The Sovereign at its Shores: An Analysis on Australia's "Stop the Boats" Offshore Processing and Pacific Island Detention Policy for Refugees and Asylum Seekers

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I. INTRODUCTION

The picture of Aylan Kurdi[1] — a dead three-year-old boy, with dark-colored hair, wearing a red shirt, blue shorts, and blue shoes, slumped face first along the shores of a nearby resort town in Turkey[2] — has generally become an anthem for the call for open borders. Aylan Kurdi's five-year-old brother Galip Kurdi met a similar end.[3] Aylan and Galip are only two of the countless children who perished at sea attempting to leave Syria because of war.[4] More disturbingly, they are only two of the millions of people who

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Cite as 60 ATENEO L.J. 945 (2016).

1. Helena Smith, *Shocking images of drowned Syrian boy show tragic plight of refugees*, THE GUARDIAN, Sep. 2, 2015, *available at* http://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees (last accessed Feb. 15, 2016).
2. *Id.*
3. *Id.*
4. *Id.* & Jessica Elgot, *Family of Syrian boy washed up on beach were trying to reach Canada*, THE GUARDIAN, Sep. 3, 2015, *available at* http://www.theguardian.

flee their countries as refugees from war-torn countries, such as Syria, and as asylum seekers from countries like Burma, which reportedly persecute people on religious or political grounds.[5]

But the same evocative image has also been deemed as evidence for the opposite response — to close borders, by "stopping the boats" that bring refugees and asylum seekers from their homelands to foreign shores through dangerous seas. In the words of former Australian Prime Minister Anthony John "Tony" Abbot (PM Abbott), "[i]f you want to stop the deaths, if you want to stop the drownings[, then] you have got to stop the boats."[6]

This is the centerpiece of "Operation Sovereign Borders,"[7] a military-civilian Australian border protection program, primarily aimed at stopping refugees and asylum seekers, through a system of heavy naval interception by the Australian Defense Force along the country's maritime borders,[8] detention in processing centers in nearby island nations receiving aid from Australia,[9] and "the reintroduction of temporary protection visas for asylum seekers currently in Australia, awaiting determination of their refugee status."[10] In this regard, a 2014 poll found strong domestic support as 71% of Australian adults reportedly agreed that the government should turn back boats "when safe to do so."[11]

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com/world/2015/sep/03/refugee-crisis-syrian-boy-washed-up-on-beach-turkey-trying-to-reach-canada (last accessed Feb. 15, 2016).

5. Iskhandar Razak, *Thousands of Myanmar refugees, asylum seekers stuck in Malaysian poverty cycle*, THE GUARDIAN, June 29, 2015, *available at* http://www.abc.net.au/news/2015-06-29/thousands-of-refugees-stuck-in-malaysian-poverty-cycle/6575134 (last accessed Feb. 15, 2016).

6. BBC News Australia, Migrant crisis: Australia PM says stopping boats key for Europe, *available at* http://www.bbc.com/news/world-australia-34148931 (last accessed Feb. 15, 2016).

7. Australian Government Department of Immigration and Border Protection, Operation Sovereign Borders, *available at* https://www.border.gov.au/about/operation-sovereign-borders (last accessed Feb. 15, 2016) [hereinafter AUS Immigration, OSB].

8. THE COALITION, THE COALITION'S OPERATION SOVEREIGN BORDERS POLICY 5 (2013).

9. *Id.*

10. *Id.*

11. Lowy Institute for International Policy, 2014 Lowly Institute Poll Finds Strong Support for Government Policy on Turning Back Boats, *available at* http://www.lowyinstitute.org/news-and-media/press-releases/2014-lowy-institute-poll-finds-strong-support-government-policy-turning-back-boats (Feb. 15, 2016). *See* Roy Morgan Research, Australians give their views on Tony Abbott & Bill Shorten, *available at* http://www.roymorgan.com/findings/6371-

This Essay seeks to examine both the socio-cultural aspects and the legal dimension of the Australian immigration policy. First, the Essay shall discuss the factual milieu by examining Australian history and its policy on immigration issues. Second, it shall inspect the relevant international agreements and obligations to which Australia is bound as well as the Australian domestic law. Third, the Essay will explore the interplay of elements surrounding Operation Sovereign Borders and legislative enactments related thereto. This Author agrees with the wide consensus that it is not merely an immigration issue, but a multi-faceted one, and one critical facet is human rights.

II. AUSTRALIAN HISTORY & IMMIGRATION POLICY

A. History

1. Brief History of Australia

The indigenous population of the Australian continent are said to be "the oldest living cultural history in the world" going back at least 50,000 years.[12] These people are generally called the aboriginals.[13] The first known European landing occurred in the 17th century, when the land was known as New Holland.[14] In 1770, Captain James Cook chartered the eastern shelf of the continent and claimed the lands for the British Empire.[15] But it was not until 26 January 1788, that a fleet of 11 British ships, carrying convicts, led by Captain Arthur Phillip, anchored at Sydney Harbor and effectively founded what is now known as Australia.[16]

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abbott-shorten-opinions-leaders-july-2015-201507300403 (last accessed Feb. 15, 2016).

12. Australian Government, Australian Indigenous Cultural Heritage, *available at* http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage (last accessed Feb. 15, 2016). *See* AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, A HISTORY OF THE DEPARTMENT OF IMMIGRATION: MANAGING MIGRATION TO AUSTRALIA (2015).

13. *Id.*

14. *Id.*

15. *Id.*

16. History, This Day in History: Jan. 26, 1788, *available at* http://www.history.com/this-day-in-history/australia-day (last accessed Feb. 15, 2016). *See* AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, *supra* note 12, at 4.

2. Immigration Policy of the Australia: Before Operation Sovereign Borders

The first immigrants of Australia were almost exclusively convicts from the British colonies.[17] Free immigrants later travelled to Australia in the middle of the 19th century to labor as agricultural workers or domestic servants.[18] In the 1850s, the country experienced a gold rush following the discovery of substantial amounts thereof, fueling migration of British, Germans, and Chinese.[19] By 1901, the Chinese comprised the third largest migrant group.[20] At the same time, the newly-formed Australian Federal Parliament promulgated the Immigration Restriction Act 1901, the legal basis for what would be known as the White Australia Policy, which sought to stem the tide of Asian immigrants, consisting mostly of South Sea Islanders and the Chinese.[21] The Policy was noted for its 50-word "dictation test" to keep "undesirable applicants" out of Australia.[22] Following the Second World War and the devastation it wrought to the population of the country, Parliament passed laws to promote immigration of Europeans, particularly Britons, with the government adopting the slogan "Populate or perish!"[23] In 1954, Australia ratified the 1951 United Nations (U.N.) Convention relating to the Status of Refugees.[24] The legal basis of the White Australia Policy was dealt a heavy blow in 1958, when Parliament passed Migration Act 1958, which was later amended in 1966, opening up the immigration policy to non-Europeans.[25] It was not until 1972, when a more progressive government took over the Australian government, that the White Australian Policy officially ended.[26] In 1975, the Racial Discrimination Act was

17. No Borders Group, Immigration Australia Timeline, *available at* http://www.noborders-group.com/about-us/History-of-Immigration-Australia (last accessed Feb. 15, 2016).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, *supra* note 12, at 14.

23. No Borders Group, *supra* note 17.

24. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, *supra* note 12, at 46 (citing U.N. Convention relating to the Status of Refugees, *opened for signature* 28 July 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]).

25. No Borders Group, *supra* note 17.

26. *Id.*

passed.[27] At the same time when the Vietnam War drew to a close, the term "boat people" entered the national lexicon as thousands of refugees from Vietnam arrived by boat.[28] Their arrival, along with refugees and asylum seekers from other countries, was preceded by prior processing in Malaysia, Hong Kong, and Thailand.[29] Waves of refugees and asylum seekers arrived periodically in Australia from 1976 to 2000, amounting to more than five million migrants,[30] many of whom were assisted by smugglers.[31] Australia responded to this quandary in 2001, with the "Pacific Solution."[32]

B. Operation Sovereign Borders

1. Precursor — The Tampa Affair[33] and the Pacific Solution (2001 to 2007)

On 26 August 2001, *MV Tampa*, a Norwegian cargo ship, responded to the distress call of *Palapa*, a 35-meter wooden fishing boat off the coast of Christmas Island, Australia.[34] *MV Tampa* rescued 433 boat people, who were mostly refugees fleeing the long-standing civil war in Afghanistan.[35] The Howard Government of Australia responded by allowing the refugees to remain at sea for weeks, deploying military assets later, and passing a series of laws on the matter.[36] The pieces of legislation effectively prevented the Migration Act 1958 from being triggered, as observed —

27. SBS Australia, Timeline: Australia's Immigration Policy, *available at* http://www.sbs.com.au/news/article/2013/06/21/timeline-australias-immigration-policy (last accessed Feb. 15, 2016).

28. *Id.*

29. *Id.*

30. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, *supra* note 12, at 66.

31. SBS Australia, *supra* note 27.

32. *Id.*

33. *See generally* National Museum Australia, 2001: Australian troops take control of Tampa carrying rescued asylum-seekers, *available at* http://www.nma.gov.au/online_features/defining_moments/featured/tampa_affair (last accessed Feb. 15, 2016).

34. Peter D. Fox, *International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution,"* 25 MD. J. INT'L L. 356, 356 (2010). *See* Katherine Gentry, How Tampa Became a Turning Point, *available at* http://www.amnesty.org.au/refugees/comments/how_tampa_became_a_turning_point (last accessed Feb. 15, 2016).

35. *Id. See generally* Insight on Conflict, Afghanistan: Conflict Profile, *available at* http://www.insightonconflict.org/conflicts/afghanistan/conflict-profile (last accessed Feb. 15, 2016).

36. Fox, *supra* note 34, at 358.

> Whereas in the past, reaching Australian territory would have afforded the refugees the opportunity to access Australian courts of law, under the Pacific Solution, the territories of Christmas Island, Ashmore Reef, and the Cocos Islands were excised *from* the purview of the Migration Act. *This legislative action denied refugees who reached outlying parts of Australia the right to seek asylum.* Further, the Pacific Solution directed the Australian Navy to intercept and transport arriving boat people to detention camps on small islands for formal processing and detention.[37]

Collectively, the legislative enactments were deemed the "Pacific Solution."[38] Among others, it included Operation Relex, the naval operation which kept boats away from the Australian mainland.[39]

Internationally, the Pacific Solution was widely criticized, but global media coverage and public attention thereto shifted away from it after 9/11 and the consequent United States' invasion of Afghanistan.[40] Domestically, however, the policy was met with apparent widespread approval.[41] In fact, the Pacific Solution is credited as one of the key policies that allowed the then-incumbent Liberal-National Coalition (Coalition) to be reelected into public office.[42]

Despite the recognition of domestic support in 2001, the election of the Rudd Government under the banner of the Labor Party led to the dismantling of the Pacific Solution and the closure of offshore processing centers.[43]

Notably, however, despite the supposed official end of the policy, immigration remained a hotly contested topic, not only in Australia, but also in Pacific Island countries, such as the Republic of Nauru (Nauru), heavily dependent on Australia for financial aid.[44]

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37. *Id.* (emphasis supplied).

38. *Id.*

39. *See* ABC.net.au, Tampa Enters Australian Waters with 433 Asylum Seekers on Board, *available at* http://www.abc.net.au/archives/80days/stories/2012/01/19/3412121.htm (last accessed Feb. 15, 2016).

40. *Id. See* Griff Witte, Afghanistan War, *available at* http://www.britannica.com/event/Afghanistan-War (last accessed Feb. 15, 2016).

41. Gentry, *supra* note 34.

42. National Museum Australia, *supra* note 33.

43. Office of the United National High Commissioner for Refugees, Australia's "Pacific Solution" draws to a close, *available at* http://www.unhcr.org/47b04d074.html (last accessed Feb. 15, 2016).

44. In exchange for the establishment of offshore processing centers and detention facilities, Nauru reportedly received more than U.S. $100 million from 2002 to 2005 and earned an estimated U.S. $8 million annually since 2001 from Australia for the operation of processing centers. *See* Jewel Topsfield, Nauru

In the 2013 Federal Election, former PM Abbott of the Coalition campaigned for and on the slogan "stop the boats,"[45] among others. The Coalition won the election.[46] This ushered in Operation Sovereign Borders.

2. Players

Operation Sovereign Borders (OSB) is "a military-led, border security operation supported and assisted by a wide range of federal government agencies[,]" with the general aim of combating smuggling and protecting Australia's borders.[47] On the one hand, it is overseen by military officials, now by Major General Andrew Bottrell.[48] On the other hand, political oversight rests on the immigration minister, and the customs and border protection service.[49]

3. Procedural Aspects and Actual Practice

As noted by one Australian news outlet, "[c]onfirming precise details of what is occurring on Australia's northern maritime approaches is difficult due to a Government-imposed information vacuum."[50] This is entirely expected, however, as Coalition officials have been consistent, since before the 2013 Australian Federal Election, in that the release of public information as regards OSB would be an "operational matter" left to the discretion of the OSB commanding officer.[51] Former PM Abbott repeatedly alluded to the OSB as comparable to war against illegal smugglers.[52]

Generally, however, the process first begins with naval vessels conducting periodical patrols along the Australian maritime borders.[53]

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fears gap when camps close, *available at* http://www.theage.com.au/news/national/nauru-fears-gap-when-camps-close/2007/12/10/1197135374481.html (last accessed Feb. 15, 2016).

45. Alison Rourke, *Tony Abbott, the man who promised to 'stop the boats', sails to victory*, THE GUARDIAN, Sep. 2, 2013, *available at* http://www.theguardian.com/world/2013/sep/07/australia-election-tony-abbott-liberal-victory (last accessed Feb. 15, 2016).

46. *Id.*

47. AUS Immigration, OSB, *supra* note 7.

48. ABC.net.au, Operation Sovereign Borders: The First Six Months, *available at* http://www.abc.net.au/news/interactives/operation-sovereign-borders-the-first-6-months (last accessed Feb. 15, 2016).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. THE COALITION, *supra* note 8, at 5.

Second, these patrols intercept any "Suspected Illegal Entry Vessels" (SIEVs).[54] Third, these boats are prevented from reaching Australian shores by being towed, turned away, and boarded, if necessary.[55] Fourth, the boats and its passengers are brought to the appropriate offshore processing centers in nearby Pacific Island nations, mainly either Nauru or Manus Island of the Independent State of Papua New Guinea (Papua New Guinea).[56] Fifth, the passengers are detained indefinitely until determination of their status, i.e., whether or not they genuinely are refugees.[57] And sixth, those detainees may be required to stay indefinitely in the processing centers, return to their country of origin, or issued temporary protection visas.[58]

The Asylum Seeker Resource Centre identifies the following as the core aspects of the OSB:

> (1) Turning back boats, including providing support to source and transit countries to intercept asylum seekers departing their shores[;]
>
> (2) Intercepting all SIEVs travelling from Sri Lanka and arranging for the immediate return of all passengers, regardless of their asylum seeker status[;]
>
> (3) Increasing the capacity of offshore detention [centers] on Manus Island and Nauru, and denying those in offshore detention resettlement in Australia, even if found to be genuine refugees[;]
>
> (4) Purchasing and deploying vessels, such as orange lifeboats, to turn (and tow) back asylum seekers whose boats are unseaworthy[;]
>
> (5) Reintroducing temporary protection visas for asylum seekers currently in Australia, awaiting determination of their refugee status[; and]
>
> (6) Denying refugee status for those who are 'reasonably believed' to have discarded or destroyed their identity documents – the Coalition government intends to simply refuse to process such asylum seekers.[59]

54. *Id.* at 7.

55. *Id.* at 5.

56. *Id.*

57. *Id.*

58. The Coalition's policy characterizes these visas in this manner — "deny access to family reunions and provide the opportunity to revisit people's refugee status when conditions in their home country change. This policy denies permanent residency, citizenship, and therefore a product for people smugglers to sell." *Id.*

59. Asylum Seeker Resource Centre, Operation Sovereign Borders, *available at* http://www.asrc.org.au/wp-content/uploads/2013/07/Operation-Sovereign-Borders-May-2014.pdf (last accessed Feb. 15, 2016).

4. Pacific Island Regional Framework

One of the most vital aspects of the OSB is the proposed "Regional Deterrence Framework."[60] The main idea and operation is a series of bilateral agreements and negotiations with various states in the Asia Pacific Region, spanning from the Pacific Island states to as far as mainland Asia's Kingdom of Cambodia.[61] However, the three most engaged partners of Australia remain to be Nauru, Papua New Guinea, and the Republic of Indonesia (Indonesia).

III. REVIEW OF RELATED LITERATURE

A. Relevant International Agreements

Several important international agreements are pertinent to this discussion.

First, Australia has been a state party to the 1982 U.N. Convention on the Law of the Sea (UNCLOS)[62] since 1994.[63] Article 98 of the UNCLOS, referring to "the duty to render assistance to persons and vessels in distress,"[64] provides —

> (1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> a. to render assistance to any person found at sea in danger of being lost;
>
> b. to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him[.][65]

This "was incorporated into Australian domestic law as [Section 317 A] of the country's Navigation Act."[66]

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60. THE COALITION, *supra* note 8, at 7.

61. Laura Rose Donegan, A Just and Sustainable Solution to the Boat People Predicament in Australia?, at 19 (May 2015) (published thesis, University of New Hampshire) (on file with the University of New Hampshire Scholars' Repository).

62. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

63. Australian Government Geoscience Australia, The Law of the Sea, *available at* http://www.ga.gov.au/scientific-topics/marine/jurisdiction/law-of-the-sea (last accessed Feb. 15, 2016).

64. Fox, *supra* note 34, at 361.

65. UNCLOS, art. 98.

Second, Australia is a state party to both the 1951 U.N. Convention relating to the Status of Refugees (1951 Refugee Convention)[67] and its 1967 Protocol.[68] As of April 2015, there are 142 State Parties to both the Convention and the Protocol.[69] The 1951 U.N. Refugee Convention is "the key international legal document relating to refugee protection"[70] and is based on the 1948 U.N. Universal Declaration of Human Rights (UDHR),[71] which recognizes the right of persons to seek asylum from persecution in other countries.[72] It defines: (1) who refugees are; (2) the rights of refugees; and (3) the legal obligations of states towards refugees.[73] As provided in the Convention, "refugees" are —

> [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[74]

Originally, the said Convention was "limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe."[75] These

66. Fox, *supra* note 34, at 361 (citing DAVID MARR & WILKINSON, DARK VICTORY 31 (2004)).

67. 1951 Refugee Convention, *supra* note 24.

68. Protocol relating to the Status of Refugees, *opened for signature* 13 Jan. 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. *See* Khalid Koser, Australia and the 1951 Refugee Convention, *available at* http://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention (last accessed Feb. 15, 2016). *See also* U.N. Treaties.org, Chapter V (Refugees and Stateless Persons): 5. Protocol relating Status of Refugees, *available at* https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#Participants (last accessed Feb. 15, 2016).

69. Koser, *supra* note 68, at 1.

70. *Id.*

71. Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc A/810 at 71 (1948) [hereinafter UDHR].

72. United Nations High Commissioner for Refugees, Convention and Protocol Relating to the Status of Refugees: Introductory Note, at 2, *available at* http://www.unhcr.org/3b66c2aa10.html (last accessed Feb. 15, 2016) (citing UDHR, art. 14) [hereinafter UNHCR, Introductory Note].

73. Koser, *supra* note 68, at 1.

74. 1951 Refugee Convention, *supra* note 24, art. 1 (A) (2).

75. UNHCR, Introductory Note, *supra* note 72, at 2.

temporal and geographical limitations were removed in the 1967 Protocol, consequently granting the 1951 Refugee Convention universal coverage.[76]

In contrast, an asylum seeker "is a person who claims to [need] protection under the Refugee Convention, but whose status has not yet been determined as meeting the criteria stated above."[77]

The underlying principles of the Convention and Protocol are non-discrimination, non-penalization, and *non-refoulement*. Among the three, the most important is the principle of *non-refoulement*.

The basis of this principle of *non-refoulement* is Article 33 of the 1951 Refugee Convention. It provides that —

> (1) *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.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[78]

An elaboration of the meaning and implications of this provision is best explained in an advisory opinion from the U.N. High Commissioner for Refugees (UNHCR), to wit —

> The protection against *refoulement* under Article 33 (1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the "inclusion" criteria) and does not come within the scope of one of its exclusion provisions. [...] It follows that that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared. [Thus,] [t]he principle of *non-refoulement* is of particular relevance to asylum-seekers.[79]

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76. *Id.*

77. Donegan, *supra* note 61, at 4. *See generally* Alan Travis, Migrants, refugees and asylum seekers: what's the difference?, THE GUARDIAN, Aug. 28, 2015, *available at* http://www.theguardian.com/world/2015/aug/28/migrants-refugees-and-asylum-seekers-whats-the-difference (last accessed Feb. 15, 2016).

78. 1951 Refugee Convention, *supra* note 24, art. 33 (emphasis supplied).

79. 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, ¶ 6 (26 Jan. 2007) [hereinafter UNHCR, Advisory Opinion on Non-Refoulement]. Persons are so excluded from protection of the principle of non-refoulement under the 1951 Convention and its 1967 Protocol because of the following reasons: (1) they are receiving

Notably, the advisory expressly explained that the principle is "applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or 'renditions,' and non-admission at the border," from the applicable article's words stating "in any manner whatsoever."[80] The advisory opinion also clarified that —

> The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.[ ] *It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to place where their lives or freedom would be in danger* on account of their race, religion, nationality, membership of a particular social group or political opinion.[ ] As a general rule, in order to give effect to their obligations under the 1951 Convention and 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.[81]

Most importantly, the advisory opinion declared that the principle of *non-refoulement* is a rule of customary international law, as it satisfies the criteria thereof.[82]

Third, Australia is a party to the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[83] It also has an express *non-refoulement* provision which "prohibits the removal of

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protection or assistance from a U.N. agency other than UNHCR; (2) they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality; or (3) they are deemed underservicing of international protection on the grounds that there are serious reasons for considering that they have committed serious crimes or heinous acts. *Id.*

80. *Id.* ¶ 7.

81. *Id.* ¶ 8 (emphasis supplied).

82. According to Article 38 (1) (b) of the Statute of the International Court of Justice, for a rule to become part of customary international, two elements are required: (1) consistent state practice and (2) *opinio juris*, i.e., the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it. *Id.* ¶¶ 14-15. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

83. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Sep. 10, 1984, 1465 U.N.T.S. 85. *See* Australian Human Rights Commission, Australian Rights Timeline, *available at* https://www.humanrights.gov.au/australian-rights-timeline (last accessed Feb. 15, 2016) [hereinafter AUSHRC, Timeline].

a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."[84]

Fourth, Australia is also a party to the 1966 International Covenant on Civil and Political Rights (ICCPR).[85] The provisions thereof also establish the obligation of state parties

> *not* to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[86]

In other words, the ICCPR provisions obligate to observe and enforce the principle of *non-refoulement.*

Fifth, Australia is also a state party to the 1989 Convention on the Rights of the Child (CRC).[87] It provides, among others, that children have the right to "their best interests considered by welfare institutions, courts of law, or administrative authorities; the right of children to apply to enter or leave a country for the purpose of family reunification; and the right of children to express their own views in any judicial or administrative proceedings."[88]

B. Australian Law

Australian domestic law has ratified all of the abovementioned treaties and integrated its provisions into a series of various legislative enactments granting extensive powers and obligations to its Human Rights and Equal Opportunity Commission.[89]

The Author recognizes the necessity to refer to Australian laws forming the basis and enhancing the powers of maritime officers to execute the objectives of OSB. In this regard, the Essay turns to the latest jurisprudence from the High Court of Australia, which is Australia's highest court,[90] on the

84. UNHCR, Advisory Opinion on Non-Refoulement, *supra* note 79, ¶ 18.

85. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171. *See* AUSHRC, Timeline, *supra* note 83.

86. UNHCR, Advisory Opinion on Non-Refoulement, *supra* note 79, ¶ 19 (emphasis supplied).

87. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. *See* AUSHRC, Timeline, *supra* note 83.

88. Fox, *supra* note 34, at 363.

89. *See generally* AUSHRC, Timeline, *supra* note 83.

90. Stephen Tully & Michael Smith, Operation "Sovereign Borders": the High Court of Australia Considers Implications of International Law (American

matter — the January 2015 case of CPCF v. Minister for Immigration and Border Protection & Anor.[91] At the center of the controversy was a provision in the 2013 Maritime Powers Act,[92] which empowered a maritime officer to "detain a person on a detained vessel and take the person, or cause the person to be taken, to a place outside Australia."[93] The High Court upheld the said powers, notwithstanding the outstanding obligations of Australia vis-à-vis international agreements binding the latter to the principle of *non-refoulement*.[94]

The provisions of the 2013 Maritime Powers Act have now been amended and superseded by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (2014 Maritime Powers Amendment)[95] and the Australian Border Force Act 2015 (Border Force Act 2015).[96]

The Border Force Act 2015 heightened the necessity for secrecy surrounding the events occurring in the Pacific Island offshore processing centers, as it renders as a criminal offense, punishable for imprisonment of up to two years, for "any person working directly or indirectly for the Department of Immigration and Border Protection to reveal to the media or any other person or organi[z]ation (the only exceptions being the Immigration Department and other Commonwealth agencies, police, coroners) anything that happens in detention [centers] like Nauru and Manus Island."[97]

IV. ANALYSIS & APPLICATION

First, it is clear from these statistics and the history of immigration into Australia that the shift from racial exclusivity to remarkable multicultural

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Society of International Law Insights), *available at* https://www.asil.org/insights/volume/19/issue/12/operation-sovereign-borders-high-court-australia-considers-implications#_edn1 (last accessed Feb. 15, 2016).

91. CPCF v. Minister for Immigration and Border Protection & Anor [2015] HCA 1 (Austl.).

92. *Id.* (citing Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)).

93. *Id.*

94. *CPCF*, HCA 1.

95. *Maritime Powers Act* 2013 (Cth).

96. *Australian Border Force Act* 2015 (Cth).

97. Greg Barns & George Newhouse, Border Force Act: detention secrecy just got worse, *available at* http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086 (last accessed Feb. 15, 2016).

openness has been attended by the recent rise of a philosophy of deterrence. This includes the militarization of immigration.[98] On the one hand, certain aspects of this development are consistent with Australian history, politics, and law as it penalizes illegal immigrants and prioritizes refugees entering Australia through U.N. programs.[99] On the other hand, this development as a whole not only stretches the limits of refugee law; it also breaches Australia's clear international legal obligations. As aforementioned, one underlying principles of the 1951 Refugee Convention and its 1967 Protocol is non-penalization.[100] This includes protection from penalties despite illegal

98. For example, the Border Protection Bill following Tampa Affair "represented a shift in power away from legal systems (where judges and evidence determine asylum seekers' future) to military and government officials. It overrode previous laws, like the international convention (1951). This gave the Prime Minister the right to turn the Tampa, and many other vessels away." Gentry, *supra* note 34.

99. Note that —

> Australia's resettlement program through the office of the [UNHCR] is the highest per capita globally. However, less than [one per cent] of the world's refugees are handled by the UNHCR resettlement program. [...] When you look at the big picture, other countries – including many developing countries – host or take more refugees per capita than Australia. They just [do] [not] do it through the UNHCR resettlement program.

Lukas Coch, FactCheck: Does Australia take more refugees per capita through the UNHCR than any other country?, *available at* http://theconversation.com/factcheck-does-australia-take-more-refugees-per-capita-through-the-unhcr-than-any-other-country-47151 (last accessed Feb. 15, 2016).

100. Article 31 of the 1951 Refugee Convention provides that —

> Article 31
>
> Refugees unlawfully in the country of refugee
>
> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or the obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

1951 Refugee Convention, *supra* note 24, art. 31.

entry.[101] In the final analysis, the indefinite detention of refugees and asylum seekers, coming as illegal migrants arrivals in SIEVs, in offshore processing facilities in either the Nauru or Manus Islands is a form of penalization. This fact is highlighted by the difference in treatment between those refugees and asylum seekers who enter the country through air and who go through the requisite processes.[102] As mentioned, despite the distinction between the two kinds of migrants, the principle of non-penalization as embodied in the Convention and its Protocol, to which Australia is bound thereby, *does not* allow the latter to make such distinction in law and treatment. This is made worse by the fact that "[illegal migrants] will never be allowed to resettle in Australia even if they are found to be genuine refugees,"[103] with the view that "90[%] of asylum seekers arriving by boat are assessed to be refugees."[104]

Second, central to the discussion is the principle of *non-refoulement*, as discussed previously. This principle is not only limited to the 1951 Refugee Convention and its 1967 Protocol, but cuts across various international instruments promoting human rights, all of which Australia is party thereto. It is admitted that the 2015 *CPCF* case ruled in favor of the maritime officials wide powers despite this principle. However, it must be emphasized that the obligation of Australia to observe this principle still remains.[105] This is not only by virtue of its treaty obligations, but because the principle of *non-refoulement* has been settled as international customary law. Moreover, the entire policy of offshore processing facilities, which includes indefinite detention and reported CRC and CAT violations,[106] comes into question as this principle refers to "the rights of refugees not to be returned to a country where they risk persecution."[107] The heighted secrecy imposed by the new

101. UNHCR, Introductory Note, *supra* note 72, at 3.

102. Gemima Harvey, Australia's Controversial Asylum Policies, *available at* http://thediplomat.com/2015/12/australias-controversial-asylum-polices (last accessed Feb. 15, 2016).

103. *Id.*

104. *Id.*

105. Jane McAdam, *Our obligations still apply despite High Court win*, THE SYDNEY MORNING HERALD, Jan. 30, 2015, *available at* http://www.smh.com.au/comment/our-obligations-still-apply-despite-high-court-win-20150129-1316fm.html (last accessed Feb. 15, 2016).

106. Harvey, *supra* note 102 (citing AUSTRALIAN HUMAN RIGHTS COMMISSION, THE FORGOTTEN CHILDREN: NATIONAL INQUIRY INTO CHILDREN IN DETENTION (2014) & Amnesty International, Australia: Damning evidence of officials' involvement in transnational crime uncovered, *available at* https://www.amnesty.org/en/latest/news/2015/10/australia-damning-evidence-of-officials-involvement-in-transnational-crime-uncovered (last accessed Feb. 15, 2016).

107. Koser, *supra* note 68, at 4.

law, i.e., the 2015 Border Force Act, by the imposition of penalties or the criminalization of mere acts of disseminating information, in relation to the situation at offshore processing facilities , to the media, exacerbate the entire problematic paradigm.

Third, this leads the discussion to relating the issues of legality with feasibility and practically. Several scholars, analysts, and organizations have concluded that community-based *onshore* processing programs would be cheaper, humane, and consistent with the international obligations of Australia.[108]

Fourth, whether offshore or onshore, regional arrangements are sorely disjoint — there are abrupt negotiations and ad hoc arrangements, but there is no framework. Notably, the major "transit" countries for refugees and asylum seekers, i.e., India, Indonesia, Pakistan, and Thailand, are not signatories to the 1951 Refugee Convention and its 1967 Protocol.[109] This deals a huge blow against refugees and asylum seekers. It forces them not to settle in the same countries and look elsewhere, notably countries like Australia, who are signatories to the said international agreements. It also reveals that despite the existing international institutional arrangements by the UNHCR, these are not enough. Arguably, this is part of the reason why countries participative of the UNHCR programs resort to more restrictive policies, such as those of Australia. Counting from 2001's Pacific Solution, the established financial arrangement between the more prosperous Australia and financially-challenged Nauru and Mauru Islands must also be considered, as the latter has become reliant on Australian aid.[110] To illustrate, from 2014 to 2015, "Australia provided $27.1 million in Official Development Assistance (ODA) to Nauru — equivalent to 23 per cent of the Government of Nauru's budget of $115 million."[111] The Australian Government's

108. Donegan, *supra* note 61, at 36 (citing Catherine Marshall, et al., Community detention in Australia, *available at* http://www.fmreview.org/en/detention/marshall-et-al.pdf (last accessed Feb. 15, 2016); Amnesty International, New refugee community processing: humane and economical says Amnesty International, *available at* http://www.amnesty.org.au/news/comments/28541 (last accessed Feb. 15, 2016); & INTERNATIONAL DETENTION COALITION, THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION (2011 ed.).

109. Koser, *supra* note 68, at 11.

110. Australian Government Department of Foreign Affairs and Trade, Overview of Australia's Aid Program to Nauru, *available at* http://dfat.gov.au/geo/nauru/development-assistance/pages/development-assistance-in-nauru.aspx (last accessed Feb. 15, 2016).

111. Australian Government Department of Foreign Affairs and Trade, Nauru Aid Program Performance Information 2014-2015, *available at* http://dfat.gov.au/about-us/publications/Documents/nauru-appr-2014-15.pdf (last accessed Feb. 15, 2016).

Department of Foreign Affairs and Trade, in a Report,[112] has credited this ODA as the basis for successful development programs involving power, utilities, and health programs, among others, in Nauru.[113] This has necessarily entailed, between Australia and the recipients of its foreign aid, a system of dependency for foreign aid. Imaginably, any sudden change in the Australian immigration policy, which includes compensating Nauru's processing facilities, would precipitate a host of problems in the said reliant islands, particularly its economy. This is why an approach of immediately dismantling the existing system of dependency, however, socially and legally destructive, is equally economically impractical and much more complex. All these precisely point to a major impetus for Australia to take the lead in making efforts to create a concerted and consultative regional effort for a legal and sustainable solution to the immigration and humanitarian question. In this regard, ASEAN is Australia's most practical and obvious geo-political partner. Bilateral talks between the nations of ASEAN and Australia create only short-term and limited options, instead of a regional effort among prosperous nations creating a long-term and dynamic refugee protection strategy.

Fifth, the issue is obviously humanitarian, but such is subtly obfuscated as being so. The government's rhetoric is observably strategic, as it only subtly recognizes the humanitarian, but amplifies the security and nationalistic, aspects of the issue. Studies have showed such rhetoric is significant and taps into the negative ideas associated with refugees and asylum seekers, particularly the ideas of illegality and fairness.[114] A simple example of strategic language employed by the government through OSB is "illegal maritime arrivals."[115] A simple example of the abovementioned negative associations is the idea that public funds spent for refugees and asylum seekers would necessarily translate to fewer resources spent for impoverished Australians.[116]

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112. *Id.*

113. *Id.*

114. Harriet McHugh-Dillon, If they are genuine refugees, why?: Public attitudes to unauthorized arrivals in Australia, at 9, *available at* http://www.foundationhouse.org.au/wp-content/uploads/2015/07/Public-attitudes-to-unauthorised-arrivals-in-Australia-Foundation-House-review-2015.pdf (last accessed Feb. 15, 2016).

115. *See* Australian Government Department of Immigration and Border Protection, Illegal maritime arrivals, *available at* http://www.ima.border.gov.au (last accessed Feb. 15, 2016).

116. *Id.* at 9 (citing Kane Turoy Smith & A. Pendersen, *The willingness of a society to act on behalf of Indigenous Australians and refugees: the role of contact, intergroup anxiety, prejudice, and support for legislative change*, 43 J. APPLIED SOC. PSYCHOL. 179 (2013); Perkoulidis R. Schweitzer, et al., *Attitudes towards refugees: The dark*

Sixth, counter-narratives which reveal the humanitarian aspects of the whole debacle have so far pointed out the human rights violations and heinous flaws of both OSB and its implementation. But these flaws and violations are in danger of being silenced through the Border Force Act 2015. As previously discussed, there are provisions promoting a "chilling effect" through imprisonment against all those who reveal potential human rights violations in offshore processing facilities. Thus, while the Border Force Act 2015 is a logical progression of Australia's restrictive immigration laws, it is a regression of Australia's commitment to honor its international obligations, particularly to those people who need it the most. These domestic statutes have are already being condemned internationally. However, it is not enough. These regressive laws must be repealed.

Seventh, the 1951 Convention and its 1967 Protocol, despite its successes, has shown a severe failing — it is "reactive rather than proactive."[117] It shows an "exilic bias" that must be addressed, i.e., "it places obligations on destination states that are increasingly onerous to fulfil; but none on the states that refugees are fleeing."[118] In other words, these international agreements, although they have proven protective and assistive of the plight of millions of refugees and asylum seekers around the globe throughout history, have also created both a system of assistance and resistance to refugees which show the same international agreements' sore limitations. Arguably, the only way to provide solutions to such failing goes into indirectly tackling the social, political, and economic stability of states or even the global political economy. However, it is undeniable that despite this argument, because of the extent of the crises confronting refugees and asylum seekers, global structural changes are necessary to confront the unending crises confronted by refugees and asylum seekers.

V. CONCLUSION

Australia's national anthem goes "*[f]or those who've come across the seas* \ *[w]e've boundless plains to share*; \ [w]ith courage let us all combine \ [t]o Advance Australia Fair."[119] These words are warm, welcoming, and inclusive — not entirely unexpected from a former imperial British penal colony turned prosperous multicultural continent nation-state. True to its tradition and law,

side of prejudice, 57 AUSTL. J. PSCHOL. 170, 170–79 (2005); & N. Klocker, *Community antagonism towards asylum seekers in Port Augusta, South Australia*, 42 AUSTRL. GEOGRAPHIC STUD. 1, 1–17 (2004)).

117. Koser, *supra* note 68, at 6.

118. *Id.*

119. Australian Government, Advance Australia Fair, *available at* https://www.itsanhonour.gov.au/symbols/docs/anthem_words.pdf (last accessed Feb. 15, 2016) (emphasis supplied).

Australia caters to populations of different cultures, faiths, and standing in life.

However, its policies combating people smuggling, discouraging illegal immigration, and protecting its borders through a philosophy of deterrence as embodied in Operation Sovereign Borders and, its newest legislation on the matter, the Australian Border Force Act 2015, have led to clear violations of refugee law, humanitarian law, and the most basic tenets of human rights law. It has promoted the rationalization of countering illegality with a concoction of policies which range from the plainly legal, ambiguously illegal, and blatantly in violation of international law — as if the legal efforts justify the employment of certain illegal elements. This is unacceptable.

This is a critical juncture. Australia might be violating human rights, but it is also in a position of invaluable experience. As discussed, existing international law instruments have its gaps, and the Australian experience could be used to constructively to fill such inadequacies. Further, its existing institutional arrangements with nearby nation-states, with the accompanying infrastructural bases, could lay a foundation for a strategy, not only of Australia, but the entire region to, not merely deal with, but engage and attend, in more responsible and humane ways, to the needs of refugees and asylum seekers.

There are alternatives to the sovereign at the shores, swinging its sword, against suspicious subjects sojourning seas. It begins with seeing these sojourning subjects, not as security concerns with a consequent militarized action, but as victims of war and other forms of violence, who deserve an appropriate humanitarian response.