Cr=Sri+Lanka&Cr1=.

The Sri Lanka Campaign for Peace and Justice estimates that 45% to 70% of the Sri Lankan economy is under the control of President Mahinda Rajapaksa and his brothers, Secretary of the Department of Defence Gotabhaya Rajapaksa and Minister for Economic Development Basil Rajapaksa, who manage five of the largest ministries in the country.[6]

In 2010, the passage of the 18th amendment to the Constitution removed important checks and balances on the power of the President. The 18th amendment removed term limits for the President and granted him wide powers to appoint judges and senior appointee to independent bodies such as the Police Commission, Human Rights Commission and Elections Commission.[7]

Since the end of the war, the rule of law has been gradually eroded in Sri Lanka.[8] In January 2013 the Chief Justice was unconstitutionally impeached after she handed down judgments that did not favour the central Government.[9] The politicisation of the judiciary through the appointment of one of the President's former advisers to the position of Chief Justice was a further blow to the independence of the judiciary and separation of powers.[10]

Sri Lankan courts no longer provide an independent check on executive power.[11] On the contrary, senior Sri Lankan human rights lawyers have described the courts' transformation since the end of the war "from a guardian of rights to an enabler of rights

[6] See Sri Lanka Campaign for Peace and Justice, 'The Rajapaksas: keeping it in the family', Infographic, available at http://1.bp.blogspot.com/-llj21DHtNvY/UUoiIjldpOI/AAAAAAAAAWY/4GeUkUYXzOM/s1600/sri+figure_20.03.13.jpg.

[7] 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', UN Doc. A/HRC/24/CRP.3/Rev.1, 23 September 2013, para. 26, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-CRP-3-Rev1_en.doc.

[8] Ibid.

[9] For more about the impeachment of the Chief Justice, see the International Bar Association Human Rights Institute, *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law*, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0d4e1219-9ce2-4390-81f9-efd8cbdacf6c, [accessed on 11 June 2013].

[10] 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', above n 7, para. 26.

[11] Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights*, Law and Society Trust, January 2014.

violations."[12] Sri Lankan lawyers now express concern that they face pressure in relation to bringing fundamental rights applications.[13]

In fact any criticism of the Government by civil society risks serious reprisals, including abduction, disappearance and death.[14] Following her visit to Sri Lanka, in September 2013 the High Commissioner for Human Rights reported high levels of intimidation and harassment of lawyers, human rights defenders and journalists, including of people to whom she spoke during her visit.[15]

Sri Lanka is ranked fourth in the Committee to Protect Journalists' 'impunity index' that ranks the worst countries in which journalists are killed with impunity. Ten journalists have been killed there in the last decade and their murders have not been solved.[16]

Since the end of the war the military has actually grown in size and is increasingly involved in the civilian government of the Tamil-majority Northern Province.[17] Tamils living in the areas formerly controlled by the LTTE still live under a heavy military influence, with an estimated one soldier for every five civilians in the Northern Province.[18] To put that figure in perspective, US Institute of Defence Analyses advised the US Department of Defence that 1 security personnel for every 20-25 civilians would

[12] Ibid p 28.

[13] 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', above n 7, para. 26. See also discussion of Nimalaruban's case in Guneratne et al, above n 11, pp 142- 145. Where national security concerns are raised by the state, judges have had little inclination to uphold fundamental rights, including in cases of deaths in custody. In October 2013, Mohan Peiris dismissed a fundamental rights application by the father of a Tamil political prisoner held on remand who had been beaten to death by Special Task Force of the police. In doing so the man acting as Chief Justice reportedly made comments supporting the right of prison authorities to use force, stating that human rights were there to protect the majority and denying access to government documents saying that disclosure would then be used to tarnish Sri Lanka's image overseas.

[14] Amnesty International, *Sri Lanka's assault on dissent*, 30 April 2013, available at http://www.amnesty.org/en/library/asset/ASA37/003/2013/en/338f9b04-097e-4381-8903-1829fd24aabf/asa370032013en.pdf [accessed on 10 June 2013].

[15] 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', above n 7, para. 25.

[16] Committee to Protect Journalists, 'Impunity Index', available at http://www.cpj.org/reports/2012/04/impunity-index-2012.php, [accessed on 10 June 2013]. Mel Gunerasekera was killed in February 2014: see Colombo Gazette, 'Cops detain murder suspect', posted 3 February 2014, available at http://colombogazette.com/2014/02/03/cops-detain-murder-suspect/ .

[17] Correspondent, 'Notes on the Military Presence in Sri Lanka's Northern Province', *Economic and Political Weekly*, July 14, 2012, Vol XLVII, No 28; 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', above n 7, para. 9.

[18] Correspondent, 'Notes on the Military Presence in Sri Lanka's Northern Province', above n 17, p 35.

be required for a reasonably high confidence of operational success in counter-insurgency operations during war.[19]

A UK court that took evidence about the situation in Sri Lanka said:

> The evidence before us indicates that the Sri Lankan government is determined to ensure that Tamil separatism and the conflict it brought never recur. The government's intention is being carried into effect by an intensive militarisation and Sinhalisation of former Tamil areas, "rehabilitation" of 11,000 former LTTE cadres, and intelligence-led monitoring and supervision of Tamil activities, both within Sri Lanka and in the diaspora.[20]

For two years running the United States has sponsored a resolution in the March session of the United Nations Human Rights Council. The resolution has called on Sri Lanka to implement the recommendations of Sri Lanka's Lessons Learned and Reconciliation Commission[21] and also to conduct an independent and credible investigation into allegations of violations of international human rights law and international humanitarian law.[22] To date, Sri Lanka has failed to implement such an investigation.[23] In her report to the Human Rights Council in February 2014, the UN High Commissioner for Human Rights has said that national mechanisms have consistently failed to establish the truth and achieve justice, and that this is because of a lack of political will on the part of the Sri Lankan Government.[24] She called for the international community to establish an international inquiry mechanism.

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[19] Ibid.

[20] *GJ and Others (post-civil war: returnees) Sri Lanka CG v. Secretary of State for the Home Department*, [2013] UKUT 00319 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 3 July 2013, paragraph 7 (**Country Guidance Case**).

[21] The Commission's key recommendations include ensuring military in the North are out of civilian life, investigating disappearances, establishing an independent body to monitor detention under the Prevention of Terrorism Act, having bilingual public officers available on a 24 hour basis and retaining singing of national anthem simultaneously in two languages, Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, November 2011, available at http://www.defence.lk/news/pdf/FINAL-LLRC-REPORT.pdf.

[22] UN Human Rights Council, Resolution promoting reconciliation and accountability in Sri Lanka, 22nd session, 19 March 2013, UN Doc. A/HRC/22/L.1/Rev.1.

[23] The Sri Lankan Government has made some attempts to further accountability in these areas, for example in establishing limited inquiries into some disappearances and a military court of inquiry, but these mechanisms fell well short of the credible, independent investigative body envisaged in the Human Rights Council resolutions: see discussion in 'Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka', above n 7.

[24] United Nations High Commissioner for Human Rights, *Promoting reconciliation and accountability in Sri Lanka*, UN Doc. A/HRC/25/23, 24 February 2014.

It is this Government and these security forces with which the Australian Government cooperates to stop boats from leaving.

4.2 Migration and interception figures

Since 2012, more Sri Lankan people have made the journey by boat to Australia than ever before. Since January 2012, Australia has received more than 8300 Sri Lankans by boat; 1957 of those arrived in 2013.[25] In 2012, a year in which Australia saw the largest number of boat arrivals on record, Sri Lankans comprised the single biggest national group among boat arrivals to Australia.[26]

Australia has never seen Sri Lankans arrive by boat in these numbers. In 2009, at the end of Sri Lanka's civil war, only 736 Sri Lankans arrived by boat in Australia.[27]

Despite years of Sri Lankan migration to Australia, including constant refugee flows, the size of this influx of Sri Lankans to Australia is a new phenomenon; both in quantity and mode of arrival. The reasons behind the increase in numbers are complex and include ongoing discrimination, persecution, torture and other human rights abuses in the country, entwined with economic concerns.[28]

However, the arrivals in Australia do not reveal the true extent to which people are seeking to flee from Sri Lanka. In the last few years the Sri Lankan Government claims to have intercepted 4,500 of its people during their journey en route to Australia.[29]

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[25] Ben Doherty, 'Sri Lankan naval officer arrested over people smuggling', *The Age*, 9 September 2013, available at http://www.theage.com.au/national/sri-lankan-naval-officer-arrested-over-people-smuggling-20130908-2te1k.html.

[26] Naomi Selvaratnam, 'Why do asylum boats keep coming from Sri Lanka?', *SBS Radio*, available at http://www.sbs.com.au/news/article/1722996/Why-do-asylum-boats-keep-coming-from-Sri-Lanka, [accessed on 15 April 2013].

[27] UNHCR, *Information Note: Mixed Maritime Movements in the Asia-Pacific Region*, Annex 4, available at http://unhcr.org.au/unhcr/images/Attachment%20B%20Information%20Note%20on%20IMMs%2025%20April%202012.pdf [accessed on 14 April 2013].

[28] The DIBP's own research shows nearly 40% of arrivals cited persecution or torture as a reason for wishing to leave Sri Lanka: Dinuk Jayasuriya and Marie McAuliffe, *Placing recent Sri Lankan maritime arrivals in a broader migration context*, Department of Immigration and Border Protection's Irregular Migration Research Program Occasional Paper Series, October 2013, p 22. See also Emily Howie, 'Sri Lankan Boat Migration to Australia: Motivations and Dilemmas', *Economic and Political Weekly*, Vol. XLVIII, No 35, 31 August 2013.

[29] The statistic of 4500 was reported by Greg Sheridan after his trip to Sri Lanka as the guest of the Sri Lankan Government, Greg Sheridan, 'Sri Lanka Holds Back the Tide', *The Australian*, 29 August 2013,

4.3 At a glance

- Since the end of its civil war in 2009, Sri Lanka has become increasingly authoritarian; the rule of law has been eroded and serious human rights violations continue to occur.
- There are credible allegations of war crimes and crimes against humanity committed by the Sri Lankan military during the final phases of the war.
- It is this military and Government with which Australia cooperates to prevent people from leaving Sri Lanka.
- Sri Lanka claims to have intercepted 4500 people en route to Australia, including many who would be asylum seekers.

available at http://www.theaustralian.com.au/opinion/columnists/sri-lanka-holds-back-the-tide/story-e6frg76f-1226706023508.

5 Australia's work on border control activities in Sri Lanka

5.1 From immigration control to 'anti-people smuggling'

Since at least 2009 Australia has partially outsourced border control to Sri Lankan authorities. The aim, as former Prime Minister Julia Gillard put it, "is to stop the boats before they leave foreign shores"[30] and prevent risky boat journeys from Sri Lanka to Australia.[31] Prime Minister Abbott has touted a reduction in the number of boats that reach Australia from Sri Lanka as a key measure of the success of this cooperation.[32]

Customs conceives of the Australian border as a continuum that stretches from the physical exit and entry points in Australia through its territorial waters and into the sovereign territory of other states.[33] As such, Customs and other agencies operate not only at Australian ports and airports and in Australian territorial waters, but also inside

[30] AAP, 'Stop boat people getting on boats: PM', *The Sydney Morning Herald*, August 18, 2010, available at http://news.smh.com.au/breaking-news-national/stop-boat-people-getting-on-boats-pm-20100818-128qo.html.

[31] See for example former Foreign Minister Bob Carr, Media Release, 'Australia-Sri Lanka talks: Four point plan to fight people smuggling', 17 December 2012, available at http://www.foreignminister.gov.au/releases/2012/bc_mr_121217.html.

[32] Prime Minister, Media Release, 'People Smuggling Cooperation with Sri Lanka', 17 November 2013 available at http://www.pm.gov.au/media/2013-11-17/people-smuggling-cooperation-sri-lanka.

[33] Australian Customs and Border Patrol Service, Annual Report 2011-12, p 3, available at http://www.customs.gov.au/webdata/resources/files/annualreport2011-12.pdf [accessed on 6 June 2013].

other countries such as Sri Lanka.[34] Commentators have noted that most of the real action in immigration control is now happening offshore.[35]

Since 2009, Australia has cultivated a very close cooperative relationship with the Sri Lankan Government and various key Sri Lankan agencies, which enables Australian officials to work with them on border control inside Sri Lanka. For example, the AFP has a liaison officer based in Colombo who works directly with counterparts in the Sri Lanka Police Service.[36] Similarly, Australian Defence, Customs and Immigration personnel work with their counterparts in the Sri Lankan Government and military to prevent irregular departures.

Prime Minister Abbott has described the relationship as "the closest possible cooperation in preventing the evil trade of people smuggling."[37]

In November 2013, Mr Abbott said that:

> …[c]ooperation with Sri Lankan authorities to counter people smuggling and disruption operations has been well-coordinated and highly effective, with at least 12 on-water interceptions by the Sri Lankan Navy in 2013.[38]

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[34] The work is done under the law enforcement paradigm of "dismantling people smuggling syndicates" and in order to "identify, deter and where possible, mitigate risks from moving in and out of Australia", Australian Customs and Border Patrol Service Annual Report 2011-12, p 3. See also The Hon Brendan O'Connor, Minister for Home Affairs, Statement to the House of Representatives, Matters of Public Importance, 20 October 2009, Hansard at p 10361 available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-10-20%2F0061%22; In June 2011, then Australian High Commissioner Kathy Klugman confirmed that Australian officials operated at Bandaranaike International Airport in Colombo: Olindhi Jayasundere, 'Aust. wants to detect 'Asylum Seekers' at BIA', *Daily Mirror*, 16 June 2011, p 1.

[35] See for example, Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?' in Jane McAdam (ed.), *Force Migration, Human Rights and Security*, Hart Publishing, 2008, p 93.

[36] Since at least 2009, AFP has had officers on the ground working from the Australian High Commission: Australian Federal Police Annual Report 2008/2009. See discussion in Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 5 June 2013, from p 90, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/7024640c-4abd-47d5-9fb3-f32fb2986e2e/toc_pdf/Foreign%20Affairs,%20Defence%20and%20Trade%20Legislation%20Committee_2013_06_05_2001_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/7024640c-4abd-47d5-9fb3-f32fb2986e2e/0000%22.

[37] Prime Minister, Press Conference, Colombo, Sri Lanka, 17 November 2013, transcript available at: http://www.pm.gov.au/media/2013-11-17/press-conference-colombo-sri-lanka. Prime Minister Tony Abbott used his November 2013 visit to Sri Lanka during the Commonwealth Heads of Government Meeting to make clear that "Australia appreciates its strong cooperative relationship with Sri Lanka in countering people smuggling", Prime Minister, Media Release, 17 November 2013, above n 32.

In 2012, the cooperation saw 65 boats intercepted involving 2900 people.[39]

Sri Lanka's Chief of Navy confirmed that its role is to contain boats, saying recently that the Sri Lanka Navy takes the task of stopping boat journeys "very seriously."[40]

The relationship between Australia and Sri Lanka was formalised in November 2009 in a Memorandum of Understanding (**MOU**) between the two countries and is operationalised through the Joint Working Group on People Smuggling and Transnational Crime.[41] The MOU sets out in broad terms the way in which the two countries cooperate "in preventing and responding to migrant smuggling and related activity", including exchange of laws, convening meetings and workshops, capacity-building initiatives, sharing best practice and cooperation in regional fora and any additional areas that the two countries may agree (clause 5).[42]

This is part of the Australian Government's construction of people smuggling as a policing issue, placing it in the context of national security concerns and transnational crime. [43]

Discussion at the Joint Working Group's inaugural meeting in Colombo in December 2012 focused on "further boosting maritime security in the region *in order to find ways and means of containing illegal migration attempts to Australia from the Island*" [emphasis added].[44] Border control activity in Sri Lanka is no longer the sole purview of

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[38] Ibid.

[39] Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

[40] 'Abbott defends Sri Lanka boat deal', *SBS News*, 17 November 2013, available at http://www.sbs.com.au/news/article/2013/11/17/aust-asylum-patrol-boats-sri-lanka.

[41] *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants*, signed 9 November 2009, released under the *FOI Act 1982* by the Attorney-General's department, copy on file with the HRLC.

[42] Ibid.

[43] See Sharon Pickering, 'The Production of Sovereignty and the Rise of Transversal Policing: People-smuggling and Federal Policing', 2004 (37) *Australian & New Zealand Journal of Criminology* 362, p 363. See also "We are working… with regional partners to combat [people smuggling], through such groupings as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime", The Hon Stephen Smith, former Foreign Minister, Statement to Parliament, 17 May 2010, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2010-03-17%2F0113%22.

[44] Ministry of Defence and Urban Development, 'Sri Lanka – Australia Joint Working Group Conference held', last modified 18 November 2012, available at http://www.defence.lk/new.asp?fname=Sri_Lanka_Australia_Joint_Working_Group_conference_held_20121217_07. In Senate Estimates hearings, after Greens Senator Lee Rhiannon referred to reports that "the

Customs; it involves a raft of inter-agency cooperation in order to disrupt boat journeys headed for Australia.

It is clear from the terms of the MOU, and the statements made since that time that the cooperation deals with irregular boat migration as a criminal, people smuggling issue.[45] While this approach may be in part a response to people smuggling networks, it is used by the Australian Government as a justification for broad ranging practices designed to curtail irregular migration by sea that also contain Sri Lankan asylum seekers inside Sri Lanka.[46] It is a crime in Sri Lanka to leave by boat except through an official port.[47] Because of the focus on crime, the policies fail to acknowledge that the passengers who are intercepted by Sri Lankan authorities are likely to include asylum seekers who are vulnerable in interaction with Sri Lankan authorities.

5.2 "Closest possible cooperation"

Australia's work on interceptions in Sri Lanka was described by Australia's previous Government as a "four-point plan to fight people smuggling" which identified four broad areas of work: information and intelligence sharing; on-water disruption, advertising and awareness campaigns; and an aid program to "reduce demand."[48]

A range of Australian agencies have formed a close and productive working relationship with Sri Lankan agencies aimed at stopping Sri Lankan people getting on boats to Australia.

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government is giving an emphasis to transnational crime to try to dilute that it is basically about people smuggling", Ambassador for People Smuggling Issues, Craig Chittick, confirmed that the "majority of time spent [at the Joint Working Group's meeting] was devoted to people smuggling", Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 5 June 2013 above n 36 at p 133.

[45] The language used by the Australian Government to discuss this cooperation is not that of offshore immigration control but an increasingly "busy program of bilateral law enforcement collaboration" directed against 'people smuggling': Australian High Commission, Colombo, Media Release, 'International Best Practice in Mutual Legal Assistance Workshop', 17 May 2012, available at http://www.srilanka.embassy.gov.au/clmb/120517_AGD.html. Australia and Sri Lankan officials collaborate on "mutual legal assistance", described as "allowing police, prosecutors and courts in different nations to access and share critical information, evidence and witnesses in order to secure convictions."

[46] See Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law,* Oxford University Press, 3rd ed., 2007, p 372.

[47] Immigrants and Emigrants Act 1949 makes it an offence to leave Sri Lanka other than through an authorised port or to facilitate such departures (ss 9 & 45(1)(b)).

[48] Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

However, whilst the picture as a whole is of integrated support across Australian Government departments and agencies, individual departments and agencies tend to represent their work as limited in scope, and are quick to distance themselves from direct involvement in interception work or interrogations. This reflects a concern not just to respect the territorial integrity of Sri Lanka but perhaps also to distance Australia from responsibility for any misconduct by Sri Lankan forces.

The Sri Lanka Police have an appalling track record of torture and mistreatment in custody, and there are serious, credible allegations of war crimes and crimes against humanity against the Sri Lankan military (see part 6.3 below). If Australia is closely cooperating with these bodies, it is important that Australian officials are not put in a position where they become complicit in any of their counterparts' mistreatment of people in custody, nor should Australia be resourcing units of the Sri Lankan military against which there are credible allegations of war crimes or crimes against humanity.

However, there is little detail on the public record about exactly what Australian officials do when they work in Sri Lanka in these ways. Apart from broad statements of areas of work, the Australian Government has provided little information on Australian operations in Sri Lanka. The following parts piece together material on the public record in order to provide a picture of the nature and extent of the cooperation.

5.2.1 Resourcing land and on-water interceptions

Australia may not be directly involved in land or on-water disruptions in Sri Lanka, but Australia provides the means and knowledge for the interceptions to take place.[49]

Australia's 'on water' cooperation extends to collaboration between the Australian Defence Force and Sri Lankan Defence Forces, and engagement by Customs.[50] Australia provides vital search and rescue equipment to intercept vessels and Australia-

[49] Although Prime Minister Abbott has affirmed Australia's commitment to continue its "excellent cooperation at sea" with Sri Lanka, Australian agencies have denied direct involvement in intercepting boats attempting to leave Sri Lanka. When asked about Australia's involvement in on-water disruptions, the Ambassador for People Smuggling Issues told a Senate Estimates hearing that "this is a matter for the sovereign state of Sri Lanka": Craig Chittick, Ambassador for People Smuggling Issues, Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 5 June 2013, above n 36 at p 133.

[50] Craig Chittick, Ambassador for People Smuggling Issues, Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 5 June 2013, above n 36 at p 131.

based maritime air surveillance training to enable the Sri Lanka Navy and Coast Guard to perform on-water 'disruptions.'[51]

Australia provides several million dollars a year in materiel support for the Sri Lanka Navy alone.[52] Customs has also gifted operational equipment to Sri Lanka, including to the Sri Lanka Coast Guard.[53]

Further, Australia also exchanges information with Sri Lanka which it is aware may lead to the interdiction of boats.[54]

In November 2013, Prime Minister Abbott announced a $2 million gift of two patrol boats to the Sri Lanka Navy, ostensibly to be used for "humanitarian purposes" to "ensure the safety of life at sea".[55] However, media reports suggested that the 2009 MOU which purports to govern the arrangement does not limit how Sri Lanka might use the military assets.[56] At the same time, Sri Lanka confirmed that a fresh MOU existed between Sri

[51] Customs has gifted operational equipment to Sri Lanka Coast Guard: see Report of the Expert Panel on Asylum Seekers, August 2012, p 115; see also Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

[52] Statement in House of Reps, The Hon Brendan O'Connor, Minister for Home Affairs, Questions without Notice: Border Security, 16 June 2009, in Hansard p 6082 available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-06-16%2F0012%22. Ben Doherty, 'Sri Lanka to make more arrests: More sailors linked to people smuggling ring', *The Sydney Morning Herald*, 16 November 2013 available at http://www.smh.com.au/national/sri-lanka-to-make-more-arrests-more-sailors-linked-to-people-smuggling-ring-20131115-2xmdd.html.

[53] Report of the Expert Panel on Asylum Seekers, August 2012, p 115.

[54] Tony Negus, Commissioner, AFP and Michael Phelan, Deputy Commissioner Operations, AFP, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, in Hansard p 100, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/99847986-e33f-4c0a-aabd-d1d65f570cd1/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_11_18_2101_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/99847986-e33f-4c0a-aabd-d1d65f570cd1/0000%22.

[55] Amanda Hodge, 'Boats to halt asylum-seekers at source', *The Australian,* 17 November 2013 available at http://www.theaustralian.com.au/national-affairs/policy/boats-to-halt-asylum-seekers-at-source/story-fn9hm1gu-1226761957645.

[56] David Wroe and Ben Doherty, 'No restrictions on patrol boats gifted to Sri Lanka', *The Age*, 19 November 2013 available at.http://www.smh.com.au/federal-politics/political-news/no-restrictions-on-patrol-boats-gifted-to-sri-lanka-20131118-2xrd0.html#ixzz2luVZ0PT4.

Lanka and Australia governing cooperation between the navies.[57] Details of the new MOU remain secret.

On land, the AFP has established the Maritime Human Smuggling Investigation Unit (**MHSU**) of the Criminal Investigation Division (**CID**) of the Sri Lanka Police. Prior to the AFP providing funding for the MHSU, Sri Lanka Police did not have a "people smuggling investigative or intelligence capability."[58] MHSU has played a key role in both disruptions and arrests since 2010.[59]

AFP has also provided significant support to other CID teams engaged in immigration fraud and people smuggling investigation, the Anti-Human Smuggling Investigation Bureau, and the Airport CID.[60]

Since the AFP office opened in Colombo in 2009,[61] the AFP has provided office fit outs,[62] motor vehicles, motorcycles, cameras, tape recorders, scanners and card

[57] Ben Doherty and Bianca Hall, 'Sri Lanka to use Aussie gift boats to stop people smugglers', *The Sydney Morning Herald,* 17 November 2013, available at http://www.smh.com.au/federal-politics/political-news/sri-lanka-to-use-aussie-gift-boats-to-stop-people-smugglers-20131116-2xnwc.html.

[58] See brief to Attorney-General for his meeting with His Excellency Admiral Thisara Samarasinghe, released under the *FOI Act*, copy on file with the HRLC.

[59] Ibid.

[60] See Senator Lee Rhiannon's comments at Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 118.

[61] AFP Annual Report 2008/2009, p 4, available at http://www.afp.gov.au/media-centre/publications/annual-reports/~/media/afp/pdf/a/afp-annual-report-2008-2009.ashx.

[62] In 2010-2011 AFP established, constructed and fitted out a computer based training lab for the SLPS and provided software and regional money-laundering program. AFP, Annual Report 2010-2011, 26 September 2011, available at http://www.afp.gov.au/media-centre/publications/~/media/afp/html/afp-annual-report-2010-2011.ashx.

readers to the SLPS,[63] and information technology and office equipment packages specifically for CID.[64.]

5.2.2 Capacity building

In addition to providing resources to conduct the interceptions, Australia also trains Sri Lankan agencies to conduct them.[65] The Australian Ambassador for People Smuggling Issues has emphasised that engagement between Australian and Sri Lankan agencies is primarily related to "training and sharing experience."[66]

The Department of Immigration[67] has provided training, capacity and ongoing support to assist Sri Lanka to identify and combat people smuggling.[68] The Attorney-General's Department has built capacity in Sri Lanka to combat people smuggling, including training magistrates in prosecuting people smuggling and providing development opportunities to senior Sri Lankan bureaucrats.[69] Department of Defence offers some

[63] Answer to Questions on Notice No 65, Senate Standing Committee on Legal and Constitutional Affairs, provided 19 January 2010 available at: http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_0910/ag/QON_065_AFP_amended.ashx; AFP, Annual Report 2009-2010, September 2010, available at http://www.afp.gov.au/media-centre/publications/annual-reports/~/media/afp/html/afp-annual-report-2009-2010.ashx; AFP statements at Senate Estimates, Legal and Constitutional Affairs Committee, 16 October 2012, in Hansard at p 75, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0e2bb940-ccdc-4a20-b4e0-b3e6031771e8/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2012_10_16_1457_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0e2bb940-ccdc-4a20-b4e0-b3e6031771e8/0007%22.

[64] to the value of $20,000: Australian Federal Police, Annual Report 2009-2010, September 2010, available at http://www.afp.gov.au/media-centre/publications/annual-reports/~/media/afp/html/afp-annual-report-2009-2010.ashx.

[65] A key plank of former Foreign Minister Carr's plan in 2012 was a focus on capacity building, to be provided by a range of Australian agencies in Sri Lanka: Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

[66] Ambassador for People Smuggling Issues, Craig Chittick, confirmed that the "majority of time spent [at the Joint Working Group's meeting] was devoted to people smuggling", Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 5 June 2013 above n 36 at p 132.

[67] Previously called the Department of Immigration and Citizenship, now called the Department of Immigration and Border Protection.

[68] DIAC 2010-2011 Annual Report, p. 136, available at http://www.immi.gov.au/about/reports/annual/2010-11/pdf/.

[69] For example, the former Secretary of the Ministry of Justice and Head of the Legal Draftsman's Office participated in Attorney General's Department 'pairing programs': See AGD – Meeting brief, released under the *FOI Act* by the Attorney-General's Department to the HRLC, copy on file with the HRLC.

niche training opportunities for Sri Lankan officials focused on maritime security and emergency management.[70]

The AFP provides a wide range of training to different departments of the Sri Lanka Police. The AFP has a MOU with the Sri Lanka Police, but its terms are secret.[71] The AFP has provided IT and office support, and assisted Sri Lanka Police officers to participate in regional people smuggling workshops and for a,[72] criminal intelligence analyst training, money laundering investigations training, and train the trainer programs.[73] At times the AFP has also provided training and operational support to the Sri Lanka Coast Guard and Navy.[74] During financial year 2012-13, the AFP spent $540,000 training the Sri Lanka Police[75], and the projected budget for 2013-14 is

[70] Letter from Department of Defence to the HRLC dated 23 August 2013, copy on file with the HRLC.

[71] This cooperation was originally governed by a Memorandum of Understanding signed by the AFP and Sri Lanka Police Service on 14 May 2009: AFP, Answer to Questions on Notice No 65, Senate Standing Committee on Legal and Constitutional Affairs, above n 63. HRLC requested disclosure of the document under the *FOI Act*, but the AFP claimed an exemption under freedom of information legislation.

[72] Answer to Questions on Notice No 65, Senate Standing Committee on Legal and Constitutional Affairs, above n 63.

[73] Andrew Colvin, Deputy Commissioner, Crime Operations, AFP, during Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, Hansard at p 56, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/b65d6111-3180-4362-b98c-96bf25cbcb65/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_05_30_1982_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/b65d6111-3180-4362-b98c-96bf25cbcb65/0000%22.

[74] Statement in House of Representatives, The Hon Brendan O'Connor, Minister for Home Affairs, Questions without Notice: Border Security, 16 June 2009, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-06-16%2F0012%22. In July 2012, DFAT official said that AFP officer in Colombo works to build the capacity of the coast guard and navy: Dan Flitton, 'Australia caught in Sri Lanka refugee crossfire', *The Sydney Morning Herald,* 25 July 2012, available at http://www.smh.com.au/opinion/political-news/australia-caught-in-sri-lanka-refugee-crossfire-20120724-22nkc.html. In more recent Senate Estimates hearings, AFP denied having a direct relationship with the Sri Lanka Navy and stated that they only dealt with the Sri Lanka Police.

[75] Michael Phelan, Deputy Commissioner Operations, AFP, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54, at p 106. Training and development support includes Australia sponsoring Sri Lanka Police officers to attend regional and Australia-based training programs and workshops on people smuggling and management: Answer to Questions on Notice No 65, above n 63.

$350,000.[76] The AFP says that the training that they provide to the Sri Lanka Police contains "elements consistent with Australia's stand on human rights".[77]

More recently, a task group of the Joint Agency Taskforce, set up by the current Australian Government under the auspices of 'Operation Sovereign Borders' and led by the AFP has been providing "operational support" to police in Sri Lanka.[78]

The two Governments have also held workshops to further their program of mutual legal assistance.[79]

5.2.3 Intelligence sharing

Intelligence and information sharing between Australia and Sri Lanka takes place at both governmental dialogue and agency levels and forms a key part of operational cooperation between the two countries.[80] In 2012, then Foreign Minister Bob Carr committed to an expansion of this cooperation including the provision of more surveillance and electronic equipment as part of a "clear agenda for intelligence sharing, naval co-operation and helping rebuild Sri Lanka."[81]

At an agency level, the AFP conducts information exchange activities through a sole liaison officer on the ground in Colombo. Though the AFP has emphasised that it does

[76] Michael Phelan, Deputy Commissioner Operations, AFP, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 106.

[77] Tony Negus, AFP Commissioner Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 56.

[78] Mark Binskin, Acting Commander Operation Sovereign Borders, Operation Sovereign Borders press conference, 11 October 2013, transcript available at http://www.customs.gov.au/site/131011transcript_operation-sovereign-borders.asp.

[79] In May 2012, Australia's High Commissioner to Sri Lanka, Robyn Mudie, and Sri Lanka's Justice Minister, Hon Rauff Hakeem MP opened a three-day 'International Best Practice in Mutual Legal Assistance Workshop'. Attended by the Attorney-General's Department staff and Sri Lankan officials from various Government Departments, the Judiciary and the Sri Lanka Police, the workshop allowed "police, prosecutors and courts in different nations to access and share critical information, evidence and witnesses in order to secure convictions", see Australian High Commission Colombo, Press Release, 17 May 2012, above n 45.

[80] Secretary of Defence Gotabaya Rajapaksa has stated, "Bilateral dialogue has taken place at a very high level, and operational cooperation through the sharing of information between the respective Navies, Coast Guards and law enforcement agencies has done a great deal to curb this trend", Keynote address at Galle Dialogue 2013 Maritime Conference, 13 December 2012, available at http://www.galledialogue.com/index.php?id=20.

[81] Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

not have actual police powers in Sri Lanka,[82] it has a relationship with "at least half a dozen agencies within the Sri Lankan police force,"[83] centred mainly on intelligence sharing activities.

The AFP has characterised this work as "criminal intelligence around active people-smuggling investigations."[84] The agency has historically been keen to give the impression that they are as tight-lipped as possible.[85] In recent Senate Estimates hearings, the AFP emphasised that the role of their liaison officer in intelligence exchange with the Sri Lanka Police is "very carefully controlled".[86] Sri Lankan authorities have at times expressed their frustration that Australia does not share more than it does.[87] Australian Government documents obtained under FOI requests reveal that the Australia is aware that its obligations under the Refugee Convention[88] constrain it from sharing information about individual asylum seekers with Sri Lanka.[89]

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[82] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee,14 February 2012, in Hansard at p 125, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/845c7390-ee92-471d-b0a4-310947ada3f0/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2012_02_14_788_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/845c7390-ee92-471d-b0a4-310947ada3f0/0009%22

[83] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 119.

[84] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee,14 February 2012, above n 82 at p 126.

[85] Mr Andrew Colvin, Deputy Commissioner, Operations, AFP, said: "The flow of information is both ways and there are tight protocols around how that information is managed and what type of information can be passed and what is passed", Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 October 2011, in Hansard at p 61, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/8553cf1d-6558-4ef2-88e3-1051f82d2582/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2011_10_18_571_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/8553cf1d-6558-4ef2-88e3-1051f82d2582/0003%22

[86] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 100.

[87] In July 2012, Commodore Attygale cautioned that "Sri Lanka's ability to combat people-smuggling was hampered by the Australian government's refusal to share intelligence gathered from asylum-seekers." Amanda Hodge, 'Returns will stop the boats', *The Australian*, 28 July 2012.

[88] *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, and *Protocol Relating to the Status of Refugees,* 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267 (collectively, **Refugee Convention**).

[89] See brief to Attorney-General for his meeting with His Excellency Admiral Thisara Samarasinghe, released under the *FOI Act*, copy on file with the HRLC.

Whilst statements such as these are reassuring, there is no external scrutiny of intelligence exchange between the police, so the statements must simply be accepted at face value.

Further, information will still be shared that could be used by the Sri Lanka Navy in relation to interception activities. Deputy Commissioner Phelan, AFP, has conceded that Australia cannot retain control of how information is used once it is passed onto the Sri Lanka Police. The AFP told Senate Estimates that "it would be a natural consequence of their actions" for Sri Lanka Police to pass information on to other Sri Lankan authorities, including the Sri Lanka Navy, for use in offshore interception.[90]

5.2.4 Advertising campaign

Since 2009, Australia has run public awareness campaigns in countries like Sri Lanka aimed at people who are seeking to leave. The campaigns were described in this way by Operation Sovereign Borders Commander Lieutenant General Angus Campbell:[91]

> We're speaking to people in their own language, on television, radio, newspapers, billboards, brochures, story boards, posters, roadshow activities, and through social media platforms such as Google, Facebook, and YouTube.

Importantly, the advertising campaigns are continually directed at passengers, rather than smugglers. The message is one of general deterrence: if you come by boat, you will waste your money, you "will be sent back home"[92] or "you won't be settled here".[93]

5.2.5 Interrogations

Some of the greatest risks to people who are intercepted or returned to Sri Lanka are during detention and interrogation. Australian agencies categorically deny any direct

[90] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 100.

[91] Operational Sovereign Borders press conference, 1 November 2013, transcript available at http://www.customs.gov.au/site/131101transcript-OSB-briefing.asp.

[92] Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31.

[93] Minister for Immigration and Border Control Scott Morrison, Operation Sovereign Borders press conference, 1 November 2013, transcript available at http://www.customs.gov.au/site/131101transcript-OSB-briefing.asp.

involvement in interrogating detainees, or any presence at interviews of any suspects or witnesses.[94]

However, in November 2013, a report in *The Sydney Morning Herald* claimed that an AFP officer had interrogated a Sri Lankan naval officer who had been held in Sri Lankan custody on allegations that he was involved in a people smuggling racket to Australia.[95] The AFP refused to comment on the involvement of their officer in this interrogation.

[94] Andrew Colvin, Deputy Commissioner, Crime Operations, AFP, during Senate Estimates hearings, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 60. In response to an allegation that an AFP officer was present during an interview of an asylum seeker who claimed that he was mistreated by Sri Lankan officials, the AFP responded that an AFP officer was in the building that day but was attending other unrelated duties and did not "witness any mistreatment by Sri Lankan officials of any person held in custody".

[95] Ben Doherty, 'Sri Lankan navy officer accused of being key player in people-smuggling racket', *The Sydney Morning Herald,* 15 November 2013, available at http://www.smh.com.au/federal-politics/political-news/sri-lankan-navy-officer-accused-of-being-key-player-in-peoplesmuggling-racket-20131114-2xk1n.html.

5.3 At a glance

- Australian AFP, Customs and Defence officials work very closely and cooperatively with their Sri Lankan counterparts inside Sri Lanka to prevent Sri Lankans leaving their country.
- Australia provides Sri Lanka with resources such as search and rescue boats, vehicles, office fit outs and surveillance equipment to increase the capacity of Sri Lankans to conduct disruption of people smuggling.
- Sri Lanka did not have a police capacity to monitor people smuggling until Australia intervened
- Australia shares intelligence with Sri Lankan authorities that may lead directly to interception of boats.
- The AFP say that their officer does not participate in any interviews, however there are reports that the AFP's officer interviewed a Sri Lankan naval officer accused of people smuggling in 2013.
- By treating the boat departures as a criminal people smuggling issue, Australia does not acknowledge that the passengers who are intercepted by Sri Lankan authorities are likely to include asylum seekers who are vulnerable in interaction with Sri Lankan authorities.

6 Interceptions are harmful

6.1 What happens to people intercepted inside Sri Lanka?

Under Sri Lankan law, it is illegal to leave the country without departing through an official port.[96] Sri Lankan authorities conduct surveillance and interception of people trying to flee at the request of, and with the explicit support of, the Australian Government. Although people who are intercepted are subject to a formal legal process with judicial oversight (except in the case of Terrorist Investigation Department (**TID**) detainees) the system is fraught with danger for some people, especially asylum seekers.[97]

In general, the Sri Lanka Navy conducts on-water interception of boats and takes the passengers to a nearby base, where they hand custody of the passengers to CID (or sometimes TID), who investigate whether to charge the people with illegal migration under Sri Lankan law or, if the person is considered to be a member of the crew or an organiser of the boats, the more serious offence of "facilitating" the boats, equivalent to people smuggling.

CID also carries out 'disruption activities' on land, where they arrest people they suspect are planning to leave. The same legal processes generally apply to people intercepted on land.

Generally, people caught by the authorities come before a court within 24 hours of arrest, although they are required to be produced to a magistrate within two weeks of their detention.[98] Those charged with illegal migration are usually granted bail, although they are often required to report periodically to local courts or police. Illegal migration carries with it a sentence of imprisonment of between one and five years and a fine

[96] Immigrants and Emigrants Act 1949 makes it an offence to leave Sri Lanka other than through an authorised port or to facilitate such departures (ss 9 & 45(1)(b)), available at http://hrcsl.lk/PFF/LIbrary_Domestic_Laws/Legislations_related%20_to_Migrants_Workers/1948%20No%2020%20Immigrants%20and%20emmigrants.pdf.

[97] See discussion of detention under the Prevention of Terrorism Act below in section 6.3.

[98] Immigrants and Emigrants Act 1949, s 48.

between 50,000 and 200,000 Sri Lankan rupees [AUD420 to 1700].[99] Sri Lanka's office of the Solicitor-General does not seek sentences of imprisonment in its prosecution of the passengers.[100]

People charged with organising or facilitating the boats face tougher treatment. They are remanded and prosecuted and can only be granted bail by the High Court in "exceptional circumstances."[101] The offence of facilitating the boats carries with it a sentence of one to five years imprisonment.[102]

Asylum seekers who are intercepted are prevented from seeking safety and their security could be compromised through contact with Sri Lankan security forces.

6.2 Australia is blocking the escape of people who need protection

Although notionally aimed at combating people smuggling, Australia's efforts at 'stopping boats' are jeopardising the ability of Sri Lankans at risk of persecution to gain access to safety and asylum.

Sri Lanka continues to produce refugees, as well as other migrants to Australia.[103] Historically, 90% of Sri Lankan boat arrivals to Australia have been found to be refugees.[104] Even in 2012-13, during which time the number of boat arrivals from Sri Lanka soared, the Department of Immigration and Border Protection (**DIBP**) reported a

[99] Immigrants and Emigrants Act 1949, s 45(1).

[100] Interview with Kapila Waidyaratne, deputy Solicitor-General, Sri Lanka, November 2012, reported in Emily Howie, 'Sri Lankan Boat Migration to Australia: Motivations and Dilemmas', above n 28, p 101. See also report that returned Sri Lankans found guilty of leaving the country improperly will be "they will likely be fined between 50,000 and 100,000 rupees ($880 and $1760), in Ben Doherty, 'Asylum denied, a penalty waits at home', *The Sydney Morning Herald,* 8 December 2012, available at http://www.smh.com.au/world/asylum-denied-a-penalty-waits-at-home-20121207-2b0qi.html.

[101] Immigrants and Emigrants Act 1949, s 47A.

[102] Immigrants and Emigrants Act 1949, s 45C(2).

[103] For an overview of Sri Lankan migration to Australia, see Jayasuriya and McAuliffe, *Placing recent Sri Lankan maritime arrivals in a broader migration context*, above n 28.

[104] Department of Immigration and Citizenship statistics, reported in Bianca Hall, 'Boat people genuine refugees', *The Age*, available at http://m.theage.com.au/opinion/political-news/boat-people-genuine-refugees-20130519-2juvg.html, [accessed on 31 May 2013].

52% final grant rate of protection visas for Sri Lankans arriving by boat.[105] The DIBP's own survey conducted in 2013 in Sri Lanka with people intending to flee suggests that 40% of respondents were fleeing because of torture or persecution.[106]

Despite Australian Government rhetoric suggesting that all Sri Lankan migrants are economic,[107] the evidence of ongoing human rights abuses creating asylum flows is well-established. A recent report by the UN High Commissioner for Human Rights points to attacks on religious minorities, journalists, human rights defenders and any critics of the government. She also raised extrajudicial killings, torture, arbitrary detention, disappearances and sexual violence against women by security forces.[108]

The UNHCR advises that Sri Lankan people with certain profiles still require protection under the Refugee Convention.[109] In particular, people with links or suspected links to the LTTE, opposition politicians, journalists, human rights activists, witnesses to abuses and LGBTI people may be or are likely to be in need of protection, depending on their circumstances. Internal relocation is not an option in Sri Lanka where the persecution is done by state actors, given "the small size of the country, coupled with the broad reach of the security apparatus, the effective territorial control maintained by the Sri Lankan Army (SLA) since the end of the armed conflict."[110]

Sri Lankans continue to be at risk of reprisal for any criticism of the government

[105] This statistic takes into account the overturn rate at the review stage. Department of Immigration and Border Protection, *Asylum Trends – Australia: 2012-13 Annual Publication*, 2013, available at http://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf.

[106] Jayasuriya and McAuliffe, *Placing recent Sri Lankan maritime arrivals in a broader migration context*, above n 28, p 22.

[107] Foreign Minister Bob Carr, Media Release, 17 December 2012, above n 31; see also Minister Scott Morrison's comments on maximising return of individuals from Sri Lanka, Operation Sovereign Borders press conference, 11 October 2013, transcript available at http://www.customs.gov.au/site/131011transcript_operation-sovereign-borders.asp.

[108] United Nations High Commissioner for Human Rights, *Promoting reconciliation and accountability in Sri Lanka*, UN Doc. A/HRC/25/23, 24 February 2014.

[109] UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", UN Doc. HCR/EG/LKA/12/04, 21 December 2012, available at http://www.refworld.org/pdfid/50d1a08e2.pdf.

[110] Ibid p 5. This was supported in the Country Guidance Case in the UK, above n 20, paras. 356(5) and (7).

After her visit to Sri Lanka in August 2013, the UN High Commissioner for Human Rights encouraged Australia to consider each Sri Lankan asylum case on its merits, given the ongoing problems in that country.[111]

However, Minister for Immigration and Border Protection, Scott Morrison, has been clear in his intention to return *all* Sri Lankans. At an Operation Sovereign Borders press conference on 30 September 2013, he said that Australia seeks "to ensure that people who may seek to come from Sri Lanka would be intercepted outside of our sea border and returned directly and all of them."[112]

To discuss boat interceptions simply in terms of combating people smuggling obfuscates the important fact that the cooperation impacts not only on people smugglers but also on the people being smuggled, the latter of whom may well be at risk of harm.[113] As one commentator suggests, the "border-policing effort is played out … in spite of potential claims for refugee status."[114] This was implicitly acknowledged in AFP Commissioner Tony Negus' statement that the AFP's work in Sri Lanka to stop people smuggling "mitigates the flow of Sri Lankan asylum seekers" to Australia.[115]

The UNHCR recommends that interception and other enforcement measures should take into account "the fundamental difference, under international law, between

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[111] Navi Pillay, *ABC Lateline*, 27 September 2013, available at http://www.abc.net.au/lateline/content/2013/s3858234.htm.

[112] Minister Scott Morrison, Operation Sovereign Borders press conference, 30 September 2013, transcript available at http://www.customs.gov.au/site/130930transcript_opderation-sovereign-borders.asp.

[113] An overwhelming majority of the 6500 Sri Lankan boat migrants that managed to make it to Australia recently have claimed asylum on arrival but none of the people who arrived after August 2012 have had their claims processed: Martin Bowles, Secretary to Department of Immigration and Citizenship during questioning in Senate Estimates hearings, 27 May 2013, reported in Bianca Hall, 'Up to 25,000 asylum seekers expected this financial year', *The Sydney Morning Herald*, 27 May 2013 available at http://www.smh.com.au/opinion/political-news/up-to-25000-asylum-seekers-expected-this-financial-year-20130527-2n6w7.html, [accessed on 31 May 2013]. It is too early to know whether the boat migrants that arrived in 2012 will be assessed as refugees by Australian authorities. However, historically, 90% of boat arrivals in Australia are found to be refugees: Department of Immigration and Citizenship statistics, reported in Bianca Hall, 'Boat people genuine refugees', *The Age*, available at http://m.theage.com.au/opinion/political-news/boat-people-genuine-refugees-20130519-2juvg.html, [accessed on 31 May 2013].

[114] Sharon Pickering, 'The Production of Sovereignty and the Rise of Transversal Policing: People-smuggling and Federal Policing', above n 43, p 363.

[115] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, AFP, 12 February 2012, p 125, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F845c7390-ee92-471d-b0a4-310947ada3f0%2F0009%22.

refugees and asylum-seekers who are entitled to international protection, and other migrants who can resort to the protection of their country of origin."[116]

In the context of interceptions by Sri Lankan authorities, there is no means whatsoever to identify genuine asylum cases. In fact, the system only exacerbates the risk to asylum seekers by criminalising boat departures and detaining intercepted people in custody.[117]

6.3 Harm during interception and detention by Sri Lankan security forces

Detention by Sri Lankan authorities itself can place some asylum seekers at risk of harm. The updated UK country guidance case on Sri Lanka acknowledges that if a person is detained by the Sri Lankan security services "there remains a real risk of ill-treatment or harm requiring international protection."[118]

Sri Lankan authorities maintain sophisticated intelligence of activities in Sri Lanka and among the diaspora.[119] Sri Lankan authorities keep 'stop' and 'watch' lists to monitor people. Persons who are on a stop list will be detained as they are people against whom there is an outstanding court order or warrant.[120] Persons on a "watch" list are monitored by security forces upon their return to a village.[121]

Human Rights Watch has documented and published at least 50 cases of rape and sexual violence of men and women, accompanied by other forms of torture and cruel,

[116] UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee, 18th Meeting, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, UN Doc. No. EC/50/SC/CRP.17, 9 June 2000, para. 34.

[117] Section 45c, Immigrants and Emigrants Act, Sri Lanka; See also Supplementary Budget Estimates Hearing, Legal and Constitutional Affairs Committee, 19 November 2013, answer to question on notice SE13/0130, 29 January 2014, available at http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0130.ashx.

[118] Country Guidance Case, above n 20, para. 356(4).

[119] Ibid para. 356(8).

[120] Ibid para. 356(6).

[121] Ibid para. 356(9).

inhuman and degrading treatment by Sri Lanka's security forces against persons in custody since the conflict's end.[122]

The BBC has reported that some people who are intercepted attempting to leave Sri Lanka by boat are handed directly to TID for investigation and are held under Sri Lanka's draconian counter-terror laws, the *Prevention of Terrorism Act* (**PTA**).[123] Those detainees face a particularly high risk of torture.[124] Amnesty International has reported detainees' claims that torture is common in TID custody.[125] In fact, the PTA contains an extraordinary defence to torture; TID officers are shielded from prosecution for torture if they claim they acted "in good faith" in pursuance of an order or direction given under the PTA.[126]

UK-based Freedom from Torture (**FFT**) has also documented torture in Sri Lankan custody, through medico-legal reports obtained from refugees. FFT found that victims with scarring, either from torture or shelling, become fearful of revealing their scars to authorities, lest authorities associate them with the LTTE.[127] Scarring is considered by Sri Lankan authorities to be evidence of LTTE involvement, even though many civilians were shelled during the final phases of the war.[128]

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[122] Human Rights Watch, *We Will Teach You a Lesson*, 26 February 2013, available at http://www.hrw.org/reports/2013/02/26/we-will-teach-you-lesson.

[123] Mahinda Liyanage, 'SL Navy intercept Australia bound 'boat people' from India', *Daily News*, 6 May 2013, available at http://www.dailynews.lk/2013/05/08/sec01.asp; See also "Six migrants detained under PTA," *BBC Sinhala.com*, 14 September 2011, available at http://www.bbc.co.uk/sinhala/news/story/2011/09/printable/110914_boatpeople.shtml (accessed 19 February 2012).

[124] Detention under the PTA is indefinite, arbitrary and lacks the most basic safeguards of ordinary detention such as judicial oversight.

[125] Amnesty International, *Locked Away: Sri Lanka's Security Detainees*, March 2012, p 15, available at http://files.amnesty.org/archives/asa370032012eng.pdf.

[126] UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', above n 109, p 10.

[127] See Freedom from Torture, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009-2011*, September 2012, which documents the torture from medico-legal reports prepared for asylum seekers in the UK, available at http://www.freedomfromtorture.org/sites/default/files/documents/Sri%20Lanka%20Ongoing%20Torture%20Report_for%20release%208%20Nov%20-%20with%20cover.pdf. "Those who bore scars (even if they were incurred during shelling) were told that this was evidence of LTTE membership and were then removed to a separate place of detention", at pp 8-9.

[128] Ibid.

Torture and mistreatment in Sri Lankan custody has been raised as a concern by a number of United Nations bodies. The UN Committee against Torture stated that it was "seriously concerned" about widespread use of torture and other cruel, inhuman and degrading treatment of suspects in police custody, including after the end of the civil war.[129]

Research conducted with Sri Lankan people who have tried to leave the country but were caught by Sri Lankan authorities supports the conclusion that interceptions do lead to mistreatment. That research discussed people who were identified as having actual or perceived links to the LTTE who reported being stripped, searched for scars and beaten in Sri Lankan navy and police custody after being intercepted.[130] Violence and abuse of boats' crews, organisers and others who did not comply with the wishes of their custodians was also reported.[131]

As recently as 2012, Australia specifically raised torture, abuse and mistreatment by police and security forces as an issue for Sri Lanka to address at the UN Human Rights Council.[132]

Australia should not support the interception of vulnerable people to custody that is seriously harmful. The credible allegations of torture and war crimes against individuals or units in foreign security forces must make those individuals or units unsuitable as recipients of Australian aid or assistance.

[129] Committee against Torture, Concluding Observations on Sri Lanka, 2011, 8 December 2011, UN Doc. CAT/C/LKA/CO/3-4, para. 6, available at http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf.

[130] Emily Howie, 'Australia dangerously close to the abuse of fleeing Sri Lankans', *The Conversation*, 15 January 2014, http://theconversation.com/australia-dangerously-close-to-the-abuse-of-fleeing-sri-lankans-21166.

[131] Ibid.

[132] Universal Period Review of Sri Lanka – 14th session, Statement by Australia, 1 November 2012, available at http://www.geneva.mission.gov.au/gene/Statement391.html.

6.4 At a glance

- Asylum seekers are almost certainly among the people who are intercepted by Sri Lankan authorities.
- Generally people who are intercepted by the Sri Lanka Navy are handed to police custody.
- The interceptions prevent asylum seekers from leaving their country to find protection.
- Where asylum seekers are fleeing persecution and harm by state actors, interception by the Sri Lankan authorities could put them directly in harm's way. Sri Lankans associated with the LTTE or with scarring on their body are particularly vulnerable to abuse.

7 Sri Lankan returnees in danger

7.1 Screening Sri Lankans out of proper refugee processing

The most recent Australian Government data confirms that over 50% of Sri Lankans arriving in Australia by boat are refugees. Yet, in defiance of its own evidence, Australia premises its treatment of Sri Lankans on the assumption that they are not genuinely seeking protection.

All 'irregular maritime arrivals' (**IMAs**) who arrive in Australia without a valid visa and seek Australia's protection are subject to screening.[133] Screening is a truncated process which expedites the removal of asylum seekers without any rigorous assessment of their protection claims. It is an administrative shortcut, sidestepping fairer and more comprehensive procedures for assessing refugee claims under Australian law.

Screening takes place behind closed doors in immigration detention centres in Australia or offshore, making the finer details of the process hard to come by. What is clear, however, is that the decision to 'screen out' and return an asylum seeker to Sri Lanka is not subject to independent oversight or review. The process also involves interviewing recent arrivals without providing them access to legal advice and or information about their rights. The Department of Immigration confirmed in a Senate Estimates Committee hearing last year that asylum seekers subject to the screening process are not advised of their right to speak with a lawyer and that if they request legal assistance, they are just given a phone book and access to a phone.[134]

Australia has clear international obligations not to return people in its custody to a place where they are at risk of persecution, torture or cruel, inhuman or degrading treatment.

[133] Department of Immigration and Border Protection, Supplementary Budget Estimates Hearing, Legal and Constitutional Affairs Committee, 19 November 2013, answer to question on notice SE13/0115, available at http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0115.ashx.

[134] Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 28 May 2013, p 62, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0f70343a-b92d-45d8-b692-58b9623ba9cd/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_05_28_1971_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0f70343a-b92d-45d8-b692-58b9623ba9cd/0000%22.

A fair and thorough assessment process is a reasonable and necessary safeguard to ensure these international law obligations are met. The enhanced screening process is anything but.

As well as potentially violating international law, the screening process also has dubious legality under Australian domestic laws. On the rare occasion that a 'screened out' asylum seeker manages to make contact with a lawyer and communicate their protection claim, the Australian Government often screens the asylum seeker back in to the normal assessment process and, in so doing, heads off a potential legal challenge.

'Enhanced screening' is being used as a deterrence measure. Sri Lankans are the only national group subject to enhanced screening.[135] The difference between screening and enhanced screening is not clear. The DIBP says that the enhanced screening interview is conducted by officers "trained in assessing Australia's protection obligations."[136] Minister Scott Morrison has publicly stated that Sri Lankans should expect "even more stringent" screening than people from other countries and that "anyone who may have come from Sri Lanka should know that they will go back to Sri Lanka. We have an arrangement with the Sri Lankan government and … we'll be ensuring that we maximise those who go back and, preferably, they will all go back."[137]

By the Government's own admission, the objective of enhanced screening is to "maximise" returns to Sri Lanka. Its purpose is to fast-track the removal of Sri Lankan boat arrivals which, in turn, warns off others thinking of coming. It is not a process designed to elicit evidence of an asylum seeker's protection claims but rather to validate the assumption that no genuine claims exist. It is a grossly inadequate safeguard against wrongful return to a country which Australia knows continues to produce refugees.

[135] Department of Immigration and Border Protection, Supplementary Budget Estimates Hearing, Legal and Constitutional Affairs Committee, 19 November 2013, answer to question on notice SE13/0115, available at http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0115.ashx.

[136] Ibid.

[137] Minister for Immigration and Border Control Scott Morrison, Operation Sovereign Borders press conference, 11 October 2013, transcript available at http://www.minister.immi.gov.au/media/sm/2013/sm208747.htm.

7.2 Failure to ensure adequate protection of returnees

Despite the risk of harm on return to Sri Lanka, Australia does not take any proactive steps to monitor the safety of the over 1100 people who have been returned since October 2012.[138]

The Australian High Commission in Colombo oversees the follow up of complaints, and the Australian Government has stated that none of the small number of claims of mistreatment received to date has been substantiated.[139] However, there are serious concerns about the adequacy of Australia's investigation of mistreatment claims, based on information contained in documents obtained from the Government under freedom of information legislation.

Australian officials observe the reception of returnees at arrival in Sri Lankan airports; however it is not clear whether officials attend all returns, or only "on occasion."[140]

There is no formal complaints mechanism at the High Commission in Colombo.[141] It is unclear whether returnees are given contact details of a DIBP or International Organization for Migration (**IOM**) officer (if receiving IOM assistance) that they can call in Sri Lanka if they experience mistreatment,[142] or only given those details if

[138] Australian High Commission, Sri Lanka, Media Statement, 'Remaining Sri Lankan boat arrivals returned to Colombo', 22 November 2013, available at http://www.srilanka.embassy.gov.au/clmb/22112013REMAININGSRILANKANBOATARRIVALSRETURNEDTOCOLOMBO.html.

[139] E.g. Department of Immigration and Border Protection, Supplementary Budget Estimates Hearing, Legal and Constitutional Affairs Committee, 19 November 2013, answer to question on notice SE13/0058, available at http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0058.ashx; evidence of former Foreign Minister Bob Carr, Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, 14 February 2013, in Hansard at p 63, available at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/32457ab2-7616-4a25-92a1-f1ba7586e32b/toc_pdf/Foreign%20Affairs,%20Defence%20and%20Trade%20Legislation%20Committee_2013_02_14_1719_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/32457ab2-7616-4a25-92a1-f1ba7586e32b/0000%22; Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, answer to Question in Writing No. 210, 5-6 June 2013, available at http://www.aph.gov.au/~/media/Estimates/Live/fadt_ctte/estimates/bud_1314/dfat/dfatqonsanswers.ashx.

[140] The documents obtained by the HRLC from DFAT under the *FOI Act* are inconsistent on this point.

[141] Email from Robyn Mudie, Australian High Commissioner, Colombo, to Bryce Hutchesson, DFAT, copying Craig Chittick, 20 June 2013, obtained under the *FOI Act*, copy on file with the HRLC.

[142] DFAT document, 'Sri Lanka – Asylum Seekers: Torture claims', obtained under the *FOI Act*, copy on file with the HRLC.

requested.[143] As a result, returnees may not know that they are able to complain if they are mistreated.

Australia does not proactively monitor what happens to returnees because in its view this "would be intrusive and could draw unfavourable attention to the people concerned, as well as for those they associate with, and those engaged in the monitoring".[144]

However, this concern has not prevented the Australian High Commission in Sri Lanka from adopting a practice of following up with Sri Lankan authorities "where possible" in the event of any claim of abuse of a returnee.[145]

Underpinning Australia's approach to returnees appears to be the view that active monitoring or facilitation of complaints would "run counter to Australia's judgement that it was safe to return people", and assurances given by Sri Lankan Government that returnees will be treated in accordance with Sri Lankan law.[146] This assurance should be seen to provide little comfort given that Sri Lankan law allows indefinite detention under executive orders.

7.3 Disclaiming responsibility and turning a blind eye

Of most concern is the way that the Australia investigates claims of mistreatment.

A Government cable obtained by the HRLC under FOI and which appears to be from DFAT Colombo describes how a complaint of "severe torture" by Sri Lanka Police was followed up. The cable says that the AFP raised the allegations with the Sri Lankan CID, who denied the allegations, and who invited the AFP to visit the individual in custody. The AFP is said to have merely "sighted the suspect, who appears in good health". Disturbingly, the cable cites the AFP as saying: "In the interests of keeping our distance from the Sri Lankan investigations, we do not intend to take up the offer to

[143] DFAT email, sender and recipient details redacted, dated 26 February 2013, obtained under the *FOI Act*, copy on file with the HRLC.

[144] DFAT briefing documents, title redacted, obtained under the *FOI Act*, copy on file with the HRLC.

[145] DFAT document, 'Background: returnees and claims of mistreatment', obtained under the *FOI Act*, copy on file with the HRLC.

[146] Email from Robyn Mudie, Australian High Commissioner, Colombo, to Bryce Hutchesson, DFAT, copying Craig Chittick, 20 June 2013, obtained under the *FOI Act*, copy on file with the HRLC.

meet with him." DFAT also indicate that they are "following up with [Sri Lankan] Navy, who undertook the arrest."[147]

The failure to independently meet with a returnee who had claimed he was severely tortured by Sri Lanka Police and the deference by Australian agencies to Sri Lankan authorities seriously undermine confidence in Australia's investigations of mistreatment claims. It is on investigations such as these that Australia bases its assertion that no claims of mistreatment have been substantiated.

This incident reveals a wilful blindness to the ongoing real risk of ill-treatment or harm of returnees at the hands of Australia's Sri Lankan partners.

This case also highlights the difficulty in extracting information from Government about the safety of returnees, including through oversight mechanisms such as Senate Estimates. The DFAT cable raises facts that are very similar to a case discussed by the AFP at Senate Estimates in June 2013. At Senate Estimates the AFP denied any direct involvement in mistreatment, but they did not did not mention that their officer had sighted the complainant or had been provided an opportunity to speak with the complainant. Deputy Commissioner Colvin said:

> We can categorically confirm for the record that the AFP officer was present in the building on that day, most likely the same building you referred to. The officer was attending to other duties unrelated to the interview that was taking place and at no stage did the AFP officer witness any mistreatment by Sri Lankan officials of any person held in custody.[148]

Another case raises questions whether to accept Australian government assertions that no claims of abuse by Sri Lankan returnees have been substantiated. Government documents obtained by the HRLC reveal that in June 2013 a claim of harm was made via email by a person returned to Sri Lanka through enhanced screening. The email contained photos in support of mistreatment allegations on return, which "indicates that the person was harmed by people smugglers". The document states:

> Consequently, this is determined to be a law and order issue for SL rather than one that is claims related. No further action therefore is being undertaken by DIAC. The claim is mentioned

[147] DFAT document, obtained under the *FOI Act*, copy on file with the HRLC.

[148] Mr Andrew Colvin, Deputy Commissioner, Crime Operations, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73, p 60.

> therefore for the record, and is not DIAC relevant. The Ombudsman's Office is not looking into this matter.[149]

There is no suggestion that Australian authorities found the claim of mistreatment on return to Sri Lanka to be unsubstantiated; rather, the Department of Immigration disclaimed responsibility. There is nothing in the documents to suggest that any other agency followed up the claim.

Separately, there have also been media reports concerning Sri Lankan returnees from Australia who claim to have been tortured on return in recent years.[150]

Despite these reports and the case the High Commission followed up, DFAT and the Australian Government have continued to assert that there is no evidence of returnees being discriminated against or tortured in Sri Lanka.[151]

[149] DFAT document, 'Sri Lanka: Claims of mistreatment (as at 9/5/2010)', obtained under the *FOI Act* , copy on file with the HRLC.

[150] Michael Gordon, 'Scarred by Sri Lankan torture' *The Sydney Morning Herald*, 24 April 2013, available at http://www.smh.com.au/federal-politics/political-news/scarred-by-sri-lankan-torture-20130424-2if16.html; See also Ben Doherty, 'Sent home to 'arrest, torture' ', *The Sydney Morning Herald*, 24 July 2012, available at http://www.smh.com.au/federal-politics/political-news/sent-home-to-arrest-torture-20120723-22kur.html.

[151] Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee, answer to Question in Writing No. 210, 5-6 June 2013, available at http://www.aph.gov.au/~/media/Estimates/Live/fadt_ctte/estimates/bud_1314/dfat/dfatqonsanswers.ashx

7.4 At a glance

- Australia has forcibly returned over 1100 Sri Lankans since October 2012.
- Sri Lankans are the only national group that Australia subjects to 'enhanced screening' on arrival. Enhanced screening is a truncated process in which new arrivals to Australia have their claims determined by an immigration official without access to a lawyer and without any independent oversight of that decision.
- The most recent Australian Government data suggests that at least 52% of Sri Lankans who arrive undocumented are likely to be refugees.
- Despite the high proportion of refugees among Sri Lankan boat arrivals, Australia does not take any proactive measures to monitor the safety of the Sri Lankans that we return.
- Australia claims it follows up complaints of mistreatment but there is evidence that follow up is not taken seriously. On one occasion, an AFP officer was in the Sri Lanka Police building in Colombo when a returnee from Australia claimed to have been severely tortured. The officer declined an offer to speak with the returnee.

8 Australia violates international obligations

Australia has a sovereign right to control its borders, but that right is not absolute. Australia must conduct immigration control within the boundaries of international law. Although Australia may be able to frustrate, to some extent, undocumented migration to Australia, it must choose lawful options for doing so.

Australia asserts that it does not return asylum seekers to Sri Lanka who engage Australia's protection obligations,[152] and that Australia's cooperation with Sri Lanka on people smuggling is conducted in full compliance with Australia's human rights law obligations.[153] However a consideration of international human rights law in light of Australia's close involvement in interceptions casts doubt on this assertion.

There is scant information about exactly what Australian officials are doing on the ground in Sri Lanka or the extent to which they might be directly complicit in any wrongdoing by Sri Lankan military or police. Further, assuming that asylum seekers are on the boats, Australia is likely to be acting inconsistently with its human rights treaty obligations in the role it plays in interception and returns.

Australia's close cooperation with Sri Lanka is expressly aimed at resourcing and supporting Sri Lankan interception of boats and preventing Sri Lankans from leaving their country. At times Australia may even share intelligence that leads directly to interceptions. The interceptions frustrate the right that every individual has to leave their country and seek protection.[154] They also expose the intercepted people to the risk of torture and mistreatment.

In these circumstances, there are good arguments that Australia's involvement in interceptions aids and assists Sri Lankan violations of international law and violates

[152] DFAT document, 'Background: Returnees and claims of mistreatment', obtained under freedom of information, copy on file with the HRLC.

[153] DFAT response to question put by Phil Lynch, HRLC, at NGO consultation, 23 October 2012, copy on file with HRLC.

[154] This right is found in Article 12, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 (**ICCPR**).

Australia's international law obligation to act in good faith in accordance with its treaty obligations.

8.1 Australia constrains the right of people to leave Sri Lanka

Article 12(2) of the International Covenant on Civil and Political Rights (**ICCPR**) establishes the right of people to leave any country, including their own.[155] States have an obligation to respect the right of each individual to leave their country in search of protection.[156] The interception of Sri Lankans seeking to leave Sri Lanka by boat directly impacts on asylum seekers' ability to exercise this right.

States that seek to deflect or obstruct access to asylum procedures may also breach this obligation.[157] Intentional policies and practices of containment without protection can constitute an abuse of rights.[158] The UN Human Rights Committee has expressed concern at the imposition of "pre-frontier arrangements" that affect the right of the individual to leave any country and their compatibility with Article 12(2).[159] States have a duty not to frustrate the exercise of the right to leave to seek asylum "in such a way as to leave individuals exposed to persecution or other violations of their human rights."[160]

Based on the composition of recent migration flows, some of the people who are intercepted by Sri Lankan authorities are almost certain to be asylum seekers seeking protection. The system of interceptions is expressly designed to prevent departure from Sri Lanka to anywhere, not just Australia. Australia's cooperation is a vital part of policies and practices of containing Sri Lankans, including would-be refugees, without making any accommodation for protection, which therefore risk constituting an abuse of rights. As Australia is responsible for establishing or facilitating key elements of this

[155] Australia is a party to the ICCPR.

[156] This obligation stems from Article 12(2) of the ICCPR, read in conjunction with the right to seek asylum (Article 14 of the Universal Declaration of Human Rights, adopted by UN General Assembly on 10 December 1948) and the totality of rights protected by the Universal Declaration on Human Rights and the ICCPR: Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 370.

[157] Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 370.

[158] Ibid p 383.

[159] Ibid p 371.

[160] Ibid p 383.

system and continues to participate in it, Australia may well be in breach of its duty to respect the right of people to leave.

The right to leave under Article 12(2) may only be limited for permissible reasons such as to protect national security, public order, or public health,[161] and may not be limited on a discriminatory basis or in a way that would breach other ICCPR rights.[162] The exceptions are aimed at preventing people from leaving to avoid paying fines or legal proceedings or for the purpose of allowing countries to impose visa requirements.[163] The UN Human Rights Committee emphasises that restrictions must be necessary, conform to the principle of proportionality and be the least intrusive measure to achieve the result.[164]

Interceptions in Sri Lanka that prevent all departures that do not go through an official port could not conform to a standard of either necessity or proportionality.

Leading refugee law academic Professor Hathaway has argued that the home state and any foreign countries with which it chooses to share jurisdiction over activities designed to prevent departures by at-risk people from its territory should be held jointly liable for breaches of Article 12(2).[165] When considering whether Australia's joint activities would breach Article 12(2) of the ICCPR or its *non-refoulement* obligations (discussed in detail below at Part 8.2), a key issue that arises is the extent to which Australia can be said to be exercising shared jurisdiction over the people who are intercepted.[166]

State jurisdiction under the ICCPR and Convention against Torture (**CAT**),[167] extends to those individuals within a State's territory and jurisdiction.[168] The concept of control is

[161] As specified under Article 12(3), ICCPR.

[162] James C. Hathaway, *The Rights of Refugees under International Law,* Cambridge University Press, 2005, p 309 and fn. 159.

[163] Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 381 and cases cited therein.

[164] UN Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, paras. 14, 16 and17.

[165] Hathaway, *The Rights of Refugees under International Law*, above n 162, pp 309-301, 313.

[166] Ibid, p 314.

[167] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987.

[168] UN Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; Committee against Torture, Conclusions and recommendations of Committee against Torture concerning the second report of the United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20.

central to the exercise of jurisdiction. Australia's human rights obligations under those key human rights treaties can be enlivened in relation to activities "within the power or effective control" of Australian authorities.[169]

Australia may claim that it does not share jurisdiction as it does not directly perform interceptions. However, the AFP's Deputy Commissioner Phelan conceded that AFP shares information with Sri Lanka Police that could lead directly to interceptions. Australian officials may not be directly intercepting people on boats, but Australian agencies are deliberately implementing measures which are designed to deflect or obstruct pathways for people to leave. In these cases, Australia's role could be characterised as aiding or assisting Sri Lanka in this system.[170]

The International Law Commission's Draft articles on State Responsibility[171] provide that a State (Australia) can be responsible for the act of another State (Sri Lanka) if:

- Australia aids or assists in the commission of an "internationally wrongful act" by Sri Lanka;
- Australia does so knowing the circumstances of the internationally wrongful act; and
- Australia could not lawfully commit that act.[172]

An "internationally wrongful act" includes a violation of international human rights law including the right to leave any country in search of protection.[173]

Australia has established the capacity of CID to conduct surveillance of migrant smuggling and provides search and rescue boats to the Sri Lanka Navy as well as other

[169] UN Human Rights Committee, General Comment No. 31.

[170] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 100.

[171] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, November 2011,, available at http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf (**Draft Articles**). The Draft Articles are a persuasive tool for interpreting international law but are not themselves binding on States. The International Law Commission is a UN body that works to promote the progressive development and codification of international law. It was established by the UN and its members are international law experts elected by the General Assembly.

[172] Article 16, Draft Articles.

[173] Under Article 2 of the Draft Articles, internationally wrongful act requires an act or omission attributable to a State that constitutes a breach of international obligations of that State.

materiel support. Australia has played a critical role in implementing, resourcing and funding the system to prevent the departure of at-risk people. Australia also participates in that system through intelligence and information sharing. In these circumstances, Australia could be seen as aiding and assisting in a violation of the right of Sri Lankans to leave their country.

8.2 Australia cannot return people to a risk of harm

Under international law, Australia cannot return a person to any place where they risk serious harm, including a risk to their life or their freedom or a risk of torture and cruel, inhuman and degrading treatment (***non-refoulement* obligation**). *Non-refoulement* is a cornerstone of international refugee protection.[174]

Under the Refugee Convention, no State "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[175]

Australia also has *non-refoulement* obligations under the ICCPR and CAT. Under those treaties, Australia must not expel or transfer a person to a country where they risk arbitrary deprivation of their life,[176] or torture or cruel, inhuman or degrading treatment.[177]

The prohibition against *refoulement* under the Refugee Convention, the ICCPR and CAT is also a rule of customary international law, binding on all States regardless of whether they are signatories to any relevant treaty.[178]

Whilst Australia can take measures to curb irregular migration, it cannot do so at the expense of the protection needs of asylum seekers who may be travelling without documentation. The UNHCR has warned that immigration controls aimed at combating

[174] 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*, 26 January 2007, p 2.

[175] Article 33, Refugee Convention.

[176] Article 6, ICCPR.

[177] Article 3, *Convention against Torture* and Article 7, *International Covenant on Civil and Political Rights*; UN Human Rights Committee, General Comment No 20: Article 7, UN Doc. HRI/GEN/1/Rev.1/30 (1994), para. 9.

[178] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, above n 174, p 7.

irregular migration, without balancing them with an adequate system for identifying genuine cases, can result in the *refoulement* of refugees.[179]

Australia creates a real risk of violating its *non-refoulement* obligations in relation to Sri Lankans returnees who were screened out of Australia without proper access to refugee status determination procedures and safeguards to determine whether they would be returned to harm.

***Non-refoulement* and interceptions**

Australia's *non-refoulement* obligations are not limited to people within Australia's territory. The UNHCR, UN Human Rights Committee and the Committee against Torture have all stated that *non-refoulement* obligations are not subject to territorial restrictions and apply to anyone subject to Australia's jurisdiction or control, including in the territory of another State or in international waters.[180] Put another way, *non-refoulement* obligations "extend to all government agents acting in an official capacity, within or outside national territory."[181]

If Australia were to conduct the interceptions directly on the high seas, and returned Sri Lankans to Sri Lankan custody without providing an opportunity for people's protection claims to be assessed, then Australia's actions would clearly violate the principle of *non-refoulement* in any case in which a person was returned to harm.

The rationale for extra-territorial application is a practical one. If the practice of States is to intercept people outside or at a distance from their territory, "the international refugee protection regime would be rendered ineffective if States' agents abroad [are] free to act at variance with obligations under international refugee law and international human rights law."[182]

International refugee protection is necessarily a cooperative exercise. The UNHCR has cautioned that interception policies that target undocumented migrants and in the process adversely affect refugees and asylum seekers will result in diverting smuggling

[179] UNHCR Executive Committee, *Interception of Asylum-Seekers and Refugees*, above n 116, para. 18.

[180] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, above n 174, p 12; UN Human Rights Committee, General Comment No. 31; Committee against Torture, Conclusions and recommendations of Committee against Torture concerning the second report of the United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20.

[181] UNHCR Executive Committee, *Interception of Asylum-Seekers and Refugees*, above n 116, para. 23.

[182] Ibid.

and trafficking routes, increase burdens on other States and fail to provide protection to those in need.[183]

In relation to maritime interceptions, the UNHCR has clearly stated that these measures should not result in asylum seekers and refugees being denied access to international protection or to them being returned to territories where their life or freedom is at risk.[184]

However, the *non-refoulement* protection under the Refugee Convention does not extend to people effectively trapped within Sri Lanka. A "refugee" is defined in the Convention as a person outside their country of origin, so the Refugee Convention has limited application to persons who have not left has been confirmed by the UK House of Lords.[185] Nonetheless, the other human rights treaties that prohibit *refoulement* do not require the refugee to be outside his or her country before a potential receiving State's obligations are engaged.[186]

For the reasons explained above, there are good arguments that Australia aids and assists the Sri Lankan system of interception; a system designed to systematically impair access to asylum procedures and also returning people to a risk of harm. Australia could be said to be aiding and abetting in a system of *refoulement*.

In any event, Australia cannot avoid its duty to act in good faith in implementing its treaty obligations.

8.3 Australia violates the good faith obligation

Under the Vienna Convention on the Law of Treaties, Australia is required to perform its treaty obligations in good faith.[187] The good faith duty requires states "not only to

[183] Ibid, para. 33.

[184] UNHCR Executive Committee, *Protection Safeguards in Interception Measures*, Conclusion No. 97 (LIV), 10 October 2003, (a)(iv).

[185] *R (on the application of European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another* [2004] UKHL 55 (**Roma Rights Case**); Article 1, Refugee Convention; Hathaway, *The Rights of Refugees under International Law*, above n 162, pp 307-308.

[186] Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 385.

[187] Article 26, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty."[188]

Importantly, the test of acting in good faith is objective and does not look to motivation or intention of the State party.[189] Therefore, if the effect of Australia and Sri Lanka's interception regime is to obstruct the flight of persons at risk of persecution or other serious harm, then Australia could be in violation of its good faith obligations under the treaties.

Measures that impose "non-arrival policies, which effectively prevent the occurrence of events which would otherwise trigger breaches of international law" are problematic.[190]

Australia works to prevent people leaving Sri Lanka, which has the effect of preventing people travelling to a place where Australia's Refugee Convention, CAT or ICCPR obligations may be triggered.[191]

As described above, Australian support for Sri Lankan authorities has encouraged, facilitated and resourced Sri Lankan authorities to intercept boats; an activity that may expose people to a risk of harm. Australian Customs expressly recognises that Australia's border 'continuum' includes work ahead of the physical border inside the sovereign territory of other states. By aiding and assisting Sri Lanka to prevent people leaving that country, Australia also violates its duty to act in good faith with its international obligations.

Australia knows that Sri Lanka continues to be a refugee producing country. Australia also knows that people fleeing who are intercepted are not provided *any* opportunity to seek asylum, or any alternative, safe protection pathways – on the contrary, asylum seekers are placed directly into the hands of authorities from whom they may be fleeing.

By assisting Sri Lanka to frustrate attempts by asylum seekers to leave Sri Lanka, Australia is doing indirectly what it could not do directly, and failing to uphold its protection obligations in good faith. Whilst the good faith argument may not extend to

[188] Yearbook of the International Law Commission, 1964, vol 1 (Summary Records of the 16th Session), 727th Meeting, 20 May 1964, 70.

[189] Ian Brownlie, *Principles of Public International Law*, 6th ed., 2003, pp 425-30, 444.

[190] Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 388.

[191] See Goodwin-Gill and McAdam, *The Refugee in International Law,* above n 46, p 388.

non-refoulement under the Refugee Convention,[192] it is not so restricted in relation to other human rights treaties.

Australia may validly take measures to control its borders, but it cannot erect barriers to prevent asylum flows without providing alternative safe pathways. For example, if Australia is serious about preventing loss of life at sea, it should consider what formal options Sri Lankans have to seek asylum. Australia should give serious consideration to allowing Sri Lankans to make asylum claims through the Australian High Commission in Colombo. In the absence of these good faith measures, Australia's support for Sri Lankan interceptions of boats that carry asylum seekers are best characterised as measures to avoid its obligations arising under international human rights law.

[192] See decision of House of Lords in Roma Rights Case, above n 185

8.4 At a glance

- Australia must conduct immigration control within the boundaries of international law.
- Australia asserts its cooperation with Sri Lanka on people smuggling is conducted in full compliance with Australia's human rights law obligations. This assertion is difficult to accept at face value.
- There is scant information about exactly what Australian officials are doing on the ground in Sri Lanka or the extent to which they might be directly complicit in any wrongdoing by Sri Lankan military or police.
- Assuming that asylum seekers are on the boats, Australia is likely to be acting inconsistently with its human rights treaty obligations in the role it plays in interception and returns.
- The interceptions frustrate the right that every individual has to leave their country and seek protection.193 They also expose the intercepted people to the risk of torture and mistreatment.
- There are good arguments that Australia's involvement in interceptions aids and assists Sri Lankan violations of international law and violates Australia's international law obligation to act in good faith in accordance with its treaty obligations.

[193] Article 12, ICCPR.

9 Problems with the manner in which Australia works

9.1 Secrecy and lack of accountability, transparency and oversight

Australia's cooperation with Sri Lanka to intercept boats is conducted under a shroud of secrecy. Existing oversight mechanisms fail to provide adequate transparency or accountability for Australian operations at an individual or systemic level.

9.1.1 Unclear standards applying to individuals in their work

The legal, policy and regulatory standards that apply to individual Australian operatives abroad are unclear and may not include guidance on how to ensure that their work does not result in cooperating in circumstances involving human rights violations or with human rights abusers.[194] To the extent that the HRLC has identified some relevant laws, their application is piecemeal.

As discussed in part 2 above, the HRLC provided written questions to government seeking basic information about the minimum standards that apply through laws, policies or regulations to Australian authorities abroad in terms of their cooperation with Sri Lankan partners.[195] We did not receive a response to those questions

Nonetheless, the HRLC identified some laws that would govern and constrain the role of individual officers acting overseas.

The Australian Public Service Code of Conduct requires APS employees to act with care and diligence, comply with all *applicable* Australian laws and "while on duty overseas, at all times behave in a way that upholds the good reputation of Australia."[196]

[194] For example, when asked about how Australia ensures that its cooperation with Sri Lanka does not lead to harm, AFP officials in Senate Estimates hearings refer to the good character of Australian officers involved and the high standards of individual behaviour that they are required to maintain.See Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 119.

[195] See Appendix 1.

[196] Section 13(12), *Public Service Act 1999* (Cth).

Applicable laws presumably include the Criminal Code and the laws governing each agency or department, to the extent that they operate extra-territorially.[197]

There are also some laws that provide useful guidance to officials in relation to their cooperation. For example in relation to information sharing, where the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (***Mutual Assistance Act***) applies, it prevents exchanging information with foreign governments in relation to criminal matters in circumstances involving torture or where a person's safety outside Australia may be jeopardised.[198] In practice however, the human rights protections under the *Mutual Assistance Act* may be circumvented by utilising informal co-operation practices between Australia and Sri Lanka.[199]

Customs has asserted that processes for clearing and sharing information with Sri Lanka include taking account of relevant international law obligations.[200]

The HRLC asked the Government to provide information about any limits on Australian officials disclosing information to Sri Lankan officials and to provide information on the laws, policies or guidelines that would apply to such disclosure.

The AFP response provided information on applicable laws in a response to questions put to the AFP in writing (Appendix 3). That response listed numerous pieces of Commonwealth legislation that impact on information disclosure by the AFP,[201] as well

[197] For example *Australian Federal Police Act 1979* (Cth); *Customs Act 1901* (Cth); *Migration Act 1958* (Cth); *Criminal Code Act 1995* (Cth). However, there is a common law presumption that Australian laws do not have extra-territorial effect.

[198] The *Mutual Assistance Act* regulates Australia's provision of international assistance in criminal matters and facilitates Australia obtaining international assistance in criminal matters: section 5, *Mutual Assistance in Criminal Matters Act 1987* (Cth). It provides that the Attorney-General either must refuse official requests for assistance by foreign countries in certain situations, including where there are substantial grounds for believing the person would be in danger of torture, and may refuse a request in other situations, including where the request relates to investigation of an act that would not be an offence in Australia, or where a person's safety outside Australia may be jeopardised: section 8(1)(ca) and section 8(2)(a) - (b), (e), *Mutual Assistance in Criminal Matters Act 1987* (Cth).

[199] This is as allowed under section 6 of the *Mutual Assistance Act.*

[200] See e.g., Supplementary Budget Estimates, Legal and Constitutional Affairs Committee, 16 October 2012, answer to question No. 144, available at http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/sup_1213/ag/QoN_144-Customs.ashx.

[201] Including *Australian Federal Police Act 1979; Australian Federal Police Regulations 1979; Privacy Act 1988; Crimes Act 1914; Telecommunciations (Interception and Access) Act 1979; Surveillance Devices Act 2004* (See Appendix 3)

as the Ministerial Direction which sets out strategic priorities.[202] It further stated that information sharing is undertaken "in the spirit of the Universal Declaration of Human Rights". None of these laws and directions offer specific guidance or impose specific restrictions on the disclosure of information about Sri Lankan detainees, save in cases where a death penalty may be imposed on the detained person.

The AFP cited the *Memorandum of Understanding between the AFP and the Sri Lanka Police on combating transnational crime and development police cooperation* as further prescribing the responsibilities in terms of disclosure and management of information, however this MOU is not publicly available.

While AFP guidelines require AFP officers to consider particular risks to Australian detainees of torture, cruel or inhumane treatment associated with sharing information, there does not appear to be equivalent guidelines in relation to sharing information on foreign detainees.[203]

If such practices are regulated by internal procedures, those procedures are not made publicly available, making it difficult to assess the considerations taken into account by Australian officials when engaging in intelligence sharing that may lead to human rights abuses.

In relation to mistreatment in custody, AFP officers abroad are required to report concerns about conducting, attending or being involved in an interview if there is a risk that a person has been subject to torture or cruel, inhuman or degrading treatment.[204] If the officer abroad becomes aware of such mistreatment, they are required to report it internally as well as through post.

These important guidelines only apply to the AFP. It is not clear whether officers of other agencies operating overseas are subject to similar reporting obligations in relation to potential torture or mistreatment. HRLC asked the Government whether Australian

[202] Ministerial Direction issued under subsection 37(2) of the *Australian Federal Police (AFP) Act 1979* (Cth), 1 July 2010, available at http://www.afp.gov.au/about-the-afp/governance/ministerial-direction.aspx.

[203] AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment available at http://www.afp.gov.au/about-the-afp/~/media/afp/pdf/ips-foi-documents/ips/publication-list/National-Guideline-on-offshore-situations-involving-potential-torture.ashx.

[204] AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment. See also comment by Andrew Colvin, Deputy Commissioner Crime Operations, AFP, during Senate Estimates hearings: "but all our officers operate under the AFP guidelines on offshore situations involving potential torture or cruel, inhumane or degrading treatment or punishment", Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 58.

High Commission staff were required to report concerns about conducting, attending or being involved in an interview if there is a risk that a person has been subject to torture, cruel, inhuman or degrading treatment. We did not receive a response to that request (See Appendix 1).

9.1.2 Secrecy and lack of public accountability

At a systemic level, there is no robust oversight of Australia's support for Sri Lankan interceptions or the harm that might ensue. Instead there is a culture of secrecy in relation to Australia's practices in Sri Lanka. This means that there is very little public accountability for activities there. Accountability through parliamentary oversight mechanisms is also limited and there is no transparent system of proactive vetting of our overseas partners to ensure that they do not have a poor track record in terms of human rights or war crimes.

Despite the HRLC's requests for information, very little was voluntarily provided on request (see 'How this report was prepared' above).

There are limited accountability mechanisms in place to test government department and agency assurances that they conduct work in Sri Lanka in accordance with human rights standards.

Senate Estimates is one of the few public fora in which it is possible for government officials to be directly questioned about Australia's role in Sri Lankan interceptions. However, despite some rigorous questioning during Senate Estimates over a number of recent sessions, very little new information was provided by Australian Government officials. Where any detail of operations is sought, officials often refuse to comment on the basis that to do so would be to inappropriately discuss "intelligence matters."[205]

Other parliamentary committees could take some responsibility for systemic monitoring of Australia's cooperation with Sri Lanka to stop boat arrivals, but to date they have not. The Senate Foreign Affairs, Defence and Trade Committee has oversight of the Australian Defence Force and DFAT, and can inquire into matters raised in their annual reports. It can also refer matters to its Human Rights Sub-Committee. The Senate

[205] See for example this exchange in Senate Estimates between Senator Lee Rhiannon and Craig Chittick, Ambassador for People Smuggling Issues: Senate Estimates, Department of Foreign Affairs and Trade, 5 June 2013, above n 36 at p 133.

Legal and Constitutional Affairs Committee has a similar role in relation to the Attorney-General and the Immigration Portfolios.

The Parliamentary Joint Committee on Human Rights has a mandate in relation to human rights matters, but its inquiry function is limited to matters referred to it by the Attorney-General, making an inquiry unlikely.[206]

The powers of these committees are recommendatory only. Further, government members generally dominate parliamentary committees, which may limit their accountability function in relation to matters that fall within government policy.

In relation to the AFP, the Minister for Justice has a discretion to arrange for an inquiry to be held concerning matters relating to the AFP including conduct by AFP officials, practices or procedures of the AFP.[207] As with government-dominated parliamentary inquiries, there may be little impetus for the Minister to arrange for such an inquiry in relation to AFP practices in carrying out government policy.

The Commonwealth Ombudsman is an independent body with power to investigate complaints about the administrative actions of Australian Government departments and agencies both within and outside Australia,[208] and conduct own motion investigations.[209] The Ombudsman can make a report but cannot overturn an agency's decision.

These mechanisms are insufficient to ensure there is detailed scrutiny of work conducted by Australian agencies in Sri Lanka, or to ensure that agencies are held to account and changes are implemented following any identified impropriety.

9.1.3 Aid money is spent on 'anti-people smuggling work'

Australia funds its deterrence of boat journeys and interception work in Sri Lanka, at least in part, through Australian aid money. Although Australia's aid programs support

[206] 'Human Rights' are defined to include the rights and freedoms recognised under key international human rights conventions, however the Refugees Convention falls outside the Joint Committee on Human Rights' mandate.

[207] Part V, Division 4 of the *Australian Federal Police Act 1979* (Cth).

[208] Section 3C, *Ombudsman Act 1976* (Cth).

[209] For example, the Commonwealth Ombudsman has oversight of the AFP, including extra-territorial activities, as the Law Enforcement Ombudsman.

education, health and sustainable economic development,[210] Official Development Assistance (**ODA**) has also been used to stop people from leaving Sri Lanka on boats.

For example, in 2012-13, the AFP categorised as ODA some of its funding for training courses for the Sri Lanka Police, such as training on management of investigations, development for individual police officer programs, criminal intelligence analyst training, money laundering investigations training and train the trainer.[211] In Senate Estimates, the AFP said half of the training it provided was ODA-eligible funding ($280,000).[212]

Whilst this type of spend may be justified in aid terms on the basis of building and maintaining governance structures which is a legitimate objective of the aid budget, it is concerning that the self-interest of such training seems to be paramount.[213] Indeed the AFP does not see itself as in the business of aid, and according to Commissioner Negus, in all training "the Australian national interest is paramount."[214]

DFAT's aid strategy in Sri Lanka includes addressing what it classifies as economic causes of people using people smugglers. The aid strategic guideline states that Australia's development assistance combats people smuggling and "supports improved livelihoods and access to economic development to groups who may be vulnerable to exploitation by people smugglers."[215]

It is not possible to quantify the proportion of Australia's estimated $37.9m aid spend in Sri Lanka in 2013-14 that will be spent supporting 'border protection' or disruption activities.[216]

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[210] AusAID, *Australia-Sri Lanka aid program strategy 2012-16*, p 6, available at http://www.ausaid.gov.au/countries/southasia/srilanka/Documents/strat-approach-srilanka-2012-16.pdf.

[211] Andrew Colvin, Deputy Commissioner, Crime Operations, AFP, Senate Estimates, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 56.

[212] Ibid at p 58.

[213] There are five "core goals" of the Australian aid program: saving lives; promoting opportunities for all; building sustainable economic development; building and supporting effective governance; and, responding to natural and humanitarian crises: AusAID, *Australia-Sri Lanka aid program strategy 2012-16*, above n 210, p 11.

[214] Tony Negus, Commissioner, AFP, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 57.

[215] AusAID, *Australia-Sri Lanka aid program strategy 2012-16*, above n 210, p 9.

[216] This includes Official Development Assistance from all Australian agencies and programs attributable to partner countries and regions (Blue Book). Official development assistance comprises 1.7% of GDP in Sri Lankan and Australia is the second largest bilateral donor. AusAID, *Australia-Sri Lanka aid program strategy 2012-16*, above n 210, p 10.

Before the aid budget was reduced by the incoming Abbott Government, $2.4 million was estimated to be spent by Government agencies other than AusAID, including AFP and the Department of Immigration and Citizenship.[217]

There is very little on the public record about how aid is spent, but some is spent supporting the disruption activities and preventing departures. The HRLC asked the Australian Government to provide information on how much aid money was spent by DIBP, AusAID (before it was folded into DFAT) or AFP on initiatives to prevent people from getting on boats or that aim to 'combat people smuggling' through providing resources and training to the Sri Lankan navy and police (see Appendix 1). The HRLC did not receive a response to that request.

9.1.4 The need for accountability and oversight

No single Australian Government department or agency accepts responsibility for considering the overall human rights implications of Australia's cooperation with Sri Lanka. The public record indicates that each department or agency considers only that department or agency's limited role and the obligations of their own staff. As a result, no agency is enquiring about whether cooperation is or would lead to or aid improper activities.[218]

For example, though clearly aware of broader human rights issues in Sri Lanka,[219] the AFP, when asked directly in Senate Estimates, provided no evidence that it raises the need for minimum human rights with their Sri Lankan partners for the purpose of

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[217] AFP provides the third largest amount of aid behind AusAID and DIAC: Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 58.

[218] See for example AFP Commissioner Tony Negus's response to Senator Lee Rhiannon's questions during Senate Estimates hearings, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 104.

[218] Amanda Hodge, 'Boats to halt asylum-seekers at source', *The Australian,* 17 November 2013 available at http://www.theaustralian.com.au/national-affairs/policy/boats-to-halt-asylum-seekers-at-source/story-fn9hm1gu-1226761957645.

[219] "There have been numerous reports in the media and by Human Rights Watch. Of course, the AFP is conscious of those": Andrew Colvin, Deputy Commissioner, AFP, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013, above n 73 at p 58.

See also this exchange during the same hearing: Senator Lee Rhiannon, "…Has the AFP ever raised the need for minimum standards of human rights such as protection from torture for persons detained as a result of joint anti people-smuggling initiatives?... Mr Colvin: The AFP has a strong presence across South-East Asia and the issues you are talking about are not just confined to Sri Lanka. This is a real issue for our officers each and every day….", Hansard at p 59.

changing their practices, or that it takes a proactive position with Sri Lankan authorities in relation to human rights.[220]

Access to information more broadly about Australia's work supporting interception of boats in Sri Lanka, at an individual and systemic level, is hindered by an unwillingness by the Australian Government to provide any details and by a lack of any rigorous law or policy that would require the information to be provided or an oversight mechanism that could command the information to be produced.

There may be good reasons for Australia and Sri Lanka to cooperate to combat transnational crime. But national security or law enforcement concerns should not trump human rights as a matter of course.

Transparency and oversight are important because they not only ensure the integrity of Australian activities abroad, but also protect the reputation of Australian officials.

The Government can assert that Government officials always do the right thing and are of the highest calibre. However, no organisations are immune from misconduct. The AFP has been the subject of allegations of involvement in the mistreatment of Mamdouh Habib during his rendition and interrogation in Egypt.[221] Australian Defence Forces have also been subject of multiple scandals involving misconduct of personnel and Customs has been the subject of allegations of corruption.[222]

The best way to guard against such misconduct at an individual level is to establish a rigorous system to assess compliance with agreed and transparent standards.

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[220] Answer to Question on Notice No. 45 from Senator Lee Rhiannon, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 30 May 2013: "The training is all about appropriate police actions and responses in particular situations, having regard to legal and other obligations, including human rights…. The AFP takes allegations of human rights abuses very seriously, and if made aware of such allegations would raise them through the appropriate channels with the country concerned." In its response to the HRLC's questions, the AFP cited its internal oversight structure, and stated that the individual with ultimate internal oversight, AFP Manager International Network, must comply with the robust integrity framework of the AFP (see Appendix 3)

[221] See discussion in Andrew Lynch and Nicola McGarrity, 'Mamdouh Habib: who knew what, and when?', *Inside Story*, 19 January 2011, available at http://inside.org.au/mamdouh-habib-who-knew-what-and-when/.

[222] The Australian Defence Force Chief has said that tackling issues of sexual, mental and physical abuse in the armed forces is one of the key challenges. See Caroline Zielinski, 'ADF must confront abuse scandals, insists defence chief', *The Age*, 21 August 2013, available at http://www.theage.com.au/national/adf-must-confront-abuse-scandals-insists-defence-chief-20130821-2sc08.html. Scott Morrison has announced a taskforce to stamp out corruption in the Customs and Border Protection Service: see 'Scott Morrison announces Customs corruption taskforce', *ABC News*, 27 November 2013, available at http://www.abc.net.au/news/2013-11-27/scott-morrison-announces-customs-corruption-taskforce/5119756.

Australia may not be able to ensure all foreign counterparts comply with human rights standards, but it can set minimum standards for those elements in which Australia participates. For example Australia can be transparent about its work, the integrity of its work can be strengthened through oversight and Australia can refuse to train or work with foreign military or police against whom there are serious allegations of human rights abuse or war crimes.

9.1.5 At a glance

- Australia's cooperation with Sri Lanka to intercept boats is conducted under a shroud of secrecy.
- Only one Australian Government official agreed to speak on the record.
- It is unclear what basic laws, policies and standards apply to Australian officials in their cooperation.
- Oversight mechanisms such as parliamentary committees provide only limited oversight of the human rights impact of Australia's border security work in Sri Lanka.
- Some of the border protection work has been funded through Australia's aid budget.
- The AFP funded its training of Sri Lanka police with Official Development Assistance, although admitted that in that training the Australian national interest is paramount.
- There is not enough information on the public record to assess how much aid is spent on other cooperative border protection activities in Sri Lanka that contain asylum seekers.

9.2 No due diligence of security forces receiving Australian assistance

Australia works closely with the Sri Lankan military against whom there are serious allegations of war crimes at the end of the war, and the Sri Lanka Police in relation to whom Australia has recently expressed concern about the widespread use of torture and mistreatment in detention. Yet Australia does not conduct any comprehensive due diligence in relation to its Sri Lankan partners.

Whilst some ad hoc inquiries may be made, the AFP has no legal obligation to comprehensively vet the police officers in the Maritime Human Smuggling Unit of the Sri Lanka Police or the Sri Lankan officers to whom Australia provides training. When asked about how the AFP ensures it is not working with people against whom there might be credible allegations of serious human rights abuse, the AFP's Commissioner simply said that they "trust the judgment of the officer on the ground."[223]

The Commissioner also asserted that the AFP does its "best to try to work with them [Sri Lankans] to apply the standards you would expect in Australia" but that he could not give "a categorical assurance as to the quality and calibre of officers from other countries around the world, because they are not my responsibility and they are not Federal Agent Wood's."[224]

Australia also provides several million dollars a year in support and training for the Sri Lankan navy.[225] If anything, the cooperation is expanding. In November 2013, Sri Lanka's Media Minister Keheliya Rambukwella confirmed that a new MOU between Australia and Sri Lanka would centre on the navies of the two countries working together to stop irregular migration by boat to Australia.[226]

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[223] "I know that Federal Agent Wood is a fine young officer. I know him personally. He is of the highest calibre and he would not tolerate anything that was seen": Tony Negus, AFP Commissioner, Senate Estimates Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 119.

[224] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 119.

[225] Ben Doherty, 'Sri Lanka to make more arrests: More sailors linked to people smuggling ring', *The Sydney Morning Herald*, 16 November 2013 available at http://www.smh.com.au/national/sri-lanka-to-make-more-arrests-more-sailors-linked-to-people-smuggling-ring-20131115-2xmdd.html; Letter from Department of Defence to Human Rights Law Centre, 23 August 2013, copy on file with the HRLC.

[226] Xinhua, 'Sri Lanka, Australia expand navy cooperation to combat people smuggling,' *Global Times*, 17 November 2013, available at http://www.globaltimes.cn/content/825446.shtml.

However, the Defence Force does not vet with the people with whom it works. Defence relies on advice from DFAT that the regional partners it deals with are in good standing in the eyes of our nation.[227]

The HRLC asked the Australian Government to provide any information about laws, policies and guidelines governing Australian Government decisions about whether or not to work with particular foreign officials and the circumstances in which Australia would refuse to work with foreign military or police. The HRLC asked what precautions, if any, Australia took to ensure that our cooperation does not include directly engaging with people against whom there are credible allegations of serious human rights abuse (such as rape or torture) or war crimes and crimes against humanity (see Appendix 1). No response was provided to those questions.

9.2.1 A model for vetting overseas security forces

Australia should adopt the US Leahy Law as a model for a mechanism by which it comprehensively vets the human rights track record of overseas security forces with whom we cooperate or to whom we provide assistance.

Since 1997, the United States Government has been prevented from directly arming or assisting human rights violators abroad through the operation of the Leahy Law.[228] The Leahy Law prohibits the US Government from providing assistance to foreign security forces, as well as certain Department of Defense[229] training programs, if there is credible information that the unit has committed gross violations of human rights.[230] Security forces include foreign militaries, police and prison guards.[231]

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[227] Chief of the Defence Force, Answer to question during speech at Cranlana Alumni Series – Big Ideas, *ABC*, available at http://www.abc.net.au/radionational/programs/bigideas/.

[228] Section 620M, *Foreign Assistance Act 1961* as amended (**FAA**), contained the law colloquially known as the 'Leahy Law' or 'Leahy Amendment', after its chief sponsor, Senator Patrick Leahy. The provisions are now found in the United States Code, Title 22. Foreign Relations and Intercourse, Chapter 32. Foreign Assistance. Subchapter III. General and Administrative Provisions. Part I. General Provisions, section 2378d. Limitation on Assistance to Security Forces available at http://uscode.house.gov/browse/prelim@title22/chapter32/subchapter1/part1&edition=prelim.

[229] Note, unlike the Leahy Law that applies to the US Department of State, the Secretary of Defense can waive this prohibition if he/she determines that "extraordinary circumstances" exist. As it applies to the Department of Defense, this is enacted in the yearly "Appropriations Legislation". For 2014, this is the *Consolidated Appropriations Act,* Public Law NO: 113-79, Sec. 8057.

[230] There is no statute of limitations, meaning that the prohibition on assistance can apply to gross violations that occurred at any time in the past.

[231] US Department of State, An Overview of the Leahy Vetting Process, Humanrights.gov (May 14, 2012),

Access to US military training and assistance is highly prized by security force personnel around the world, so the Leahy Law provides a powerful incentive for recipient countries to change their human rights conduct. Although the State Department does not publicly report on the armed units that the Leahy Law has been applied to, it is understood to have frozen assistance to security forces in Turkey, Bolivia, Mexico and Colombia, Afghanistan and the Philippines.[232]

Australia's cooperation with Sri Lankan security forces on border control is also highly prized by the Sri Lankan Government, in terms of the provision of valuable resources as well as the closeness of the relationship.

To achieve its aims, the Leahy Law requires the US Department of State to 'vet' foreign security forces on human rights grounds before providing assistance to those forces. When the vetting process uncovers credible information that an individual or unit has committed a gross violation of human rights, assistance is withheld. Gross violations include torture or cruel, inhuman or degrading treatment, politically motivated rape, arbitrary detention, enforced disappearance and other flagrant denial of the right to life, liberty or security of the person.[233]

The Department of State determines whether information is "credible" on a case-by-case basis, taking into account the source, circumstances in the relevant country, level of specificity of the information, and availability of corroborating information.

Importantly, the Department is required to receive and take account of information about gross violations from a variety of sources outside the US Government, including NGO information and press sources.[234] Typically, information is given greater weight when corroborated by multiple sources.

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available at http://www.humanrights.gov/2011/10/06/an-overview-of-the-leahy-vetting-process.

[232] See Winifred Tate, 'Human Rights Law and Military Aid Delivery: A Case Study of the Leahy Law', *Political and Legal Anthropology Review,* November 2011 and Nathanael Tenorio Miller, 'The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences', *Cornell International Law Journal,* Fall, 2012.

[233] Section 502B(d) of the FAA. Department Leahy Vetting policy includes politically motivated rape as a gross violation of human rights.

[234] United States Code, Title 22. Foreign Relations and Intercourse, Chapter 32. Foreign Assistance. Subchapter III. General and Administrative Provisions. Part I. General Provisions, section 2378d. Limitation on Assistance to Security Forces, (d)(2).

The vetting process has two vital steps; an initial in-country review by US embassies, and a secondary, Washington-based review by the Bureau of Democracy, Human Rights, and Labor inside the US Department of State.[235]

The law also encourages the Department of State to publicise, to the maximum extent that is practical, the identity of units that are ineligible for assistance as a result of the Leahy Law.[236]

The Department of State is also encouraged to offer assistance to foreign governments to help them bring the specific individuals responsible for the commission of abuses to justice.[237]

9.2.2 Australia should adopt a Leahy Law

A Leahy-style law would improve Australia's legitimacy and moral standing in international affairs by ensuring that Australia does not provide assistance to perpetrators of gross human rights violations abroad. It would also mean that Australia could leverage its close relationship with Sri Lanka to improve human rights outcomes.

By adopting a vetting system and denying assistance to Sri Lankan security forces engaged in gross human rights violations, Australia could also encourage the Sri Lankan Government to prosecute human rights violators, and prevent future gross human rights violations.

A Leahy-style law would create a space for active and effective human rights dialogue with Sri Lanka.

A Leahy-style law could also create a requirement that the Australian Government receive and take account of information from a broad range of sources, including NGO material, creating more of a culture of openness to non-government information.

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[235] See US Department of State website, Bureau of Democracy, Human Rights, and Labor, at http://www.state.gov/j/drl/. .

[236] See United States Code, Title 22. Foreign Relations and Intercourse, Chapter 32. Foreign Assistance. Subchapter III. General and Administrative Provisions. Part I. General Provisions, section 2378d. Limitation on Assistance to Security Forces, (d)(7).

[237] United States Code, Title 22. Foreign Relations and Intercourse, Chapter 32. Foreign Assistance. Subchapter III. General and Administrative Provisions. Part I. General Provisions, section 2378d. Limitation on Assistance to Security Forces (c) duty to inform.

9.2.3 At a glance

- There are credible allegations of the commission of war crimes and crimes against humanity against Sri Lanka's military as recently as 2009.
- Torture and other forms of mistreatment, including sexual violence, is reportedly widespread in the custody of Sri Lanka's security forces.
- Despite these serious human rights issues, Australia makes no comprehensive attempt to vet the human rights record of the individuals or units with which it works on border security.
- Australia should introduce a law similar to the US Leahy Law, which would prohibit Australia from providing direct aid or assistance to any foreign security forces against whom there is credible information of serious human rights abuses, such as rape or torture, or war crimes.

9.3 In partnership with the people smugglers?

At the same time last year as Australia was praising Sri Lanka's close cooperation in stopping the boats, allegations emerged that senior members of the Sri Lanka Navy were key players in people smuggling operations.

In April 2013, *The Island* reported that the Sri Lanka Police CID was investigating "the alleged involvement of security forces elements with a criminal gang which organises smuggling of people by boats to Australia."[238]

[238] Hemantha Randu, 'Security elements too behind people smuggling bids?', *The Island*, 22 April 2013, available at http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=77426.

The Sri Lanka Police in November 2013 arrested a Lieutenant-Commander of the Sri Lanka Navy in connection with people smuggling activities, who had previously met with high-level Australian officials in Australia to discuss the Sri Lanka Navy's anti-people smuggling measures.[239]

The Australian Government has dismissed concerns that naval complicity may be systemic, Prime Minister Abbott stating at the Commonwealth Heads of Government Meeting (**CHOGM**) in November 2013 that "[w]hile I regret … that at least on the face of it there appears to have been some improper behaviour, the fact the Sri Lankan government is cracking down hard on this gives me great confidence."[240]

When the AFP was asked in Senate Estimates hearings what mechanisms were in place to ensure that its officers were not inadvertently supporting Sri Lankan officials that may be engaged in people smuggling, Commissioner Negus' response was limited to the standards to which its own staff were required to adhere, and did not address the extent to which its partners might be complicit in people smuggling.[241]

Anecdotally, there is widespread belief among people who are trying to leave Sri Lanka on boats that the Navy and the Government either operate the smuggling or condone it. One Sri Lankan man has been quoted as saying "The navy is giving much support for the agents. If the agents fail to pay the navy then they can't leave; the military will stop you."[242]

Whether or not naval or Sri Lankan Government complicity in people smuggling activities is proved, the existence of allegations raises serious questions about the suitability of Sri Lanka as a partner in anti-people smuggling activities that may expose asylum seekers to risk. In these circumstances, there is a clear imperative for Australia to conduct a thorough vetting of its partner agencies in Sri Lanka to determine whether

[239] Ben Doherty, 'Sri Lankan navy officer accused of being key player in people-smuggling racket', *The Sydney Morning Herald,* 15 November 2013, available at http://www.smh.com.au/federal-politics/political-news/sri-lankan-navy-officer-accused-of-being-key-player-in-peoplesmuggling-racket-20131114-2xk1n.html.

[240] Ben Doherty, 'Tony Abbott's boats gift to Sri Lanka comes under fire', *The Age*, 18 November 2013, available at

http://www.theage.com.au/federal-politics/political-news/tony-abbotts-boats-gift-to-sri-lanka-comes-under-fire-20131117-2xp5z.html

[241] Tony Negus, AFP Commissioner, Senate Estimates, Legal and Constitutional Affairs Legislation Committee, 18 November 2013, above n 54 at p 119.

[242] Emily Howie, 'Sri Lankan Boat Migration to Australia: Motivations and Dilemmas', above n 28.

these allegations are credible, and to ensure Australia is not providing any support for officials or agencies against whom there are credible allegations.

9.3.1 At a glance

- Senior members of the Sri Lanka Navy are suspected of being key players in the people smuggling operations to Australia, including a Lieutenant-Commander who had briefed Australia on the Sri Lankan navy's anti-people smuggling measures
- Allegations raise serious questions about the suitability of Sri Lanka as a partner in anti-people smuggling activities that may expose asylum seekers to risk.
- Australia should conduct a thorough vetting of its partner agencies in Sri Lanka to determine whether these allegations are credible, and to ensure Australia is not providing any support for officials or agencies engaged in people smuggling.

9.4 Impact on Australian foreign policy

Australia's international reputation on human rights issues has taken a backward slide as a result of its desire to remain close with the Sri Lankan authorities to prevent the flow of people, including asylum seekers, by boat to Australia and to maintain its ability to return Sri Lankans who arrive by boat.

This was starkly evident at CHOGM in November 2013. Just prior to the meeting, the Prime Minister Abbott said that Australia would not lecture Sri Lanka on human rights.

He said Australia needed to maintain the "best possible relations" with Sri Lanka to ensure the ongoing cooperation in them taken back people arriving by boat.[243]

By contrast, the Canadian and Indian Prime Ministers both boycotted the event. Canada cited its deep concern about the "absence of accountability for the serious violations of human rights and international humanitarian standards during and after the civil war."[244] UK Prime Minister David Cameron attended the meeting but took the opportunity to visit the Tamil-majority Northern Province and made his views clear that there had been "nowhere near enough improvement."[245]

An Australian Senate motion was passed on 13 November 2013 that called on the Australian Prime Minister to raise the matter of independent investigation into allegations of violations of international human rights law and international humanitarian law with the President of Sri Lanka during CHOGM.[246] Publicly, however, Prime Minister Abbott did no such thing.

As reports were published that a high-ranking Sri Lankan navy officer had been arrested on people smuggling charges, Prime Minister Abbott announced the gift of two Australian naval boats to Sri Lanka.[247] The aim of the gift was to increase Sri Lanka's interdiction capacity and continue our "excellent" cooperation at sea.[248]

Minister Scott Morrison would not say whether Sri Lanka would use the boats for purposes other than "to stop people coming to Australia illegally by boat."[249] However, it is not illegal under Australian law to seek asylum after arriving irregularly.

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[243] Paul Osborne, 'Sri Lanka makes rights progress: Abbott', *The Sydney Morning Herald*, 11 November 2013, available at http://news.smh.com.au/breaking-news-national/sri-lanka-makes-rights-progress-abbott-20131111-2xbwq.html.

[244] Stephen Harper, Statement by the Prime Minister of Canada, 7 October 2013, available at http://pm.gc.ca/eng/news/2013/10/07/statement-prime-minister-canada.

[245] Prime Minister David Cameron, 'op-ed', 13 November 2013, https://www.gov.uk/government/news/pm-on-commonwealth-heads-of-government-meeting.

[246] Australian Senate motion,14 November 2013, excerpt available at http://lee-rhiannon.greensmps.org.au/content/media-releases/australian-senate-calls-pm-abbott-raise-sri-lanka%E2%80%99s-human-rights-abuses-chogm.

[247] Prime Minister, Press Conference, Colombo, 17 December 2013, transcript available at http://www.pm.gov.au/media/2013-11-17/press-conference-colombo-sri-lanka.

[248] Ibid.

[249] AAP, ''Sri Lanka's use of gift boats will be 'worked through,' says Scott Morrison', *The Guardian*, 18 November 2013, available at http://www.theguardian.com/world/2013/nov/18/sri-lanka-gift-boats-scott-morrison.

In his press conference at the end of the Commonwealth summit, Prime Minister Abbott refused to criticise Sri Lanka and in the course of questioning he excused torture. Torture is unjustifiable and its prohibition one of the most unequivocal human rights, yet Prime Minister Abbott said:

> Obviously the Australian Government deplores any use of torture. We deplore that, wherever it might take place, we deplore that. But we accept that sometimes in difficult circumstances, difficult things happen.[250]

Such a statement is inconsistent with the strong prohibition against torture in Australia's domestic and international law obligations, provides cover for human rights abusers, and fails to acknowledge the ongoing problem of torture and mistreatment in Sri Lankan custody.[251]

At the UN Human Rights Council session in March 2014, the US will sponsor another resolution on Sri Lanka. The UK is calling for the resolution to include an international mechanism to address war crimes and ongoing human rights violations.[252] What will Australia do? In 2013, Australia co-sponsored the US-led resolution, but only at the very last minute, avoiding the need to make any public statements critical of Sri Lanka in the Human Rights Council chamber.

Australia has so far not committed to supporting another US resolution.[253] However there are reports that US and UK officials are concerned that Australia will "actively undermine" a push for an international inquiry.[254]

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[250] ABC radio report by Louise Yaxley, including audio of interviews with Tony Abbott, Bill Shorten, Scott Ludlum and Scott Morrison, http://www.abc.net.au/news/2013-11-18/abbott-faces-questions-over-comments-in-sri-lanka/5099522.

[251] Torture is prohibited under both Australian law (Div 274, *Criminal Code*,) and international law treaties to which Australia is a party (including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Geneva Conventions of 1949). Australia is also a state party to the Rome Statute of the International Criminal Court, which includes torture among grave crimes in violation of international law.

[252] "I want to ensure that the House understands that if a credible domestic process has not properly begun by March 2014, we will use our position on the UN Human Rights Council to work with the United Nations High Commissioner for Human Rights and call for an international investigation": address to House of Commons by Mark Simmonds, UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, 23 January 2014, available at http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140123/halltext/140123h0001.htm.

[253] See Julie Bishop's statement in Tom Allard, 'Julie Bishop refuses to back investigation into Sri Lanka war crimes', *The Sydney Morning Herald*, 5 February 2014, available at http://www.smh.com.au/federal-

As Prime Minister Abbott kowtows to the Sri Lankan agenda, Australia's reputation as a good global citizen is damaged. Australia must stand against mass murder and war crimes, or else what does Australia stand for?

9.4.1 At a glance

- Australia is increasingly reluctant to make any criticism of Sri Lanka's appalling human rights record. Prime Minister Abbott says that Australia needed to maintain the "best possible relations" with Sri Lanka to ensure that Sri Lanka will continue to accept returnees.
- Australia's reputation as a good global citizen has been greatly damaged by Australia's foreign policy positions as a result.
- At the Commonwealth Summit held in Sri Lanka, Prime Minister Abbott avoided criticising Sri Lanka's human rights record despite strong statements of concern made by other likeminded states such as Canada, the United Kingdom and India. By contrast, Prime Minister Abbott made a statement that seemed to excuse Sri Lanka's history of torture and suggesting that in "difficult circumstances, difficult things happen."

politics/political-news/julie-bishop-refuses-to-back-investigation-into-sri-lanka-war-crimes-20140205-321gr.html.

[254] Bianca Hall and David Wroe, 'Diplomats fear Australia will wreck UN probe into Sri Lankan war crimes', *The Sydney Morning Herald*, 24 February 2014.

10 List of Appendices

10.1 Appendix One

Questions for Australian Government: Co-operation with Sri Lanka to combat people smuggling, dated 21 November 2013

10.2 Appendix Two

Questions put to Department of Defence by Human Rights Law Centre, dated 26 August 2013

10.3 Appendix Three

Response to questions put by Human Rights Law Centre from Australian Federal Police received on 28 February 2014