

# The Uncertain Future of Australia's Pacific Solution

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## ABSTRACT

The plight of a refugee is one that many of us will never understand. However, the ugly truth is that there is a global rise in the number of displaced persons seeking asylum. By the end of 2015, the number of displaced persons surpassed post World War II numbers, prompting developed nations around the world to enforce, amend, or implement policies targeted at controlling the flood of refugees at their borders. This Comment examines the policies of Australia, a nation that has had strict immigration policies in place for decades. Specifically, it discusses the Australian stance on refugee migration and how such policy reconciles with human rights obligations imposed by international treaties.

## I. INTRODUCTION

Australia’s Pacific Solution is the country’s answer to decades of displaced migrants landing on its shores seeking asylum. First arising in an official capacity in 2001, the Pacific Solution’s goal was to prevent asylum seekers arriving by boat from entering Australian territory. Australian government officials would detain migrants attempting to reach Australian shores by boat. Migrants would then be rerouted to processing facilities in Nauru or Papua New Guinea where their asylum claims were processed and their status as refugees was determined. However, even if granted refugee status, migrants were still not permitted to resettle on Australian soil.

By 2008, subsequent administrations had put an end to the Pacific Solution, only to see an even more restrictive version revived in 2012. Australian officials defend it as necessary to deter people smugglers and to save lives at sea.<sup>1</sup> Others, however, criticize it as a harsh response to a global migration crisis.<sup>2</sup> Amnesty International has said the Australian government has chosen “intolerable cruelty” as a tool to further its policy to deter boat arrivals; a method that puts Australia in breach of international

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1. See generally Elaine Pearson, *Australia’s harsh refugee policy is no global model*, THE WASH. POST (Sept. 19, 2016), [https://www.washingtonpost.com/news/global-opinions/wp/2016/09/19/australias-harsh-refugee-policy-is-no-global-model/?utm\\_term=.bea225467444](https://www.washingtonpost.com/news/global-opinions/wp/2016/09/19/australias-harsh-refugee-policy-is-no-global-model/?utm_term=.bea225467444) [https://perma.cc/A2P2-P2WN].

2. *Id.*

human rights laws and international refugee laws.<sup>3</sup> As of February 2016, the Australian High Court has upheld the legality of the Pacific Solution despite its controversial terms. However, a recent decision from the Supreme Court of Papua New Guinea, coupled with an announcement that detention centers on Manus Island will close, threaten the future of the Pacific Solution.<sup>4</sup>

As a signatory to virtually every major human rights agreement, Australia is facing allegations that its Pacific Solution violates international law.<sup>5</sup> The Universal Declaration of Human Rights (“UDHR”) is an international document enshrining the basic rights, including civil, political, economic, and cultural rights, and fundamental freedoms to which all human beings are entitled.<sup>6</sup> The UDHR was adopted in 1948 as a result of events related to World War II and was proposed as a type of road map for the newly created United Nations to guarantee the rights of all individuals.<sup>7</sup> The

3. AMNESTY INT’L, ISLAND OF DESPAIR: AUSTRALIA’S “PROCESSING” OF REFUGEES ON NAURU 7 (2016), [https://www.amnesty.org/download/Documents/ASA1249342016\\_ENGLISH.PDF](https://www.amnesty.org/download/Documents/ASA1249342016_ENGLISH.PDF) [<https://perma.cc/UWS4-R856>] [hereinafter *Island of Despair*] (“The inescapable conclusion is that the abuse and anguish that constitutes the daily reality of refugees and asylum-seekers on Nauru is the express intention of the Government of Australia. In furtherance of a policy to deter people arriving in Australia by boat, the Government of Australia has made a calculation in which intolerable cruelty and the destruction of the physical and mental integrity of hundreds of children, men and women, have been chosen as a tool of government policy. In so doing the Government of Australia is in breach of international human rights law and international refugee law.”).

4. See generally *Namah v. Pato*, SCA. No. 84 of 2013, SC1497, 1, 27 (Papua N.G. Sup. Ct. Apr. 26, 2016), <http://www.pacii.org/pg/cases/PGSC/2016/13.pdf> [<https://perma.cc/QFK8-W4H2>] (ruling that detention of asylum seekers in Papua New Guinea is unconstitutional). Kelly Buchanan, *Australia/Nauru: High Court Rules Offshore Detention of Asylum Seekers Is Lawful*, LIBRARY OF CONGRESS (Feb. 5, 2016), <http://www.loc.gov/foreign-news/article/australianauru-high-court-rules-offshore-detention-of-asylum-seekers-is-lawful/> [<https://perma.cc/4VRA-SVMA>].

5. The list of international agreements to which Australia is a party includes: The Universal Declaration of Human Rights, the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the International Covenant on Civil and Political Rights. See Jared L. Lacertosa, Note, *Unfriendly Shores: An Examination of Australia's "Pacific Solution" Under International Law*, 40 BROOKLYN J. INT’L L. 321, 323 (2014).

6. *What is the Universal Declaration of Human Rights?*, AUSTRALIAN HUMAN RIGHTS COMM’N, <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> [<https://perma.cc/J6L3-7XJ4>] (last visited Oct. 16, 2016); see generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

7. *History of the Document*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/> [<https://perma.cc/AX2G-AJTQ>] (last visited Oct. 16, 2016).

UDHR is a declaration rather than a treaty, meaning it is not legally binding on countries. However, some argue that it has become binding as a part of customary international law.<sup>8</sup>

The 1951 Convention Relating to the Status of Refugees (“Refugees Convention”) is grounded in Article 14 of the UDHR, recognizing the right of persons to seek asylum from persecution in other countries.<sup>9</sup> It provides minimum standards for the treatment of refugees and is underpinned by three fundamental principles: non-discrimination, non-penalization, and non-refoulement.<sup>10</sup> The Refugees Convention was originally limited in scope to cover persons fleeing from events taking place in Europe before January 1, 1951,<sup>11</sup> but in 1967, the Refugees Protocol expanded the Refugees Convention’s definition of “refugee” to apply universally.<sup>12</sup>

The International Covenant on Civil and Political Rights (“ICCPR”)<sup>13</sup> is a treaty comprised of basic, fundamental human rights including the right of self-determination, the right to life, the right to be free from inhumane punishment, and the right to be free from slavery.<sup>14</sup> The ICCPR serves as a “yardstick” for drafting laws related to fundamental rights.<sup>15</sup>

This Comment will examine the current and future state of the Pacific Solution and suggest how Australia might respond to the recent threats posed to its policy. Part II provides a historical framework of Australia’s policy towards asylum seekers and refugees who arrive by boat. Part III

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8. AUSTRALIAN HUMAN RIGHTS COMMISSION, *supra* note 6.

9. U.N. High Comm’r for Refugees, Introductory Note from the Office of the UNHCR to the Convention and Protocol Relating to the Status of Refugees 2 (Dec. 2010), <http://www.unhcr.org/en-us/3b66c2aa10> [<https://perma.cc/KZ5W-FG7H>] [hereinafter *UNHCR Introductory Note*].

10. *Id.* at 3; *see generally* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 (“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.”); “non-refoulement” is defined as “a principle of international law providing a refugee or asylum seeker with the right to freedom from expulsion from a territory in which he or she seeks refuge or from forcible return to a country or territory where he or she faces threats to life or freedom because of race, religion, nationality, membership in a particular social group, or political opinion.” *Non-refoulement*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/non-refoulement> [<https://perma.cc/MXJ4-GNWP>] (last visited Mar. 16, 2018).

11. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268; *UNHCR Introductory Note*, *supra* note 9, at 3.

12. *UNHCR Introductory Note*, *supra* note 9, at 2, 4.

13. G.A. Res. 2200 (XXI) A, Int’l Covenant on Civil and Political Rights (Dec. 19, 1966).

14. Christian Tomuschat, *Int’l Covenant on Civil and Political Rights* at 2, U.N. AUDIOVISUAL LIBRARY OF INT’L LAW (2008), [http://legal.un.org/avl/pdf/ha/iccpr/iccpr\\_e.pdf](http://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf) [<https://perma.cc/WJ6U-FTCS>].

15. *Id.* at 3.

discusses how the Pacific Solution may threaten Australia's adherence to its international obligations. Specifically, Part III will examine three key aspects of the policy that may cause it to infringe on Australia's international obligations: its statutory construction, its purpose and procedures, and the living conditions of the facilities that carry out the policy. Part IV will address the April 2016 announcement that detention centers will close on Papua New Guinea's Manus Island and how it might affect Australian policy moving forward. Finally, Part V proposes steps that Australia should take to ensure the safe resettlement of the refugees currently being held in offshore detention centers.

## II. THE CREATION OF THE PACIFIC SOLUTION

Australia's current policy towards asylum seekers who arrive by boat is most commonly referred to as the "Pacific Solution." To fully understand this policy, it is important to have a clear view of its historical framework and evolution. The policy has become increasingly more restrictive over the decades. The migration of "boat people" to Australia first began following the Vietnam War,<sup>16</sup> a conflict where more than three million people were displaced.<sup>17</sup> As the number of arrivals increased, so did a perception of a loss of border control.<sup>18</sup> In reality, however, only 2,059 asylum seekers arrived by boat between 1976 and 1979.<sup>19</sup> By 1982, the arrivals had dropped to zero and did not pick up again until 1989.<sup>20</sup> Despite these statistics, the Australian government passed legislation in 1989 that permitted officers to detain migrants who attempted to enter Australia without a valid visa.<sup>21</sup> The detentions were meant to be temporary, lasting only until the migrant's immigration status was resolved.<sup>22</sup> Finally, in 2001, the Pacific Solution

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16. Kaitlyn Pennington-Hill, Note, *The Legal Challenges of Globalization: A View from the Heartland: Note: Australia Makes a U-Turn with the Revival of the Pacific Solution: Should Asylum Seekers Find a New Destination?*, in *THE CHALLENGES OF GLOBALIZATION: A VIEW FROM THE HEARTLAND*, 13 WASH. U. GLOBAL STUD. L. REV. 585, 587 (2014).

17. Giada Zampano et al., *Migrant Crisis: A History of Displacement*, WALL ST. J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-history-of-displacement/> [<http://perma.cc/X5B4-CMNF>].

18. Pennington-Hill, *supra* note 16.

19. Bridie Jabour, *Did John Howard's Pacific Solution stop the boats, as Tony Abbott Asserts?*, THE GUARDIAN (July 19, 2013), <https://www.theguardian.com/world/2013/jul/19/did-howard-solution-stop-boats> [<https://perma.cc/R24B-E7S6>].

20. *Id.*

21. Pennington-Hill, *supra* note 16, at 589.

22. *Id.*

was officially implemented following what is now known as the Tampa Affair.

#### A. *The Tampa Affair*

In 2001, the “Tampa Affair” or “Tampa Crisis”<sup>23</sup> occurred, changing the tone of Australian immigration policy. Giving rise to the name, the following chain of events occurred. An Indonesian boat, carrying 433, primarily Afghan asylum-seekers, became stranded in international waters about 140 kilometers north of the Australian territory of Christmas Island.<sup>24</sup> Under the direction of the Australian Maritime Safety Administration, a Norwegian container ship known as the MV Tampa (“Tampa”) rescued the stranded asylum seekers.<sup>25</sup>

Following the rescue, the Tampa headed back to Indonesia, the closest port, but when asylum seekers threatened suicide, the Tampa changed course and headed back towards Christmas Island.<sup>26</sup> The Australian government refused to allow the Tampa to dock and unload the asylum seekers.<sup>27</sup> Rather, the Australian government advised Arne Rinnan, the Tampa’s Captain, that if he docked and attempted to disembark the asylum seekers, he would be subject to prosecution for human smuggling.<sup>28</sup>

Many of asylum seekers on board were in poor health and the Tampa was ill-equipped to provide even basic services to its rescued passengers.<sup>29</sup> After making repeated assistance requests to Australian authorities to no avail, Captain Rinnan crossed the Australian maritime border.<sup>30</sup> The Australian government responded by dispatching Special Air Services to board the ship and prevent it from sailing any closer to Christmas Island or disembarking the asylum seekers.<sup>31</sup> The Australian government then made arrangements with the countries of Nauru and New Zealand to process the asylum seekers.<sup>32</sup>

The Australian government’s response during the Tampa Affair solidified its stance on unwanted migration. Not only did the Australian government

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23. *Defining Moments in Australian History, Tampa affair*, NAT’L MUSEUM OF AUSTL., [http://www.nma.gov.au/online\\_features/defining\\_moments/featured/tampa\\_affair](http://www.nma.gov.au/online_features/defining_moments/featured/tampa_affair) [https://perma.cc/3NVQ-VFBS] (last visited Jan. 30, 2018).

24. *Id.*

25. *Id.*

26. NAT’L MUSEUM OF AUSTL., *supra* note 23; Pennington-Hill, *supra* note 16, at 591.

27. NAT’L MUSEUM OF AUSTL., *supra* note 23.

28. Pennington-Hill, *supra* note 16, at 592.

29. NAT’L MUSEUM OF AUSTL., *supra* note 23; Pennington-Hill, *supra* note 16, at 592.

30. NAT’L MUSEUM OF AUSTL., *supra* note 23.

31. NAT’L MUSEUM OF AUSTL., *supra* note 23; Pennington-Hill, *supra* note 16, at 592.

32. NAT’L MUSEUM OF AUSTL., *supra* note 23.

forbid the Tampa from entering its territorial waters, it ignored pleas for humanitarian assistance. It further criminalized the actions of Captain Rinnan who was left with no other choice but to approach Australian territory to save the lives of his passengers.<sup>33</sup> After taking the drastic action of mobilizing military forces for the sole purpose of preventing entry by asylum seekers, the government then refused to process their asylum claims, opting instead to export the responsibility to willing sister nations.<sup>34</sup>

As a result of the Tampa Affair, the Australian government passed three key pieces of legislation<sup>35</sup> relating to the handling of asylum seekers,<sup>36</sup> collectively labeled the “Pacific Solution.”<sup>37</sup> The first piece of legislation passed was the *Border Protection (Validation and Enforcement Powers) Act 2001* (“Border Protection Act 2001”).<sup>38</sup> The Border Protection Act 2001 retroactively and unambiguously validated the actions taken by the Australian government during the Tampa Affair.<sup>39</sup> It also made any future detention of a ship and restraint on any liberty of those on board the vessel lawful action. Moreover, the Act foreclosed detainees from initiating civil or criminal proceedings against the Australian government or any person assisting in the detention.<sup>40</sup>

The second piece of legislation passed was the *Migration Amendment (Excision from Migration Zone) Act 2001* (“Migration Zone Act”).<sup>41</sup> The purpose of the Migration Zone Act was to “excise certain Australian territory from the migration zone . . . for purposes related to unauthorized arrivals [ . . .].”<sup>42</sup> The Act effectively removed the Australian territories of Christmas Island, Ashmore Island, Cartier Island, and the Cocos (Keeling) Islands from Australia’s migration zone, thus limiting the ability of “offshore entry persons” to make valid visa applications if they were to land on one of these territories.<sup>43</sup>

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33. See Pennington-Hill, *supra* note 16, at 592.

34. See NAT'L MUSEUM OF AUSTL., *supra* note 23.

35. Pennington-Hill, *supra* note 16, at 593.

36. NAT'L MUSEUM OF AUSTL., *supra* note 23.

37. *Id.*

38. *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) (Austl.); Pennington-Hill, *supra* note 16, at 593.

39. *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) pt 2 subsec. 5 (Austl.).

40. *Id.* at pt 2 subsec. 8.

41. *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) (Austl.); Pennington-Hill, *supra* note 16, at 593.

42. *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) (Austl.).

43. *Id.* at sch 1.

The Migration Zone Act made it clear that any visa application made by an offshore entry person will not be valid<sup>44</sup> unless the Immigration Minister, at his discretion, determines otherwise.<sup>45</sup> The Immigration Minister, however, has no duty under the act to consider exercising that discretionary power with respect to any offshore entry person.<sup>46</sup> In other words, any asylum seeker who lands on either Australian shores or shores of an Australian territory will not be able to subsequently apply for a visa, and the Minister has no duty to review any application. Thus, even a subsequently bona fide refugee can be legally prevented from entering Australia if he or she had first arrived by boat.

The third and final piece of legislation passed as part of the Pacific Solution was the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (“Consequential Provisions Act”).<sup>47</sup> The Consequential Provisions Act, as implemented in 2001, permits Australian officials to detain and remove an offshore entry person to a declared country.<sup>48</sup> To declare a country, the Minister would assert in writing that the country:

1. provides access for persons seeking asylum, to effective procedures for assessing their needs for protection; and
2. provides protection for persons seeking asylum, pending determination of their refugee status; and
3. provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
4. meets relevant human rights standards in providing that protection.<sup>49</sup>

Following the enactment of Consequential Provisions Act, the Australian government negotiated agreements with Papua New Guinea and Nauru, to make each a declared country that would admit asylum seekers.<sup>50</sup> Under these agreements, asylum seekers who arrived on Australian soil or in the

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44. *Id.*; *Migration Act 1958*, s 46A, subsec. 1 (Austl.).

45. *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) sch 1 (Austl.); *Migration Act 1958*, s 46A subsec. 2 (Austl.).

46. *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) sch 1 (Austl.); *Migration Act 1958*, s 46A, subsec. 7 (Austl.).

47. *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) (Austl.); Pennington-Hill, *supra* note 16, at 593.

48. *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) sch 1 (Austl.); Pennington-Hill, *supra* note 16, at 594.

49. This amendment created section 198A under the *Migration Act 1958* which was later repealed under the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) sch 1 pt 6 (Austl.).

50. Pennington-Hill, *supra* note 16, at 595.



excised territories would be transferred to processing centers on Nauru and Papua New Guinea's Manus Island where they would be detained while their asylum claims were assessed.<sup>51</sup>

This version of the Pacific Solution remained in place until 2008. In 2002, one year after the Pacific Solution was introduced, only one boat carrying a single asylum seeker arrived, while only several hundred asylum seekers arrived between 2003 and 2008.<sup>52</sup> In sum, from 2001 until 2008, a total of 1,322 asylum seekers, most of whom were from Afghanistan and Iraq, were detained on Nauru and a total of 315 asylum seekers detained on Manus Island.<sup>53</sup> Although on the surface the Pacific Solution may have appeared successful in achieving its goal of deterring boat arrivals, asylum seekers continued to arrive by air at a rate of about 4,000 people per year.<sup>54</sup>

Moreover, in 2011, the United Nations High Commissioner for Refugees ("UNHCR") commented there was no empirical evidence giving credence to the assumption that the threat of being detained deterred irregular migration.<sup>55</sup> To have any deterrent effect, the threat of detention must outweigh the threat of war and persecution from which the migrants are escaping.<sup>56</sup>

Thus, in evaluating the statistics of boat arrivals during the reign of the Pacific Solution, one must consider two conditions. First, one must consider that the conditions of an asylum seeker's home nation and the ability to obtain a valid visa for air travel before seeking refuge in Australia. In turn, it is evident that obtaining a valid visa can be more difficult for some migrants than others. A majority of the illegal boat arrivals in Australia were nationals of Afghanistan and Iraq, two countries war-torn for decades.<sup>57</sup> It can very

51. Janet Phillips, *The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island*, Department of the Parliamentary Library, Background Note at 2 (2012), [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/PacificSolution](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution) [<https://perma.cc/GN9N-W8AW>].

52. Lacertosa, *supra* note 5, at 332.

53. Phillips, *supra* note 51, at 13.

54. John Menadue, *The Pacific Solution didn't work before and it won't work now*, AUSTRALIAN BROADCASTING CORP. (Mar. 13, 2012), <http://www.abc.net.au/news/2012-03-14/menadue-the-pacific-solution-didn27t-work-before-and-it-won27/3886792> [<https://perma.cc/S68R-Z3H2>].

55. *Id.*

56. *Id.*

57. *See generally* Griff Witte, *Afghanistan War*, ENCYCLOPEDIA BRITANNICA (Oct. 14, 2016), <https://www.britannica.com/event/Afghanistan-War#toc292843> [<https://perma.cc/H8WS-XYML>] ("The joint U.S. and British invasion of Afghanistan in late 2001 was preceded ; *see generally* *Iraq War*, ENCYCLOPEDIA

well be that migrants from these nations did not have the luxury of obtaining valid visas before fleeing their homelands and sought the quickest means of escape possible.

Second, one must also consider political stability in areas where many of the asylum seekers came from, including Afghanistan.<sup>58</sup> Notably, the implementation of the Pacific Solution came shortly after the events of September 11, 2001, which contributed to the removal of the Taliban from power in Afghanistan.<sup>59</sup> The overall effect was a global decline in Afghan asylum seekers, a forty-five percent reduction in refugee resettlement around the globe, and a drop in the international refugee population by 1.5 million people.<sup>60</sup> Perhaps then, the decrease in boat arrivals during the Pacific Solution can be partially attributed to the overall decline of migrants from nations such as Afghanistan which gained some political stability during that time.

In February 2008, newly elected Prime Minister Kevin Rudd ended the Pacific Solution<sup>61</sup> and developed new framework for processing asylum claims on Christmas Island for migrants arriving by boat.<sup>62</sup> In arriving at this decision, Rudd's administration cited high costs and called the program unsuccessful.<sup>63</sup> Following the end of the Pacific Solution, boat arrivals began to increase. In 2008, seventy boats carrying 161 passengers arrived.<sup>64</sup> In 2009 the number increased to 60 boats carrying 2,726 passengers, and in 2010 it reached 134 boats carrying 6,555 passengers.<sup>65</sup>

The increase in migration during these years, however, coincided with an increase in global political instability. For example, in 2007, American troops surged in Afghanistan, contributing to the outflow of refugees.<sup>66</sup> By February of 2009, the American troop count in Afghanistan had reached

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BRITANNICA (Dec. 15, 2011), <https://www.britannica.com/event/Iraq-War> [<https://perma.cc/E522-RGZQ>] (discussing the history of conflict in Iraq beginning in the 1990's).

58. Menadue, *supra* note 54; Jabour, *supra* note 19.

59. See generally Griff Witte, *Afghanistan War*, ENCYCLOPEDIA BRITANNICA (Oct. 14, 2016), <https://www.britannica.com/event/Afghanistan-War#toc292843> [<https://perma.cc/H8WS-XYML>] ("Kandahar, the largest city in southern Afghanistan and the Taliban's spiritual

60. Jabour, *supra* note 19.

61. Phillips, *supra* note 51, at 3.

62. Ariane Rummery, *Australia's "Pacific Solution" draws to a close: The last 21 Sri Lankan refugees on Nauru leave for Australia, signaling the end of Australia's "Pacific Solution,"* UNHCR (Feb. 11, 2008), <http://www.unhcr.org/en-us/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html> [<https://perma.cc/JG35-XR9P>].

63. Lacertosa, *supra* note 5, at 332.

64. Phillips, *supra* note 51, at 3.

65. *Id.*

66. Menadue, *supra* note 54.

38,000 and by December of the same year it had soared to almost 100,000.<sup>67</sup> As discussed above, facing massive instability and war, migrants from these countries may not have been able to obtain proper documentation for air travel and migrants may have been forced to travel by boat, risking detention to flee persecution.

Rudd was ousted as Prime Minister in 2010 by his Deputy Prime Minister, Julia Gillard, following a leadership challenge.<sup>68</sup> Bolstered by the reports of casualties at sea of people attempting to reach Australian soil by boat, Gillard sought to reinstate offshore processing of asylum seekers.<sup>69</sup>

### *B. The Malaysia Solution*

In 2011, Gillard announced her policy, “The Malaysia Solution.”<sup>70</sup> In this regard, Gillard attempted to invoke section 198A of the *Migration Act 1958* (“Migration Act”), which at the time, allowed the Immigration Minister to name Malaysia a “declared country,” where an offshore entry person could be taken.<sup>71</sup> Under this solution, 800 people who had arrived at Australia by boat would be sent to Malaysia in exchange for 4,000 “genuine” refugees, those who had already been granted refugee status.<sup>72</sup> This exchange was aimed at sending the message that attempting to reach Australia illegally by boat would result in being sent to the “back of the queue” for processing in Malaysia.<sup>73</sup> By deterring would-be migrants from

67. CNN Library, *Operation Enduring Freedom Fast Facts*, CNN (Oct. 5, 2016), <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/> [http://perma.cc/4UH8-VKPM].

68. Kate Lyons, *Australian party leadership challenges: a brief history of spills*, THE GUARDIAN (Sept. 14, 2015), <https://www.theguardian.com/australia-news/2015/sep/14/australian-party-leadership-challenges-brief-history-of-spills> [http://perma.cc/76ZP-GHBL].

69. Lacertosa, *supra* note 5, at 333.

70. *Gillard announces the Malaysian Solution*, SYDNEY MORNING HERALD (May 7, 2011), <http://www.smh.com.au/national/gillard-announces-malaysian-solution-20110507-1ed0h.html> [hereinafter *Malaysian Solution*].

71. See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, para. 11 (Austl.) (available at <http://eresources.hcourt.gov.au/showCase/2011/HCA/32>). This amendment created section 198A under the *Migration Act 1958* which was later repealed under the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. See *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) sch 1 (Austl.).

72. *Malaysian Solution*, *supra* note 70.

73. *Id.*; Pastore, Anthony, Comment, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615, 617–618 (2013).

undertaking the dangerous boat journey to Australia, the agreement was intended to reduce human smuggling.<sup>74</sup> Gillard described the solution as a “big blow” to people smugglers.<sup>75</sup>

However, the Australian High Court struck down the Malaysia Solution the same year it was proposed in *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* (“*Plaintiff M70*”).<sup>76</sup> The plaintiffs in the case were two Afghan nationals who arrived at the Australian territory of Christmas Island by boat that had sailed from Indonesia.<sup>77</sup> Both plaintiffs claimed to have a well-founded fear of persecution in Afghanistan on grounds that would qualify them as refugees under the Refugees Convention.<sup>78</sup> However, under the Malaysia Solution, because the plaintiffs arrived by boat at Christmas Island, an excised offshore location, and lacked visas, they were classified as an offshore entry person and subject to detention.<sup>79</sup>

Once detained and subject to removal to Malaysia under Australia’s new Malaysia Solution, they filed suits to stop their removal.<sup>80</sup> Plaintiffs argued the only source of power to remove them from Australia was in section 198A of the Migration Act.<sup>81</sup> However, that power was conditioned on the Immigration Minister making a *valid* declaration of the country to which they were to be removed.<sup>82</sup> Plaintiffs alleged that the declaration made was not valid because Malaysia did not meet the criteria under section 198A(3) of the Migration Act.<sup>83</sup>

The High Court of Australia ruled in a six to one decision that the proposal to send unwanted asylum seekers to Malaysia was illegal because it contravened section 198A of the Migration Act.<sup>84</sup> The Court interpreted the criteria laid out in section 198A(3) as being intended to satisfy Australia’s international

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74. Bergeron, Claire, *Current Development: Developments in the International Field: Australia Enacts New Refugee Law After High Court Halts “Malaysia Plan”*, 26 GEO. IMMIGR. L.J. 201, 202 (2011).

75. *Malaysian Solution*, *supra* note 70.

76. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, para. 68 (Austl.), <http://eresources.hcourt.gov.au/showCase/2011/HCA/32>.

77. *Id.* at para. 3.

78. *Id.*

79. *Id.* at para. 5.

80. Bergeron, *supra* note 74, at 204.

81. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, para. 16 (Austl.).

82. *Id.*

83. *Id.*

84. Ting Walker, *The High Court decision on the Malaysian Solution*, AUSTRALIAN BROADCASTING CORP. (Nov. 25, 2011), <http://www.abc.net.au/local/stories/2011/11/23/3374312.htm> [<https://perma.cc/7JXH-Q6RY>]; see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, para. 68 (Austl.).

obligations under the Article 33(1) of the Refugees Convention<sup>85</sup> which prohibits “refouling,”<sup>86</sup> the process of transferring migrants to a place where they may be at risk of human rights violations including inhuman or degrading treatment.<sup>87</sup> In its decision, the Court noted:

Malaysia is not a party to the [1951] Convention [Relating to the Status of Refugees]. It does not recognize, or provide for the recognition of, refugees in its domestic law. It therefore does not provide any procedures for the determination of claims to refugee status . . . Malaysia does not bind itself, in its immigration legislation, to non-refoulement.<sup>88</sup>

The Court held that since Malaysia has not bound itself to the principles of the Refugees Convention, and it neither participates in the Refugees Convention, nor provides refugee protection through its domestic laws, it could not guarantee there would be no refoulement of refugees sent from Australia.

### C. Rebirth of the Pacific Solution—Gillard's Workaround

After the Court buried the Malaysia Solution in *Plaintiff M70*, Gillard assembled an Expert Panel on Asylum Seekers.<sup>89</sup> The panel was tasked with proposing a new solution to asylum seekers arriving by boat.<sup>90</sup> The panel released its report on August 13, 2012.<sup>91</sup> In its first recommendation, the panel identified the need for short, medium and long-term priorities in reshaping Australian policymaking toward asylum seekers.<sup>92</sup> It further

85. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, para. 66 (Austl.); Bergeron, *supra* note 74, at 204.

86. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 (“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.”).

87. *Island of Despair*, *supra* note 3, at 16.

88. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, ¶ 249 (Austl.).

89. *Lacertosa*, *supra* note 5, at 335.

90. *Id.*

91. Ian McCluskey, *Report of the Expert Panel on Asylum Seekers and regional processing: legislation before the Senate*, PARLIAMENT OF AUSTRALIA (Aug. 16, 2012), [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2012/August/Report\\_of\\_the\\_Expert\\_Panel\\_on\\_Asylum\\_Seekers\\_and\\_regional\\_processing\\_legislation\\_before\\_the\\_Senate](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/August/Report_of_the_Expert_Panel_on_Asylum_Seekers_and_regional_processing_legislation_before_the_Senate) [https://perma.cc/6LV6-H68G].

92. GOV'T OF AUSTRALIA, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS (2012) at 14, available at <http://artsonline.monash.edu.au/thebordercrossingobservatory/>

recommended an expansion of Australia’s Humanitarian Program to increase the number of refugees Australia would resettle.<sup>93</sup> Most importantly, it advocated reviving the Pacific Solution by re-opening the processing centers in Papua New Guinea and Nauru to act as a short term “circuit breaker” to the surge of irregular maritime arrivals<sup>94</sup> urging policymakers to enact “legislation to support the transfer of people to regional processing arrangements.”<sup>95</sup>

Armed with the Expert Panel’s recommendations, the Australian government resumed debate on the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, which had been introduced in the House of Representatives on September 21, 2011.<sup>96</sup> This debate led to the passing of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (“Regional Processing Act”) on August 17, 2012<sup>97</sup> and subsequent re-designations of Nauru and Papua New Guinea as regional processing countries.<sup>98</sup>

### III. DOES THE PACIFIC SOLUTION VIOLATE INTERNATIONAL LAW?

#### A. *The Problem with the 2012 Amendments to the Migration Act*

The Regional Processing Amendment modified several provisions of the Migration Act.<sup>99</sup> Most notably, the Regional Processing Act made it mandatory—rather than permissible as was the language in the 2001 amendment—for officers to detain any unlawful non-citizen found in an offshore excised place.<sup>100</sup> It also became mandatory for an officer to remove an offshore entry

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files/2015/03/expert\_panel\_on\_asylum\_seekers\_full\_report.pdf [https://perma.cc/RNE9-PPNY] [hereinafter *Report of the Expert Panel*].

93. *Id.*

94. *Id.* at 47–49.

95. *Id.* at 15.

96. McCluskey, *supra* note 91.

97. See *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (Austl.).

98. See *Instrument of Designation of the Republic of Nauru as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958* (Cth) (Austl.) (dated Sept. 10, 2012); see also *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958* (Cth) (Austl.) (dated Oct. 9, 2012).

99. See generally *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (Austl.).

100. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch. 1 div 8 sub-div B s 198AD(2) (Austl.); *Migration Act 1958*, div 7, sub-div A, s 189 (Austl.).

person (now referred to as an “unauthorised maritime arrival”) to a regional processing country.<sup>101</sup>

The Regional Processing Act also repealed section 198A of the Migration Act,<sup>102</sup> which laid out the criteria for declaring a country eligible for offshore processing.<sup>103</sup> As previously discussed, the court in *Plaintiff M70* relied upon section 198A in finding illegal the declaration of Malaysia as an offshore processing country. It held section 198A necessarily incorporated Australia's obligations under the Refugee Convention<sup>104</sup> and that Malaysia had not bound itself to or complied with those obligations.<sup>105</sup> The repeal of section 198A eliminated the constraints of the Refugees Convention in naming a particular country as a “regional processing country.”<sup>106</sup>

However, seemingly in acknowledgment of Australia's obligations under the Refugees Convention, the Regional Processing Act also added section 198AA to the Migration Act as follows:<sup>107</sup>

- a. people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- b. offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
- c. it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

101. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div B s 198AD(2) (Austl.); *Migration Act 1958*, pt 2 div 8, sub-div B, s 198AD(2) (Austl.).

102. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div A (Austl.).

103. *See Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) sch 1 s 198A (Austl.).

104. *See Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, ¶ 118 (Austl.).

105. *See id.* at ¶ 249.

106. Under the 2012 amendment, a “designated country” is now referred to as a “regional processing country.” *See Migration Act 1958*, div 8, sub-div B, s 198AB (Austl.).

107. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div B s 198AA (Austl.).

- d. the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.<sup>108</sup>

Essentially, section 198AA eliminated both the need for the regional processing country to be a signatory to the Refugees Convention and the incorporation of similar provisions of the Refugees Convention into its domestic laws. By including this new language, the Australian government acknowledged its obligations under the Refugees Convention, yet did not require the regional processing country to uphold those obligations. Hence, the section provided an effective way to skirt around the issue identified by the court with the Malaysia Solution.

The Regional Processing Act further created section 198AB of the Migration Act and provided guidance on naming a regional processing country.<sup>109</sup> The only condition for naming a regional processing country is the Minister's finding that it is in the national interest.<sup>110</sup> In considering the national interest, the Minister "must have regard to whether or not the country has given Australia assurances" that there will be no refoulement<sup>111</sup> and that the country will determine a person's refugee status based on the definition of "refugee" in Article 1A of the Refugees Convention.<sup>112</sup>

However, section 198AB also provided that "the assurances . . . need not be legally binding."<sup>113</sup> So, despite the fact that both Nauru and Papua New Guinea are signatories to the Refugees Convention,<sup>114</sup> once Australia outsourced the processing of asylum claims to these countries, it had no obligation to ensure that the spirit and provisions of the Refugees Convention were upheld. In contrast, the United Nations Human Rights Committee and the European

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108. See *Migration Act 1958*, (Cth) pt 2 div 8, sub-div B, s 198AA (Austl.); *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div B s 198AA (Austl.).

109. See *Migration Act 1958*, (Cth) pt 2 div 8, sub-div B, s 198AB (Austl.).

110. *Migration Act 1958*, (Cth) pt 2 div 8, sub-div B, s 198AB (Austl.).

111. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.S.T. 6223, 189 U.N.T.S. 150 ("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.").

112. *Migration Act 1958*, (Cth) pt 2 div 8, sub-div B, s 198AB (Austl.); *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div B s 198AB(3)(a) (Austl.).

113. *Migration Act 1958*, (Cth) pt 2 div 8, sub-div B, s 198AB (Austl.); *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 div 8 sub-div B s 198AB(3)(a) (Austl.).

114. Nauru acceded to the Convention on June 28, 2011 and Papua New Guinea acceded to the Convention on July 17, 1986. See U.N.T.C., [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en) [<https://perma.cc/V63H-6HH5>] (last visited Oct. 16, 2016).



Court of Human Rights hold that where a State exercises “effective control” over a person extraterritorially, the person will be subject to the State’s jurisdiction and relevant human rights obligations will apply.<sup>115</sup> While, the Australian government accepted that, where it is exercising “effective control,” its human rights obligations may apply “extraterritorially,”<sup>116</sup> it nevertheless, went to great lengths to carefully tailor legislation to avoid oversight responsibility.

The duties of the Australian government under the Memorandum of Understanding (“MOU”) with Nauru—the document that permits the transfer of migrants to Nauru—demonstrate that Australia is exercising effective control over the asylum seekers it transfers to the Nauru processing center. The High Court of Australia noted that under the MOU, the Australian government agreed to lodge visa applications for transferees with the Nauruan government.<sup>117</sup> Moreover, the Australian government agreed to bear the costs associated with the MOU and it was the Australian government that contracted for the construction and maintenance of the processing center on Nauru, in accordance with the MOU.<sup>118</sup> Furthermore, only the Australian government can submit applications for transferee visas and the Australian government occupies an office at the processing center to carry out functions related to the Nauru center and its transferees.<sup>119</sup> In fact, under the agreements with Nauru, the Australian government is tasked with providing many services at the center including security, cleaning, and catering.<sup>120</sup> Therefore, because if its effective control, the Australian government cannot relieve itself of its international obligations to asylum seekers simply by transferring them to another nation.

### *B. The Problem with the Policy Justification and its Procedures*

The stated purpose of the Pacific Solution is to address the undesirable consequences of people smuggling, including deaths at sea.<sup>121</sup> But, what the Australian government fails to realize is that by implementing a harsh policy aimed at deterring boats, it is indirectly penalizing those passengers

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115. *Report of the Expert Panel, supra* note 92, at 82.

116. *Id.*

117. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, para. 3 (Austl.), <http://eresources.hcourt.gov.au/showCase/2016/HCA/1>.

118. *Id.* at ¶ 3, 7.

119. *Id.* at ¶ 9, 13.

120. *Id.* at ¶ 10, 12.

121. *See Migration Act 1958*, div 8, sub-div B, s 198AA (Austl.).

who seek refugee status. This approach puts Australia in violation of Article 31(1) of the Refugees Convention, which provides that the State:

Shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from another territory where their life or freedom was threatened . . . 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.”<sup>122</sup>

Under the Pacific Solution, asylum seekers arriving by boat (unauthorised maritime arrivals), are considered unlawful non-citizens and are required to be detained<sup>123</sup> and relocated to a regional processing country.<sup>124</sup> Furthermore, the Migration Act specifically states that, “[a]n application for a visa is not a valid application if it is made by an unauthorised maritime arrival who is in Australia and is an unlawful citizen.”<sup>125</sup>

Moreover, in 2013, then Prime Minister Kevin Rudd took the stance that no asylum seeker who arrived by boat to Australia would have any chance at being resettled in Australia as a refugee.<sup>126</sup> By prohibiting any review of asylum seekers’ status as refugees and instead immediately sending them to Nauru—with no chance of ever being resettled in Australia—the would-be refugees are penalized on the basis of their “illegal” mode of entry. The Refugees Convention expressly prohibits such penalization.

Regardless of their mode of entry, if migrants are found to be genuine refugees, their fate should not be arbitrarily determined based on their mode of migration. The fact that some refugees arrive by boat—a costly and dangerous endeavor—may indicate their situation is more dire than those who can arrive by a safer option.<sup>127</sup> The Refugee Council of Australia found that from 2010 through 2011, 89.6% of asylum seekers who arrived by boat were found to be refugees compared to only 43.7% of those who arrived with valid visas.<sup>128</sup>

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122. Convention Relating to the Status of Refugees, signed July 28, 1951, 19 U.S.T. 6223, (entered into force Apr. 22, 1954), art. 31 (Austl.).

123. *Migration Act 1958*, div 7, sub-div A, s 189 (Austl.).

124. *Migration Act 1958*, div 8, sub-div B, s 198AD (Austl.).

125. *Migration Act 1958*, div 3, sub-div AA, s 46A (Austl.).

126. *Aust will never accept boat people: Rudd*, SPECIAL BROADCASTING SERVICES (Feb. 27, 2015), <http://www.sbs.com.au/news/article/2013/07/19/aust-will-never-accept-boat-people-rudd> [<https://perma.cc/JDV6-XT66>].

127. *See People who come by boat*, REFUGEE COUNCIL OF AUSTRALIA (May 17, 2014), <http://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/boat-arrivals/> [<https://perma.cc/V7R2-ES2N>].

128. *Id.*

### C. Questionable Conditions of the Processing Centers

The conditions of the processing centers may also put Australia in violation of international law. Article 33 of the Refugees Convention prohibits “refoulement,”<sup>129</sup> which means the Australian government cannot transfer migrants to places where they may be at risk of human rights violations including inhuman or degrading treatment.<sup>130</sup> This principle is echoed in ICCPR Article 7 and the UDHR Article 5, which provide that “[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”<sup>131</sup> The UDHR also provides in Article 25 that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . .”<sup>132</sup>

Amnesty International found that, between September 2012 and September 2016, 531 people were repatriated from Nauru and Manus Island to countries such as Afghanistan, Iraq, Somalia, Sri Lanka, Sudan, and Syria; all common source countries for refugees.<sup>133</sup> Amnesty International pointed out that “[g]iven the abysmal conditions on Nauru, it is doubtful whether these departures were truly voluntary,”<sup>134</sup> implying that refoulement had indeed taken place.

Australia and Nauru impose strict secrecy regarding the detention centers, refusing most requests by journalists or researchers to visit Nauru.<sup>135</sup> However, in July 2016, researchers from Amnesty International and Human Rights Watch entered Nauru without disclosing information about their organizational affiliations.<sup>136</sup> Once there, they witnessed the conditions first-hand, interviewed

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129. Protocol Relating to the Status of Refugees, art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

130. *Island of Despair*, *supra* note 3, at 16.

131. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 7 (Dec. 16, 1966); G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 5 (Dec. 10, 1948).

132. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948).

133. *Island of Despair*, *supra* note 3, at 23.

134. *Id.*

135. There is an \$8,000 non-refundable visa fee for journalists and Nauru granted visas to only two media outlets from January 2014 to July 2016. *See Australia: Appalling abuse, neglect of refugees on Nauru*, AMNESTY INT’L (Aug. 2, 2016, 11:30 AM), <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/> [<https://perma.cc/L9RQ-MH9B>] [hereinafter *Neglect of Refugees*].

136. *Id.*

eighty-four refugees and asylum seekers detained on the island,<sup>137</sup> and reported on the appalling conditions of the Nauru detention center.<sup>138</sup>

*1. Detainees Suffer Severe Mental Anguish and Engage in Self-Harm*

Amnesty International reported that the feelings of no clear future and no appropriate medical care resulted in high rates of poor mental health among detainees on Nauru.<sup>139</sup> During the July 2016 interviews, detainees reported suffering “severe anxiety, inability to sleep, mood swings, prolonged depression, and short-term memory loss . . . .”<sup>140</sup>

Amnesty International also found that self-harm and attempted suicides were commonplace among Nauru’s refugee and asylum-seeking population.<sup>141</sup> For example, in April 2016, a 23-year old Iranian refugee set himself on fire, reportedly shouting, “This is how tired we are, this action will prove how exhausted we are. I cannot take it anymore.”<sup>142</sup> The young man later died in an Australian hospital.<sup>143</sup> One month later, a 21-year old Somali refugee also set herself on fire, sustaining serious burns to 70% of her body, but surviving.<sup>144</sup>

A Pakistani man attempted suicide in both May and July 2016 saying, “I’d rather die than continue living here.”<sup>145</sup> An Iranian man recounted an event where his pregnant wife unsuccessfully tried to hang herself.<sup>146</sup> An Iraqi man told researchers, “I cannot go back. But here I am dying a thousand times. In Iraq you get just one bullet or bomb, and it’s over, and here I am slowly dying from the pain.”<sup>147</sup> The anguish is not limited to adults; children are also displaying the symptoms. For example, a 13-year old Afghan boy has attempted suicide three times including attempting to drown himself at sea.<sup>148</sup>

This pattern of self-harm resulting from the mental breakdown of detainees indicates that Australia is in violation of the Refugees Convention, the ICCPR, and the UDHR. The Australian government has knowingly and forcefully placed asylum seekers in an environment that has proven to have severe detrimental effects on their mental health and will to live. Refugees are

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137. *Id.*

138. *See Island of Despair, supra* note 3, at 8.

139. *Id.* at 18.

140. *Neglect of Refugees, supra* note 135.

141. *Island of Despair, supra* note 3, at 19.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

left with few options: stay in Nauru and suffer there, repatriate to their home nations and suffer there, or end their lives—and the suffering—all together.

## 2. *Arbitrary Arrests, Police Misconduct, and Indifference*

The ICCPR Article 9 provides that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>149</sup> Yet, during its investigation, Amnesty International uncovered evidence of arbitrary arrests and police misconduct.<sup>150</sup> In one such case, a refugee was jailed for attempting suicide in April 2016.<sup>151</sup> Rather than address the problem of rampant mental health issues, the Nauruan government criminalized the actions of those suffering.<sup>152</sup> Although Nauru later decriminalized suicide in May 2016, the law still allows prosecution for actions that took place prior to the decriminalization.<sup>153</sup>

There are also cases of police indifference and misconduct. An Iranian man was robbed by two drunken Nauruan locals, one in civilian clothes and one in a police uniform.<sup>154</sup> The man went to the police station multiple times to report the theft, but police told him the computer was broken and they could not take a report.<sup>155</sup> When the man asked the police to write the report by hand, the police said they had no paper.<sup>156</sup> Other refugees have claimed that police destroyed refugee-prepared statements and instead forced them to sign statements written by the police.<sup>157</sup> Some refugees have even reported that police have physically assaulted them.<sup>158</sup>

Other refugees have complained of physical abuse to the police, but to no avail. Detainees have been beaten and robbed and local police have allegedly made little or no effort to investigate the attacks.<sup>159</sup> Women are especially vulnerable to attack; reported incidents of sexual assault include groping, touching, and attempted rape.<sup>160</sup>

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149. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 9 (Dec. 16, 1966).

150. *See Island of Despair*, *supra* note 3, at 39.

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.* at 61.

155. *Id.*

156. *Id.*

157. *Id.* at 40.

158. *Id.*

159. *Neglect of Refugees*, *supra* note 135.

160. *Id.*

In July 2015, Nauru's former chief justice, Geoffrey Ames, testified before an Australian Select Senate Committee that "There is a serious question about [police] independence and about their willingness to investigate allegations against Nauruans who are charged with assaults of non-Nauruans."<sup>161</sup> Prior to his testimony, Ames, an Australian national, was forced out of his Nauruan judicial office in 2014 when his visa was revoked by Nauruan authorities.<sup>162</sup> Refugees housed on Nauru seem to have little recourse for invasions of their personal security and may even be targeted by the police; a condition that is untenable under international law.

### 3. *Medical Treatment is Inadequate*

There are also allegations of insufficient medical care on Nauru. Medical services are provided by International Health and Medical Services (IMHS), a private company contracted by the Australian government, in addition to the services provided by the Republic of Nauru Hospital (RONH).<sup>163</sup> However, migrants have to wait months to see specialists or undergo necessary tests even when doctors indicate their condition are serious.<sup>164</sup> Even further, some tests and procedures are not available on Nauru.<sup>165</sup> For example, a thirty-four year old Iranian man who reported having severe pain in his stomach and legs and bleeding, vomiting, and pain urinating was unable to obtain a needed colonoscopy in Nauru.<sup>166</sup> When he asked if he had cancer, the doctors simply replied "maybe," and that they could not perform any tests.<sup>167</sup> Sometimes, patients' claims are simply dismissed by medical providers, as was the case when a young diabetic man went to the IMHS manager after inexplicably losing sixty pounds only to be told that such weight loss is normal.<sup>168</sup>

It also seems that the medical providers are not equipped to handle serious emergencies. It reportedly took twenty-six hours to evacuate the young Iranian man to who set himself on fire in April 2016 to Brisbane for treatment, where he later died from his injuries.<sup>169</sup> Another man recalled that when his wife was in labor, the bed in the delivery room did not have a mattress and the bathroom did not have toilet paper or soap.<sup>170</sup>

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161. *Id.*  
162. *Id.*  
163. *Island of Despair, supra* note 3, at 24–25.  
164. *Id.* at 25.  
165. *Id.*  
166. *Id.*  
167. *Id.*  
168. *Neglect of Refugees, supra* note 135.  
169. *Island of Despair, supra* note 3, at 25.  
170. *Neglect of Refugees, supra* note 135.

Furthermore, a service-provider explained that it is not authorized to either call ambulances for refugees or transport them to the hospital because such "advocacy" does not help refugees become "independent."<sup>171</sup> Yet, when refugees attempt to call ambulances themselves, the hospital refuses to send one.<sup>172</sup>

Overall, the lack of medical services available to refugees puts Nauru and Australia in violation of the UDHR which calls for a standard of living that is adequate for a person's health and well-being.

#### 4. *Children are Constructively Denied Access to Education*

Access to public elementary education is a right expressly given to refugees under the Refugee Convention, Article 22.<sup>173</sup> Article 26 of the UDHR also states that "[e]veryone has the right to education."<sup>174</sup> Before 2015, a Save the Children school at the refugee processing center had an estimated ninety percent attendance rate.<sup>175</sup> However, the school was closed in mid-2015, so that the building could be converted into office space and recreation area for detention center staff,<sup>176</sup> and refugee children were forced to attend local schools where they were bullied, harassed, or physically assaulted by teachers or local children.<sup>177</sup> Within six months of the transition, refugee children attendance dropped from 60% to 5%.<sup>178</sup> Thus, the fear of abuse has constructively denied refugee children access to the education system.

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171. *Island of Despair*, *supra* note 3, at 26.

172. *See id.*

173. United Nations Convention Relating to the Status of Refugees, art. 22, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

174. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

175. *Island of Despair*, *supra* note 3, at 31.

176. Ben Doherty, *School in Nauru Detention Centre to be Closed*, THE GUARDIAN (Mar. 30, 2015, 3:17 P.M.), <https://www.theguardian.com/australia-news/2015/mar/31/asylum-seeker-children-start-campaign-to-save-their-nauru-school-from-closure> [https://perma.cc/DLZ5-HE4U].

177. *Island of Despair*, *supra* note 3, at 31.

178. *Id.*

#### IV. THE FUTURE OF THE PACIFIC SOLUTION

##### A. *The High Court of Australia's Ruling on Nauru*

In 2016, proceedings were brought before the High Court of Australia challenging the legality of offshore processing in Nauru in the case *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.<sup>179</sup> Plaintiffs alleged it was illegal for the Australian government to fund and operate detention centers in a third country.<sup>180</sup> Recall that under the MOU between Australia and Nauru, the Australian government agreed to bear the costs associated with offshore processing.<sup>181</sup>

While the case was ongoing, the Australian government hastily passed legislation that included a provision specifically allowing the Australian government to pay for and participate in matters related to the detention of persons held in regional processing countries.<sup>182</sup> The legislation, the *Migration Amendment (Regional Processing Arrangements) Act 2015* (“Processing Arrangements Act”), enacted on June 30, 2015, created section 198AHA of the Migration Act.<sup>183</sup> The newly created section applied retroactively with an effective date of August 18, 2012.<sup>184</sup> Thus, its provisions were “in force” prior to the signing of the first MOU between Australia and Nauru on August 29, 2012.<sup>185</sup>

Section 198AHA provides:

1. This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country.

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179. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, ¶ 110 (Austl.) (available at <http://eresources.hcourt.gov.au/showCase/2016/HCA/1> [<https://perma.cc/3QB9-S64D>]).

180. Elizabeth Byrne & Stephanie Anderson, *High Court throws out challenge to Nauru offshore immigration detention; Malcolm Turnbull vows people smugglers will not prevail*, AUSTRALIAN BROADCASTING CORP. (Feb. 8, 2016, 3:03 AM), <http://www.abc.net.au/news/2016-02-03/high-court-throws-out-challenge-to-offshore-detention/7135504> [

181. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, para. 3, 7 (Austl.), <http://eresources.hcourt.gov.au/showCase/2016/HCA/1>.

182. Buchanan, *supra* note 4; Byrne & Anderson, *supra* note 180.

183. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, ¶ 110 (Austl.), <http://eresources.hcourt.gov.au/showCase/2016/HCA/1> [<https://perma.cc/3QB9-S64D>].

184. *Id.* at ¶ 68.

185. *See id.*



2. The Commonwealth may do all or any of the following:
  - a. take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
  - b. make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
  - c. do anything else that is incidental or conclusive to the taking of such action or the making of such payments.
3. To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.
4. Nothing in this section limits the executive power of the Commonwealth.<sup>186</sup>

In a six to one decision, the Court held that the Australian government is legally able to participate in the detention of asylum seekers in Nauru.<sup>187</sup> In its decision, the Court noted that “Section 198AHA is concerned with the regional processing functions of a country declared by the Minister under s 198AB(1) as a regional processing country to which UMAs (unauthorised maritime arrivals) may be taken under s 198AD(2).”<sup>188</sup> The Court found that because the MOU is an arrangement relating to the regional processing functions of Nauru, section 198AHA(2) authorizes the Australian government to fund the center and services provided under the MOU.<sup>189</sup>

The decision could cause 267 asylum seekers currently in Australia, including more than 30 babies who were born in Australia to asylum seeking mothers, to be transferred to Nauru.<sup>190</sup> The broader effect of this decision is that the Australian government now has the green light to continue with offshore processing in Nauru.

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186. *Migration Act 1958* (Cth) s 198AHA (Austl.).

187. Buchanan, *supra* note 4.

188. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, ¶ 42 (Austl.), <http://eresources.hcourt.gov.au/showCase/2016/HCA/1> [<https://perma.cc/3QB9-S64D>].

189. *Id.* at ¶¶ 46, 71.

190. Buchanan, *supra* note 4.

### B. *The Papua New Guinea Supreme Court Ruling*

On April 26, 2016, the Supreme Court of Papua New Guinea ruled the detention of asylum seekers on Manus Island violated their right to personal liberty under the Papua New Guinea Constitution.<sup>191</sup> The Court explained that the power to detain, and therefore deprive a person of his liberty, is only available against persons who have entered or remain in the country without a valid entry permit or an exemption.<sup>192</sup> Any other deprivation of a person's liberty is unconstitutional and illegal.<sup>193</sup> The court found that the asylum seekers on Manus Island had received an exemption pursuant to the MOUs between Papua New Guinea and Australia.<sup>194</sup> Therefore, the asylum seekers were lawfully in Papua New Guinea and entitled to constitutional protections.<sup>195</sup>

In support of this conclusion, the Court stated:

In the present case, the undisputed facts clearly reveal that the asylum seekers had no intention of entering and remaining in PNG. Their destination was and continues to be Australia. They did not enter PNG and do not remain in PNG on their own accord. This is confirmed by the very fact of their forceful transfer and continued detention on MIPC (Manus Island Processing Center) by the PNG and Australian governments. It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will. This [sic] arrangements were outside the Constitutional and legal framework in PNG . . . Naturally, it follows that, the forceful bringing into and detention of the asylum seekers on MPIC is unconstitutional and is therefore illegal.<sup>196</sup>

The Court instructed the governments of Papua New Guinea and Australia to take all necessary steps to cease and prevent the unconstitutional and illegal detention and continued breach of the asylum seekers' human rights.<sup>197</sup> Following this decision, Papua New Guinea's Prime Minister announced the facility on Manus Island would close and the Australian government would have to make alternative arrangements for the asylum seekers held there.<sup>198</sup>

In response, Australia's Immigration Minister, Peter Dutton, reiterated that Australia retained its position that no one attempting to reach Australia by boat will be permitted to settle in Australia, including those who are currently

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191. *Namah v Pato*, [2016] PCSC 13; SC1497 (26 Apr. 2016), 5, 27 (Papua N.G.), <http://www.paclii.org/pg/cases/PGSC/2016/13.pdf> [<https://perma.cc/D46X-GMFU>].

192. *Id.* at para. 38.

193. *Id.*

194. *Id.* at para. 58.

195. *Id.*

196. *Id.* at para. 39.

197. *Id.* at para. 74(6).

198. *Papua New Guinea to shut Australia's Manus Island migrant camp*, BBC NEWS (Apr. 27, 2016), <http://www.bbc.com/news/world-australia-36136630> [<https://perma.cc/9HZK-UH68>].

in the Manus Island facility.<sup>199</sup> Australian Prime Minister, Malcom Turnbull, proposed legislation “doubling down” on Australia’s stance on boat arrivals.<sup>200</sup>

The new legislation, proposed to the parliament by Turnbull in November 2016, would create a lifetime ban on obtaining an Australian visa for boat migrants.<sup>201</sup> This ban would apply to all the adult migrants who have been sent to Nauru or Manus Island since July 19, 2013.<sup>202</sup> The bill faced immediate opposition by the Labor party, who unanimously voted to oppose it.<sup>203</sup>

The Labor party positioned that the ban could make resettlement deals harder to secure. For example, New Zealand extended a standing offer to take 150 refugees per year from the offshore detention centers, but Australia rejected the offer over concerns that it could give people indirect access to Australia.<sup>204</sup> Although the visa ban would quell these concerns, it could also cause New Zealand to take the deal off the table entirely, because New Zealand refuses to create second-class citizens, which would occur should Australia place a lifetime visa ban on the refugees that New Zealand takes in.<sup>205</sup>

The bill’s legality is also at issue. Implementation of such a ban would mean that a refugee who is resettled and becomes a citizen in a third country, such as the United States or Canada, could never return to Australia for business, tourism or even to visit family.<sup>206</sup> A result that critics say would

199. Press Release, Peter Dutton, Minister for Immigr. & Border Prot., PNG Supreme Court judgment (Apr. 26, 2016), <http://minister.homeaffairs.gov.au/peterdutton/2016/Pages/png-supreme-court-judgement.aspx> [<https://perma.cc/8S4J-Z74G>].

200. *Australia asylum: Arrivals by boat face lifetime visa ban*, BBC (Oct. 30, 2016), <http://www.bbc.com/news/world-australia-37814496> [<https://perma.cc/A8RU-J8ZK>].

201. *Id.*; *Briefing on Lifetime Visa Ban*, REFUGEE COUNCIL OF AUSTRALIA (July 11, 2017), <https://www.refugeecouncil.org.au/publications/reports/asylum-reports/lifetime-visa-ban-bill/> [<https://perma.cc/CWZ2-64PH>].

202. BBC, *supra* note 200.

203. Paul Karp, *Labor Rejects Government’s Proposed Lifetime Refugee Travel Ban*, THE GUARDIAN (Nov. 7, 2016, 7:05 PM), <https://www.theguardian.com/australia-news/2016/nov/08/labor-unanimously-rejects-governments-proposed-lifetime-refugee-travel-ban> [<https://perma.cc/WC78-SGSB>].

204. Ben Doherty, *Peter Dutton Says Getting Women and Children off Nauru is ‘First Priority’*, THE GUARDIAN (Sept. 20, 2016, 12:17 AM), <https://theguardian.com/Australia-news/2016/sep/20/peter-dutton-says-getting-women-and-children-off-nauru-is-first-priority> [<https://perma.cc/P2DQ-3DAH>] [hereinafter Doherty, *Women and Children First Priority*].

205. *See* Karp, *supra* note 203.

206. Michelle Innis, *Australia’s Proposed Lifetime Ban on Boat-Borne Refugees Draws Fire*, N.Y. TIMES (Oct. 31, 2016), <https://www.nytimes.com/2016/11/01/world/australia/refugee-asylum-seeker-lifetime-ban.html> [<https://perma.cc/WC78-SGSB>] [hereinafter Innis, *Australia’s Proposed Lifetime Ban on Boat-Borne Refugees Draws Fire*].

separate families<sup>207</sup> and violate Australia's international human rights obligations to protect families and children.<sup>208</sup>

The ban would also exasperate Australia's violation of Article 31(1) of the Refugees Convention, which, as discussed earlier, prohibits state imposed penalties on refugees "on account of their illegal entry." Australia is already illegally penalizing boat migrants by detaining them. Imposing the penalty of a lifetime ban on these same refugees is another clear violation of international law.

### C. *The Future of the Detainees on Manus Island and Nauru*

The future of the detainees on Manus Island remains uncertain. Neither the Australian, nor the Papua New Guinea governments, have announced a timeline for phasing out the Manus Island facility.<sup>209</sup> Australia may also face complications with its Nauru processing facility because its two major processing center operators there, Broadspectrum and Wilson Security, discontinued services in October 2017.<sup>210</sup>

For now, Australia's short-term plan for both facilities hinges on an agreement negotiated with the United States in November 2016.<sup>211</sup> Under the one-off agreement, endorsed by the United Nations, the approximately 1,600 detainees on Manus Island and Nauru will be sent to the United States for resettlement.<sup>212</sup> However, several major obstacles stand in the way of this agreement coming to fruition. First, it is unclear how many refugees the United States will actually accept.<sup>213</sup> The U.S. State Department's Bureau

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207. *Id.* (Critics of the ban include Richard Di Natale, leader of the Australian Greens, Bill Shorten, leader of the Labor Party, and Hugh de Kretser, a lawyer from the Human Rights Law Center in Melbourne).

208. Jane McAdams and Ben Saul, *Malcolm Turnbull is Breaking International Law with Cruel Lifetime Refugee Ban*, SYDNEY MORNING HERALD (Nov. 9, 2016), <http://www.smh.com.au/comment/malcolm-turnbull-is-breaking-international-law-with-cruel-lifetime-refugee-ban-20161108-gskstx.html> [https://perma.cc/8WFF-LZV6].

209. Stephanie Anderson, *Manus Island detention center to close, Peter Dutton and PNG Prime Minister confirm*, AUSTRALIAN BROADCASTING CORP. (Aug. 17, 2016), <http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810> [https://perma.cc/UUF3-EMEL].

210. *Island of Despair*, *supra* note 3, at 14.

211. Robb Stewart, *Australia Strikes Deal to Resettle Refugees in U.S.*, WALL ST. J. (Nov. 12, 2016, 10:03 PM), <http://www.wsj.com/articles/australia-strikes-deal-to-resettle-refugees-in-u-s-1478997228>.

212. Michelle Innis, *As Trump Nears Office, Australian Deal to Move Refugees to U.S. Is in Doubt*, N.Y. TIMES (Nov. 17, 2016), <http://www.nytimes.com/2016/11/18/world/australia/australia-us-refugee-deal.html> [hereinafter Innis, *U.S. Deal is in Doubt*] [https://perma.cc/69RA-C3AS].

213. Eric Tlozek & Stephanie Anderson, *Refugee deal: United State cannot speculate on Trump and refugee deal*, AUSTRALIAN BROADCASTING CORP. (Nov. 20, 2016), <http://>

of Population, Refugees and Migration did not provide specific numbers, but stated it had “agreed to consider referrals from the UNHCR,” and that it “will determine the size of this program in consultation with the UNHCR.”<sup>214</sup>

Second, the timing of the deal is leads to speculation that Australia entered into a “people swap” agreement.<sup>215</sup> The announcement that the United States would take refugees from Nauru and Manus closely coincided with another announcement that Australia agreed to resettle refugees from a camp in Costa Rica.<sup>216</sup> In this secondary agreement, Australia pledged monetary support and intake of refugees who fled gang violence in countries like Guatemala, Honduras, and El Salvador.<sup>217</sup> However, Australia did not specifically grant additional resettlement places for these refugees.<sup>218</sup> Thus, presumably, the central American refugees will be part of Australia’s annual intake of 13,750 per year.<sup>219</sup> The question then becomes whether this is a quid-pro-quo situation in which Australia will take the central American refugees as long as the United States follows through on its pledge to take the Nauru and Manus Island refugees.

Third, the United States will likely attempt to rescind or at least skirt its obligations under the agreement.<sup>220</sup> The original agreement was entered into under the Obama administration shortly before his tenure in office ended. Obama’s successor, Donald Trump was inaugurated as President of the United States on January 20, 2017.<sup>221</sup> On January 28, 2017, just eight days

[www.abc.net.au/news/2016-11-17/un-to-determine-the-number-of-refugees-to-be-resettled-in-us/8035276](http://www.abc.net.au/news/2016-11-17/un-to-determine-the-number-of-refugees-to-be-resettled-in-us/8035276) [<https://perma.cc/A564-DL5V>].

214. *Id.*

215. See Jiyoung Song, *What do we know about the central American refugee deal between the U.S. and Australia?*, THE GUARDIAN (Nov. 24, 2016, 2:00 PM), <https://www.theguardian.com/commentisfree/2016/nov/25/what-do-we-know-about-the-central-american-refugee-deal-between-the-us-and-australia> [<https://perma.cc/9NQB-KT4J>].

216. *See id.*

217. *Id.*

218. Ben Doherty, *Australia will take refugees from Costa Rica camps, Turnbull Tells U.N.*, THE GUARDIAN (Sept. 20, 2016, 6:22 PM), <https://www.theguardian.com/australia-news/2016/sep/21/australia-will-take-refugees-from-costa-rica-camps-turnbull-tells-un> [<https://perma.cc/KG96-JR78>] [hereinafter Doherty, *Refugees from Costa Rica*].

219. Australia plans to increase humanitarian intake to 18,750 people per year by 2018-2019. Doherty, *Refugees from Costa Rica*, *supra* note 218; Doherty, *Women and Children First Priority*, *supra* note 204.

220. Innis, *U.S. Deal is in Doubt*, *supra* note 212.

221. *Presidential Inauguration 2017*, USA.GOV, <https://web.archive.org/web/20170202000105/https://www.usa.gov/inauguration-2017> [<https://perma.cc/Z6LX-X77T>] (last visited Feb. 2, 2017).

after taking office, President Trump reportedly told Australian Prime Minister Malcolm Turnbull that the refugee agreement was, “the worst deal ever.”<sup>222</sup>

This proclamation came just one day after President Trump signed an executive order titled “Protecting the Nation From Foreign Terrorist Entry Into the United States,” which called for: (1) a ninety-day suspension on entry of people from Iran, Iraq, Libya, Somalia, Sudan, and Yemen; (2) an indefinite ban on the resettlement of Syrian refugees; (3) suspension on the entry of all other refugees to the United States for 120 days; and (4) an immediate suspension of the Visa Interview Waiver Program and compliance with the requirement that all individuals seeking a nonimmigrant visa undergo an in-person interview.<sup>223</sup>

The Executive Order (“Order 13769”) affected all foreign travelers traveling to the United States, including those traveling for immigration purposes, those traveling for non-immigration purposes (such as for tourism or business), and refugees.<sup>224</sup> Most notably, Order 13769 indefinitely banned Syrian refugees until such time that the President “ha[s] determined that sufficient changes have been made the USRAP (U.S. Refugee Admissions Program) to ensure that admission of Syrian refugees is consistent with the national interest.”<sup>225</sup>

Order 13769 faced implementation problems in its first few days. There was some initial confusion over whether the Order applied to permanent residents as well as refugees. Initially, White House officials said the Order applied to green card holders from Iran, Iraq, Libya, Somalia, Sudan, and Yemen requiring a case-by-case waiver to return to the United States.<sup>226</sup> The next day, however, White House officials backtracked and said it would not affect green card holders, but only travelers from the targeted countries would be subjected to additional screening.<sup>227</sup>

There was also uncertainty surrounding the scope of authority granted to Order 13769. On January 28, 2017, the day after the Order was signed,

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222. Greg Miller and Philip Rucker, ‘This was the worst call by far’: *Trump Badgered, Bragged and Abruptly Ended Phone Call with Australian Leader*, THE WASH. POST (Feb. 2, 2017), [https://www.washingtonpost.com/world/national-security/no-gday-mate-on-call-with-australian-pm-trump-badgers-and-brags/2017/02/01/88a3bfb0-e8bf-11e6-80c2-30e57e57e05d\\_story.html?utm\\_term=.952c43447797](https://www.washingtonpost.com/world/national-security/no-gday-mate-on-call-with-australian-pm-trump-badgers-and-brags/2017/02/01/88a3bfb0-e8bf-11e6-80c2-30e57e57e05d_story.html?utm_term=.952c43447797) [https://perma.cc/VQ4Z-UNEF].

223. Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Michael Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>.

224. See Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

225. *Id.*

226. Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html>.

227. *Id.*

two Iraqi men<sup>228</sup> petitioned the court for a stay of removal.<sup>229</sup> The court enjoined respondents from removing individuals who: (1) have approved refugee applications pending, (2) are holders of valid visas, and (3) other individuals from the targeted countries who are legally authorized to enter the United States.<sup>230</sup>

The court found that petitioners “have a strong likelihood of success in establishing that the removal of the petitioner . . . violates [his] rights to Due Process and Equal Protection guaranteed by the United States Constitution.”<sup>231</sup> Moreover, there is “imminent danger” that “there will be substantial and irreparable injury to refugees, visa-holders, and other individuals from nations subject to the January 27, 2017 Executive Order.”<sup>232</sup> The decision only restricts the removal of affected individuals, falling short of barring their detention.<sup>233</sup> Other courts across the United States issued similar orders, some seeming to expand the restriction to bar both removal and detention.<sup>234</sup>

Eventually, on March 6, 2017, Order 13769 was expressly revoked and replaced by Executive Order 13780 (“Order 13780”)<sup>235</sup> Order 13780 attempted to clarify the ambiguities of Order 13769. It provided a country-by-country analysis as to the named countries in the travel ban and also provided guidance as to the scope of the ban.<sup>236</sup> Order 13780 imposed a temporary pause on the entry into the United States of foreign nationals of Iran, Libya, Somalia, Syria, and Yemen (notably eliminating Iraq from

228. Mica Rosenberg & Jonathan Stempel, *U.S. judges limit Trump immigration order; some officials ignore rulings*, REUTERS (Jan. 29, 2017, 1:48 PM), <https://www.reuters.com/article/us-usa-trump-immigration-courts/u-s-judges-limit-trump-immigration-order-some-officials-ignore-rulings-idUSKBN15D0XG> [<http://perma.cc/QF3H-2H7X>].

229. *Darweesh v. Trump*, No. 17 Civ. 480 (AMD) (E.D.N.Y. Jan. 28, 2017) (order granting stays of removal).

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

234. For example, In Boston, on January 29, 2017, U.S. District Judge Allison Burroughs issued a temporary restraining order barring officials from detaining or removing approved refugees, visa holders, and permanent U.S. residents entering from the targeted countries. Likewise, a court in Virginia blocked the removal of permanent U.S. residents who were detained at Dulles International Airport. Rosenberg & Stempel, *supra* note 228.

235. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212 (Mar. 9, 2017).

236. *See generally* Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210–13214 (Mar. 9, 2017).

the list)<sup>237</sup> and again called for a 120-day suspension of the U.S. Refugee Admissions Program,<sup>238</sup> with the program officially resuming on October 24, 2017 under Executive Order 13815.<sup>239</sup>

Finally, on September 27, 2017, President Trump issued Proclamation 9645 which added travel restrictions to foreign nationals of Chad, North Korea, and Venezuela, in addition to the foreign nationals already listed in Order 13780.<sup>240</sup> Although some of the lower courts enjoined some of the travel restrictions of Order 13780, the United States Supreme Court stayed the injunctions on December 4, 2017, allowing the travel restrictions of both Order 13780 and Proclamation 9645 to be implemented fully<sup>241</sup> while legal challenges to the restrictions continue to proceed in lower courts.<sup>242</sup>

In light of the President's tough stance on controlling immigration to the United States, as demonstrated by the language of his various executive orders and proclamation, it is unlikely the United States will resettle all of Australia's refugees, many of whom came to Australia from the countries targeted by the orders. Despite the Presidential roadblocks, the United States began effectuating the agreement in September 2017, when the State Department confirmed that fifty-four approved refugees would be traveling to the United States from Papua New Guinea and Nauru.<sup>243</sup>

A fourth challenge facing Australia is that the United States deal came only months after the High Court of Australia upheld the legality of the Nauru facility. But, shopping around for a nation willing to accept the refugees from both facilities, the Australian government seems to concede that Nauru is not a viable option for resettlement. In 2015, Nauru's justice minister, David Adeang, indicated Nauru would never be a permanent home for the refugees.<sup>244</sup> He said that "durable resettlement solutions for [Nauru's] refugees," was a "critical missing component," going on to say, "I

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237. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13213 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161, 45171 (Sept. 24, 2017).

238. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13215 (Mar. 9, 2017).

239. Exec. Order No. 13815, 82 Fed. Reg. 50055, 50056 (Oct. 24, 2017).

240. Proclamation 9645, 82 Fed. Reg. 45161, 45171 (Sept. 24, 2017).

241. U.S. DEP'T OF STATE: NEW COURT ORDER ON PRESIDENTIAL PROCLAMATION (Dec. 4, 2017), <https://travel.state.gov/content/travel/en/traveladvisories/ea/new-court-orders-on-presidential-proclamation.html> [<https://perma.cc/6YWG-NKL8>].

242. Robert Barnes, *Supreme Court Allows Full Enforcement of Trump Travel Ban While Legal Challenges Continue*, THE WASH. POST (Dec. 4, 2017), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-allows-full-enforcement-of-trump-travel-ban-while-legal-challenges-continue/2017/12/04/486549c0-d5fc-11e7-a986-d0a9770d9a3e\\_story.html?utm\\_term=.8f890ce232e1](https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-full-enforcement-of-trump-travel-ban-while-legal-challenges-continue/2017/12/04/486549c0-d5fc-11e7-a986-d0a9770d9a3e_story.html?utm_term=.8f890ce232e1) [<https://perma.cc/X5LT-KP4B>].

243. Jaqueline Williams & Adam Baidawi, *In Deal Trump Called 'Dumb,' U.S. Taking 50 Refugees from Australia*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/world/Australia/refugees-turnbull-trump.html> [<https://perma.cc/2YAF-RCW8>].

244. Doherty, *Refugees from Costa Rica*, *supra* note 218.



encourage states today to assist us find [sic] permanent homes for the 924 refugee men, women and children currently on Nauru.” Rather than accept this reality and resettle the refugees in its territory, Australia continues to shop for alternative solutions.

Finally, the Australian government has failed to lay out a long-term plan for future migration to its shores, other than the proposed lifetime ban on obtaining Australian visas. The rudimentary “plan” implies the Australian government intends to keep the Pacific Solution. But how will this fare on the international stage? How long will other nations be willing to take refugees off the hands of the Australian government?

#### *D. The Long-Term Solution to the Pacific Non-Solution*

Offshore processing and detention is not a long-term solution to irregular migration. As discussed earlier, offshoring asylum claims to Nauru has placed Australia in violation of numerous international obligations including: Articles 22, 31, and 33 of the Refugees Convention; Articles 7 and 9 of the ICCPR; and Articles 5 and 25 of the UDHR. In November 2016, a UN Special Reporter on migrant human rights declared that conditions on Nauru were “cruel, inhuman and degrading,” pointing out that “Australia would vehemently protest if its citizens were treated like this by other countries especially if Australian children were treated like this.”<sup>245</sup>

In addition, UDHR Article 14 provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” Through the Pacific Solution, the Australian government has denied this fundamental right to migrants who arrive by boat seeking asylum in Australia. The penalization and discrimination of refugees who arrive by boat should cease immediately. Asylum seekers arriving by boat should have their claims processed in the same manner as asylum seekers who arrive by air. If they are deemed refugees, then they should receive the same treatment as any other refugee in Australia.

“Irregular maritime arrivals” are no less refugees deserving of the same protections as refugees currently arriving with a visa. In the end, a refugee is a refugee, regardless of whether he or she arrived by plane or was forced to make the dangerous journey by boat. To penalize a refugee simply because he arrived by an “unauthorized” mode of transportation violates international agreements.

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245. *Id.*

Furthermore, continuing to transfer migrants to Nauru places Australia in violation of Article 15 of the UDHR which provides that “[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>246</sup> According to Amnesty International, the Nauruan government issues identification documents to refugees, but lists the person’s nationality as “refugee.”<sup>247</sup> This effectively denies refugees of a nationality, leaving them in limbo, forced to hang in the balance until Australia can convince another country to take them in. They will never be accepted in Australia, but clearly Nauru has not accepted them either.

The offshoring process should end, and asylum seekers’ claims should be processed in Australia, by Australian officials. Categorizing migrants as regular arrivals or irregular arrivals should stop and anyone found to be a refugee should be helped in an equally humanitarian manner.

If Australia nonetheless decides to continue offshore processing, it should conduct the processing in one of its own territories and should provide complete transparency of the facilities’ operations. By doing so, Australia could take greater control in ensuring humane treatment and adequate living conditions in the offshore facilities.

It could also ensure that asylum claims are processed under Australian law, rather than that of a third country, demonstrating that the Australian government is willing to take accountability for the treatment of asylum seekers. Australia would be taking ownership of its international human rights obligations and any violation of domestic or international law would fall squarely under the jurisdiction of the Australian courts. There would be no more muddying of the water as to whether a violation was attributed to the laws of some other nation and the debate over extraterritorial control would be silenced.

Finally, Australia must devise a more concrete plan for the resettlement of the refugees rather than leave them in a perpetual state of uncertainty. This could be achieved by long-term agreements with sister nations, or by simply allowing the resettlement of refugees in Australian territory.

## V. CONCLUSION

The plight of a refugee is one that many of us will never understand. In the inevitable absence of utopian world peace, there will always be people who are displaced from their homes and who must flee out of fear of persecution. The world is currently grappling with a historic number of

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246. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948).

247. *Island of Despair*, *supra* note 3, at 23.

displaced people. At the end of 2015, 65.3 million people, equating to one out of every 113 people on Earth, were displaced according to the UNHCR.<sup>248</sup> A number that surpasses post World War II numbers.<sup>249</sup> Of the people displaced, 21.3 million are refugees, of which children make up over fifty percent.<sup>250</sup>

The leading nations of the world cannot turn their backs to these migrants. Rather, such nations must uphold their humanitarian obligations and provide a safe place for those who have nowhere to go. Otherwise, international human rights agreements are no more than empty promises that fail to help establish a world where all people can live with dignity and respect.

Although Australia's Pacific Solution may purport to have the best intentions in mind, it falls short of upholding Australia's human rights obligations and must end. By continuing to accept the Pacific Solution, the international community is setting a dangerous precedent that could lead to a race to the bottom.<sup>251</sup> The Australian government touts its policy as a model for other countries to follow,<sup>252</sup> but the policy is rooted in isolating the island nation from migration and exporting refugees who have already made the journey.

If other countries implement similar policies, as the United States has through its Executive Orders, Australia will find itself in a buyers' market and will continue to struggle to find viable resettlement countries for its refugee population. Its only substantive solution, the agreement with the United States, will likely fall short, forcing Australia back to the drawing board. The time is now for the Australian government to do what it should have done already: resettle the refugees from offshore detention centers in Australian territory and come up with a long-term solution that complies with international law.

248. Adrian Edwards, *Global Forced Displacement Hits Record High*, UNHCR (June 20, 2016), <http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html> [<https://perma.cc/2V7K-ANPG>].

249. Euan McKirdy, *UNHCR Report: More Displaced Now Than After WWII*, CNN (June 20, 2016, 9:29 AM), <http://www.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/index.html> [<https://perma.cc/Z8HM-XZBV>].

250. Edwards, *supra* note 248.

251. Waleed Aly, *Australia's Poisonous Refugee Policy*, N.Y. TIMES (Oct. 26, 2016), [https://www.nytimes.com/2016/10/27/opinion/australias-poisonous-refugee-policy.html?\\_r=0](https://www.nytimes.com/2016/10/27/opinion/australias-poisonous-refugee-policy.html?_r=0) ("Australia's policy is a kind of contagion, lowering global standards on refugee policy, shifting the boundaries of what nations now find acceptable.") [<https://perma.cc/G8YL-28JB>].

252. Ben Doherty, *Malcolm Turnbull tells world leaders to follow Australia's asylum policies*, THE GUARDIAN (Sept. 19, 2016, 6:24 PM), <https://www.theguardian.com/australia-news/2016/sep/20/Malcolm-turnbull-tells-world-leaders-to-follow-australias-asylum-policies> [<https://perma.cc/DU6E-QPUQ>].

