

**DETAINMENT: HOW THE GOVERNMENTS OF THE  
UNITED STATES AND AUSTRALIA CHOOSE TO SECURE  
BORDERS THROUGH INHUMANE MEANS**

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*Both the United States and Australia have developed economies and vast resources that affords them the ability to come to the aid of a large number of refugees and asylum seekers. Instead, both countries have chosen to “protect their borders” at the expense of asylum seekers and basic human rights. Through great expense lawful asylum seekers are being kept from reaching a place of safety where they can file their asylum claims and avail themselves of either country’s protections. In addition, both the United States and Australia have created levels of deterrence through indefinite detention, family separation, and off-shore processing. All of these tactics have been determined to be violations of the basic human rights, as well as domestic and foreign law.*

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*Behrouz Boochani is a Kurdish-Iranian journalist who fled to Australia seeking asylum.<sup>2</sup> Boochani left his home after the newspaper's offices were raided and his colleagues were arrested.<sup>3</sup> The timing and mode of his escape created a problem.<sup>4</sup> Rather than allowing Boochani*

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<sup>2</sup> Boochani wrote for Werya, a student paper that promoted Kurdish language, culture, and politics. He was arrested and interrogated by Sepah in 2011. In addition, he was a member of the Kurdish Democratic Party and Nation Union of Kurdish Students. Al Jazeera, *Behrouz Boochani: Living in Limbo on Manus Island* (Feb. 10, 2018)

<https://www.aljazeera.com/programmes/talktojazeera/inthefield/2018/02/behrouz-boochani-living-limbo-manus-island-180208113527825.html>

<sup>3</sup> *Id.*, Boochani, Behrouz, *'This is hell out here': how Behrouz Boochani's diaries expose Australia's refugee shame*, The Guardian (Dec. 4 2016) <https://www.theguardian.com/world/2017/dec/04/this-is-hell-behrouz-boochani-diaries-expose-australia-refugee-shame>.

<sup>4</sup> *See generally*, Migration Act 1958, [http://www8.austlii.edu.au/cgbin/viewdb/au/legis/cth/consol\\_act/ma1958118/](http://www8.austlii.edu.au/cgbin/viewdb/au/legis/cth/consol_act/ma1958118/) (hereinafter, Migration Act); Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012, <https://www.legislation.gov.au/Details/C2012A00113> (hereinafter Regional Processing Amendment); Convention Relating to the Status of Refugees (entered into force Apr. 22, 1954) (hereinafter Refugee Convention); and Protocol Relating to the Status of Refugees (entered into force Oct. 4, 1967) (hereinafter Refugee Protocol).

Starting with the August 2012 amendment to the Migration Act, Australia began seeking ways to circumvent their responsibilities to asylum seekers who arrived by boat. Now classified as “unauthorized maritime arrivals” or “illegal maritime arrivals” these refugees and asylum seekers were given less consideration and humanitarian rights. They were even barred from their legal rights altogether. The new regulations allowed the government to treat all these arrivals, even those who actually arrived in Australia or Australian territories, as if they were off-shore arrivals. Australian Prime Minister put in place a law that would ban all people arriving by boat from July 19, 2013 forward would be barred from applying for asylum in Australia. Children are exempt from the ban. The new legislation also left an option which would allow the Minister of Immigration and Border Protection to “lift the bar” and allow admittance if the application for a visa would be considered in the public interest. The Australian government in what they described as a “battle of wills” made this change to their laws, blatantly disregarding the Convention and Protocol for Refugees, after multiple boats full of people seeking asylum sunk in their waters. The stated purpose of this new regulation was to stop people smugglers however, it was not the people smugglers who were forced to handle the consequences. (Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1617a/17bd072](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1617a/17bd072). *See also*, Hunter, Fergus and Michael Koziol, Asylum seekers who come by boat banned for life under new laws, Sydney Morning Herald (Oct. 30, 2016), <https://www.smh.com.au/politics/federal/asylum-seekers-who-come-by-boat-banned-for-life-under-new-laws-20161030-gsdvf7.html>.)

*and his shipmates to apply for asylum, government officials transferred them from their landing spot on Christmas Island<sup>5</sup> to the Manus Regional Processing Centre<sup>6</sup> on Papua New Guinea.<sup>7</sup>*

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To this end, the government has declared that they did successfully stop the boats. The government has also denied running afoul of their obligations under the Convention and Protocol for the Status of Refugees.

In addition, the Australian government claims that by placing refugees in the “safe third country” the government is not returning refugees to their unsafe country or place of persecution and therefore still meeting the obligations set in the Refugee Convention. The cost for the Australian government to avoid taking in these refugees is billions annually to the governments of Papua New Guinea (PNG) and Nauru. (Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the Convention, U.N. Doc CERD/C/AUS/18-20, at 38-40.)

<sup>5</sup> Christmas Island is an Australian territory located south of Jakarta and west of Darwin in Australia’s Northern Territory. Migration agents in Australia have lodged complaints against the government for the forced removal of refugees on Australian territory. In May 2017, DIBP temporarily lifted the ban on maritime arrivals, allowing them approximately three months to lodge their requests for protection. The refugees were only allowed to request protection under the temporary protection visa (TPV) or safe haven enterprise visa (SHEV). The TPV only provides a three-year visa and there is nothing in place that will allow permanent protection. (Australian Government Department of Home Affairs, <https://www.homeaffairs.gov.au/trav/visa-1/785->.) The SHEV is a five-year visa with the potential to request a more permanent status. (Australian Government Department of Home Affairs, <https://www.homeaffairs.gov.au/trav/visa-1/790->.) However, in order to apply for a permanent visa, the SHEV requires that the asylee reside in a rural area which can be exceedingly difficult for members of refugee communities because these outlying areas lack the availability of resources, assistance, and support.

<sup>6</sup> The Australian government re-established offshore processing center for refugees in 2012. The government paid approximately 1.2 billion annually to the government of PNG and Broadspectrum to run the facility. The Manus Processing Centre houses men. There is another Regional Processing Centre on Nauru for families, women, and children. Legal representatives were rarely allowed access to the offshore detention centers and instead had to rely on phone calls to speak to their clients. Amnesty International, *Treasure Island How Companies Are Profiting From Australia’s Abuse of Refugees on Nauru* (2017), <https://www.amnesty.org/en/documents/asa12/5942/2017/en/>; See generally, United Nations High Commissioner for Refugees, Inquiry into the Serious Allegations of the Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, Submission 43 and Human Rights Watch, *World Report 2017 – Australia* (Jan. 12, 2017), <http://www.refworld.org/docid/587b585d4.html>.

<sup>7</sup> Boochani, Behrouz, *Malcolm Turnbull, why didn’t you answer my questions on Q&A about Manus Island?*, *The Guardian* (Jun. 20, 2016), <https://www.theguardian.com/commentisfree/2016/jun/21/malcolm-turnbull-why-didnt-you-answer-my-question-on-qa-about-manus-island>. After the Ban, ships would be intercepted at sea and re-routed to Nauru and Manus off-shore

*Boochani is only one of the approximately 2,000 people that have been detained in Australia's offshore processing centers.<sup>8</sup> The majority of detainees being held at the Manus Regional Processing Centre and the Nauru Regional Processing Centre are legally recognized as refugees and that status makes them eligible for asylum<sup>9</sup>. Even with that status classification, they are prohibited from leaving the detention center.<sup>10</sup> Hundreds of men, like Boochani, have been imprisoned on Manus since the country's ban on "boat arrivals" was first imposed. These unjustifiably imprisoned individuals are paying the cost for the Australian government's "battle of wills" with people smugglers. Since they received their refugee status on PNG, that is the country where they were instructed to remain.<sup>11</sup> They were not being allowed to settle in Australia.<sup>12</sup> The Australian government has taken*

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processing centers. Officials would not board the boat or check the safety of the passengers prior to forcing the boats to change course. On one such instance, the boat was at sea for an additional five days and the passengers were without food for the length of the voyage.

<sup>8</sup> Boochani, Behrouz, *'This is hell out here': how Behrouz Boochani's diaries expose Australia's refugee shame*, The Guardian (Dec. 4 2016), <https://www.theguardian.com/world/2017/dec/04/this-is-hell-behrouz-boochani-diaries-expose-australia-refugee-shame>. It is important to not lose sight that these facilities are paid for and maintained by the Australian government even though the facilities are not on Australian land or territory. In order for the scheme to work, the people seeking asylum cannot be on Australian land so that Australia is not required to provide them asylum but are still not returning them home. Air arrivals are not treated in this manner and are allowed to seek asylum in Australia.

<sup>9</sup> Boochani, Behrouz, *Faysal Ishak Ahmed's life was full of pain. Australia had a duty to protect him*, The Guardian (Dec. 29, 2016), <https://www.theguardian.com/commentisfree/2016/dec/30/faysal-ishak-ahmeds-life-was-full-of-pain-australia-had-a-duty-to-protect-him>. Many were granted asylum by the PNG government and Australia admitted that they had valid claims.

<sup>10</sup> *Id.* Instead of being free to leave the detention centers, the refugees and asylees were sent to different housing structures in the detention center.

<sup>11</sup> Boochani, Behrouz, *All we want is freedom – not another prison camp*, The Guardian (Nov 12, 2017), <https://www.theguardian.com/commentisfree/2017/nov/13/all-we-want-is-freedom-not-another-prison-camp>; Boochani, Behrouz, *Diary of disaster: the last days inside Manus Island detention centre*, The Guardian (Oct. 30, 2017), <https://www.theguardian.com/commentisfree/2017/oct/30/diary-of-disaster-the-last-days-inside-manus-island-detention-centre>

<sup>12</sup> When the Ban was put into place, PM Turnbull declared that no one arriving by boat would ever be settled in Australia. PM Turnbull refused to allow the refugees to be resettled in New Zealand because that would be a "backdoor" into Australia. Time and again, PM Turnbull has shown through his actions that he preferred to allow these men to be imprisoned and tortured than to allow them to leave the prison he created.

*great efforts and expense to avoid caring for these refugees.<sup>13</sup> In addition, the people of Manus are openly hostile towards the refugees<sup>14</sup> and have violently attacked their camps.<sup>15</sup>*

*When the Manus detention facility was closed five years after Boochani arrived, the men housed in the centre were expected to travel to Loregau to resettle or be resettled on Nauru.<sup>16</sup> Neither PNG or Nauru had the capabilities to care for the refugees. The citizens of both areas feared the refugees since they had initially been housed in a prison-type environment and their large numbers.<sup>17</sup> Some of the lucky few may be*

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<sup>13</sup> In 2016-2017, the Australian government had expended over four billion dollars on various schemes to protect their border. These schemes included a resettlement in Cambodia at the cost of 6.76 million dollars to resettle 7 refugees, only three remain in Cambodia. The government also provided cash payments of approximately \$25,000 a person to voluntarily return to their country. The Australian government also reached an agreement with the United States in which the US agreed to take refugees from Manus in exchange for Australia taking refugees held by the US on Costa Rico. The refugees must meet the requirements under USCIS before being settled in the US and the US could in effect re-settle none of the refugees and still be seen as upholding their end of the bargain. (Packham, Colin and Aaron Bunch, Scores of detained asylum seekers take Australian cash and return home, Reuters (Mar. 1, 2017), <https://www.reuters.com/article/us-australia-asylum/scores-of-detained-asylum-seekers-take-australian-cash-and-return-home-idUSKBN1690DF>.)

<sup>14</sup> Boochani, Behrouz, *Days before the forced closure of Manus, we have no safe place to go*, The Guardian (Oct. 27, 2017), <https://www.theguardian.com/commentisfree/2017/oct/27/days-before-the-forced-closure-of-manus-we-have-no-safe-place-to-go> Boochani is understanding of the concerns of the Manus people. It is a small island and the town where the 800 male refugees would be resettled has a small population of about 3,000 people. Not only are there cultural differences but the closure of the center also eliminates jobs for the locals. None of these issues appear to have been considered by either the Australian or PNG government when they entered into this agreement. The situation leaves the locals of Lorengau and the refugees feeling unsafe.

<sup>15</sup> Boochani, Behrouz, *Malcolm Turnbull, why didn't you answer my questions on Q&A about Manus Island?*, The Guardian (Jun. 20, 2016), <https://www.theguardian.com/commentisfree/2016/jun/21/malcolm-turnbull-why-didnt-you-answer-my-question-on-qa-about-manus-island>.

<sup>16</sup> Australia funds a separate off-shore detention processing facility on Nauru. This facility was initially set up to house families, women, and children. The UNHCR concluded an investigation as to whether it would be possible to resettle the refugees on Nauru only to conclude that the refugee populations had needs were too great for the Nauruans to manage even in the short term. (Australian Human Rights Commission, *Asylum seekers, refugees, and human rights: Snapshot report (2<sup>nd</sup> edition)*, 2017, at 39-40 [https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_Snapshot%20report\\_2nd%20edition\\_2017\\_WEB.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Snapshot%20report_2nd%20edition_2017_WEB.pdf).)

<sup>17</sup> *Id.*

*considered for resettlement in the United States.<sup>18</sup> Currently, there is no safe place for the refugees to settle, which leaves them with the only option of remaining in the detention center— their prison home—despite its forced closure.<sup>19</sup>*

*Boochani continued to live on Manus as his friends around him died needlessly. He kept a diary of the treatment suffered by the refugee prisoners.<sup>20</sup> Boochani was even so bold as to create a documentary with the aid of filmmaker Arash Kamali Savestani who edited the videos taken by Boochani with a smartphone and erratic wi-fi.<sup>21</sup> Boochani documented the mundaneness and hopelessness of the men in the Manus detention center.<sup>22</sup> The name of the film came from the beloved native bird, Chauka. At the same time every day, the song of the Chauka would fill the air. Sadly, for the inmates of Manus, it was also the name of a solitary confinement shed where many of them had faced beatings and torture at the hands of the very people whom the Australian government*

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<sup>18</sup> Malcolm Turnbull, Transcripts of phone calls with Mexico and Australia, The Washington Post, Miller, Greg, et al.

[https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm\\_term=.19fb473422af](https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm_term=.19fb473422af). See also, Anderson, Stephanie and Francis Keany, *Malcom Turnbull, Peter Dutton announce refugee resettlement deal with US*, Australian Broadcasting Corp. News Australia (Nov. 12, 2016), <http://www.abc.net.au/news/2016-11-13/australia-announces-refugee-resettlement-deal-with-us/8021120>

<sup>19</sup> The PNG government ruled that the off-shore detention centers were illegal and that they needed to be closed. Many of the inmates at Manus were granted asylum on PNG even though they did not elect to have their asylum claims be processed by the PNG government. In addition, due to past attacks on the detention center, the refugees and asylees did not feel free from harm on the island.

<sup>20</sup> The Guardian printed many portions of his diary in addition to printing op-ed articles relating to life and treatment on Manus. Boochani has in many ways become the face of the Manus prisoner. He refuses to be silenced or to accept the injustices placed upon him by the Australian government. Although he initially wanted to seek asylum in Australia, he now just wishes to escape their hold.

<sup>21</sup> The film was edited by Arash Kamali Savestani. Savestani is also credited as the co-director. The film can be found online at: <https://vimeo.com/ondemand/chauka>.

<sup>22</sup> “Chauka, Please tell us the time” premiered at the Sydney Film Festival in 2017. I was lucky enough to attend the showing of the film and Question and Answer session with Boochani’s collaborator Arash Kamali Sarvestani. He spoke of the injustices occurring at the prison camp on Manus, highlighting the little ways that the camp was killing the spirit of refugees. He also told of the difficulty of obtaining the footage since the men on Manus are under surveillance and the wi-fi connection was unpredictable. He spoke about the refugees being denied access to medical treatment and legal assistance. At the conclusion, he reminded all of us in the audience that Boochani was not with us that night and that he was still on Manus. Boochani was not allowed to attend either showing, his requests for VISAS were denied.

*was paying millions in order to keep these refugees safe.<sup>23</sup> Boochani continues to speak from Manus, mourning the deaths of his friends and his hope, and waiting for the US to fulfill their agreement with Australia.<sup>24</sup>*

*“If I could accept injustice, I would have stayed in Iran. I cannot forget my humanity, principles and values.”<sup>25</sup>*

### **I. Wealthy Nations Ignoring Their International, Domestic, and Humanitarian Duties**

Australia is not alone in its practice of offshore detainment, indefinite detainment, and violations of domestic and international law with regards to the rights of asylum seekers. The United States and Australian governments have taken grave measures to ensure the security of their borders.<sup>26</sup> The actions taken by both governments have fallen

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<sup>23</sup> Chauka, Please tell us the time (Sarvin Productions 2017)

<sup>24</sup> *Saturday Morning: Behrouz Boochani – Chauka, Please tell us the time*, Radio New Zealand (May 5, 2018), <https://www.radionz.co.nz/national/programmes/saturday/audio/2018643598/behrouz-boochani-chauka-please-tell-us-the-time>. Many of the 600 remaining men are from countries that the US have restricted under EO 13780, including Boochani whose nationality is Iranian. Boochani believes that the US will view his case differently since he is a Kurdish Iranian. (*See generally*, Proclamation No. 9645, Fed. Reg. 82,186 (Sept. 27, 2017).

<sup>25</sup> Boochani, Behrouz, *It is hard for me to leave Manus Island without justice. Behrouz Boochani on the US refugee deal*, The Guardian (Nov. 12, 2016), <https://www.theguardian.com/australia-news/2016/nov/13/its-hard-for-me-to-leave-manus-island-without-justice-behrouz-boochani-on-the-us-refugee-deal>

<sup>26</sup> Citizens of both countries have expressed interest in overall immigration reform. Many have spoken out against harsh and inhumane treatment. It remains a hot button for politicians in both countries and it does not appear that the issue will be resolved in the near future. There is much debate about it actually means to secure the border. (Freedom House, *Freedom in the World 2017 – Australia* (Sept. 1, 2017), <http://refworld.org/docid/59c10310e.html>; Freedom House, *Freedom in the World 2017 – United States* (Apr. 15, 2017), <http://www.refworld.org/docid/58ff3e167.html>)



short of their obligations under international<sup>27</sup> and domestic laws.<sup>28</sup> Both countries allow indefinite detention and arbitrary detainment as a deterrence for future immigration, while also enlisting the assistance of surrounding countries to house and prevent immigrants from crossing into their borders.<sup>29</sup> While the United States and Australia should be blazing a path of humanitarianism towards their worldly neighbors in need, instead they are showing the world ways to isolate their nations and avoid international responsibility.<sup>30</sup> Under the guise of border sovereignty, the governments of the United States and Australia have used their great power and wealth to avoid their international responsibility to our neighbors who are in the greatest of need.

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<sup>27</sup> For both countries this includes the Refugee Convention and Refugee Protocol of which both countries have signed and then incorporated into their domestic law. *See generally*, Refugee Convention, Refugee Protocol, Immigration and Nationality Act (INA), and Migration Act.

<sup>28</sup> *See generally*, INA and Migration Act

<sup>29</sup> *Id.* *See also* Global Detention Project, *United States Immigration Detention Profile* (May 2016),

<https://www.globaldetentionproject.org/countries/americas/united-states>;

Amnesty International, *Americas: US and Mexican authorities must respect caravan participants' right to seek asylum*, April 24, 2018,

<http://www.refworld.org/docid/5b323294a.html> (US and Mexican officials took steps to circumvent a caravan of asylum seekers from crossing the border once they learned of their purpose. US President used the caravan as an excuse to deploy the National Guard. Department of Homeland security threatened to indefinitely detain any one crossing the border who was a member of the caravan.)

<sup>30</sup> Even while elected officials are taking such extreme efforts to curb immigration, it cannot go without saying that many of the citizens of these nations are speaking out against their government officials. Not only are they marching in the streets but in the US, we are seeing a greater level of diversity in many political races.

## II. Why Compare the Immigration Policies Between the United States and Australia?

I have chosen to compare the relevant policies between the United States and Australia, because both countries have similar resources and the duty and ability to follow the Convention on Refugees and the Protocol for the Convention of Refugees.<sup>31</sup> The governments of both countries have pushed the importance of human rights and pushed for the importance of international law, although the level of support has differed over the years since the formation of the Refugee Convention. The landmass each country has available is similar, with the United States being slightly larger.<sup>32</sup> Additionally, both countries have similarly developed economies, which grants them the ability to provide aid for people outside of their borders.<sup>33</sup> It would not be appropriate to compare countries that already face economic difficulties and overpopulation when stating the need to reapportionment aid to those in need.

However, there are also key differences that I took into account during my assessments and analyses surrounding immigration with each country. The most apparent difference is the fact that the United States

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<sup>31</sup> Convention Relating to the Status of Refugees (entered into force Apr. 22, 1954)); Protocol Relating to the Status of Refugees, <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

<sup>32</sup> The United States is 9,833,517 square kilometers and Australia is 7,741,2200 square kilometers. (*United States vs. Australia – Country Comparisons*, <https://www.indexmundi.com/factbook/compare/united-states.australia>)

<sup>33</sup> See generally, *United States vs. Australia – Country Comparisons*, <https://www.indexmundi.com/factbook/compare/united-states.australia>. Although there is a larger population in the US, the unemployment rates are within a percentage. In addition, the GDP, consumption, and inflation are aligned.

has land borders and Australia does not. Immigrants traveling to Australia must arrive by air or boat, whereas in the United States traveling over land is the primary mode used.<sup>34</sup> Although both countries tend to have larger pockets of the population residing on and near the coastal boundaries, for Australia that is out of necessity due to low habitability in the center of the continent and country.<sup>35</sup> It is essential to live nearer the food table for most of the population. Finally, the cost of living is slightly higher in Australia than it is in the United States.<sup>36</sup>

My final consideration in these comparisons nestled on the United States' and Australia's continued collaborative work in a multitude of foreign affair issues. It is believed that Australia's use of offshore-detention centers was initially modeled off of the United States' similar practices dating back to the 1980's.<sup>37</sup> Relating specifically to refugees and asylees, former United States President Barack Obama and former Australian Prime Minister Malcolm Turnbull came to an agreement regarding the transfer of asylees and refugees from both countries' offshore-detention facilities.<sup>38</sup> It is unclear what the status of

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<sup>34</sup> Even with these differing land configuration, both nations have chosen similar tactics to keep immigrants away from their borders. Both have collaborated with foreign nations to detain and monitor immigrants, used boats to intervene while immigrants are still at sea, and spend a great sum of tax payer dollars to detain those that do arrive or are caught without documentation.

<sup>35</sup> *United States vs. Australia – Country Comparisons*, <https://www.indexmundi.com/factbook/compare/united-states.australia>

<sup>36</sup> *Id.*

<sup>37</sup> Global Detention Project, *United States Immigration Detention Profile* (May 2016); <https://www.globaldetentionproject.org/countries/americas/united-states>

<sup>38</sup> Anderson, Stephanie, et al., *Malcolm Turnbull, Peter Dutton announce refugee resettlement deal with US*, Australia Broadcasting Corp. (Nov. 12, 2017), <http://www.abc.net.au/news/2016-11-13/australia-announces-refugee-resettlement-deal-with-us/8021120>; Malcolm Turnbull, Transcripts of phone calls with Mexico and Australia, The Washington Post, Miller, Greg, et al.

that international agreement is or how many refugees the United States will accept now that President Obama is no longer in office.<sup>39</sup>

### III. People Forced to Flee from Their Home: Refugees and Asylees in the United States

“No one leaves home unless home is the mouth of a shark.”<sup>40</sup>

The United States Congress passed the Refugee Act in 1980, which would ultimately incorporate the majority of the United Nations Convention on the Status of Refugees and Protocol on the Status of Refugees into our domestic law.<sup>41</sup> The Refugee Act was later

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[https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm\\_term=.19fb473422af](https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm_term=.19fb473422af)

<sup>39</sup> Packham, Colin and Aaron Bunch, *Scores of detained asylum seekers take Australian cash and return home*, Reuters (Mar. 1, 2017)

<https://www.reuters.com/article/us-australia-asylum-idUSKBN1690DF>.

<sup>40</sup> Shire, Warsan, *Home* (Dec. 4, 2015)

Excerpts from Shire’s beautiful tribute to refugees and the harshness of the refugee experience will appear throughout. This poem has been used in many campaigns for refugees. Multiple versions exist and can be found online which include photographs, drawings, dance, and theatrical interpretation. The author’s spoken word with interpretive images can be found at

<https://www.youtube.com/watch?v=nI9D92Xiygo&t=16s>. Shire is a London Poet Laureate and also the author of many of the songs on Beyonce’s album *Lemonade*.

<sup>41</sup> The Refugee Act defines a refugee as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...” The Refugee Act also allows for Presidential intervention if the person meets the aforementioned criteria but is not in the United States. Refugee Act of 1980, Public Law 96-212, <https://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>

incorporated into the Immigration and Nationality Act.<sup>42</sup> The purpose of the Act was to provide a procedure for people seeking asylum and resettling in the United States.<sup>43</sup>

People seeking asylum sometimes arrive with a valid visa and request protection after their arrival. Others may present themselves at the border, requesting asylum and protection from persecution lacking valid travel documentation.<sup>44</sup> Those who arrive at the borders will undergo a “credible fear” hearing, where an immigration officer or judge will decide whether this person’s fear is “real.” The test is both subjective and objective. The persecution faced must be related to the individual’s race, religion, nationality, political opinion, or particularized social group, and whether their government is able and willing to protect them anywhere in their country of origin.<sup>45</sup> The hearing is short and the asylee is rarely granted any legal representation.<sup>46</sup> This is particularly

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<sup>42</sup> INA § 208 and 8 U.S.C. 1158 details the regulations for Asylum. In order for a person to apply for asylum, the immigrant must be physically present in the United States. Legal means of arrival is not required if the immigrant can show that have a credible fear and meet the definition of refugee.

<sup>43</sup> *See generally*, Refugee Act and INA § 208. The Act also created exceptions for application including “safe third country” which would allow the removal of an asylum seeker to a country where the refugee had made their home and they would not face persecution, time limit of one year since arrival in the United States or change in their country’s conditions, previous denial, a change in circumstances which includes change in country conditions and extraordinary circumstances.

<sup>44</sup> The use of fake documents to arrive in country will not make a person seeking asylum ineligible. It can be part of how the Judge determines credibility.

<sup>45</sup> INA §235(b)(1)(A); 8 CFR §208.30, *See generally*, INA §208, Refugee Convention Art. 1, 8 CFR §207.1-207.3

<sup>46</sup> The Ninth Circuit has set aside their prior ruling by three judges and has set a new hearing with the eleven judge panel *en banc* to take place in December 2018 on *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9<sup>th</sup> Cir. 2018) which argued that alien minors have the right to counsel at government expense. In this instant case the immigration court did not advise the minor that he had a right to apply for Special Immigrant Juvenile Status.

important, because it is unlikely that the person seeking asylum<sup>47</sup> has a thorough and clear understanding of the immigration laws of the United States or understands what information they need to provide to the immigration officer during this brief hearing. Additionally, the questions asked by the officer tend to be open-ended and vague,<sup>48</sup> inviting incomplete and ill-informed answers from their interviewees. During the hearing, the refugee must show that there is a significant possibility of persecution, a standard which produces significant challenges given that it must be done in a different language and with differing cultural standards that the court does not always understand or consider.<sup>49</sup>

#### **IV. The Use of Arbitrary Detention as Deterrence for Future Immigration**

*no one leaves home until home is a sweaty voice in your ear*

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<sup>47</sup> Although the term “alien” is a legal term of art used throughout the laws of the United States, I will be referring to people who cross borders and are from other nations as people, refugees, immigrants. The sooner nations are able to see immigrants simply as people and not as others, the sooner comprehensive immigration reform can occur. People should never be seen or referred to as illegal, undocumented is barely acceptable.

In addition, those arriving by boat into Australia are legally referred to as irregular maritime arrivals, unlawful maritime arrivals, or illegal maritime arrivals. Not only are these terms dehumanizing but they also false. It is not unlawful to seek asylum, even if one has to disobey a law in order to arrive on the land to request asylum. These are simply people, refugees, immigrants in need of help.

<sup>48</sup> Many elements of the persecution may also be sensitive and difficult to tell a stranger. Women are often expected to share stories of sexual violence with a male that they just met moments ago. Also most cultures are not open about sexual assault and some people are unaware that overall violence should not be expected to be the norm.

<sup>49</sup> INA ¶235(b)(1)(B)(v). The significant possibility must be more than “a minimal or mere possibility” and the applicant must “demonstrate a substantial or realist possibility of succeeding.” Memo, Lafferty, Chief, Asylum Division, USCIS, Release of Updated ADOTC Lesson Plan, Credible Fear of Persecution and Torture Determination, HQRAIO 120/9.15b (Feb. 28, 2014).

*saying  
leave,  
run away from me now  
i dont know what i've become  
but i know that anywhere  
is safer than here*<sup>50</sup>

In 2009, the US Immigration and Customs Enforcement (ICE)<sup>51</sup> detained somewhere between 380,000 and 442,000 people, and the overwhelming majority of these individuals were being held for only civil immigration violations, at an annual cost of \$1.7 billion.<sup>52</sup> These individuals, families, and children can be detained indefinitely while they await their hearing determinations and potential removal.<sup>53</sup> The prolonged detention while awaiting immigration hearings can become too much for people, causing them to give-up on their dreams of building a new life and agree to a voluntary departure. The United States government briefly used the forced separation of children, including infants, from their asylum-seeking parents as a deterrent to those crossing the border.<sup>54</sup> Detainees exist in a strange in-between world of

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<sup>50</sup> Shire, Warsan, *Home* (Dec. 4, 2015)

<sup>51</sup> U.S. Immigration and Customs Enforcement (ICE) was created in 2003 through a merger of U.S. Customs Services and Immigration and Naturalization Service (INS). Prior to the creation of ICE, INS managed detention and deportation. It is not uncommon for members of the international communities and NGO's to refer to INS as ICE in actions that took place prior to 2003.

<sup>52</sup> Human Rights Watch, *Flaws in the US Immigration Detention Policy* (May 6, 2010), <https://www.hrw.org/report/2010/05/06/costly-and-unfair/flaws-us-immigration-detention-policy>.

<sup>53</sup> *Id.* and *Jennings v. Rodriguez*, 583 U.S. \_\_ (2018).

<sup>54</sup> Amnesty International, *USA: Routine Separation of asylum-seeking families violates international law*, May 7, 2018, <http://www.refworld.org/docid/5b3232c3a.html>. Immigration agents did not

our nation's justice system: they are being held for a civil violation, but in a criminal environment. They are not allowed self-determination and growth.<sup>55</sup> Asylees and refugees even fall prey to this type of arbitrary detention.<sup>56</sup> Some are forced to remain in the facilities long after the immigration court has granted them refugee status due to faulty paperwork.<sup>57</sup> These immigrants do not have any legal recourse except to depart; in the case of many refugees and asylees, this means the very real possibility of persecution and death.<sup>58</sup>

If the person is deemed to have a credible fear, the United States Citizenship and Immigration Services (USCIS), the agency administering the nation's immigration and naturalization processes, has the option of granting humanitarian parole so that they may enter the United States and wait for their asylum interview.<sup>59</sup> Unfortunately, granting of humanitarian parole has become less and less frequent.<sup>60</sup> It is now more

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consider proof of familial relationships of the fact that families could show credible fear. The new policy treats asylum seekers as criminals.

<sup>55</sup> In 2018, USCIS switched the priority handling of asylum claims. New claims are now being scheduled for their interview first and people who have already been waiting for at least a year will be stuck waiting even longer. Prior to the switch, many people had been waiting for two years. This change means that they could be waiting in limbo for many more years to come. The government has stated that this change will discourage false claims and allow deportation to occur sooner. We are torturing the already persecuted by not giving them the opportunity to build their new life. Many have work authorization but is it really healthy to keep people perpetually waiting on hold.

<sup>56</sup> *Supra*, Note 50

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> INA §212(d)(5)

<sup>60</sup> U.S. Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Jan. 4, 2010) [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf). The granting of humanitarian parole for asylum seekers used to occur after the officer found that the asylum seeker had credible fear, it was determined that another bar did not exist that could prevent admission, and that parole would be for "significant public interest."



common for the person to be sent to an immigration detention facility to await their interview.<sup>61</sup> Affirmative asylum seekers now make up a small portion of the detention population, but they used to be a rarity.<sup>62</sup>

Detention centers are even holding people after they have been given asylum, with the length of time kept ranging from days to weeks due to incorrect paperwork.<sup>63</sup>

*“Being in perpetual limbo has so many destructive impacts on the mental health of every single person.”<sup>64</sup>*

For those living undocumented and being apprehended by ICE, the likelihood of release continues to decline.<sup>65</sup> Executive Order (EO) 13767 calls for a greater reduction of “catch and release” practices when a refugee comes into contact with officers and agents.<sup>66</sup> Congress has

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<sup>61</sup> In February 2018, USCIS began to process new applications on a first in, first out basis with interviews being set within 45 days of the filing. During the last few years, wait time for an interview had grown from four to six months to up to two years after filing. Interviews were set up in date order. The change in processing will leave thousands of people who were already waiting left in limbo for an even greater period of time. For those individuals and families trapped in a detention facility, the increased waiting period leads many to rescind their application.

<sup>62</sup> United Nations High Commission for Refugees, *Beyond Detention: A global strategy to support governments to end the detention of asylum seekers and refugees 2014-2019* (2014, Revision 1), <http://www.unhcr.org/53aa929f6.pdf>. An application of asylum may be filed affirmatively or defensively. Defensive asylum claims are filed after removal proceedings have been initiated.

<sup>63</sup> *Id.*

<sup>64</sup> Boochani, Behrouz, *The Guardian*, *This is Manus Island. My Prison. My torture. My humiliation.* (Feb. 18, 2016) <https://www.theguardian.com/commentisfree/2016/feb/19/this-is-manus-island0my-prison-my-torture-my-humiliation>.

<sup>65</sup> Exec. Order. No. 13767 of Jan. 25, 2017. (E.O. 13767), <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>.

<sup>66</sup> *See generally*, E.O. 13767. “Catch and release” is the colloquial term for releasing the undocumented immigrant after they have been apprehended by ICE and provided with their removal hearing date. This was the common practice followed for most immigrants but has been gradually decreasing in the last decade. ICE used to release all but those that were dangerous or a flight risk. Releasing the immigrant prior to their removal hearing would allow the person

mandated that the Department of Homeland Security (DHS) maintain 34,000 detention beds for undocumented individuals, and EO 13767 calls for an increase in this quota.<sup>67</sup> It is estimated that this will require an additional \$2.6 billion.<sup>68</sup> In addition to not providing humanitarian parole, DHS has started to detain individuals that have been given parole and follow the release guidelines.<sup>69</sup>

The issue of overuse of detention exponentially harms the person seeking asylum. These individuals fled their home where they were persecuted and often feared for their life, only to be locked away in a prison-like environment. They are not free. They are being treated as if their existence is a crime and being forced to endure additional persecution.<sup>70</sup> Some detainees can receive a bond for release, but the amount required is often unaffordable or the immigration judge will change their mind and not allow bond without providing a reason.<sup>71</sup>

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to remain with their family, continue to work and care for themselves and family members, and also reduces government costs. The reduction of catch and release also applies to unaccompanied minors.

<sup>67</sup>The Immigration Form, *The Math of Immigration Detention: Runway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, August 2013, <https://immigrationforum.org/blog/themathofimmigrationdetention/>.

Immigration and Customs Enforcement report that the cost per bed, including administration costs, is \$159 per person, per day or five million dollars per day. Also, ICE admits that the numbers provided to Congress are lower than the actual costs.

<sup>68</sup> *Supra*, Note 63 and Note 65

<sup>69</sup> Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 21, 2016), <http://www.splccenter.org/20161121/shadow-prisons-immigrant-detention-south.>; 8 CFR §1236.1

<sup>70</sup> Members of the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) communities, especially transgender people, are often kept in solitary confinement or only are in contact with the general population for limited periods of time. This is particularly egregious since their claims for persecution are rarely discredited and usually will lead to the granting of asylum unless they are barred for another reason.

<sup>71</sup> *Supra*, Note 67

While USCIS and the Office of Refugee Resettlement (ORR) make an effort to reduce the amount of time that minors are in detention centers, the new executive orders and whether an individual was in detention prior to their arrival in the United States directly undermines these efforts.<sup>72</sup> Unaccompanied children are often reunited with family members currently living in the United States or they are sent to group homes.<sup>73</sup>

The detention process begins at Customs and Border Patrol (CBP) facilities, located on the border. While potential asylees await their credible fear hearing they are held in basic, short-term, holding cells. Even after recent hiring, there is still a limited number of officers who are available for the border credible fear hearings. People seeking asylum often wait days in a holding cell before finally having their credible fear hearing.<sup>74</sup> The treatment while in these temporary facilities is sub-standard and borders on inhumane.<sup>75</sup> The cells at CBP were not intended to house people for an extended period of time, the cells were

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<sup>72</sup> USCIS works with ORR to resettle unaccompanied minors/children (UAC) who enter the US.

<sup>73</sup> *Supra*, Note 65

Family members are required to prove their identity, but it is not required for the caregiver of a minor to be documented. One of the concerns with placing children is that they will fall prey to trafficking.

LGBTQI are often segregated or isolated from the general population. It can be harder to place the LGBTQI youth with a home because not all families will take in LGBTQI youth. Transgender youth face greater levels of violence and persecution in detention centers, group homes, and foster homes.

<sup>74</sup> Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (Feb. 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>

<sup>75</sup> *Id.*

initially constructed with hours, maybe a day in mind.<sup>76</sup> This becomes more problematic with the greater number of people in the facility.

The CBP cells often lack proper sleeping arrangements; as a result, people are required to sleep on a concrete floor.<sup>77</sup> Instead of bedding, detainees are given Mylar emergency blankets to keep themselves warm.<sup>78</sup> CBP does not have facilities that allow for families to be held together while they await their hearings.<sup>79</sup> The pulling apart of already traumatized children has a greater impact on their mental health, no matter the length of time.<sup>80</sup> The incarceration may last days before release or more likely being moved to a new facility for removal proceedings.<sup>81</sup>

In addition to increased detention inside the US borders, the US government has funded immigration enforcement by Mexican officials in an attempt to prevent immigrants from El Salvador, Guatemala, Honduras, and Nicaragua from reaching the border, blatantly ignoring the immigrants right to seek asylum.<sup>82</sup> The refugees that are apprehended

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* The reasoning given for the poor treatment including lack of sleeping mats and blankets is that the facilities were not originally intended to keep detainees overnight. The current regulations state that the holds at CBP should not exceed 72 hours.

<sup>79</sup> *Id.* It is customary for detained families to be kept together at the detention facilities although this does not always occur. Specific detention centers are just for housing families, women, and children. CPB does not have the space available at their border stations which can, and often does, cause the children to be kept from their parents while awaiting that initial credible fear hearing at the border. Sadly, recent news and rumors have begun to circulate about mothers being separated from children as young as 18 months without a clear reason.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup>Lakhani, Nina, *Mexico departs record numbers of women and children in US-driven effort*, The Guardian (Feb. 4 2015),

in Mexico prior to crossing into the United States, are then detained by Mexican immigration officials before being returned to their country, regardless of the potential asylum claims.<sup>83</sup> The US government does not have to take responsibility for the detention centers in Mexico or the treatment of the person held in those facilities. Given that asylum can only be requested on US soil, by preventing potential asylum seekers from stepping onto US land or reaching border patrol, the US government sidesteps their international responsibilities.<sup>84</sup>

#### **V. Australian Government's Quest to Stop the Boats, Even at the Cost of the Refugees and Asylees**

*"We will take anyone that you want us to take. The only people that we do not take are people who came by boat. So we would rather take a not very attractive guy that help you out then to take a Noble [sic] Peace Prize winner that comes by boat."*<sup>85</sup>

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<https://www.theguardian.com/world/2015/feb/04/mexico-deports-record-numbers-women-children-central-america>

<sup>83</sup> *Id.* Similar to the Australian government's claim that off shore detention eliminated the issue of people smugglers and the unsafe boats, the US government claims that this program was successful due to a 50% reduction in immigration at those borders. The US officials in charge of these policies appear to have little empathy for the unaccompanied minors that make up the vast majority of those who have been captured in Mexico while trying to reach the US border for help.

<sup>84</sup> INA §208(a)(1); *see also*, 8 U.S.C. 1158. This is true of any country that offers asylum, the person must be within or at their borders in order receive protection from that nation. Traveling through a third party country does not create a bar to applying in the United States unless the party seeking asylum has settled in the third party country and enjoys the protection of said country. Since Refugees and Asylum Seekers often travel great distances, even having prolonged stays in some places while trying to reach their final destination, the hearing office or Immigration Judge will weigh the evidence in order to determine if they have previously availed themselves of another government.

<sup>85</sup> Malcolm Turnbull, Transcripts of phone calls with Mexico and Australia, The Washington Post, Miller, Greg, et al. [https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm\\_term=.19fb473422af](https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm_term=.19fb473422af)

Australian immigration trends have shifted since the start of the millennium. In 2001, three out of four asylum seekers arrived by plane, with a valid visa, and would later apply for asylum.<sup>86</sup> However, not all immigrants were able to arrive by plane. For many people, they required the aid of smugglers to help them escape their countries.<sup>87</sup> The cost to be smuggled out of a country is greater than the cost of a visa and airfare.<sup>88</sup> By 2011, applications from people arriving by boat and air were almost even.<sup>89</sup> All boat arrivals were detained in offshore detention centers.<sup>90</sup> The Australian Navy and Border Force would stop illegal boats and force

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<sup>86</sup> Asylum Insights Facts and Analysis, *Air Arrivals* (Mar. 23, 2018), <http://www.asyluminsight.com/air-arrivals/#.WrVmPJPwa9Y>

<sup>87</sup> In order to travel on a plane, a passport is required. For the stateless individuals obtaining a legal passport is nearly impossible. For example, a Rohingya Muslim is not given citizenship by the Myanmar government or any country that they flee to. Without citizenship, this person is unable to freely travel because they cannot obtain State paperwork including a passport. For most Rohingya the first official identification document they receive come from the UNHCR. Almost all travel for these people fall outside of the law. In addition, Rohingya people are forced to pay bribes to attend school, to work, and simply to exist whether it is their country of birth or a nearby country they fled to. Failing to be able to pay these bribes means no access to education or employment; and in the worst cases it means being brutally beaten or murdered in the streets. The people do not have the means or capability to obtain the necessary documentation, permission from the government, and the cost of airfare. Their only hope is a crowded boat.

<sup>88</sup> The costs to be smuggled out of a country could include the fees for the smuggler, bribes to officials, bribes to other third parties, costs associated with fake documents, and cost of food and housing.

<sup>89</sup> *Supra* Note 87. The increase in boat arrivals also signified an increase on the number of boats that begun to sink offshore. Boats would be filled beyond capacity and poorly maintained. Most boats were scheduled to arrive at night.

<sup>90</sup> *Supra* Note 87. Non-IMA or air arrivals without a valid visa are kept in onshore facilities. They are also able to receive a bridging visa which allows them to leave the detention facility while they await the ruling. Once an immigrant receives a bridging visa, they are eligible for medical and financial assistance. The financial assistance is a loan the immigrant must pay back. If asylum isn't granted, the debt follows the immigrant and can prevent them from getting a visa in the future.

them away from Australian shores in order to circumvent international law that would require them to give asylum to those on their shores.<sup>91</sup> It is important to note that the number of people who receive asylum and arrive by plane is relatively low while those who arrive by boat meet the requirements that require recognition of asylum at the rate of 88% to 98%.<sup>92</sup>

*You have to understand,  
no one puts their children in a boat  
unless the water is safer  
than the land*<sup>93</sup>

Australia has put in place different policies to manage air and boat arrivals.<sup>94</sup> The reason given for the arbitrary distinction stems from people smugglers and boats being packed beyond capacity.<sup>95</sup> This led to

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<sup>91</sup> The offshore facilities came under fire and were ordered to be closed by October 2013. They are still housing in refugees awaiting to go to a new home. The people of Papua New Guinea deny the refugees work and housing, with only 25 of the 675 to relocate to the island. The Australian government has stated that even though these people are refugees, they were never in Australia, so they are not eligible for asylum in Australia and they need to remain in PNG. (Human Rights Watch, *World Report 2017 – Australia* (Jan. 12, 2017), <http://refworld.org/docid/587b585d4.html>.)

Prior to the ordered shutdown, the PNG government would refuse to allow refugees in need of medical assistance to leave the island. The Australian Government paid PNG approximately 1.2 billion.

<sup>92</sup> After Australia declared that no one who arrived by boat would receive asylum or any citizenship to Australia, a humanitarian group determined that 98% of refugees locked away on Manus and Nauru had valid asylum claims. Australia went as far as to block a deal with New Zealand's government that would have allowed over 130 refugees in the offshore facilities to immigrate to New Zealand. New Zealand citizens are allowed to travel and live in Australia without a visa. The Australian government saw this as a backdoor into the country.

<sup>93</sup> Shire, Warsan, *Home* (Dec. 4, 2015)

<sup>94</sup> *Supra*, Note 4

<sup>95</sup> *Supra*, Note 3, Note 76

multiple sea rescues and many refugee deaths.<sup>96</sup> In 2013, the Australian government vowed to eliminate the smuggling of refugees on their land by boat.<sup>97</sup> Since 2016, Australia has been attempting to find a solution that the government created with their off-shore detention facilities.<sup>98</sup>

*“It is not because they are bad people. It is because in order to stop people smugglers, we had to deprive them of the product.”<sup>99</sup>*

On January 28, 2017, the United States’ President Trump spent his conversation with Prime Minister Malcolm Turnbull exclaiming that the deal “shows him to be a dope” and he would “be seen as a weak and ineffective leader.”<sup>100</sup> misrepresenting the actual agreement made between the countries, and accusing all of the potential immigrants of taking part in terrorist activities.<sup>101</sup> It was clear that the United States’ president was not concerned with following domestic or international law related to asylum seekers and refugees or recognizing the

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<sup>96</sup> *Id.*; See generally, Ghezelbash, Daniel, *Refuge Lost Asylum Law in an Interdependent World* (2018).

<sup>97</sup> Human Rights Watch, *World Report 2017 – Australia* (Jan. 12, 2017), <http://refworld.org/docid/587b585d4.html>; *Supra*, Note 83

<sup>98</sup> See generally, Ghezelbash, Daniel, *Refuge Lost Asylum Law in an Interdependent World* (2018).

<sup>99</sup> *Supra*, Note 83

<sup>100</sup> *Supra*, Note 86.

<sup>101</sup> *Supra*, Note 86. It is important to note that the agreement between the US and Australia was not single sided. Many migration agents in Australia have referred the agreement made between Obama and Turnbull as a “people swap” or “refugee swap.” The US would take in up to 1,250 refugees being detained on Manus and Nauru in exchange for Australia taking refugees from the US detention center on Costa Rica. The detainees on Manus and Nauru had arrived or attempted to arrive in Australia via boat and the Australian government declared that boat arrivals would never be allowed to settle in Australia. It is important to note that the Australian government made a brief exception in May 2017 which allowed boat arrivals to apply for the TPV or SHEV. They provided an arbitrary deadline to apply for said visas as October 21, 2017.



Declaration of Human Rights. However, during this conversation Prime Minister Malcolm Turnbull acknowledged that the immigrants in question were in fact refugees and that they would have received different treatment if they had arrived by air.<sup>102</sup> It appears that both men placed little value on the importance of human rights and only saw the value of their own political capital.

## VI. Criminalization of A Lawful Act

*“All human beings are born free and equal in dignity and rights...”*<sup>103</sup>

Seeking asylum is undeniably a lawful act; however, there has become an increased number of asylum seekers who are being held in detention. Countries have begun to use detention as a form of deterrence.<sup>104</sup> Although the United Nations High Commissioner for Refugees (UNHCR) does acknowledge the need to quickly access false claims and return of the rejected asylum seekers, countries are using the automatic detention as a way to lessen the effects of crimes such as people smuggling and trafficking.<sup>105</sup> The use of detention in this way is a direct violation of the Convention and Declaration. This does not punish the person committing the felonious crime and often does not lead to any penalty for those people. The Refugee Convention states that the person

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<sup>102</sup> *Supra*, Note 86

<sup>103</sup> Decl. of Human Rights, Art. 1

<sup>104</sup> *Supra*, Note 3, Note 58, Note 60

<sup>105</sup> There are differences between human traffickers and smuggling. Some smuggler are also traffickers, but others just provide the way into the country for some form of payment.

seeking asylum is not to be penalized for how they obtain entry, even if they use illegal means.<sup>106</sup>

In the United States, entering without inspection comes with the criminal penalty of up to 6 months in jail and a fine of up to \$250 for the first offense. In the past, the penalty was waived for people seeking asylum. The person seeking asylum used to be given the opportunity to show themselves at the border and request asylum and it was not deemed to be entering without inspection if granted humanitarian parole.<sup>107</sup> If someone crossed the border after being removed, then it was a felony. However, this is not an automatic bar against the immigrant seeking asylum.<sup>108</sup> This person is still afforded the opportunity to have a credible fear hearing as it related to that moment in time due to the fact that domestic immigration law takes into consideration changing country conditions.<sup>109</sup>

When people are forced to flee from their country, many have to make difficult decisions. The person is fearful for their life and they do

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<sup>106</sup> Refugee Convention Art. 31. Both the US and Australian domestic law require asylum seekers to explain their mode of arrival and give reasons for unlawful activity. Common issues that occur during border crossings are the destruction of identifying documents and the use of illegal papers. For the US the standard is to view the crime committed against the seriousness of the persecution and threat faced by the asylum seekers. AU requires an explanation that includes fear or threat of danger. US and AU have waived admissibility bars against murder and manslaughter in rare and extreme circumstances. The decision to not penalize asylum seekers has been incorporated into the domestic laws of both nations. INA §235

<sup>107</sup> INA §208(a)(1)

<sup>108</sup> INA §208(b)(2)

<sup>109</sup> INA §208(a)(2)(D) The asylum seeker has the right to have his case adjudicated based on the current circumstances. The person might not have had an asylum claim when they entered the country previously but the change in country conditions, such as a change in political party, genocide, change in religious practices, have warranted a fresh look.

not believe that their government is able to assist them. In many cases, the group they fear is the part of the government. This makes legal travel difficult. Borders are monitored and security at airports can be difficult to bypass. Most people are forced to take different modes of transportation in order to not appear to be fleeing their country. The routes tend to become standardized and the people who aid those fleeing are all viewed as smugglers. Most receive money for their assistance. Often bribes are required along the way. This practice is especially common-place at airports.

There is also the misconception that the people seeking asylum travel to the country illegally. Some asylum seekers plan and are able to leave their nation with proper documentation and upon arrival request asylum. Others arrive with valid papers only to find that their country has changed, or they have changed in such a way that returning to their nation would now be dangerous.<sup>110</sup> Some are forced to purchase fake or bogus travel documents in order to escape the country that is persecuting them.<sup>111</sup>

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<sup>110</sup> *Id.* Common examples of change in country conditions are wars and coups. In addition, it is not uncommon for students who come to the west for education to have changing world views and religious views. Depending on their home country a change in religion or the adoption of feminist views could lead to the likelihood of persecution.

<sup>111</sup> Stateless people are stuck in the position of being smuggled and/or using false documents in order to travel since Stateless individuals are not able to legally obtain travel documents. In addition, people who are people persecuted by their government also face difficulty trying to travel throughout their country. When their travel documents are scanned, the local authorities may be notified which could lead to greater levels of persecution. One of the reasons that people chose to travel by boat is that that are able to bypass government officials and they are not forced to provide identification to leave their country.

## VII. Private Detention Centers are Profit Centers

### *Forced labor*

It is unlawful for detainees to be forced to work within the detention centers. However, it is a common practice for detainees to carry out jobs similar to those prisoners can also be assigned to, including: kitchen detail, laundry duty, and manual labor. Even with the meager pay, some detainees agree to the work assignments because they include various perks such as additional food and the opportunity to move more freely in the facility.<sup>112</sup> Detainees often make less than a dollar a day for their work.<sup>113</sup> This low pay, as well as delay in pay, has made some detainees decide not to take part in work details. In retaliation, detainees are put into solitary confinement.<sup>114</sup>

Class action lawsuits have been filed against private prison conglomerates including CoreCivics and GEO Group.<sup>115</sup> The response to suits demanding payment of minimum wage to be paid to detainees, is

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<sup>112</sup> Morrissey, Kate, Class-action lawsuit alleges immigrants are forced to labor in detention, AL Times (Dec. 3-, 2017), <http://www.latimes.com/local/lanow/lame-ln-sd-detention-center-20171230-story.html>

<sup>113</sup> *Id.*, Woodman, Spencer, *Private Prison Continues to Send ICE Detainees to Solitary Confinement for Refusing Voluntary Labor*, The Intercept\_ (Jan. 11, 2018), <https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/>

<sup>114</sup> *Id.*; Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 21, 2016), <http://www.splccenter.org/20161121/shadow-prisons-immigrant-detention-south>.

<sup>115</sup> Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 21, 2016), <http://www.splccenter.org/20161121/shadow-prisons-immigrant-detention-south>; Woodman, Spencer, *Private Prison Continues to Send ICE Detainees to Solitary Confinement for Refusing Voluntary Labor*, The Intercept\_ (Jan. 11, 2018), <https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/>

that it would drive up the cost of the now billion-dollar contracts that the US government has with these private prison corporations.<sup>116</sup>

Even with the suits, these prison corporations have little to worry about even when they lose. The Plaintiffs are often nowhere to be found. The majority having already been deported from the United States.<sup>117</sup>

*Balancing the Budget through incarceration*

For those immigrants in the southern state of the US, their chance of release is even more bleak. Many counties receive a portion of the proceeds for the detention centers and use it as a method to balance budget items.<sup>118</sup> Releasing people would therefore cut into their bottom line. Private companies making millions offer a small kick back to the local folks so that they ignore the indecency and inhumanity of what takes place in the facilities.<sup>119</sup>

The similarities between the for-profit detention centers of the south and Australia's off-shore detention cannot be denied. Guards are often openly xenophobic and prejudiced to the immigrants they are supposed to be caring for.<sup>120</sup> Guards are quick to retaliate thorough the use of segregation, solitary confinement, and brutality.<sup>121</sup> Once the immigrant has been sent to the facility, it is unlikely that they will be

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<sup>116</sup> Woodman, Spencer, *Private Prison Continues to Send ICE Detainees to Solitary Confinement for Refusing Voluntary Labor*, The Intercept\_ (Jan. 11, 2018), <https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/>

<sup>117</sup> *Id.*

<sup>118</sup> *Supra*, Note 67

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; *Supra*, Note 2, Note 8, Note 10, Note 13, Note 21, Note 23

<sup>121</sup> *Id.*

able to leave unless they chose to return to the home that they are running from.<sup>122</sup> There is lack of information about their legal case.<sup>123</sup> While Manus and Nauru blocked almost all access of lawyers, the southern facilities have less than 6% representation for their detainees.<sup>124</sup> Mail is confiscated and not given to detainees. There is an overall lack of food, water, and hygiene.<sup>125</sup> And behind closed doors, the corporations that run the facilities are sitting on piles of money.<sup>126</sup>

### **VIII. The Past Provided a Humanitarian Solution but the United States and Australian Governments Have Forgotten Why All People Needed the Human Rights Declarations and Convention of Refugees**

Once, the world idly watched as people were rounded up and killed.<sup>127</sup> Many of those same people were turned away from the shores

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> The standard of care is slightly better in facilities that house women and children. In facilities where men are kept alone, there is a higher level of brutality, confinement, and overall punishment.

<sup>126</sup> *Supra*, Note 5, Note 66; *See generally*, Global Detention Project, *United States Immigration Detention Profile* (May 2016);

<https://www.globaldetentionproject.org/countries/americas/united-states>

<sup>127</sup> Today the world faces similar atrocities and once again the populace has largely chosen to turn away from the plight of the Rohingya people, the Israeli and Palestinian conflict, and the decades long wars in the Middle East. These are just a small number of concerns that have led to the rise in refugees. UNHCR was established in the aftermath of World War II to provide aid and service to refugee populations. UNHCR has been working with countries to provide safe passage and a chance to build a new home for these and many other refugee populations. For many refugees, UNHCR provides needed identification to establish refugee status so that they have the hope of immigrating to a new country and rebuild their lives.

These are lessons we should have learned but governments look to the idea of sovereign borders as if that provides a right to allow deaths that could be avoided with minimal aid. Instead wars are waged in specific places that hold something we have deemed valuable. The Declaration of Human Rights tried to be a reminder that the thing of value, is each and every person.

of countries that could have offered a safe haven.<sup>128</sup> Only after the true nature of those atrocities occurring in Germany and Nazi-occupied land came to light did the world leaders come together. In 1946, the United Nations was formed and delegates from across the globe came together to draft the Universal Declaration of Human Rights.<sup>129</sup> The Declaration is the cornerstone of the UN's human rights treaties and incorporated into the language of the majority of the human rights treaties.<sup>130</sup>

To further protect the persecuted and stateless, the Convention Relating to the Status of Refugees<sup>131</sup> was drafted in 1951.<sup>132</sup> It was then in the hands of the countries to become signatories and to ratify the law in their respective lands. It was a promise to protect the future

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<sup>128</sup> Gross, Daniel A., The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies, Smithsonian.com (Nov. 18, 2015), <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/>. One man's story of espionage was used to turn away a boat of 937 people of which at least a quarter would die in the Holocaust. Lives that could have been saved had the US not acted in fear but with humanity.

<sup>129</sup> United Nations, *History of the Document: Universal Declaration of Human Rights*, <http://www.un.org/en/sections/universal-declaration/history-document/index.html>; *See generally*, Universal Declaration of Human Rights. Although the Declaration is not a law in itself, the rights that were established were painstakingly debated by the initial eighteen-member Commission on Human Rights and then carefully drafted by the eight-member drafting committee. At a time when the world was trying to heal, countries with vastly different ideologies worked to create a document that represented all people. It would later be amended to ensure the inclusion of all people and not just those fleeing Europe.

<sup>130</sup> *Id.*, International Covenant on Civil and Political Rights art. 9, March 23, 1976, 999 U.N.T.S. 171, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

<sup>131</sup> The Refugee Convention defines a refugee as someone "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable to, owing to such fear, unwilling to return to it."

<sup>132</sup> *See generally*, The Convention on the Status of Refugees

generations from falling prey to past atrocities. The 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) removed the geographical limitations and the reference to events occurring before January 1, 1951.<sup>133</sup> The Protocol also incorporated articles 2 to 34 of the Refugee Convention.<sup>134</sup> This Protocol was a promise that moving forward, we would not allow those in need of this level of aid to die on our watch. The delegation wanted to ensure, never again.

By signing and ratifying the Protocol, the United States and Australia made a pact with the persecuted people of the world, present and future: *We will offer you protection. Come to our shores and we will take you in.*<sup>135</sup> Over five decades have passed since the ratification, and there is one important question to be addressed: Can either country and economic powerhouse honestly say they have made the promised good faith effort?

Although there is much debate, both legal and philosophical, about the duty owed to immigrants, I would offer that all people are owed the same duties set forth in the Universal Human Rights Declaration, of which the United States aided in drafting and has later accepted as law through its incorporation in the International Covenant on Civil and Political Rights (ICCPR) which was signed and ratified by the United States Congress.<sup>136</sup> There is no distinction made that in order

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<sup>133</sup> Protocol Relating to the Status of Refugees, Art. I (2)-(3)

<sup>134</sup> Protocol Relating to the Status of Refugees, Art. I (1)

<sup>135</sup> See generally, Refugee Protocol and Refugee Convention.

<sup>136</sup> International Covenant on Civil and Political Rights Art. 9, March 23, 1976, 999 U.N.T.S. 171,

<http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>



for the rights to remain universal, the person must remain within the border of the place of their birth. Freedom from arbitrary detention and not being forced into labor has a simple meaning and is without exception.

Instead of leading the way to higher humanitarian goals, the governments have chosen a fear-based, xenophobic approach. Two countries formed by immigrants now turn their backs on those calling out for help or lock them away in the hopes that no more will come. It is my hope that in the years to come, both countries chose alternates to detention that are both more humane and less costly to their citizens.

*who would choose to spend days  
and nights in the stomach of a truck  
unless the miles travelled  
meant something more than journey.  
no one would choose to crawl under fences,  
be beaten until your shadow leaves you,  
raped, then drowned, forced to the bottom of  
the boat because you are darker, be sold,  
starved, shot at the border like a sick animal,  
be pitied, lose your name, lose your family,  
make a refugee camp a home for a year or two or ten,  
stripped and searched, find prison everywhere and if you  
survive  
and you are greeted on the other side with go home blacks,  
refugees  
dirty immigrants, asylum seekers sucking our country dry of  
milk,  
dark, with their hands out*

*smell strange, savage –*  
*look what they have done to their own countries,*  
*what will they do to ours?*<sup>137</sup>

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<sup>137</sup> *Supra*, Note 38

Author's Note: The subjects of immigration and detention are vast. This administration has made swift policy changes with regards to immigrants and detention. It is expected that the policies and laws will continue to shift over the next decade. I attempted to touch on many issues but with little elaboration. For those who might be interested in a deeper comparison of the United States and Australia, Daniel Ghezelbash's *Refuge Lost Asylum in an Interdependent World* will provide greater insights into that comparison and into Australian immigration law as a whole. Many NGO's have issue specific reports relating to family facilities, refoulment of potential asylum seekers while trying to reach a border, refoulment while at sea, LGBTQI immigrants and asylum seekers, forced labor, separation of families at borders, and sexual assault and physical abuse in detention center. I have attempted to scratch the surface of some of the problem of arbitrary detention with a focus on refugees and those seeking asylum. My research led me to learn more about my own country's history with immigrants. I left many articles and reports feeling sad and disappointed with my country's leaders, both past and present. But even today, with the current political climate, I still have hope that this nation and many others just like it, can improve and learn from the shameful mistakes of those that came before us.