

# The Legitimation of Australia's Deterrent Migration Policy

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In 1992, the Australian government passed regulation legalising the mandatory detention for asylum seekers arriving by sea, a policy implemented through policies such as creation of offshore detention centres and the excision of its own territorial waters. This more restrictive set of policies sent “a clear message... that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community” (Opeskin, 2012:570). In response to worsening regional crises, in 2001 Australia introduced the Pacific Solution that sanctioned the transfer of asylum seekers arriving by sea to Papua New Guinea (PNG) and Nauru pending decision on their asylum claims (Zamfir, 2016:2). In addition, during that same year, Australia excised more than three thousand five hundred islands from its territory, announcing that Australia will no longer be responsible for migrants in these zones (*Migration Amendment Act*, 2001). Recently, this excision has been applied to the entire length of Australia's coastline (*Migration Amendment Act*, 2013). In 2013, these exclusionary policies were formalised into a deterrence strategy called Operation Sovereign Borders (OSB) (Zamfir, 2016:3). OSB allowed the Royal Australian Navy to forcibly restrict boats transporting asylum seekers from approaching Australian shores and coined the now infamous deterrent slogan: “No way. You will not make Australia home.” (Zamfir, 2016:3).

Gammeltoft-Hansen and Tan (2017:28) argue that such “restrictive migration control policies are today the primary, some might say only, response of the developed world to rising numbers of asylum seekers and refugees”. In this sense, the developed world has shifted states focus from refugee protection to restrictive deterrence strategies (*ibid.*). However, the international refugee protection regime features various legal instruments prohibiting such deterrent practices. The Universal Declaration of Human Rights of the United Nations (UN) states in Article 14 (1) that “everyone has a right to seek and to enjoy in other countries asylum from persecution” (UN General Assembly, 1948). This concept is inherent in the principle of non-refoulement within the UN Convention relating to the Status of Refugees (Article 33 (1)) that provides the “prohibition of expulsion or return (“refoulement”)” (UNHCR, 2010). Furthermore, Article 33 (1) states that “no Contracting 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” (*ibid.*). The introductory note of the Refugee Convention further emphasises that no derogation nor reservation can be made to the principle of non-refoulement (*ibid.*:3). According to Hathaway (2002:6), non-refoulement applies unconditionally regardless of status and immediately after the asylum seeker enters the country's *de facto* authority. Accordingly, the Declaration of States Parties to the Refugee Convention and its Protocol Relating to the Status of Refugees affirms that non-refoulement is a fundamental principle within customary international law (2001:81, 1.3 §4). In this light, the deterrence policies employed by Australia clearly infringe the principle of non-refoulement.

Deterrence strategies, such as the regulations employed by Australia, are often characterised by non-admission policies and non-arrival measures, offshoring asylum seekers, resettlement to third countries, the criminalisation of illegal migration and human trafficking, mandatory detention, family separation and so forth (Gammeltoft-Hansen and Tan, 2017:34). According to Gammeltoft-Hansen and Hathaway (2015:7), deterrence policies enable prosperous countries to preserve a “formal commitment to international refugee law, while at the same time largely being spared the associated burdens”.

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Deterrent tactics are clearly in violation of the spirit of international refugee and human rights law, if not the laws themselves. However, they are not considered violations (Gammeltoft-Hansen, 2014b). There appears to be a general assumption that developed countries can avoid their responsibility to protect refugees by transferring them to third countries through deterrent strategies and manipulation of international law (Gammeltoft-Hansen and Tan, 2017:40; Gammeltoft-Hansen and Hathaway, 2015). It is clear then, that deterrence regulations constitute 'creative legal thinking' since they exploit loopholes in international law, while allowing countries to maintain sovereignty and control over migration (Gammeltoft-Hansen, 2014a).

Nevertheless, deterrence strategies, such as offshore detention centres, have significant adverse effects on receiving states (Gammeltoft-Hansen and Tan, 2017:28). Currently, according to Gammeltoft-Hansen and Tan (*ibid.*), only 14% of the world's total refugee population is protected by high-income countries. Furthermore, the human rights violations affiliated with deterrence strategies present particular concerns for those working in refugee protection. The UNHCR (2001:§11(c)) declared that "refugees and asylum seekers should not be detained (...) for the purposes of deterrence". Hence, it is crucial to understand why Australian policy is increasingly perceived by many states as a model immigration strategy (Achieme et al., 2017:6), and how the country has maintained this relative impunity (Morris, 2003:52) despite its practice of illegal deterrence.

This paper will therefore analyse the ways in which Australian authorities legitimise their deterrence regulations in relation to international refugee legal standards. Therefore, the first section of this paper will explain how, over the years, Australia has used geographical and political techniques such as border excision and offshore detention centres to defend its migration policy. This essay will then analyse the Australian government's maintenance of this dubious legality, locating their policies within a broader international fight against irregular migration and trafficking. Finally, the agreements made between Australia and state/non-state actors to facilitate its deterrence policy will be analysed to understand how they are used to justify Australia's migration strategy.

## Geographies of Exclusion: Deterritorialisation, Offshore Detention and Non-Arrival Procedures

Australia has cleverly excised its coasts and islands thereby changing its migration zones and modifying its political geographies (Hyndman and Mountz, 2008:268). The Migration Amendment Bill of 2001 lawfully removed the Christmas islands, Ashmore reef, Cartier islands and Cocos island from Australia's migration area, allowing Australian authorities to arbitrarily define who is legally outside or inside the country (Morris, 2003: 55, 58). Twelve years later, Australia applied the same process to the country's entire migration area, preventing all asylum seekers arriving in those zones to claim asylum in Australia. As a result, between 2014 and 2016, not a single refugee boat was allowed to reach Australian shores (Zamfir, 2016:2; Gammeltoft-Hansen and Tan, 2017:45). These geographical meanderings can therefore, be perceived as a manipulation of international law since Australia uses such policies to effectively avoid its responsibility towards asylum seekers, while remaining signatory to the Refugee Convention and maintaining its international legitimacy (Dickson, 2015).

However, such policies do not relieve Australia of its commitments to process and protect asylum seekers. Gammeltoft-Hansen and Tan (2017:33) explain that there are legal precedents set in other countries where domestic courts ruled that states are prohibited from excising parts of their territory and thus modify their zones of refugee responsibility into 'international zones'. According to Gammeltoft-Hansen and Hathaway (2015:15), "both the nature of state territory in international law and overarching duties to meet standards of fairness wherever there is an exercise of state power, mean that 'international zones' are not capable of insulating a state from its legal obligations to protect refugees under its jurisdiction". Therefore, these changes in domestic law create geographical zones where Australia still has jurisdiction, but where asylum seekers are denied basic rights (Dickson, 2015:439-49). These special zones where asylum seekers are excluded from international protection, can also be applied to offshore detention, which will be discussed in the following section (*ibid.*). Thus, Australia uses legal strategies within its own domestic legal system to avoid its responsibilities under international law.

Secondly, in a further strategy to avoid responsibility for asylum seekers, Australia has continued its policy of running extra territorial detention centres. Asylum seekers are detained in facilities financed by the Australian government, but their asylum application is evaluated under the laws of the country of detention; Nauru or PNG. Australia argues

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that this process is completely legal since Nauru and PNG have ratified the Refugee Convention and its Protocol. However, since Australia exercises authority over the centres, and Australian domestic law fails to restrict the length of time that migrants can be legally detained, asylum seekers are often detained for extended periods in overcrowded and dangerous conditions. In September 2016, almost fifty percent of the detainees were in the centres for more than a year. (Zamfir, 2016:4)

Despite UNHCR's assessment of the centres in Nauru and PNG as unlawful, unfair, and unsafe (UNHCR, 2013a; UNHCR, 2013b) and such wide scale detention deemed unlawful under Article 31 (2) of the Refugee Convention (UNHCR, 2010), Australia argues that its mandatory detention policy is an act of fairness towards 'lawful' refugees waiting patiently for resettlement under UNHCR programs. In justification, the Australian government argues that 'illegal' migrants should not 'jump the queue' of legal refugees waiting for resettlement (Dickson, 2015:442; Zamfir, 2016:3). However, Dickson (2015:442) suggests that no such queue exists since Australia's resettlement procedures are extremely protracted and rarely end in asylum being granted. Moreover, according to Karlsen (2015), there are considerable delays in the processing of asylum claims from detainees in Nauru and PNG, with initial referrals taking up to eighteen months. Therefore, Australia conceptualises Nauru's and PNG's asylum seekers as unlawful in order to legitimise their unlawful deterrence policies.

Australia also seeks to avoid responsibility for conditions within its detention centres. When pressed on the conditions of asylum seekers on Nauru, The High Court of Australia asserted that only Nauru can be held responsible for what happens in the centres (*M68-2015 v. Minister for Immigration and Border Prot.* (2016) HCA 1, §102, seq.78). The High Court further affirmed that from the moment irregular migrants leave Australian maritime custody, they become Nauru's responsibility (*ibid.*:§34). In this sense, states such as Australia, "believe that they can immunize themselves from legal responsibility for the deterrence" since refugees in their offshore detention centres are under the authority of another country (Gammeltoft-Hansen and Hathaway, 2015:9). Through these avoidance tactics, Australia has adapted its domestic law to avoid its obligations towards offshore detentions centres and the detainees held within them (Dickson, 2015:450). As a result, Australia once again effectively utilises domestic legal strategies to avoid its responsibility under international law.

However, Gammeltoft-Hansen and Hathaway (2015:40) argue that, if a state intercepts asylum seekers at sea and detains them in detention centres (even if outside the state's territory), the intercepting and detaining state has authority, and thus bears sole responsibility for conditions of asylum seekers. As previously mentioned, UNHCR states that the transferring state remains responsible for offshore detention, yet the "geopolitical structure of these territorially detached operations allows the transferring state to evade jurisdictional responsibility and political accountability" (Dickson, 2015:444). Additionally, since both PNG and Nauru have ratified the Refugee Convention, Australia and both Islands are responsible for the detentions centres (UNHCR, 2013a; UNHCR, 2013b). According to Mountz (2011:121), Manus and Nauru's detention centres are a junction of sovereignty creating confusion over who bears responsibility for the treatment and onward movement of asylum detainees. In this case, Australia manipulates the core of refugee law, the UNHCR convention, to justify its deterrent procedure and offshore detention centres.

According to Gammeltoft-Hansen and Tan (2017:35), such procedures of interdiction/non-arrival are the favoured form of deterrence. Interdiction policies allow the state to protect itself from refoulement since asylum seekers are not given the opportunity to reach the country's shores (Motomura, 1993:698). According to Motomura (*ibid.*:706), interdiction strategies prohibiting access to Australian waters disconnect migrants from the country. While the Refugee Convention is a comprehensive instrument within the refugee protection regime, certain protection gaps are problematic since they fail to include non-entrée strategies (Morris, 2003:59). This highlights a protection gap in the current refugee protection scheme as asylum seekers can be held in zones where they are devoid of rights. Accordingly, Morris (*ibid.*:60) argues that non-arrival policies put refugees "in orbit" where their very existence can be denied.

Therefore, the excision of migration zones and the offshore detention centres used by Australia demonstrate that "it is possible for an individual to be within the jurisdictional control of the state and remain 'outside' the zone of juridical responsibility" (*ibid.*:51, 55). Hence, Australia is diminishing its territorial boundaries while increasing its control over

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migration (*ibid.*:58). According to Morris, "while interdiction exploits the gap between jurisdiction and juridical responsibility on the high seas, Australia's excision policy has created such a gap on its own territory" (*ibid.*). This concept of 'deterritorialisation' allows nations to separate themselves from their territorial state (Jacobson, 1996:127).

Opeskin (2012:578) believes that, even if international law holds states to account for refugee protection, some of them succeed in maintaining authority over inward migration streams and the power to decide who to admit or refuse. This is the case for Australia and its control over deciding which migrant can enter the country, which appears clearly in violation of the principle of non-refoulement. Nevertheless, when looking beyond refugee law, a consensus emerges that human rights principles should be applied both inside and outside a state's territory, implying that Australia must not violate non-refoulement if it wants to be perceived as an ethical and fair nation (Dickson, 2015:443-444). Accordingly, in international law, a state is responsible for operations conducted in its name both inside and outside of its legal territory (Brouwer and Kumin, 2003:14).

## 'Irregular' Migration: Sovereignty and Rhetorical Distinctions

According to Morris (2003:52), the non-arrival tactics previously discussed aim to assert states authority over who can enter a country. Since there is no specific right to enter a country enshrined within refugee law, states themselves have the right to decide which individuals can be afforded entrance into a nation (UN, 2009:6-14; Opeskin, 2012:560). According to Agamben (1998:15) "the sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law". When viewed in the refugee context, Pickering (2005:158) argues that this issue of "national and territorial sovereignty" has been at the centre of the debate. Moreover, Soguk (1999) argues through sovereignty, migration policies will be applied, further highlighting the importance of the state's power over migrants' rights. Since refugee law leaves states free to implement their human rights obligations and domestic migration processes as they wish, states interpret and apply treaties and conventions to their own advantage (Gammeltoft-Hansen and Tan, 2017:46; Opeskin, 2012:560). Opeskin (*ibid.*) argues that democratic states can easily remain legitimate within international law while sustaining their authority over domestic refugee regulations. There is a consensus within developed countries that engagement with international migration law is representative rather than unconditional (Gammeltoft-Hansen and Hathaway, 2014b:5). Morris (2003:59) adds that the Refugee Convention and its Protocol can only be applicable through domestic legal systems, highlighting the importance of a correct implementation of these instruments within domestic law.

This state territorial power, in terms of borders and inclusion of asylum seekers, has de-legitimated migrants' status and portrays them as illegal citizens. The sovereign exercises its authority to decide who can enter its territory, implying that crossing borders without permission becomes a breach of domestic law (Pickering, 2005:159). Australia uses its sovereign power to control migration flows since, according to McAdam and Chong (2014), Australia is not domestically responsible for refugee regulations that fail to adhere to international legal standards. This is because the Australian Migration Act of 1958 does not share the same principles as refugee and human rights law (*ibid.*). According to Morris (2003:53), in the case of Australia, "the goal of reasserting sovereignty clearly supersedes international responsibilities in this regard".

Moreover, Australia legitimises these deterrent detention policies by arguing that they combat smuggling and irregular migration (*MoU Nauru-Austl.*, 2013:3). Morris (2003:58) states that excision of borders depicts illegal migrants and asylum seekers as "non-citizens" trying to unlawfully reach Australia, a process which demonises migrants and portrays Australia as a state under threat. Through its interdiction and non-arrival procedures Australia stops the arrival of irregular boats on its modified shores (Zamfir, 2016:1). This results in an accumulation of asylum claims treated as unlawful (*ibid.*:4). This strategy is problematic for the human rights of migrants since, according to Australian standards, "non-citizens" are subject to mandatory detention under the 1958 Migration Act (Morris, 2003:56). In that case, Australian authorities reverse the situation by implying that asylum seekers are illegal and that Australia is enforcing the law by combatting irregular migration. Therefore, Australia uses legal vocabulary to its own advantage and manipulates the legal concept of regular and irregular migration flows to legitimise its illegal strategies.

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Moreover, Australia distorted international refugee law by declaring that the principle of non-refoulement does not apply to "non-citizens" (Migration and Maritime Powers Legislation Amendment Bill 2014, Subsect. 197 (c) (Cth)). As a result, the Australian government has asserted that 'illegal' persons are not allowed to make an official visa application (Goldenziel, 2016:547). This legal assertion breaches international law, the principle of non-refoulement, and prevents asylum seekers coming by sea to seek protection and to become legal refugees (Dickson, 2015:447). Pickering (2005:144) believes that "it is not appropriate to codify an international instrument (as does the Migration Amendment Act) at a domestic level when it was designed to respond to changing circumstances".

As previously mentioned, Australia justifies this categorisation of legal and illegal migrants by arguing that asylum seekers arriving through waters should not have priority over those waiting to be resettled through the official UNHCR re-admission program (Zamfir, 2016:3; Dickson 2015:442). By asserting that non-refoulement does not apply to 'irregular' migrants, Australia thus discards an entire group of individuals from the rights inherent in the Refugee Convention (*ibid.*:446) and allows the continued exploitation of international law to its own advantage. However, according to international law standards, 'non-citizen' asylum seekers should be granted permission to enter Australia while their claim is being processed (Gammeltoft-Hansen and Hathaway, 2015:3). To Dickson (2015:441), states like Australia "diverge from international norms of protection for asylum seekers under the pretence of promoting state security". Once again, the Australian government distorts international legal terms and prioritises domestic law over international law. This is extremely dangerous since, by doing that, Australia manages to appear as a state respecting rules and maintains its reputation within the international community.

## Bilateral, Multilateral and Private Agreements: Shifting Responsibility

In a further attempt to avoid responsibility, Australia has made numerous agreements with state and non-state actors to justify their deterrence policy. Firstly, the Australian government has privatised their offshore detention centres and declared that migration related issues are private matters that should be withheld from public scrutiny (Crock and Saul, 2002:58). Detention centres in Nauru and PNG are operated by private organisations such as Ferrovial and Wilson Security (Achiime et al., 2017:56). Furthermore, the *Australian Border Force Act* 2015 (2015, (Cth)) prohibits border control employees from disclosing any information regarding the transfer of migrants and Australian detention facilities. This lack of transparency is dangerous since it allows Australia to act in contravention of law without scrutiny or repercussion. Australia sees this contracting-out of detention centres as enabling the government to avoid all responsibility for the criminal activity and rights' violations that characterise life in the facilities (Pickering, 2005:157).

However, even if the detention centres are not situated in Australia and are contracted out to private parties, Australian officials still have control over the centres since the private companies running the facilities (such as Ferrovial and Wilson Security) communicate directly with and act at the behest of the Australian government. Moreover, the Australian government oversees decision-making within the detention centres and therefore, operates a *de facto* authority over the asylum seekers (Achiime et al., 2017:102; Gammeltoft-Hansen and Hathaway, 2015:43).

Additionally, a commonly used deterrence method is the transfer of asylum seekers through bilateral or multilateral arrangements such as the "safe third country" agreement (Vedsted-Hansen, 1999). The Australian government has labelled PNG and Nauru as safe third countries (since they are signatory of the Refugee Convention and Protocol), a categorisation that has been widely contested due to the conditions and incidents reported in the detention centres (Zamfir, 2016:4). Additionally, Australia has bilateral agreements with Cambodia, with Australia offering development assistance in return for Cambodian admittance of asylum seekers and refugees from Nauru (Gammeltoft-Hansen and Tan, 2017:36). However, only five refugees accepted such relocation to Cambodia since the beginning of the agreement, and out of the five, three returned to their home country resettlement (Zamfir, 2016:5). This is probably because when they initially fled persecution, they aimed to be protected by Australia and not by Cambodia where human rights abuses and poor living conditions are commonplace (Gammeltoft-Hansen and Tan, 2017:37). The ineffectiveness of the deal demonstrates its ineffectiveness as a feasible solution for migrants since they sought protection in Australia, not a third country. Therefore, these arrangements can be considered as a further attempt by Australia to shift responsibility for migrant protection onto a third country.

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Furthermore, such bilateral financial agreements are questioned by Fitzpatrick (2000:291) since the arrangement's goal is once again not focused on protecting migrants. For example, Australia pays Nauru monthly fees for hosting asylum seekers and refugees in the detention centres and an additional fee per migrant present on the island (Save the Children and Unicef, 2016). These types of agreements generally aim to shift burden or make financial gain for the countries involved (Fitzpatrick 2000: 291).

Moreover, in 2011, Australia signed a bilateral agreement with Malaysia to exchange asylum seekers from PNG and Nauru with 'legal' refugees (Dickson, 2015:441). This agreement was rejected by the Australian High Court because Malaysia did not ratify the Refugee Convention (*ibid.*) meaning that Australia would still be lawfully responsible for asylum seekers transferred to Malaysia (Gammeltoft-Hansen and Hathaway, 2015:51). Other types of bilateral agreements are arranged by Australian authorities such as the training of Sri Lankan officials to prevent human smuggling approaching Australia (*ibid.*:24).

However, according to UNHCR's declaration regarding bi/multilateral agreements (2013c:3,§4), "in terms of State responsibility post-transfer (...) and regardless of the arrangement, the transferring State remains, inter alia, subject to the obligation of non-refoulement. (...) the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law". Thus, Australia theoretically cannot protect itself against refoulement and escape its responsibility towards migrants through bilateral or multilateral agreements. The burden remains and if the transferring state does not fulfil its duty towards migrants, then it is breaching the principle of non-refoulement.

These different agreements with state and non-state actors expose Australia's goal to transfer obligations towards migrants and bypass the principle of non-refoulement. These strategies orchestrated by Australian authorities aim to maintain legitimacy in the eyes of the international community and legally defend their deterrence regime.

## Conclusion

It becomes obvious that Australia, in short, has effectively used the wording of international legal instruments to legitimise its breaches of those very same guidelines. The problem is therefore not only a case of Australia breaching international law, but that Australia justifies these violations in terms of law itself. Put differently, Australia may twist international law but the real issue is how it uses the wording and protection gaps within the very same international legal regimes as justification for those breaches.

It remains obvious then, that the Australian government uses geographical and political methods to exclude asylum seekers, preventing them from ever reaching Australian shores. Australia excised its geographical extremities and coastline to reduce the size of its migration zone and therefore avoid receiving asylum claims. Through this geographical excision, Australia has created a space where it maintains control over migratory flows, but avoids its obligations under international law. The same principle applies to offshore detention centres where Australian officials maintain the country's jurisdiction while avoiding responsibility for conditions therein. The Australian government maintains this immunity from juridical responsibility as the centres are located outside of Australian territories. This is extremely dangerous for asylum seekers since they find themselves lost in an 'orbit' where their juridical protections and rights are unclear and undefined.

Furthermore, Australia insists on its right to sovereign assertion against illegal migration to justify deterrence policies. The Australian government considers every individual entering the excised territory as illegal and labelled a 'non-citizen'. By asserting that these people are unlawful, Australia demonises and criminalises asylum seekers. Moreover, Australia declared that the principle of non-refoulement does not apply to asylum seekers arriving by sea since they are considered as illegal aliens 'jumping the queue' ahead of other migrants arriving through official channels such as the UNHCR re-settlement program. This demonstrates that Australia is prioritising its sovereign power and domestic legal system over international obligations, while maintaining international impunity for its breaches of international refugee law.

To further legitimise their deterrent migration policy, the Australian authorities have made numerous agreements with

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state and non-state actors. Firstly, they have privatised all detention centres holding refugees and asylum seekers to avoid responsibility for mistreatment and breaches of human rights. Moreover, Australian domestic law prevents border control officers from revealing any information concerning migrants' transfer and incarceration. On the other hand, Australia made various bilateral and multilateral agreements with other countries to resettle refugees or increase their border control. These arrangements demonstrate once again that Australia aims to escape migrants' responsibility through avoiding refoulement and shifting the burden of responsibility onto developing nations that cannot afford such influxes.

The different strategies used by the Australian authorities to legitimise their deterrence policy illustrate that Australia is distorting the international legal system to its own benefit. Besides, the constant changes to the Migration Act allow them to follow their domestic laws without adhering to international refugee and human rights regulations. According to McAdam and Chong (2014), there is no concrete proof that Australia is respecting international protection obligations to which Australia is a party. The Australian migration case and the lack of international response towards it highlight a severe gap within the current refugee protection regime. According to Morris (2003:59), UNHCR fails to maintain authority over powerful states that do not respect the Refugee Convention. As Adler and Pouliot (2011:119) persuasively argue, "the rules of international society become 'paper tigers' in the face of domestic law and regionally powerful governments". Thus, since the Refugee Convention and its Protocol seem inappropriate, inefficient and too narrow in scope to deal with the current refugee crisis, Gammeltoft and Tan (2017:46) suggest creating another legal instrument that is better adapted to the current situation and geo-political concerns.

Finally, if Australia fails to experience consequences regarding their deterrent policies, other states may be persuaded to implement the similar strategies and the refugee protection gap identified here could expand. In 2016, Danish ministers planned to visit the detention centre in Nauru to understand the Australian migration model. They hoped that this visit could "provide answers to migration crisis in Europe" (Eddie, 2016). It remains abundantly clear that the world's wealthiest nations do not hold migrants' best interest at heart, but are dedicated only to their narrow national interests thus explaining the international acceptance of Australia's impunity regarding its deterrent regime.

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