Third Country Processing Regimes and the violation of the principle of non-refoulement

A Case Study of Australia's Pacific Solution

Conflict of interest: The author(s) has no conflict of interest.

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Abstract

This article investigates the violation of the principle of non-refoulement under Australia`s mandatory off-shore processing regime, which has emerged as one of the most extreme methods of externalization.
Through bilateral agreements with the governments of Nauru and Papua New Guinea, Australia has contracted out the processing of asylum applications to third party States in its entirety. This processing regime has been persistently condemned by the international community for human rights abuses and violation of the most fundamental principle of international refugee law, non-refoulement.
The rapid proliferation of EU-wide externalization policies, some directly emulating the Australian model, are emblematic of an insidious trend forming on the horizon, aiming to push the global "migration crisis" out of EU borders. The Australian model which is being used as a blueprint for future off-shore processing regimes by EU leaders, will lead to a significant shift in the paradigm of migration control policies. Thus, it is crucial to examine the failings of the Australian model, particularly the violation of the principle of non-refoulement, through the exposure of asylum seekers to human rights abuses.
The article starts out by mapping out Australia`s history of predicating draconian migration policies upon the notions of "state sovereignty" and the "migration as a threat." This is followed by a theoretical study of the concepts of "state responsibility" and "violation of the principle of non-refoulement through human rights violations". A single in-depth qualitative secondary analysis of published studies to date reveals the violation of the principle non-refoulement under the offshore regime.

Keywords: Off-shore asylum processing; Non-refoulement; Third country asylum processing; The Pacific Solution; Externalization; Refugee protection

Introduction

The primary purpose of this article will be to analyze whether Australia's off-shore detention regime violates the principle of non-refoulement by perpetuating ongoing human rights violations in the off-shore detention centres. This off-shore processing scheme, also known as the "Pacific Solution", was first established in 2001 under the Howard Government and re-introduced under Operation Sovereign Borders (hereinafter "OSB") in 2013. Under this policy any asylum seeker entering Australian territory, including mainland Australia, will be automatically transferred to the off-shore detention centres in Nauru and Papua New Guinea (hereinafter "PNG") and will not be resettled in Australian territory, regardless of whether they are found to be "genuine refugees" within the meaning of the 1951 Refugee Convention. The policy encompasses all asylum seekers without a case-by-case evaluation of their claims and allows them to be detained in the off-shore centres indefinitely.
Despite severe condemnation by the international community at large, more and more EU countries show an inclination toward emulating the Australian model. EU funded non-arrival schemes, such as the funding of the Libyan Coast Guard for the interception of ships in Libyan waters, have functioned as covert externalization policies, pushing the "migration crisis" out of mind and out of sight. Although this covert externalization is by no means a novelty, the rising anti-immigration rhetoric and the concomitant establishment of off-shore processing regimes points toward externalization potentially dominating European migration policies in an unprecedented manner.
Such off-shore processing policies inspired by the Australian experiment are already taking shape. In June 2021, the Danish Parliament has passed the Bill L226, enabling the government to transfer asylum seekers to detention centres in third countries. In a similar vein, the UK Nationality and Borders Bill which enables the removal of asylum seekers and refugees to third countries for the processing of their applications, has passed through the House of Commons in December 2021.
In light of the recent developments within the EU, it is crucial to examine Australia's off-shore processing scheme and its violation of the principle of non-refoulement as a flagship policy.
The principle of non-refoulement under Article 33 of the 1951 Refugee Convention precludes Contracting States from expelling or returning "a refugee in any manner whatsoever to the frontier 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." This article will precisely focus on how this principle, which is the benchmark of any refugee

protection framework, has been violated throughout Australia`s off-shore processing policy due to exposure to human rights violations. As noted in the introduction, it will do so by utilizing qualitative data that has been derived from previous publicly archived research studies, including but not limited to, a selection of policy texts, scholarly articles, reports produced by NGOs, reports of UN bodies, case law and news reports.

The principle of non-refoulement in Australia: Criminalization and externalization

The Australian government has a long-documented history of undermining, and eventually disregarding the principle of non-refoulement, with a continuous trajectory toward with-drawing from its obligations under international refugee law (Henderson, 2014, 1162). Strict immigration restriction arising from "nationalism expressed as racism and the xenophobic anxiety of a young nation isolated from the powerful allies", has had a formative impact on the nation's culture and government (Jamen, 2018, 1).

Australia became a state party to the Refugee Convention in January 1954 and a party to the 1967 Protocol on December 1973, and proceeded to further incorporate some of the obligations enshrined in the Refugee Convention into the Migration Act of 1958. The Migration Act sets out the sources of Australia's non-refoulement obligation as follows: "(i) the Refugees Convention; or (ii) the Covenant; or (iii) the Convention Against Torture" in addition to "any obligations accorded by customary international law" Australia's domestic law explicitly reaffirms the notion that Australia is bound by the obligation of non-refoulement irrespective of whether it is a party to the Refugee Convention and its 1967 Protocol.

Despite this initial recognition of the principle of non-refoulement, both under custom and treaty law, the government of Australia has time and time again purposefully avoided to remedy the gaps in the incorporation and implementation of the Convention rights and has further shown an effort to justify deflection practices through official statements and policies.

Section 197C of the Migration Act is explicitly reflective of this unwillingness to comply with the obligations under international refugee law. This section of the Migration Act prescribes that it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Further undermining the obligation, it is stated that an unlawful non-citizen can be removed without an assessment of Australia's non-refoulement obligations. Troublingly, the term "unlawful citizen" is used in a manner which encompasses any asylum seeker who arrives to Australian territory to make an asylum application, without a valid visa. The Migration Act lays the groundwork for off-shore detention and other policies and practices leading to the penalization of certain arrival means and methods. This penalization is both a symptom and a tool of what some scholars refer to as "crimmigration" which is the socio-political discursive construction linking public disorder, organized crime, and insecurity with migration/migrants, reframing a traditionally non-security issue and a societal security threat (Billings, 2019, 6). The linguistic dimension has been a key element in the criminalization of the right to seek asylum as asylum seekers have been continuously labelled as economic migrants or those who have no claim to refugee status since they are fleeing conflict, generalized violence or upheaval. During a 2017 interview, Australian Immigration Minister Peter Dutton demonstrated an attitude nearing contempt towards refugees in the off-shore detention centers as he stated, "They're economic refugees, they got on a boat, paid a people smuggler a lot of money, and somebody once said to me that we've got the world's biggest collection of Armani jeans and handbags up on Nauru waiting for people to collect it when they depart" (Doherty, 2017).

In this vein, Australia's efforts to disengage from the obligation of non-refoulement has been predominantly based on two arguments. The initial argument has been built around the denial of refugee status within the meaning of the Refugee Convention.

The second argument for this disengagement has been constructed around the denial of territorial jurisdiction over the off-shore detention centres, which will be examined in detail within the following sections of this paper. These two arguments have almost always been accompanied by a frequent referral to the "act of state" doctrine, which has been historically used by the Australian government as a "right to exclude" for the preservation of sovereignty, which was discursively represented as under direct threat by the asylum seekers (McDonald, 2011, 289) and in conflict with international human rights norms protecting the rights of the asylum seekers (Gelber & Mcdonald, 2006, 270).

The efforts of the government to discharge non-refoulement obligations have also been supported by highly contentious decisions of the High Court of Australia (hereinafter "the High Court"). In the case of Minister for

Immigration and Multi-cultural Affairs v. Haji Ibrahim, the High Court held that the definition of a refugee "does not encompass those fleeing generalized violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions" (Minister for Immigration v Haji Ibrahim, 2000).

In the case of Minister for Immigration v. Khawar, the High Court further sought to limit the conferral of refugee status by stating that the term "asylum" does not appear in the main body of the text of the Convention and therefore protection against non-refoulement does not extend to asylum seekers (Minister for Immigration v Khawar, 2000). This assertion of the High Court is highly problematic considering Australian government's explicit enthusiasm towards narrowing down the scope of the protection against refoulement despite numerous statements by the UNHCR and scholars affirming that the prohibition of non-refoulement "inheres on a provisional basis even before refugee status has been formally assessed by a state party" (Hathaway, 2005, 342).

In another highly problematic decision, the High Court noted that Australian courts should apply Australian state law regardless of whether the law violates "a rule of international law" (CPCF v Minister for Immigration, 2015). Unilateral declarations and assertions by Australian government officials have systematically pointed to a blatant disregard toward non-refoulement obligations. During the discussions regarding the extension of non-refoulement obligations to international human rights instruments such as the Convention Against Torture, Australia was the only state to express "near contempt" towards this form of complementary protection (Goodwin-Gill& McAdam, 2007, 221).

The former Prime Minister John Howard's tough stance during the Tampa incident[i] has been perceived as a crucial factor in him securing a win for the Coalition government during the 2001 federal election. In his election policy speech, Howard referred to the "fundamental rights of this country to protect its borders" and noted, "we will decide who comes to this country and the circumstances in which they come" (Boese & Marotta, 2017). The Tampa incident and the subsequent election win by Howard's Coalition government have been regarded by many scholars as a "turning point in Australia's refugee history" (Stats, 2015, 1).

The Tampa incident and the electoral victory also led to the adoption of the legislative framework known as the "Pacific Solution", enabling the government to transfer and detain asylum seekers in off-shore processing centres in Nauru and PNG for the processing of their asylum applications. Since Howard`s speech, the issue of migration control has come to center stage and dominated the political discourse in the wake of every election. Thus, it is not unexpected to see refugee protection being portrayed as a political issue rather than a humanitarian one, and that punitive measures geared at preventing asylum seekers from ever attempting to enter Australian territory have dominated consecutive migration control policies for the last two decades.

State Responsibility

The question "who is responsible for off-shore processing in PNG and Nauru?" has been essential in determining Australia's legal obligations under the off-shore scheme.

Since the initial introduction of the Pacific Solution in 2001 by the Howard government, successive Australian governments have continuously denied responsibility for the people detained in the off-shore detention centers. These attempts at shifting responsibility have been primarily aimed at distancing the Australian government from the human rights violations occurring in the detention centers, and the resulting violation of the principle of non-refoulement.

The predominant, traditionally accepted presumption for State jurisdiction is territoriality, a presumption that has been used by the Australian government to limit their human rights obligations to Australia's territorial borders. Irrespective of the government's efforts to opt out of their obligations under international human rights and refugee law, Australia's responsibilities very much extend to those detained in PNG and Nauru. The extension of these obligations is based upon the notion of "extraterritorial jurisdiction" which prescribes that a state's responsibilities under international law reaches beyond its territory. The concept of extraterritorial jurisdiction has been continuously recognized by scholars and case law of international courts, primarily the European Court of Human Rights (hereinafter "ECtHR") (Van Berlo, 2016, 51). It has been affirmed time and time again by various scholars that the responsibility of a Contracting State within the meaning of the Refugee Convention "will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it" (Lauterpacht & Bethlehem, 2001, 110).

The United Nations Human Rights Committee (hereinafter "UN HRC") has also endorsed this view, demonstrated in its General Comment 31 of 2004 as it noted that a State must ensure and respect rights to "anyone within the power or effective control of that State, even if not situated within the territory of the State Party."
The case law of the ECtHR has also emulated this expansive approach, and although the ECtHR has no jurisdiction over the Australian case, it is significant to touch upon these decisions to accurately outline the theoretical concept of "extra-territorial jurisdiction" that is largely accepted by the international legal community, particularly considering the broader context of the feasibility of EU attempting to emulate the Australian off-shore detention model.
As demonstrated by the Loizidou v. Turkey case, where the Court provided that the concept of "jurisdiction" by the meaning of Article 1 of the European Convention on Human Rights (hereinafter "ECHR") "is not restricted to the national territory of the High Contracting Parties" (Loizidou v Turkey, 1995).
The effective control Australia has over the detention centres has also been repeatedly affirmed by the UNHCR, as all persons in the detention centers are under the "effective control of the State Party (Australia), because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice" and consequently, "as a matter of international law, the physical transfer of asylum-seekers from Australia to Papua New Guinea, as an arrangement agreed by the two 1951 Convention States, does not extinguish Australia's legal responsibility for the protection of asylum-seekers affected by the transfer arrangements" (UNHCR, 2014).
The notion of extra-territorial jurisdiction predicated upon effective control is also supported by the Court, as it is provided that when a state exercises "effective control over an area (or an individual) situated outside its national territory" this will amount to exercise of jurisdiction "within the meaning of Article 1 of the Convention" (Isaak v Turkey, 2006).

Refoulement through exposure to human rights violations in third countries

Prohibition on refoulement under Article 33 of the Refugee Convention precludes Contracting States from expelling or returning "a refugee in any manner whatsoever to the frontier 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." The interpretation of this article carries particular significance in determining the scope of the protection provided by the Convention and its 1967 Protocol.
Article 31(1) of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In accordance with the VCLT, the wording of the article is the initial starting point for the interpretation of the extent of protection against refoulement. It has been noted by scholars that the words "in any manner whatsoever" indicates any act of removal that would put the person concerned at risk in the ways contained in Article 33 (Lauterpacht & Bethlehem, 112). The same view has been repeatedly supported by the UNHCR. In its advisory opinion on the scope of the application of non-refoulement, the UNHCR reiterated that the prohibition of refoulement is "applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border" (UNHCR, 2007). This approach is also mirrored by way of teleological interpretation of the article which has been construed to provide the refugees "the widest possible exercise of fundamental rights and freedoms" in line with the Convention's humanitarian object and purpose expressed in the preamble (McAdam, 2006, 6).
Traditionally, the protection provided by the principle of non-refoulement has been triggered by asylum seekers who are facing extradition or deportation to the country of origin. However, according to both scholarly opinion and international case law, protection obligations under the principle occur in several scenarios when a state acquires effective control over a person (Gillard, 2008, 704). The expansion of the scope of the principle of non-refoulement relies heavily on human rights law in combination with international customary law and the Refugee Convention as a specialist instrument (McAdam, 5). The jurisprudence of human rights courts, albeit Eurocentric in nature, has played an essential role in developing complementary forms of protection. Furthermore, the UNHCR has provided several guiding principles for establishing a clear definition of the notion of "safe third country." In a 1991 background note, the UNHCR has explained that the safe third country concept applies where a nation is one on which refugees can enjoy asylum without facing any danger (Arreaga, 2020). The UNHCR has

identified the following factors to consider whether a transfer of a refugee or asylum seekers would constitute an act of refoulement, which is by no means an exhaustive list: "ratification of and compliance with the international regional human rights instruments; ratification of and compliance with international refugee instruments, in particular with the principle of non-refoulement; readiness to permit asylum seekers to remain while their claims are being examined; adherence to basic recognized human rights standards for the treatment of asylum seekers and refugees; and, notably, the State' s willingness and practice to readmit returned asylum seekers and refugees, consider their claims in a fair manner and provide effective and adequate protection" (UNHCR, 1995).

The prohibition against refoulement that is embedded in Article 3 of the ECHR, stipulates that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Despite the ECHR not being an international instrument specifically concerned with the protection of refugees, it is significant to note that the ECtHR deems Article 3 as providing an effective instrument in protection against refoulement and engaging the "responsibility of the State under the Refugee Convention." The Court confirmed its approach in subsequent judgements as well as expanding the reach of the protection to indirect removal and international arrangements "concerning the attribution of responsibility for deciding asylum claims", as it noted that such agreements cannot absolve states of their responsibilities under the Refugee Convention (UNHCR, 2006). Although the ECHR is not one of the seven core international human rights treaties that Australia is a party to, unlike the Convention Against Torture (hereinafter "CAT") and the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), the prohibition on torture expressed in Article 3 is also deeply anchored in customary law and deemed to be jus cogens.

The prohibition against refoulement is also expressly granted under Article 3 of the CAT, whereas implied within Article 7 of the ICCPR. Moreover, the non-refoulement obligation in Article 3 applies to "any territory under the State party's jurisdiction" which includes "any territory or facilities and must be applied to protect any person, citizen, or non-citizen without discrimination subject to the de jure or de facto control of the State party" (OHCHR, 1997).

According to the Committee against Torture, the following acts by the State Party gives rise to the breach of the principle of non-refoulement contained in the article: "States parties should not take measures or adopt policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them." More specifically, the Committee elaborates that a State Party is prohibited from transferring a refugee to "a country where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment." It is important to note that the Committee refers "to a country" rather than "the country of origin." As such, the prohibition proscribed by Article 3 applies to transfers to not only the country of origin but also to any third country of deportation where the person might fall under the risk of ill-treatment or torture.

Article 7 of the ICCPR is another recognized source of complementary protection which indirectly imposes non-refoulement obligations upon the Parties. The article encompasses the obligation to not extradite, deport, expel, or otherwise remove a person from the State territory if the removal gives rise to a risk of violations proscribed by articles 6 and 7.

Most notably, the UNHCR interprets that the prohibition on removal under the ICCPR proscribes not only removal to the country of origin but to "any country to which the person may subsequently be removed" (UNHCR, 2007).

The ECtHR, in addition to an abundance of soft law material, has frequently reiterated that the principle of non-refoulement engrained in the Refugee Convention and aforementioned human rights instruments prohibit transfers where "the receiving state is unable or unwilling to protect the transferee" (Droege, 2008, 678). Other human rights monitoring bodies have also consistently followed suit by adopting the position that a state can violate its obligations under human rights law not only by its own acts but also if it knowingly puts a person in a situation where it is likely that his or her rights will be violated by another state (Gillard, 708).

Additionally, it has been reiterated by scholars that since the principle of non-refoulement is derived from "the absolute prohibition of torture and cruel, inhuman or degrading treatment and from the right to life itself, it is logical that states cannot, on any account, circumvent these obligations and place people in jeopardy by transferring them to other states where they risk such treatment" (Droege, 678).

Although international law does not prohibit third country processing, some have even outright rejected the concept of a "safe third country" as "unworkable in practice" due to it being impossible for a State to fulfill their obligations through or in a third State (Durieux, 2009, 77).

The definitions of torture and ill-treatment in various human rights instruments tend to not entirely correspond to each other. However, judgments handed down by the ECtHR have played a very significant role in the formulation of this definition within the European context of refugee law and detention centres. In the case of Sufi and Elmi v. UK, the Court affirmed that the conditions in the Dadaab refugee camps were dire enough to reach the threshold that constitutes a violation of Article 3 of the ECHR. Most notably, the Court stated that "Due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. Moreover, the refugees living in – or, indeed, trying to get to – the Dadaab camps are also at real risk of refoulement by the Kenyan authorities. Finally, the Court notes that the inhabitants of both camps have very little prospect of their situation improving within a reasonable timeframe" (Janmyr, 2014, 126).

Publicly available records from Nauru and PNG have consistently indicated that the conditions at the centres have been akin to torture (Freyer & McKay, 2021, 449) and do not meet the necessary standards for a designated third country transfer to be deemed safe under the Refugee Convention and other pertinent complementary instruments. The third country processing regime set up by Australia in PNG and Nauru violates several core human rights instruments by way of ill and degrading treatment of the detainees, and an explicit unwillingness by the local governments to live up to international human rights standards. The government of Australia is obliged under the Refugee Convention to assess whether a risk of such violations arise due to the transfer scheme established under the MOUs (Droege, 679). The threshold prescribed for a transfer to a third country to constitute refoulement based on torture, ill or degrading treatment varies from instrument to instrument. Lauterpacht and Bethlehem have described the fullest form of the threshold under customary international law as "circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment" (Lauterpacht & Bethlehem, 162).

As will be explored in the following section, the violations within these inadequate, unsanitary, and overcrowded detention centres have been so severe that the processing regime at hand is in direct contravention of the prohibition on torture embedded in customary law and human rights instruments, hence a breach by the Australian government of their obligation of non-refoulement.

Human rights violations in the detention centres

Access to justice and the prohibition on arbitrary detention

The right to access to justice and the right to not be arbitrarily detained are fundamental rights engraved in international human rights law. Goodwin-Gill has described the concept of procedural justice as one of the most significant elements in the international legal regime of refugee protection (Goodwin-Gill, 1997, 5). Even though the Refugee Convention and the 1967 Protocol do not set out specific procedures for the determination of refugee status, it is essential for the Australian government to provide the detainees in the off-shore detention centres with fair and efficient procedures in order to ensure compliance with the Refugee Convention and customary law. As such, asylum procedures put into place by Australia should be "guided by or built around international and regional refugee instruments, notably the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, international human rights law and humanitarian law" (UNHCR, 2001).

Article 16(2) of the Refugee Convention refers to the right to access to justice and provides that "a refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi." Similarly, Article 32 on expulsion provides that the expulsion of a refugee "shall be only in pursuance of a decision reached in accordance with due process of law" and "the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

In addition to the Refugee Convention, the right to access to justice is embedded in various international human rights instruments such as the Articles 6 (1) and 13 of the ECHR; Article 2 of the ICCPR; and Article 8 of the 1948 Universal Declaration of Human Rights. The notion of "access to justice" has been broadly defined by the UN Development Programme as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards" (UNDP, 2005, 5).

Regardless of what specific definition can be inferred from numerous international and regional instruments, “access to justice needs to be adopted to a particular context” (UNDP, 5), in this case the context of off-shore detention centres.

Under the Australian Immigration Advice and Application Assistance Scheme, government-funded access to “professional immigration advice and application assistance” is provided to those who meet the eligibility criteria. The Scheme explicitly excludes those who have arrived at Australia “illegally”, forcing anyone without a valid visa to get legal assistance at their own expense.

Article 189 of the Migration Act prescribes that, “unlawful non-citizens” within the “migration zone” or those who are “seeking to enter the migration zone” are required to be detained until they are removed from the country or granted a valid visa. This mandatory detention scheme was introduced in 1992 under sections 189, 196 and 198 of the Migration Act. Under Australian domestic law, there is no limit to mandatory detention which has resulted in asylum seekers being detained for prolonged periods, as exemplified by the case of Kurdish-Iranian journalist and writer Behrouz Boochani who remained in PNG for over six years, until he resettled in New Zealand in 2019. This indefinite, protracted detention has been widely reported to aggravate or inflict mental harm on detainees, often manifesting depression, PTSD and self-harm (Saul, 2012, 13; Freyer & McKay, 452) as studies have consistently demonstrated that the experience of detention adds to the cumulative effect of exposure to trauma leading to a “building block effect”, severity of mental distress being significantly greater in those who have been detained for prolonged periods (von Werthern et al., 2018, 2).

In 2005, the government introduced a series of detention reforms including Sections 486L-486Q of the Migration Act. Under these Sections, if a person has been in detention for two years or more, the Department of Immigration (hereinafter “DIMIA”) is obliged to report the case to the Commonwealth Ombudsman and provide a report on that person every six months. In return, the Ombudsman will provide an assessment and recommendation which must be tabled in the Parliament. This mechanism has been widely criticized for falling short in providing a real safeguard from arbitrary and inhuman detention (Henderson, 1169). Concern has been heightened since the duty to report to the Ombudsman does not begin until the person has been detained for two years and that this two-year period is unduly long, given that a person's initial detention is not subject to review or investigation (Commonwealth, 2013).

According to the UN Human Rights Committee, "illegal" entry into state territory does not merit such prolonged imprisonment in the absence of factors such as "the risk of absconding and lack of cooperation" detention may be judged arbitrary" (HR Commission, 1997). The UNHCR has acknowledged further elements which are required to make such detention in line with international human rights law, such as the detention being pursued for a legitimate purpose of protecting public order, public health or national security; necessary in the individual case (requiring an individual assessment of the asylum seeker); reasonable in all the circumstances (requiring an assessment of any special needs of the individual); and proportionate to a legitimate purpose (UNHCR, 2013, 11). As Australia’s mandatory detention policy applies in a way that encompasses all “unlawful non-citizens”, the process leading to indefinite detention is not comprised of a case-by-case evaluation. This lack of individual assessment has been deemed as additional evidence of the policy`s arbitrary nature by various UN bodies and NGOs (Henderson, 1169).

In addition to the highly problematic all-encompassing mandatory detention practice, the Australian government has reiterated that once in off-shore detention, refugee status determination becomes the responsibility of the governments of Nauru and PNG, a concerning prospect considering the relatively lackluster legal assistance provided by these governments. As evidenced by a 2017 UNHCR Fact Sheet on Manus Island, which reported that caseworker support on-site was not available at the time (UNHCR, 2017, 2).

In 2018, the government of Nauru severed its ties with the High Court of Australia, which served as the final court of appeal since 1976. The decision was presented as an act to further entrench Nauru`s identity as a sovereign nation, albeit causing anxiety among the international community as the abolishment of this appeal mechanism prevented asylum seekers on the island from appealing adverse decisions on their refugee status in the High Court of Australia. Under the current system, if an asylum seeker’s claim for refugee status is unsuccessful, he/she may apply for review to the Supreme Court of Nauru. However, this judicial review is only possible in cases of an error on a point of law and does not entail a review of the merits of the claim (UNSW Kaldor Centre, 2018, 7). During the period where the former appeal mechanism was scraped and a new one was established by the government of Nauru, asylum seekers were left without means to appeal the decisions on their refugee status.

Furthermore, many have proposed that the decision had the underlying motive of blocking the "avenue of appeal" for nineteen citizens who were persecuted for a 2015 demonstration outside the Parliament of Nauru (Harris, 2018).

The refugee status determination process in PNG also faced intense criticism due to its lack of capacity to adequately process claims and lack impartiality within the legal system. In 2013, when the asylum seekers first started arriving to Manus Island, the government of PNG did not have a refugee framework in place (Amnesty International, 2012, 2). Furthermore, various reports by the UNHCR have emphasized that the applicable legal framework on migration, Migration Regulation 1979, was inconsistent with the principles of the Refugee Convention as it incorrectly applied exclusion clauses and failed to provide adequate safeguards in line with international standards (UNHCR 2013, 6). In 2017, the Kaldor Centre for International Refugee Law reiterated UNHCR's concerns on PNG's status determination system, emphasizing that the law does not provide any protection against refoulement and that "any decision by the Minister relating to the grant or cancellation of the removal of a person from the country is not open to review or challenge in any court or any ground" (McAdam, 2017). Moreover, these systems lack majority of the safeguards and due diligence standards, such as independent merits review, time limit on the determination process and legal advice, that would be accessible to asylum seekers being processed within mainland Australia (von Doussa, 2007, 41).

In addition to the glaring human rights violations, scholars have held that the differences between the procedural safeguards in offshore and onshore processing arrangements carry the sole purpose of deterrence and are in direct contradiction with Article 31 of the Refugee Convention as "any treatment that was less favorable than that accorded to others and was imposed on account of illegal entry was a penalty within article 31 unless objectively justifiable on administrative grounds" (von Doussa, 48).

Living conditions in the detention centres

Human rights organizations, watchdogs, and UN monitoring bodies have repeatedly expressed grave concern about the deplorable circumstances in the off-shore detention centers, with increasing evidence that Australia is engaged in torturing asylum seekers alongside the well-documented substandard living conditions (Sanggaran & Zion, 2016, 420).

Articles 23 and 20 of the 1951 Convention foresee that the same standard of treatment with nationals should be accorded to refugees in the matters of public relief and rationing. Article 25 (1) of the UDHR reaffirms that "everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." Principle 18 of the Guiding Principles on Internal Displacement provides that all internally displaced persons have the right to an adequate standard of living and elaborates that at a minimum, regardless of the circumstances, IDPs should be provided with basic shelter and housing; appropriate clothing; and essential medical services and sanitation. Although the Guiding Principles compile law pertaining to IDPs, they can be used as a tool to establish the minimum standards for international refugee protections as well, as one might argue that refugees and asylum seekers are often in need of higher levels of protection since their status as non-citizens make them more vulnerable than IDPs.

The conditions of detention in Nauru and Papua New Guinea are patently in violation of the human rights norms set forth in the above-mentioned instruments. Furthermore, since the establishment of these facilities, the living standards have continuously deteriorated, despite heavy condemnation by the UNHCR and the international community as a whole. Troublingly, there are many who believe that the Australian government has purposefully and knowingly continued to keep the conditions in the centres below international standards for the sole purpose of deterrence and regulating the flow of migration into their borders (Pickering & Weber, 2014, 1010) through "cruelty by design" (Mann, 2021, 316).

The UNHCR undertook numerous monitoring visits to Nauru and PNG to assess the situation within the detention centres. After a 2013 monitoring visit, the UNHCR expressed their concern that the centres "do not provide safe and humane conditions of treatment in detention" (UNHCR, 2013, 1; UNHCR, 2013, 1). The UNHCR noted that, in the compounds, the only real opportunity for privacy for asylum-seekers was ablution blocks, many of which were not cleaned and maintained regularly enough. There was also particular concern in regard to one of the blocks which "smelt putrid and had blocked shower drains with several inches of filthy water flooding the floor, was badly lit and not adequately ventilated" (UNHCR, 1). These observations were validated by the interviewed

asylum seekers which expressed the following issues about the living arrangements: Very cramped conditions and the need for privacy; hygiene issues and lack of culturally appropriate facilities in the ablution blocks; extreme heat and humidity; health concerns caused by insects and parasites (particularly malaria from mosquitos); and hygiene issues in relation to the food served (UNHCR, 1). An eye-witness account of a pediatric doctor who traveled to Nauru in 2014 described how showers and toilets were up to 120 metres away from the housing units, deterring many women and children from making the long walk at night under the eyes of the guards, who wet their beds and then put their mattresses in the sun to dry. It was also reported that shower time was extremely limited, and guards would offer longer periods if the women exposed themselves (Isaacs, 2015, 412).

The observations of the UNHCR were repeated over time by numerous UN bodies, international organizations and scholars. Paris Aristotle, who was a member of the Expert Panel that incentivized the Labor government to restart the off-shore processing system, stated that the detention centres were "horrible" and "a corruption of what was recommended to the government" (Doherty, 2017).

Nauru files published in 2016 by the Guardian, describe alleged attacks, sexual assaults, attempts at self-harm, and child abuse. According to the Guardian's investigation, children are involved in 51.3 percent of the 2116 reports, even though they made up only approximately 18 percent of those detained at the time. The files comprised of 2,000 of leaked incident reports from the detention centre on Nauru, totaling to about 8,000 pages, has been dismissed and trivialized by the immigration minister Peter Dutton (Berger, 2016, 1).

In its submission to the Committee on Economic, Social and Cultural Rights (hereinafter "OHCHR"), Human Rights Watch referred to the leaked UNHCR report which found that "ptsd and depression have reached epidemic proportions" in the detention centres and "anticipated that mental illness, distress and suicide will continue to escalate in the immediate and foreseeable future" (HRW, 2016).

A joint 2018 report by the Refugee Council of Australia and Amnesty International, addressed issues of safety in the detention centres, exemplified by two infamous events. The first one of these was the 2014 incident in PNG, where locals and contractors attacked the centre, resulting in the death of Reza Barati, an Iranian asylum seeker. The second incident that took place in 2017 resulted in nine people being injured due to the PNG Defence Force firing shots at random into the centre (Amnesty International, 2018, 14).

The surge of suicides and suicide attempts in the centres have been symptomatic of the dire mental health situation, which is a reflection of, among many issues, the inhuman living conditions enforced upon the asylum seekers. On May 2018, the UNHCR Director of the Bureau for Asia and the Pacific, made the following statement on the mental health crisis in the offshore detention centres, "The long-term detention – five years plus – in Nauru has taken an immense toll on the people… Over 80 per cent of the people have been diagnosed by clinical psychiatrists and others as suffering from PTSD and trauma and depression, in both PNG and Nauru" (Ratwatte, 2018).

A former Salvation Army employee who had been contracted to provide "welfare services" at Manus Island Regional Processing Centre, described the conditions at the centre in his testimony to the Legal and Constitutional Affairs Committee: "When I arrived on Manus Island during September 2013, I had previously worked on Nauru for one year. I thought I had seen it all: suicide attempts, people jumping off buildings, people stabbing themselves, people screaming for freedom whilst beating their heads on concrete. Unfortunately, I was wrong; I had not seen it all. Manus Island shocked me to my core. I saw sick and defeated men crammed behind fences and being denied their basic human rights, padlocked inside small areas in rooms often with no windows and being mistreated by those who were employed to care for their safety" (SLS, 2017, 40).

In July 2018, the findings on the death of the Hamid Khazei, a 24-year-old Iranian asylum seeker detained on Manus Island, were handed down by the Queensland coroner. The coroner revealed that Khazei's death was very much preventable as he suffered from a common tropical infection that could have been effectively treated with antibiotics. According to the coronial findings, "no antibiotic was available at the MIRPC clinic to safely and effectively treat the range of infections commonly found in a tropical setting, including the infection suffered by Mr. Khazei" (Coroners Court, 2018, 3).

A December 2018 report by the Medecins Sans Frontieres (hereinafter "MSF") stated that the "mental health suffering on Nauru is among the worst MSF has ever seen, including in projects providing care for victims of torture" (MSF, 2018).

In February 2019, the Asylum Seeker Resource Centre released a sample of 49 de-identified medical cases of asylum seekers held in the detention centres. According to the released data sample, majority of the cases who

were recommended for medical transfer had been waiting for 2 to 3 years for transfer and the patients' conditions had "escalated in severity and complexity in the meantime" (ASRC, 2019).
An asylum seeker detained in Manus Island described the lack of medical treatment by saying "the local doctors don't want to treat us; they send police when someone attempts suicide instead of a medical nurse or doctor" (ASRC).
Even more alarming, there have been repeated reports of allegations of outright torture, including the use of techniques such as "waterboarding" and "zipping" (Sanggaran & Zion, 420), with some referring to the facilities as "Australia's Guantanamo Bay" (Morales, 2016, 327).

Conclusion

The off-shore processing regime established by Australia is a symptom emanating from the decades long framing of refugee policies as a threat to national security and sovereignty. The government's insistence to overlook the humanitarian aspect of the off-shore regime makes way for the egregious human rights violations witnessed at the centres in Nauru and PNG. Dissecting the short-comings and violations stemming from this regime carries particular importance as an increasing number of European countries are expressing an interest in adopting third-country processing regimes.
It is troubling to see that the government of Australia has not been truly held accountable for its blatant disregard for international law and committing refoulement through exposing asylum seekers to human rights violations. The normalization of this policy of suspending asylum seekers indefinitely in a condition of exteriority, cannot be prevented without holding the Australian government accountable for the treatment of refugees and asylum seekers (Dickson, 2015, 437). The repeated condemnations by the UNHCR have fallen on deaf ears, and the off-shore policy has continued to be reiterated by successive Australian governments.
The absence of domestic criminal litigation has led to many scholars and legal experts to point towards the International Criminal Court as another avenue for holding Australia responsible (SLS, 2017). In a Communiqué submitted to the Office of the Prosecutor (hereinafter "OTP"), a coalition of experts has found that there is basis to believe that the crimes "at the heart of Australia's immigration detention policy constitute a widespread and systematic attack against a civilian population, within the meaning of Article 7 of the Rome Statute of the International Criminal Court" (SLS). Despite this Communiqué, the OTP did not open a preliminary examination over the allegations, a highly criticized decision, and it appears that there are no remaining international grievance mechanisms to investigate or prosecute the alleged violations of the Australian off-shore detention regime. Irrespective of the OPT's decision, it is crucial for the international community to continuously lay bare the gravity of the crimes committed by Australia and strive towards incentivizing domestic and international courts to hold perpetrators of these acts accountable and prevent the replication of this policy by EU countries.

[i] In 2001, the Norwegian freighter MV Tampa rescued 433 asylum seekers stranded in international waters, 150 kilometers north of Christmas Island. The vessel's captain Arne Rinnan declared a state of emergency and attempted to dock at Christmas Island. The Howard government refused to allow the vessel to reach the Christmas Island and dispatched SAS troops to board the vessel to prevent it from reaching Australia's territorial waters. The conflict resolved after the Australian government entered into dual agreements with Nauru and New Zealand. Consequently, the asylum seekers were transferred to detention centers in Nauru, a number of them consequently being resettled in New Zealand.

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