

# Immigration Detention at Sea: maritime migration governance in Australia and the sanctioning of indefinite detention for the purpose of removal

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## Abstract

Over the past four decades, maritime geographies have become prominent sites of migration governance. While there is important scholarly work on these spaces, charting changing techniques of control and containment, what continues to demand attention is the governance that works through systematically keeping people seeking asylum mobile at sea. This article focuses on Australia, examining the coerced mobilities that follow interdictions at sea and their carceral nature. I interrogate the High Court case, *CPCF v Minister for Immigration and Border Protection*, which addresses the extended maritime detention of 157 people seeking asylum in June 2014. Through analysing the language used in this case, such as the conclusion by the majority that “to detain” a person at sea mandates a concomitant duty “to take” that person somewhere, I highlight how coerced mobility has become central to Australia’s strategy of maritime migration governance and how this has come to legitimate detention at sea without any clear time limitation. This will reveal the extent to which carcerality informs migration governance in Australia’s maritime geographies.



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Published by the SciPost Foundation.

Received 16-03-2022  
Accepted 22-05-2024  
Published 19-06-2024  
doi:[10.21468/MigPol.3.1.002](https://doi.org/10.21468/MigPol.3.1.002)



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## 1 Introduction

In late June 2014, an Indian flagged vessel carrying 157 Tamils fleeing Sri Lanka and seeking asylum went into distress in the maritime geography off Australia after an oil leak caused a fire in the engine room. On June 29, after contacting the Australian Maritime Safety Authority, the vessel was intercepted by The Royal Australian Navy and the Customs and Border Protection Service and the people seeking asylum were boarded on an Australian Customs vessel. The boat was intercepted 16nm off Christmas Island, outside Australia's territorial waters, yet within the state's contiguous zone. It was decided by Australia's National Security Committee of Cabinet that the people rescued should be returned to India, as it had been a transit country in their journey. In a ten-day period between July 1 and 10, the vessel upon which the people seeking asylum were being held sailed toward India. As no former agreement had been made to disembark these individuals in India, the Customs vessel was forced to remain offshore while negotiations between India and Australia proceeded. No agreement was reached and after nearly a month detained at sea, they were disembarked at the Australian territory of the Cocos (Keeling) Islands, before being transferred to the Curtin Immigration Detention Centre in West Australia, and then taken to Australia's offshore immigration detention centre in Nauru. Several months later, this ad hoc practice of forced mobility and prolonged detention at sea was rendered lawful in the High Court of Australia, with the case *CPCF v. Minister for Immigration and Border Protection*. The presiding judges ruled that it was a lawful form of detention, in particular claiming that "to detain" a person at sea mandates an obligation "to take" that person somewhere. As Justice Gageler notes, "Detention of a person under the provision triggers a concomitant duty to take the detained person to a place."<sup>1</sup> As is explored in this article, the term "taking" is specifically impactful as the destination of such journeys was left resoundingly vague. The judges further ruled that there cannot be a limitation on the time that is needed to facilitate such journeys. As Australia exists as the international example of an offshore migration governance regime that has managed to "successfully stop" maritime arrivals, this case and the at-sea strategies it legitimated holds profound significance for practices of immigration detention at sea internationally.

This article examines migration control in maritime geographies in Australia, asking the questions: how is maritime migration governance increasingly defined by a carceral mobility and what role does the sea play in justifying this carcerality? I perform a discourse/materiality analysis of the High Court case *CPFC v Minister for Immigration and Border Protection* to examine the legitimation of strategies of detention and coerced mobility at sea. This case is specifically profound as it took place in Australia's High Court, the nation's apex court responsible for clarifying the application of domestic law and policy. The court case justified detention at sea as requisite and necessary to a strategy of migration governance, with the sea framed as demanding indefinite confinement for the purpose of transportation. While Australia has been reliant on coerced mobilities at sea for several decades, this case established the maritime environment of Australia as an explicitly carceral space for people seeking asylum. This article begins by establishing the significance of carceral mobility to maritime migration governance. It then examines the growing importance of coerced mobilities at sea in Australia's agenda of maritime migration control, before interrogating how the *CPCF* case legitimated an indefinite detention to facilitate endless mobility at sea.

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<sup>1</sup> *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 28 January 2015 S169/2014. 376

## 2 The Sea as a Carceral Geography for People Seeking Asylum

The *CPCF v. Minister for Immigration and Border Protection* case is a deeply significant case in migration governance and is yet to receive the attention it is due. The ruling in this case legitimated detention at sea for undefined periods of time to facilitate the removal of people seeking asylum to varying overseas destinations. The effect of such a ruling is profound for it extends an immigration detention network across vast maritime geographies. This article presents an analysis of the *CPCF* case that develops how we engage with maritime geographies in migration and critical border studies. There is a great deal of research investigating migration governance at sea, from the changing technologies and techniques of policing (i.a. Carrera and Den Hertog, 2015; Cuttitta, 2018a; Den Hertog, 2012; Tazzioli, 2018), to the evolving geographies of maritime migration governance (i.a. Basaran, 2010; Bialasiewicz, 2012; Everuss, 2020; Hyndman and Mountz, 2008); and the violence of these agendas (i.a. Mazzara, 2019; Mirto, 2018; Presti, 2019; Squire, 2017; Stierl, 2017). Such research expands knowledge on how borders function at sea and challenges where we understand them to be. As a result, maritime borders have come to be understood as unfixed from certain geographies, appearing in shifting locations to restrict the movement of mobile populations rendered “undesirable”. Within this canon of research, however, the idea of the border remains an immutable lens of analysis. In this article, I move beyond a bordered language in order to emphasise mobility as a method of governance, examining how people seeking asylum are contained at sea through being kept mobile. The term “border” loses significance in this context as the delineation between an “inside” and an “outside” fails to help us interrogate the myriad mobilities that transpire in this liquid geography.

Mobility is an increasingly pertinent concept in migration studies. Focusing on mobility persuades us to engage with geographies such as the maritime as defined by a series of encounters and the control and containment that is rendered through onward trajectories of movement. Huysmans (2021, p. 6) has articulated the significance of “giving primacy to movement” (2021) in security studies, articulating how “conceptualizing life as motion without stasis invites distinct analytics of security”. As Huysmans emphasises, this focus on motion encourages “letting go of defining the politics of security as an enactment of continuously dividing insides and outsides” (Huysmans, 2021, p. 7). Tazzioli (2019) examines this in the context of migration governance in Europe, drawing emphasis to migratory mobilities, rather than the immobility implied by borders. Tazzioli (2019, p. 129) details “mobility as a technique for neutralising and dividing emergent collective formations”. Equally, Cuttitta (2022) has explored the externalisation and anti-externalisation tactics in the governance of migration between Italy and North Africa, revealing such practices to be geographically expansive and informed by trajectories and routes. I build on this nascent work to expose the centrality of mobility as a method of governance in maritime migration control in Australia and, importantly, the carcerality of such practices. As the *CPCF* case reveals, the effect of these myriad mobilities has come to define Australia’s maritime geography as one which can suspend people seeking asylum in a state of indeterminate mobility, shifting between unknown geographies for undefined periods of time.

Agents of migration governance frequently enforce mobilities at sea. These movements have been interrogated as “pushbacks”, “pullbacks”, or “returns” (i.a. Borelli and Stanford, 2014; Carrera and Cortinovis, 2019; Cuttitta, 2018b; Enkelejda and Denard, 2020). In this article, I use the term “coerced” mobilities to foreground the

multidirectional nature of such journeys and their disciplinary and carceral character. There are three distinct ways in which these mobilities instructed by agents of migration control are carceral. On the first hand, they reflect a containment at sea. The carceral is not premised on the suspension of a person's mobility but rather on the control over mobility, in fact, coerced mobilities are central to the design of containing and separating people (see i.a. Martin and Mitchelson, 2009; Mincke, 2020; Moran, 2016; Moran, Turner and Schliehe, 2018; Turner and Peters, 2017). Keeping people seeking asylum mobile is far more than an incidental aspect of migration governance; instead, it emerges as integral to the design of control and containment at sea. Secondly, this mobility is harmful and has a disciplinary intention. Coerced mobility at sea is part of a logic of migration governance in which states attempt to impede people from reaching the state's territory through keeping them mobile and thus unable to claim rights. As a result, this mobility has an "intentional" and "detrimental" effect as it functions as part of the apparatus of regulating migration and discouraging future mobilities (Moran, Turner and Schliehe, 2018, p. 678). Finally, these mobilities keep people seeking asylum under the governing powers of the state while holding them in a condition of reduced rights, suspending them in a deeply carceral condition. While in more formal carceral sites, such as prisons, detained persons are not entirely beyond legal frameworks, Brown (2014, p. 177) highlights how prisoners, like refugees and other detainees, "share restricted rights and weaker claims to citizenship". Using carcerality as a lens through which to interrogate these at-sea practices thus exposes the significance of such mobilities and the way they link to broader immigration detention networks.

The reworking of the maritime as a space without rights for people seeking asylum and which subsequently facilitates such carceral practices taking place has been previously detailed and is relevant to this case (Dickson, 2021). The geography of the maritime has a variant relationship to the sovereign territory, at times framed as part of the sovereign territory of the state, while at other times rendered distinctly beyond the state (Peters, 2011). As has been explored, this variant relationship has facilitated states "hollowing out" rights for people seeking asylum, expunging the applicability of articles of the Refugee Convention, or the Convention at large, from maritime geographies (Dickson, 2021). At the same time, states expand migration governance agendas in these same geographies, leading to a de-territorialising and re-territorialising of the sea. This was demonstrated in the US in 1993 through the Supreme Court case *Sale v Haitian Councils Centres inc*, in which the Refugee Convention was ruled not to apply at sea. As a result, the US government could police, intercept, and return Haitian maritime arrivals without providing them access to an asylum procedure. Australia extrapolated on this to eliminate their migration zone for those arriving in an "irregular" manner, resulting in people arriving by sea being prohibited from claiming asylum. Through these changes to the legal geographies of the maritime, the maritime has been rendered a blurry sovereign geography that is at once outside and inside the state in the context of migration governance - beyond a geography of rights for people seeking asylum, yet within a geography of policing. The sea subsequently becomes a "carceral wet" space for such arrivals, defined by a condition of policing in abstraction of rights (Dickson 2021). This article extrapolates on the legal changes which have given way to the carceral potential of the sea to detail something novel: the significance of coerced mobilities at sea in Australian migration governance and how it expands the carceral landscape of Australian migration control.

To explore the centrality of carceral mobility to Australia's governance of maritime migration, I draw on a methodological approach which privileges both discourse and

materiality. As Aradua et al, (2015, p. 62) write, “matter is... an active factor in the construction of relationships in discursive-material processes; it actively shapes how subjects and objects of insecurity are constructed, regulated and materialized in discourse”. To consider the “co-constitution of matter and discourse”, Aradua and others propose the need to focus on the relationality between discourse and matter to detail how they perpetually reconfigure each other (Aradua et al., 2015, pp. 62–63). In the context of this study, this co-constitution is between a discourse of migration detention and the space of the sea as one that legitimates detention. The research design of this paper is based on a discourse/materiality analysis of the transcripts of the High Court proceedings between the plaintiff and defendant, *CPCF v. Minister for Immigration and Border Protection & Anor Case S169/2014*, as well as the response by the presiding judges *CPCF v Minister for Immigration and Border Protection* [2015] HCA 2015. This case is chosen as a point of analysis for several reasons. Firstly, it refers to a pinnacle in Australian migration governance at sea, where strategies that contravene the Refugee Convention of detention at sea and *refoulement* were ruled to be lawful strategies. While legal scholars have examined the *CPCF* case, considering the framing of the statutory and executive power of the government in this case (Emerton and O’Sullivan, 2015; Marmo and Giannacopoulos, 2017; Tomasi, 2015), there has not been consideration of what this case means for the framing of the maritime as a space which permits detention and coerced mobility and the way the sea was used to legitimate such practices. Secondly, as the primary institution in Australia codifying how policy should be applied, this High Court case was profound in contributing to the normalising of a discourse on the sea as a geography that necessitates detention and onward mobilities. The research design relied upon a coding of the two transcripts, identifying references to detention at sea as well as the concept of mobility at sea. In this paper, I paid greater attention to the transcript of the ruling by the judges due to their statements having conclusive influence determining the implementation of the Maritime Powers Act (2014) and legitimating strategies of migration control at sea. The article further relies upon an analysis of preceding migration policies to illustrate the significance of mobility to the Australian migration governance agenda.

### 3 Australia and Coerced Mobility at Sea

The coerced mobility at sea that has come to inform migration governance in Australian maritime geographies is not without context. As a settler convict state, Australia has a very recent history shaped by administering punishment through coerced maritime mobilities. Beginning in 1788, the transportation of convicts to the Australian territory lasted 80 years, with the final convict transportation vessel landing in West Australia in 1868, a little over 150 years ago. During this time 168,000 prisoners were transported from the UK to Australia (Godfrey and Williams, 2018). In addition to this transportation of convicts to Australia, from 1788 until 1901, the colony also relied upon a network of at least eleven offshore carceral islands (Roscoe, 2018). These carceral islands were spaces of secondary punishment for re-offending convicts as well as spaces to separate and contain indigenous Australians that resisted colonialization, displacing them from their land and distancing them from the mainland colony. As Roscoe (2018, p. 48) writes, “punitive relocation’ to offshore islands was an important part of the colonial system of punishment that emerged in Australia”. The Australian settler colony relied upon a maritime carceral mobility, from the transportation of convicts to the colony, to the governing and policing of persons within the colony.

Maritime mobility and a distance maintained through seascapes was thus central to the governance of disobedient bodies in Australia. This very recent history is not irrelevant to the High Court ruling in Australia that instructs that detaining a person seeking asylum at sea necessitates a taking of that person somewhere else, somewhere beyond mainland Australia.

Coerced mobility has, over the last three decades, become central to Australia's migration governance. The proliferation of this coerced mobility has been facilitated by the specific geopolitical condition of this maritime environment. Australian maritime migration governance occurs in an exceptionally vast maritime geography, with Australia having an exclusive economic zone at sea that is the third largest in the world. Compared with other maritime regions currently defined by strategies of regulating human mobility, such as the Mediterranean, there is an absence of private, commercial, and humanitarian actors engaging in rescues. Australian authorities are the primary actors interacting with people seeking asylum at sea, affording the government exclusive authority over what happens to those who are interdicted. Almost all vessels arriving in a manner that the government has deemed "irregular" are "detected either en route or upon arrival" (Pickering, 2014, p. 191). Following this interdiction, people seeking asylum are removed to various geographies beyond Australia. In other words, they always face onward mobilities. Since 2013 and the commencement of the militarised programme Operation Sovereign Borders, there has been very little transparency into events at sea. Despite recursive reports of human rights abuses at sea, Australia has emerged as an international example of a state that has managed to "stop" maritime arrivals yet, as demonstrated below, this is not achieved through rendering people immobile, but rather through *keeping* them mobile.

The coerced mobilities of Australian maritime migration governance developed in a noteworthy way in 2001. This year marked the commencement of Australia's Pacific Solution (2001-2007), a regional policy premised on various offshore sites of interception that aimed to prevent maritime arrivals from reaching the territory of Australia and claiming asylum. To realise this, the Australian government bolstered operations at sea which saw people seeking asylum interdicted in increasingly distant geographies, at which point they were either encouraged to return to their port of departure or, if this was not possible, they were removed to sites of offshore immigration detention, namely those situated on Christmas Island, Manus Island, and Nauru (Loyd and Mountz, 2014, p. 28; White, 2014, p. 9). The analysis of these offshored sites of detention and the way they suspend people seeking asylum in geographies that lack both legal accountability and fair access to asylum is beyond the scope of this article (see i.a. Mountz, 2011; Taylor, 2005; Wallis and Dalsgaard, 2016; Warbrooke, 2014). Instead, I examine that which has received far less scrutiny: the containment and exclusion that is realised through these at sea mobilities that commenced with the Pacific Solution and were later emboldened by successive operations.

Under the Pacific Solution there were three successive operations designed to interdict and remove people seeking asylum at sea: Operation Relex (2001-2002), Operation Relex II (2002-2006), and Operation Resolute (2006-ongoing). The commencement of the first Operation Relex signified the beginning of an explicit programme of pre-emptive policing at sea. It aimed to interdict people arriving via maritime routes in order to keep them mobile and outside the Australian territory. Within Australian law, intercepted boats carrying people seeking asylum are referred to as "suspected

illegal/irregular entry vessels” (SIEV). Operation Relex initially attempted to convince boats to return to Indonesia. However, after the first four “SIEVs” arriving under the Operation could not be “persuaded to return”, a practice of “active return” began, which was referred to in government as “the tow-back policy” (Schloenhardt and Craig, 2015, p. 538; Howard, 2003, p. 41). In referring to the development of the practice of enforced returns, the Select Committee inquiry states:

From the commencement of Operation Relex on 3 September, the initial policy that we were given to implement was to intercept, board and hold the UAs [unauthorised arrivals] for shipment in sea transport - or air transport, but primarily sea transport - to a country to be designated. With SIEV 5, we received new instructions which were to, where possible, intercept, board and return the vessel to Indonesia (Senate Select Committee, 2002 Chapter 2, para 2.69, emphasis added).

Hence, after only a few interceptions at sea, this operation developed from one in which onward mobility at sea would proceed only after a destination country had been designated, to one which executed immediate forced mobilities. Operation Relex was replaced by Relex II in 2002, which had a concomitant agenda. Within five years, these two operations had collectively interdicted all fourteen vessels which had attempted to reach Australia. Of these fourteen, five vessels were forcibly encouraged back to Indonesia, a country which is not signatory to the Refugee Convention and Protocol and where people seeking asylum thus have no right to seek protection. Those that were not returned to Indonesia were removed to sites of offshore immigration detention.<sup>2</sup> As such, *all* interceptions that transpired in the maritime geographies around Australia during this period thus led to the forced mobility of people at sea. These developments at sea exist within a greater logic of “deterrence” in migration governance (De Leon, 2015; Matera et al., 2023; Pickering and Weber, 2014), whereby states obstruct journeys, increase the risks of migratory routes, and communicate such risks internationally in attempt to prevent people from reaching the state and making rights-based claims.

It is important to note that the coerced mobilities that have become central to Australia’s strategy of migration governance at sea undermine the Refugee Convention. Article 33 of the Refugee Convention protects against *refoulement* or forced return, stipulating that a mobile person shall not be returned to a frontier or territory where “[their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion”. People seeking asylum interdicted in Australia’s maritime peripheries are either removed to Indonesia or to places they are fleeing, such as Sri Lanka. Indonesia is not signatory to the Refugee Convention and thus holds no obligation to protect people against what is known as onward or chain-*refoulement*. Returning people seeking asylum to Indonesia, as a country through which they transited, is thus recognised as a practice that constitutes *refoulement* (Kaldor Centre for International Refugee Law, 2015b). Beginning in 2012, the Australian government began subjecting people from Sri Lankan seeking asylum to an “enhanced screening” process at sea, which functions as a truncated asylum application. This controversial practice is widely condemned by international human rights groups as not providing adequate access to an asylum procedure (Refugee

<sup>2</sup> There were also some fatalities at sea during this period. Three vessels, named SIEV IV, VI, and X met with disaster at sea during interdiction and return, with a number of individuals perishing during the disasters.

Council of Australia, 2021a). Those screened out are frequently transferred to Sri Lankan authorities at sea, with reports from human rights groups indicating that they are often subsequently detained upon arrival in Colombo (Refugee Council of Australia, 2021a). While migration governance at sea in Australia is heavily obscured, in 2021 the Refugee Council of Australia reported that more than 1,000 Sri Lankans have been returned to Sri Lanka as a result of this policy (Refugee Council of Australia, 2021a). This enhanced screening was expanded to including people fleeing by sea from Vietnam and Australian authorities have equally since returned people seeking asylum to Vietnamese authorities (Refugee Council of Australia, 2021a, 2021b). These practices of removal at sea thus defy the state's obligation to *non-refoulement*, which is not only a core principle of the Refugee Convention, of which Australia is a signatory, but it is recognised as customary international law.

In late 2013, a new government led by the conservative Liberal Prime Minister, Tony Abbott, was formed. Abbott initiated an expressly militarised programme of maritime migration control termed Operation Sovereign Borders (OSB). Under OSB, the government announced that Australia's borders were "shut" to maritime arrivals. To achieve this, the government intensified the scope of coerced mobility at sea, with far more exhaustive measures taken. Emphasising the centrality of mobility to this programme, the former immigration minister, Scott Morrison, described the new agenda as one premised upon "forcibly repelling" people seeking asylum (Hall, 2013). Under this programme, the geographies of operation further expanded in scope, with the Australian authorities crossing the territorial waters of Indonesia's archipelagic state on six occasions (ACBPS, 2014). Indonesia has not agreed to accept returned vessels, and as such, Australian authorities more commonly take vessels carrying people seeking asylum to the edges of Indonesia's territorial waters and instruct their onward journey to Indonesia (Refugee Council of Australia, 2021b, p. 3; see also Dastyari and Ghezlbash, 2020). Within the first 18 months of OSB, the government prevented 20 vessels carrying 633 people seeking asylum from reaching Australia (Jabour, 2015). As of March 2024, 48 vessels carrying 1,126 people seeking asylum have been subject to at sea mobilities that culminated in people being returned to their country of departure or country of origin, while it is estimated that a further 1,026 people were transferred to offshore detention centres during this time (Refugee Council of Australia, 2024).

The mobilities that transpire in and importantly beyond Australia's maritime territories often lead to the incarceration of people seeking asylum in sites of immigration detention. The incarceration that follows these coerced mobilities at sea is not constricted to Australia's island detention centres. The Australian government has funded Indonesian immigration detention centres, contributing to the use of detention in Indonesia as a method of controlling human mobility (Nethery, Rafferty-Brown and Taylor, 2013, p. 96). Indeed, Nethery et al (2013, p. 98) highlight how "Indonesia rarely detained asylum seekers before Australia began actively to encourage it to do so." Moreover, there is evidence that those returned to Sri Lanka face arrest and incarceration (Doherty, 2016). The removal that transpires at sea can thus be understood as an extension of the carceral system, transporting people to sites of more enduring confinement. As Pickering (2014, p. 188) writes, the Customs vessels that intercept and remove people to various offshore geographies "perform a custodial function following the interception of asylum seeker boats to Christmas Island, mainland Australia or designated offshore processing centres such as Nauru and Papua New Guinea." These onward mobilities at sea thus reflect a broader programme of containing and separating people seeking asylum.



Yet, these vessels are not just carceral due to their connection to broader systems of immigration detention, transporting confined people to larger detention facilities. These coerced mobilities turn the vessels holding people seeking asylum into carceral spaces in their own right. Moran et al (2018) propose that the carceral emerges in the tension between *detriment, intent and spatiality*. This refers to the “lived experiences of harm”, which may or may not take the form of punishment; the intention behind this detriment, it is not happenstance but rather imposed by an agent or organization; and the spatial dynamic to the carceral condition (Moran, Turner and Schliehe, 2018, p. 677). Coerced mobility signifies the suspension of autonomous movement to facilitate a control that is realised through keeping a subject mobile, signifying both detriment and intent. After all, the onward mobility that transpires at sea, instructed by a governing power, is disciplinary and punitive - it prevents individuals from seeking asylum, removing them to various at sea and offshore geographies as a form of punishment for the “irregular” nature of their travel. Moreover, there is a clear spatiality to these mobilities, as people seeking asylum are concealed from sight, distanced from populations, and prevented them from accessing legal aid. This coerced mobility at sea thus comes to constitute a carceral space, detrimentally, intentionally, and spatially keeping people seeking asylum mobile as a form of carceral containment.

#### 4 Indefinite Detention to Facilitate Myriad Mobilities at Sea

While Australia has an enduring history of employing coerced mobility as a method of governance at sea, the significance of this maritime mobility reached an acme in 2014, when 157 Tamil people seeking asylum were detained at sea on an Australian Customs Vessel for the period of one month. Throughout this time, the Customs vessel moved to different maritime geographies, keeping these individuals beyond the territory of Australia by attempting to remove them to various overseas geographies. During this prolonged period of maritime detention, the authorities refused to inform the people seeking asylum or the Australian public about the location of the Customs vessel or its intended destination. We know now that the journey from the point of interception to the coast of India took ten days, and after negotiations failed, the Customs vessel then made the significant journey back to the Cocos Islands.

The conditions of containment at sea during this period were explicitly carceral in nature. The people seeking asylum were confined below deck for 22 hours per day and were only able to access fresh air for two hours of each day (Dickson 2021, p. 8). The rooms within which they were held were categorised by gender, having the effect of separating families. One of the people formerly held at sea, named Dinesh, has stated, “I was locked in a room with 80 people. I was kept apart from my wife and children and was very worried about them” (Human Rights Law Centre, 2015). Dinesh has further informed that there were no questions asked during this period of confinement about his asylum request, such as why he had left Sri Lanka or the potential risks to his life that he faced there (Human Rights Law Centre, 2015). As such, this detention posed no purpose in processing asylum claims, but existed solely to enable a removal from Australia. Moreover, it was unequivocally agreed by both parties in the CPCF case that this period of confinement constituted a detention.<sup>3</sup>

<sup>3</sup> QC R Merkle in *CPCF v Minister for Immigration and Border Protection & Anor* [2014] HCA Trans 227 (14 October 2014), Pg 8.

Not long after this event at sea, the Australian government passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*. This Act legalised prolonged detention and forced return at sea, while also expunging Australia's obligation to international law, specifically relating to *non-refoulement*. These changes to domestic law not only undermined the Refugee Convention and Protocol, they in fact directly opposed it. These changes were made, however, in order to retroactively legalise this event of detention at sea, specifically addressing the length of time of this detention. Clarifications were made to the *Maritime Powers Act* in order to emphasise the need to afford officers of migration governance flexibility in their control of people seeking asylum in maritime spaces. An Explanatory Memorandum stipulates that "Parliament's intent is that this is a broad provision which provides maritime officers with the flexibility and discretion needed to effectively exercise maritime powers in real-world operational circumstances".<sup>4</sup>

Several months after the detention at sea, the CPCF case was heard in October 2014 at the High Court of Australia in Canberra. This was a momentous case determining how Australia's *Maritime Powers Act* should be applied at sea. The High Court ruled by a majority of 4:3 that the detention of the people seeking asylum for the period of one month was not, at any time, unlawful. The High Court also recognised that these actions were permitted by the *Maritime Powers Act*, meaning they did not have to dispute whether or not it was sanctioned by the government's non-statutory executive powers. The majority held that the people seeking asylum could effectively be interdicted in the contiguous waters of Australia and removed to a "place" beyond Australia. This was influenced by the Amendment to the *Maritime Powers Act*<sup>5</sup> made by the Commonwealth Parliament months after the detention of the Plaintiff and instituted retrospectively to facilitate the detention of the 157 Tamils fleeing Sri Lanka (Tomasi, 2015, p. 428).

### To Detain is to Take

The case orientated around whether Australia's officers were authorised to carry out such an extended period of detention at sea. The Commonwealth maintained that the *Maritime Powers Act* (MPA) or the non-statutory Commonwealth executive power legitimated the extended detention of the plaintiff. Section 72(4) of the MPA was central to the debate.<sup>6</sup> It reads as follows:

A maritime officer may detain the person and take the person, or cause the person to be taken:

- (a) to a place in the migration zone; or
- (b) to a place outside the migration zone, including a place outside Australia.

The plaintiff argued that S 72(4) had to be understood in the context of Australia's obligation to international law, specifically that of *non-refoulement*. This would mean that a person who is intercepted, contained and removed at sea could not be taken to a place in which they face persecution, or to a place that is not signatory to the Refugee Convention and which does not protect against onward *refoulement*. Furthermore, the plaintiff also argued that if a decision on the destination is not made before departure, the period of

<sup>4</sup> Clause 3, para 13, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill, 2013-2014, House of Representatives, Explanatory Memorandum.

<sup>5</sup> This is referring to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* (2014).

<sup>6</sup> This section was not changed through the amendment to the MPA in 2014.

time in which a person can be detained in order to remove them to a space outside Australia can exceed what is reasonably justifiable. Without a pre-determined destination, detention at sea can become indefinite. As the plaintiff posited, “There must be a limit discernible on the time of detention which must be ascertainable and not in the discretion of the Commonwealth”.<sup>7</sup> The plaintiff also disputed whether Australian border officers are authorised to effectuate removals without asylum procedures when interdicting people seeking asylum in the contiguous zone.

A central aspect of this case orientated around the terms “to detain” and “to take” in S 72(4) of the MPA. Indeed, two of the judges declared the terms “to detain and to take” to be “the central focus of this case”.<sup>8</sup> Reflecting this, the phrase is repeated recursively in the ruling by the presiding judges. The judges collectively ruled that the terms “detain” and “take” need to be understood in conjunction. In other words, *detaining* and *taking* were determined not to be distinct actions at sea, but rather one continuous action. As Justice Gageler notes, “Detention of a person under the provision triggers a concomitant duty to take the detained person to a place.”<sup>9</sup> This interesting framing, linking detention to coerced mobility, was not a disputed aspect of this case despite having a significant impact on practices at sea. In fact, two of the judges who ruled the maritime detention of the Tamil people seeking asylum to be unlawful *still* held that these terms were to be understood in conjugation: “The power given by S 72(4) to detain and take a person to a place outside Australia is understood better as a single composite power than as two separate powers capable of distinct exercise.”<sup>10</sup> The idea that “to detain is to take” is to some extent implicit. If someone is interdicted and detained at sea on a mobile Customs or Naval vessel, at some point, a “taking” somewhere else is necessary. Yet, in the context of this case, “taking” is made rather complex. As explained above, the “migration zone” has been expunged from the territory of Australia. It is thus a legal device rather than a place and all those arriving by sea without a valid visa are precluded from accessing this legal device. Hence, a maritime arrival can only realistically be taken somewhere outside Australia, or to an Australian territory for a temporary period of time before being taken elsewhere. In concluding that detaining requires a concomitant taking at sea, the judges thus sanctioned detention for the purpose of onward mobility in the form of removal. As the MPA relates specifically to maritime migration regulation, this conclusion by the court firmly established Australia’s seascape as a geography that facilitates the carceral transportation of people seeking asylum.

Justice Gageler explained in relation to the detention and removal of people seeking asylum at sea “... the place [to which they are removed] need not be a place which is *proximate* to the place of detention, and it need not be a place with which the detained person *has any existing connection*”.<sup>11</sup> This statement detracts from the obligation to disembark rescued persons at the nearest safe port or the “next port of call”. There is no firm international law mandating where people are disembarked (van Berckel Smit, 2020). As UNHCR note, “The obligation to come to the aid of those in peril at sea is beyond doubt. There is, however, a lack of clarity, and possibly lacunae, in international maritime law when it comes to determining the steps that follow once a vessel has taken people on board” (UNHCR, 2002 para. 11). Place of safety is also “ill-defined” in both the SOLAS and SAR conventions (van Berckel Smit, 2020, p. 506). The nearest safe port can include the

<sup>7</sup> QC R Merkle *in CPCF v Minister for Immigration and Border Protection & Anor* [2014] HCATrans 227 (14 October 2014), Pg 13.

<sup>8</sup> J Hayne and J Bell, Para 67, *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 28 January 2015 S169/2014.

<sup>9</sup> *Ibid.*, 376.

<sup>10</sup> *Ibid.*, 90.

<sup>11</sup> *Ibid.*, 377, emphasis added.

following port where a vessel is travelling to, which is particularly relevant in the case of rescues performed by commercial vessels; the port closest to the rescue location; or a port that is considered better equipped to provide care and assistance to those onboard (Papastavridis, 2018). UNHCR note that safe port could also include returning those to their place of embarkation as it is the responsibility of states “to prevent un-seaworthy vessels from leaving its territory”, so long as this does not constitute a *refoulement* (UNHCR, 2002 para. 30). Ultimately, “ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation” (UNHCR, 2002 para. 30). Disembarking people seeking asylum rescued at sea should thus be done in a time sensitive way to a place where they do not face persecution. In determining that the place to which a person should be removed “need not be proximate”, J Gageler affirmed that the *Maritime Powers Act* need not take heed of these international recommendations and can instead prolong journeys for the purpose of disembarkation at a distant geography. In light of this, “taking” does not lead to a disembarkation that is for the benefit of the person seeking asylum or the vessels carrying them, rather it denotes a removal to geographies beyond Australia, geographies which need be neither “proximate” nor “convenient”.

Secondly, the ambiguity of the destination was further emphasised by J Gageler, who articulated that it should also be flexible. J Gageler argues that there should be no restriction on the places chosen for disembarkation, referring in particular to territories where the Australian government may not have a prearranged agreement to disembark people seeking asylum. Requiring an agreement prior to travel would, according to J Gageler, introduce limitations to the MPA which do not presently exist within the Act: “Having regard to the myriad circumstances in which, and myriad geographical locations at which, the maritime power to detain and to take might fall to be exercised, it would amount to a significant constraint on operational flexibility.”<sup>12</sup> In suggesting that limiting destinations would restrict operational flexibility, J Gageler emphasises the centrality of mobility to the function of the *Maritime Powers Act*. This removes all restriction on the destination of these maritime mobilities, or what J Keane repeatedly refers to as “compulsory movements”.<sup>13</sup> Thus, the destination need not be “proximate”, “convenient” or predetermined. Rather, it can be at any distance from Australia and be a territory subject to open negotiations, rendering all third-party territories potential spaces where people can be removed to via the sea. Here we see how “taking” becomes a profoundly impactful term, indicating an expansive form of movement without constriction.

As an effect of such lengthy journeys that emerge from having variable and distant destinations, these statements imply that the period of time a person seeking asylum is detained at sea is not of significant concern. If someone is taken across vast maritime geographies rather than disembarked at the nearest safe port, the duration of their detention is unnecessarily prolonged, as was the case with the Tamils held on the Customs vessel. J Crennan declared that it “is not necessary to ensure respect for the plaintiff’s personal liberty or to avoid indefinite detention or detention at the discretion or whim of the Executive government.”<sup>14</sup> While J Crennan clarified that the the MPA does not subsequently permit indefinite detention at sea,<sup>15</sup> the judges concluded that any constraint on time would be incompatible to realising the objective of *taking* that the MPA instructs. As such, so long as negotiations are underway between Australia and a destination state, detention can exist at sea for any period of time. Thus, in this case, “to detain is to take” is articulated to be a complex phrase which permits endless maritime

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<sup>12</sup> Ibid., 379.

<sup>13</sup> Ibid., 424.

<sup>14</sup> Ibid. 218.

<sup>15</sup> Ibid. 223-4.

journeys that keep people seeking asylum in a condition of partial rights, en route to uncertain destinations. While Australia authorised indefinite detention on territorial geographies under the Keating government in 1992, turning the maritime geography into a zone within which people seeking asylum can equally be detained for an indeterminate period of time for the purpose of removal marks a profound development in Australia's detention policy.

In the CPCF court case, three of the judges ruled in favour of the plaintiff, concluding that detention for the purpose of removal to India was not a lawful application of the *Maritime Powers Act*. Two of these judges were J Hayne and J Bell, who stated “What is presently important is that the power is to take to ‘a place’, not ‘any place’, outside Australia. The use of the expression ‘a place’ connotes both singularity and identification.”<sup>16</sup> The attempt to remove the people seeking asylum to various undefined geographies was thus considered by J Hayne and J Bell to be unjust. Nonetheless, none of the three dissenting judges disputed that *detaining* someone demanded a *taking* of that person somewhere else. This is significant as maritime arrivals have no right to claim asylum in Australia, thus a *taking* implies a *taking away*. Moreover, it is important to consider that in the dissent by these judges, a number of significant points raised by the plaintiff were not responded to. There was no acknowledgement of Australia's duty to protect against *refoulement* and the extra-territorial obligations of the Refugee Convention, although there was recognition by CJ French and J Crennan that such obligations may have extraterritorial effects. In fact, the judges did not engage in a detailed way with international refugee law (Kaldor Centre for International Refugee Law, 2015a). Additionally, the conditions of detention were not challenged, despite reports of medications being confiscated, families separated, and a restricted access to fresh air onboard the vessel. As such, the minority who held this detention was unlawful did not contest the broader way this Act contravenes international migration law.

#### *A Geography That Demands Carceral Mobility?*

In the rulings made by the presiding judges, there are several statements which highlight the significance of the maritime geography to the justification of this at sea detention. In discussing the various onward mobilities that occurred at sea during the detention of the people seeking asylum, J Keane states that such continuous mobility “is hardly surprising given the unpredictability of the circumstances of such voyages”.<sup>17</sup> There was, however, no unforeseeable event that prolonged this detention: there was no shipwreck after the embarkation of the people seeking asylum on the Customs vessel, nor was there any other unforeseen maritime event. The one thing that did prolong the nature of the journey was India refusing disembarkation, which is precisely what the plaintiff was arguing led to an unfairly extended detention and what in fact the judges deemed to be acceptable. In emphasising the “unpredictable” nature of maritime voyages J Keane, who ruled this detention to be lawful, drew to the fore vague assumptions of the maritime as a mutable space that is erratic and unruly. J Crennan also emphasised the maritime geography as demanding flexibility in operations, quoting a former reading of the *Maritime Powers Bill* (2012) “The unique aspects of the maritime environment merit a tailored approach to maritime powers, helping to ensure flexibility in their exercise and to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous

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<sup>16</sup> Ibid. 92.

<sup>17</sup> Ibid. 478.

situations.”<sup>18</sup> These statements suggests that the prolonged at sea detention was a consequence of the unpredictability of the maritime geography. This language thus entangles the maritime in the justification of ongoing detention at sea, suggesting that it is as responsible in prolonging coerced mobilities as the operatives arbitrarily moving people between indeterminate destinations.<sup>19</sup>

Within these statements made by the judges, the geography of the maritime is tied into the justification of detention and removal. In asserting that that unconstrained mobility at sea is operationally pivotal to the *Maritime Powers Act*, J Gageler emphasised that the space of the maritime should be used *to keep people seeking asylum mobile*. This implicitly frames the sea as a surface of transportation. The maritime geography has long been idealised as a “friction-free transportation surface” in which goods can be transported internationally without impediment (Steinberg, 2001, p. 125). Yet, in ruling that “to detain is to take” in migration governance, this case centralised the function of the sea as a space of coerced mobility in the control of people seeking asylum. Moreover, in emphasising the mutability of the maritime as causational to the length of immigration detention at sea, the judges further amplified the significance of the maritime to carceral mobility at sea, using it to justify extended periods of confinement. Thus, the maritime was profoundly entangled in the ruling of this detention at sea as lawful, with assumptions of this geography as a space of transportation with a capricious nature used to legitimate onward mobilities and maritime detention without time limitation. Through this event of prolonged detention and the High Court case that came to justify the practices of the Australian authorities as necessary due to the condition of the maritime environment, the agenda of migration control in Australia developed from one premised on coerced mobilities, to one that sanctioned a detention that is indefinite in nature in order to facilitate ongoing mobility.

Mobility as a method of containing migration is not unique to Australia. Experts by experience have provided countless testimonies on the violent and life-threatening tactics of coerced mobilities at the Greek and Turkish border, which leave people in maritime locations outside Greek territorial waters, or Turkish territorial geographies. They have also revealed how in many cases, they had already reached land-based geographies of Greece where they were detained without access to asylum procedures and then later returned by sea (Pro Asyl, 2013, p. 10). This mobility also proliferates within Europe with the coercive relocation of people on the move within France and Italy (Tazzioli, 2020). In these instances of migration governance, control emerges through a strategy of keeping mobile. The coerced mobilities informing migration governance are thus not distinct to the Australian context. What is specific about the Australian context is the extent to which this coerced mobility is explicitly ratified in domestic law as central to the state’s strategy of migration control at sea. Equally, detention for prolonged periods of time at sea is not unique to Australia, but rather reflects a growing inclination to turn maritime geographies into carceral spaces for mobile populations that governments seek to deter. In 2017, the *NY Times* reported on the US’ “floating Guantánamos” and the US Coast Guard vessels that travel thousands of miles from US territories to interdict and detain drug smugglers at sea (Wessler, 2017). These detentions transpire under Operation Martillo, initiated in 2012, which operates between South and Central America, interdicting drug smuggler vessels and bringing those detained to trial in US courts. However, in the context of maritime detention in Australia, the agenda is the opposite: detention at sea enables myriad onward mobilities until people seeking asylum are disembarked anywhere *but* Australia.

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<sup>18</sup> Ibid. 201.

<sup>19</sup> It should be noted that Keane had a commitment to facilitating returns at sea. In relation to non-refoulement, Keane declared that “Australian courts are bound to apply Australian statute law ‘even if that law should violate a rule of international law’.” (Ibid. 462).

The detention of 157 Tamils seeking asylum at sea and the later sanctioning of such opened ended maritime carceralities by the High Court elucidates the carceral reworking of Australia's maritime migration governance strategy. Carceral studies scholars have explored the constant mobility that informs carceral systems, including the cyclical movement of visitors, staff, techniques and technologies, and prisoners between and beyond formal penal sites (Gill et al., 2018; Mincke, 2020; Moran, 2016). The constancy of this movement has encouraged Mincke (2020, p. 7) to ask "whether the prison is best defined by its boundary". As Mincke articulates, the carceral can perhaps better be understood as "restricting or encouraging—the mobility of convicted offenders, and not as a territory isolated from the rest of society." (2020, p. 8). In this sense, the carceral does not produce stasis, but rather emerges in myriad controlled mobilities. Focusing on these controlled mobilities shifts our attention away from the liminal geographies that denote parameters to consider how mobilities are in fact central to a method of governance. The constriction of migratory movements at sea is, like the prison, not "based on *crossing*... [but is rather] understood through modification of the relative position of the points under consideration." (Mincke, 2020, p. 8). The governance that transpires through indefinite detention for the purpose of onward mobility is acutely significant to Australia's agenda of migration control, tying the sea into the state's amorphous and expansive immigration detention network. The geography of the maritime has been pivotal to this, with its liquid materiality used to justify movement as necessary, and its ever-changing surface permitting such onward mobilities to be indefinite in nature.

## 5 Conclusion

There is little transparency into events of interception and at sea mobilities under Australia's militarised migration governance programme, Operation Sovereign Borders. Through various reports and Parliamentary hearings, what is estimated is that between 2013 and 2024, 2,152 people seeking asylum endured coerced mobilities at sea which resulted in them either being returned to the place they were fleeing, returned to a country they departed from, or taken to a third country immigration detention centre (Refugee Council of Australia, 2024).<sup>20</sup> Australia's agenda of maritime migration governance is leading to a carceral reworking of maritime geographies. This carcerality is manifest in the containment and control that is rendered through keeping people seeking asylum in a condition of endless detention for the purpose of transportation to undesignated geographies. The judges of the *CPCF v Minister for Immigration* determined that under the Australian Maritime Powers Act, "to detain is to take" in migration governance at sea. Yet, as the judges detailed where and how this taking can occur at sea, the phrase acquired multiple meanings. "To detain is to take" denotes a *taking away* from Australia, as well as a *taking away* of autonomous mobility, the right to asylum, the protection against arbitrary detention and *refoulement*. While these carceral mobilities transpire across maritime and terrestrial geographies, there is a specificity of the sea to Australia's agenda as it was through assumptions of the space of the maritime as unpredictable yet a space of transportation that the judges concluded that the destination of at sea mobilities should remain flexible, and as such, the detention of people seeking asylum at sea during these mobilities should exist without time constraint. The blurriness of this liquid geography has thus enabled a carceral mobility to emerge as central to the governance of migration at sea in Australia.

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<sup>20</sup> Data from the Refugee Council of Australia (2024) pages 1 & 2.

## Acknowledgements

I would like to sincerely thank Migration Politics for the opportunity to participate in a wonderfully stimulating residency, hosted by the University of Amsterdam. I am greatly appreciative of the conversations and exchanges had during this time and how they progressed my ideas. I am especially thankful to Darshan Vigneswaran, Saskia Bonjour, Evelyn Ersanilli, Christiane Fröhlich, Lea Müller-Funk, Richa Shivakoti, Kidjie Saguin, Gina Longo, Jennifer Turner, Polly Pallister-Wilkins, and Claudio Minca who provided feedback on earlier drafts of the paper.

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