

# ANALYSIS OF REFUGEE EXTERNALISATION

THE COMPARATIVE NETWORK ON REFUGEE  
EXTERNALISATION POLICIES (CONREP)  
BLOG COMPENDIUM



**CONREP**

Comparative Network on  
Refugee Externalisation Policies

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- The University of Melbourne (Australia)
- Deakin University (Australia)
- Monash University (Australia)
- Western Sydney University (Australia)
- University of Bologna (Italy)
- University of Gothenburg (Sweden)
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## Preface

It gives me great pleasure to provide this preface to the CONREP Blog Compendium. I commend the editors of the blog collection, and thank them for their commitment to the provision of a breadth of perspectives and original, incisive analysis. In 2018, when a group of scholars and PhD students from Australia and Europe came together, to work on the application for funding for the CONREP Network, the blog series was considered an original and important means of outreach and dissemination of research and understanding of the refugee experience.

We anticipated that the Network Blog would provide an important outlet for Network partners, other prominent scholars and civil society, to disseminate new research findings and expert analysis on the different aspects of externalisation. Participants from our events, other universities, institutions and organisations, were invited to publish blog pieces based on their own research and experiences. It was anticipated that the blog would provide a dynamic resource, and include perspectives of academics, policy makers and civil society. The pieces would cover topical issues, challenges and impacts of externalisation, both from a practitioner and civil society point of view but also more theoretical discussions on the implication of externalisation for European integration and regionalism.

We set out with the intention that the blog pieces should be accessible to academics, civil society, policy makers, students and the public through our website. As promised, the blog provided a forum to communicate our research findings in an accessible manner, to give voice to the perspectives of civil society, to provide experience of publishing for emerging academics and PhD students and to engage in a public debate and discourse on the instruments and impacts of externalisation policies. These objectives have all been achieved. Readers have access to concise expert analysis on the impact of externalisation policies.

The blog aims were:

- To ensure our research on the impact of externalisation of refugee policies is accessible to academics, civil society, policy makers, students and the public;
- To facilitate an informed dialogue and public debate about the challenges and implications of externalisation policies on EU integration, refugee protection and regional cooperation;
- To provide analysis on existing and new literature on migration control, asylum policies and externalisation;
- To provide an opportunity for emerging early career academics and PhDs to publish their analysis and research to a wider audience.

This CONREP Blog Compendium has, I suggest, exceeded our expectations, as it grew organically and exponentially into a major resource that remains very accessible. This blog series features dynamic and engaging pieces, featuring experienced scholars, those with the experience of being a refugee, and early career scholars and PhD and Masters students.

The CONREP network has made significant contributions to research regarding refugee externalisation policies since 2018. One contribution that is immediate in impact is this blog collection. This Compendium will constitute a resource for policymakers; civil society and scholars. The Compendium features interdisciplinary and transnational research. It contributes to a deepening of the knowledge of many, and often diverse, aspects of refugee policy.

The field of refugee studies has been enriched by the availability of funding, such as that awarded to CONREP, from the European Commission, so that connections are made not only among the seven universities of CONREP, but also with other universities, with civil society, with policy makers and, especially refugees themselves - and these connections are reflected in this Compendium.

I am very impressed by the range of incisive analysis that is very accessible in the short pieces featured in this Compendium. These articles illustrate the ability of scholars, experts and refugees to encapsulate an important issue or aspect of refugee studies into about 1000 words.

The blog pieces have illustrated that externalisation policies remain damaging, with substantial human and political costs. The writers have illustrated that alternatives are required for humanitarian and long-term solutions to the challenges of refugee protection.

It can be difficult to write about refugee issues. It is difficult to tell stories of the experience of being an asylum seeker or refugee. It can be difficult to listen to, or read, such accounts. It is difficult to challenge policy at times. Seeking to engage with policy makers and to bring about change is not always easy. Yet I am confident that this Blog Compendium not only constitutes an important resource, but alternative

approaches for governments and the European Union. Through the broad network of blog authors, who have provided evidence of harm to refugees and asylum seekers, achievable alternatives to refugee externalisation policies are presented. They have contested externalisation strategies and practices and made the case for humane policies and practices. This example of research-policy nexus is an important feature of this compendium.

I am confident that readers will encounter research excellence and fresh perspectives in this valuable Compendium.

*Philomena Murray, Director of CONREP  
July 2022*

## About CONREP

The movement of refugees is one of the most pressing governance challenges of our time. In seeking to control – or prevent - the access of arrivals to their territory, Australia, the European Union (EU) and its member states employ a range of externalisation policies. These policies operate beyond the state to disrupt migration pathways by preventing individuals from reaching or entering a state’s territory.

Externalisation policies reshape the boundaries of sovereignty and blur the lines of responsibility among states. By avoiding their legal and political responsibility, many states violate their legal obligations. Externalisation deflects responsibility, transforming the governance of refugee protection and border control. Regional cooperation for refugee protection is weakened, and human rights protections are undermined. At a global level, migration pathways are disrupted, and refugees are often trapped in transit, placing them at risk. Nationally, some governments gain electoral advantage by being “tough” on border protection. The accelerating phenomenon of externalisation characterising these “tough” border protection policies requires a comprehensive analysis by researchers, civil society actors, refugees, and policy makers.

The Comparative Network on Refugee Externalisation Policies (CONREP) researches the impact and effects of the externalisation of refugee policies in two regions: Australia’s activities in Southeast Asia and the Pacific; and the European Union and its member states’ activities in North Africa and the Mediterranean. These policies exploit power asymmetries to transfer state and regional obligations and responsibility for asylum seekers and refugees to neighbouring states. At their most destructive, externalisation policies can prevent refugees from reaching safety, and breach their human rights.

CONREP has worked to sharpen our understanding of the dynamics behind these towards externalisation by focusing its activities on five core themes

1. *Governance*: the implications of externalisation policies adopted by state and non-state actors at different levels of governance, including the repercussions for regional governance of the militarisation and securitisation of migration control, and the loss of solidarity and cooperation amongst states and regions.
2. *Legitimacy*: the impact of externalisation policies upon the legitimacy of states and regional bodies deploying these policies.
3. *Responsibility*: an examination of the exercise, delegation and “outsourcing” of legal and political responsibility, in state and non-state actor settings, and its effects upon refugees seeking protection.
4. *Democracy*: an examination of how externalisation shifts the ‘problem’ away from domestic scrutiny within states, towards political narratives of control and resistance to external and internal review and public debate.
5. *Human rights*: the impact of externalisation policies which disrupt migration pathways, upon access to human rights protections for refugees and asylum seekers.

CONREP is an interdisciplinary network of researchers from Australia and Europe. It consists of seven partner universities, led by the University of Melbourne. The other six partner universities are Deakin University, Monash University, Western Sydney University, the University of Bologna, the University of Geneva and the University of Gothenburg.

## Introduction: Reflection from the CONREP Blog Editors

*Federico Ferri, Elena Giacomelli,  
Kelly Soderstrom and Tamara Tubakovic*

July 2022

A key activity of The Comparative Network on Refugee Externalisation Policies (CONREP) was the production of a Network blog. Since the network commenced in September 2018, CONREP researchers and invited blog authors have focused their analyses on CONREP's five core themes:

1. Governance: the implications of externalisation policies adopted by state and non-state actors at different levels of governance.
2. Legitimacy: the impact of externalisation policies on the legitimacy of states and regional bodies.
3. Responsibility: the effects of the exercise and the delegation of legal and political responsibility on refugees affected by externalisation.
4. Democracy: how externalisation limits the exposure of these practices to the scrutiny of regional and domestic democratic institutions.
5. Human rights: the impact of externalisation policies on access to human rights protections for refugees and asylum seekers.

The CONREP Network blog represents an important activity, facilitating academic debate on key topics in refugee policy externalisation. This introduction is a reflection on our shared experiences as CONREP blog curators, examining synergies and shared concerns in engagement.

### ***Curation of the blog***

The CONREP Network blog was organised and edited by a team of five doctoral students and early career academics affiliated with CONREP. The purpose of the editorial team was to source authors, provide quality control of the blog articles, publish the blog online, and promote the blog through CONREP's social media channels. Each blog post was reviewed by one or two editors, who ensured that the blog piece was relevant to CONREP's core themes. Editors also provided some copy-editing services. These activities provided continuity of themes and style among the articles, which helped to construct a coherent narrative examining the complexities of externalisation policies.

### ***Diversity of authors***

An important aspect of the blog has been the involvement of different authors. Beside professors and academics from the CONREP network, the blog has been enriched by authors from different faculties, different levels of experience, and different backgrounds, including refugee background. Professors, PhD candidates, post-doctoral researchers, and students have all contributed significantly to the CONREP blog, with each author bringing a unique set of expertise and perspectives.

CONREP blog authors drew on each others' strengths to improve on areas of their own research and writing. Most of all, the involvement of students empowered them, giving them the opportunity to be part of such an important network and engaging them further in externalisation policies and learning practices.

The CONREP blog embraces transnational, interdisciplinary examination of the scope, methods and impact of externalisation policies of Australia, the European Union (EU), and its member states. The interdisciplinarity nature of CONREP is reflected in the different contributions. Working across disciplinary boundaries is important for furthering knowledge, awareness and enhances the dynamism of the blog content. Blog pieces include contributions on externalisation policies; migration pathways; human rights protection; border protection; sovereignty; state and regional obligations, and other interesting and relevant topics, using a variety of disciplinary lenses from sociology to law and from political science to anthropology and personal experience.

Given the multifaceted nature of externalisation policies and practices, such an approach has been invaluable to capturing the multiple perspectives and issues involved. Interdisciplinary research is more accountable and innovative than one approach. Each discipline had its own specific methodological approach, with some cross-over, thus every blog piece is simultaneously interdependent and distinct.

Author diversity has meant having content contributed from a variety of sources and examined through a variety of disciplinary lenses. In other words, it has been an opportunity to see CONREP themes from new and different perspectives. Finally, authors' diversity brought different writing styles to the table, catering to different audiences, both academic and non-academic. This helped the impact to be more profound.

### ***Themes of the blog and the importance of interdisciplinary research***

In order to fuel a long-lasting and exhaustive debate on refugee externalisation policies, the blog was designed as a tool to foster a comparative and interdisciplinary approach. Indeed, a detailed assessment of the causes, manifestations, and effects of externalisation policies in Australia and the European Union implies broad-range considerations. Accordingly, the blog hosts pieces which are diverse in nature. In particular, authors contributing to the blog have dealt with externalisation policies from political, sociological, legal and civil society points of view. That was crucial to reach pivotal goals for academics, such as disseminating knowledge and raising awareness, collecting feedback from a multitude of readers, and stimulating fruitful debates outside the CONREP network.

For the same reasons, the debate developed through the blog was not limited to refugees *stricto sensu*; overall, it refers to migrants in vulnerable conditions, with a major emphasis on asylum seekers/beneficiaries. At the same time, the blog did not miss the opportunity to enrich its mission by targeting states that are linked with Australia and the EU when it comes to refugee externalisation policies (the UK, the U.S., Indonesia, Turkey, Libya, and others). All pieces published on the blog align with the priority topics of CONREP's research activities, namely migration pathways; human rights protection; border enforcement; state sovereignty; and state responsibility.

Firstly, the blog provides reflections regarding multilevel compliance with relevant international and supranational hard/soft rules. In this regard, some posts criticized the "securitarian" approach that continue to be pursued to tackle migration flows. This problem includes, *inter alia*, enhanced border controls or political campaigns against migrants seeking shelter in the host country.

In addition to security, the Blog Compendium included analyses of the lack of efficient solidarity schemes and many states' failure to undertake legal, political, and social responsibility. Therefore, the blog considers cooperation patterns involving strategic countries of origin and of transit, as well as the role played by private actors.

The blog articles also focused on possible negative consequences suffered by vulnerable migrants, like children; women; stateless persons; people with disabilities, and those who have been harmed in a migratory context. Moreover, the Blog Compendium analyses how states and the EU have, at times, contributed to weakening the agency of these individuals and some cases include breaches of the *non-refoulement* principle, illegal detention, procedural obstacles, and limited assistance in the field of welfare.

Finally, given the importance of putting all these issues into context, the Blog Compendium also included pieces concerning how the core issue addressed by CONREP has been affected by large-scale threats and crises; for example, conflicts, climate change, environmental degradation, and the COVID-19 pandemic.

### ***Contribution to knowledge on refugee externalisation***

Social science research plays a crucial role in knowledge production. Migration is a phenomenon characterised by epistemic uncertainty. This makes it vulnerable to knowledge conflicts. Policy debates are often characterised by competing knowledge claims about the causes, dynamics, and impacts of migration. One of the core aims of the CONREP Network was to develop empirically-driven knowledge about refugees, migration and the impacts of externalisation. In this regard, the CONREP blog offered an accessible means for PhDs, early career researcher and senior researchers, as well as civil society, practitioners and refugees, to share their knowledge and exchange insights on the practices and consequences of refugee externalisation. The Blog Compendium complements the academic dissemination strategies of the CONREP Network, such as peer-reviewed journal articles and edited volumes, by providing concise analysis of key issues currently facing refugees and policymakers when it comes to accessing and managing refugee protection. The Blog Compendium has therefore played a crucial role in our epistemic learning of refugee externalisation – Why do governments choose to externalise? How do they externalise? Who is involved in externalisation? What instruments are used to externalise? How does this affect the lived experiences of refugees and their ability to access protection? How does it shape migration and border governance practices in third countries?

The Blog Compendium's accessibility has also meant that it has had a broad impact on public knowledge and discourses, encouraging public debate and challenging the often-harmful narratives about refugee arrivals and their place in society. It facilitated honest and critical exchanges about the current state of refugee protection, and how we governments can be held accountable for the widespread harms that are taking place within national borders and beyond. It also aimed to demonstrate the ineffectiveness and cost of externalisation policies. The knowledge produced through these blog pieces has therefore been central to thinking about how we can design better policies that respect and protect the rights of those seeking protection.

## Contributors

*The below brief biographies are reflective of the authors' affiliations at the time they wrote their blog piece.*

**Giulia Azzarone** is a student at the College of Europe, where she is enrolled in the International Relations and EU Diplomacy Studies Programme. She is currently examining the external dimension of EU internal policies and the internal and external dimensions of the EU Area of Justice Security and Freedom. While a UN online volunteer at L'Osservatorio - Research Centre on Civilian Victims of Conflicts, she published a report entitled 'The Multinational Joint Task Force: achievements and challenges', touching upon the terrorist threat faced by a number of states in the Sahel region.

**Nicola Bergamaschi** is a PhD student at the Faculty of Law at the University of Bologna. He graduated in law in Bologna and in 2018 he spent three months as visiting researcher at the Maastricht Centre for European Law. His studies concern the external dimension of European Union action, particularly in the fields of investment protection and migration policies. He also analyses the impact of these policies on the internal legal framework of the EU. He is a member of the network of scholars "Accademia Diritto e Migrazioni" (Law and Migration Academy).

**Mitch Buzza** has 20 years' experience in media-based education as a digital producer, learning designer and ed-tech leader. Most recently he has been with The University of Melbourne, in the exciting and fast-evolving world of experiential learning.

**Daniela Caracostas** is a professional translator enrolled in the Register of the Chamber of Commerce in Rome and a certified teacher of Italian for Foreigners (Ditals II, Siena University). She also works as a tutor of Latin and Ancient Greek for young and adult students. In 2018 she attended the post lauream continuous training Course for Legal Interpreters/Translators (University of Bologna), co-funded by the EU Erasmus+ Programme, and is now finishing the Master's degree studies in "Language Society and Communication" (University of Bologna) being particularly interested in Intercultural Mediation and Humanitarian Communication. Daniela is a member of REII (Rete di Eccellenza dell'Italiano Istituzionale), established at the Directorate General for Translation of the EU, and part of the REII Working Group on Linguistic Gender Parity. She is a volunteer translator for Translators4Children and Translators without Borders.

**Chiara Cigliano** is an MA student in Language, Society and Communication at the University of Bologna. She graduated cum laude from the University of Naples 'Federico II' in European Languages, Cultures and Literature in 2019, after spending a semester abroad at the University of Manchester, UK. Her current focus is on communication strategies and analysis of public discourses. In particular, her BA thesis focused on the study of language attitudes, and how these can influence our perception of immigrants – with dramatic effects on the migrants' lives and futures in Europe.

**Rashaam Chowdhury** is a PhD Candidate at the University of Melbourne. She is interested in areas of state crime, refugees, genocide and war victimisation. Her thesis explores feeling of victimisation and perceptions of justice among Bangladeshis in relation to the 1971 liberation war. She was the recipient of the J.V. Barry Medal for the most distinguished criminology student at the University of Melbourne in 2014.

**Jeff Crisp** has held senior positions with UNHCR (Head of Policy Development and Evaluation), Refugees International (Senior Director for Policy and Advocacy) and the Global Commission on International Migration (Director of Policy and Research). He has also worked for the Independent Commission on International Humanitarian Issues, the British Refugee Council and Coventry University. Jeff has first-hand experience of humanitarian operations throughout the world and has published and lectured widely on refugee and migration issues. He has a Masters degree and PhD in African Studies from the University of Birmingham. He is currently an Associate Fellow in International Law at Chatham House.

**Ludovica Da Lozzo** is an MA student currently enrolled in the second cycle degree in Language, Society and Communication at the University of Bologna. In 2020, she graduated cum laude from Ca' Foscari University of Venice with a BA in Language, Civilisation, and the Science of Language. During the third year of her BA degree, she spent a semester at the University of Paris Nanterre, France, within the Erasmus+ programme. Her fields of study and research span from translation studies to intercultural communication. In 2021, she joined the community of volunteer translators of TED, combining her background in modern languages with her keen interest in a wide range of cultural, academic, political, and humanitarian topics.

**Azadeh Dastyari** is an Associate Professor in the Faculty of Law at Western Sydney University with expertise in international refugee law, human rights law, international maritime law, and constitutional law. She is particularly interested in the interception of people seeking protection at sea; offshore and extraterritorial processing; and immigration detention. She also researches the regulation and control of dissent and protest. Azadeh has been a visiting scholar at Harvard Law School (Fulbright and Lionel Murphy scholar); the European University Institute; Georgetown University and the University of Bologna. She is a former Deputy Director of the Castan Centre for Human Rights Law at Monash University.

**Sara Dehm** is a Senior Lecturer in International Law at the Faculty of Law, University of Technology Sydney. She teaches and researches in the areas of public international law, international migration and refugee law, and the history and theory of international law and institutions.

**Cameron Doig** is a Melbourne-based student and writer. He is co-author of 'Outsourcing Control: The International Organization for Migration in Indonesia', *International Journal of Human Rights*, 2018. 22(5): 681-708.

**Philippa Duell-Piening** is a PhD candidate at the Melbourne Law School with support from the Melbourne Social Equity Institute. Her research is primarily in the field of human rights law with a focus on disability and refugee rights. Prior to commencing her PhD candidature in 2019, Philippa worked at the Victorian Foundation for Survivors of Torture coordinating the Victorian Refugee Health Network. The focus of Philippa's work was on health sector development and government engagement to reduce health inequalities and improve access to health services for people who are refugees. Philippa has worked in the forced-migration contexts of Timor-Leste in 2002 and on the Thai-Myanmar border in 2012. She has a Graduate Diploma in International Law, a Master in Community and International Development, and a Bachelor of Occupational Therapy. She has published in *Disability and Society* about refugee settlement and disability, and about refugee health in a wide range of journals.

**Angeline Ferdinand** has had a wide-ranging academic career that has focused on applied research that addresses complex problems of health equity, social determinants of health and the implications of new technologies in public health practice. Angeline is a postdoctoral researcher at the Doherty Institute for Infection and Immunity and Honorary Fellow with the Centre for Health Policy, School of Population and Global Health at the University of Melbourne. She has more than a decade of experience in refugee and migrant health and is a co-convenor of Academics for Refugees at the University of Melbourne. Angeline has authored more than two dozen publications (3 in the top 5% of all research outputs scored by Altmetric) and has attracted approximately 1.2million AUD in competitive research funding (in addition to two prestigious national doctoral scholarships).

**Federico Ferri** is Adjunct Professor of EU Law and Tutor of International Law at the University of Bologna and works within the Schools of Law and Political Science. He holds a PhD in European Law from the Universities of Bologna and Strasbourg (2015) and a Specialising Masters in Human Rights and Humanitarian Intervention (2011). Federico is also a civil attorney in the municipality of Bologna and collaborates with companies, institutions and reviews in Italy and abroad. In particular, he monitors the evolution of the EU secondary law and jurisprudence on migration on behalf of the journals *Immigrazione.it* and *Diritto, immigrazione e cittadinanza*. He conducts research in a variety of fields relating to sustainable development and innovation, environment, energy, alternative finance, an intellectual/industrial property. Federico has a special interest in the concept, nature and legal implications of sustainable development, migration, and the protection of fundamental human rights.

**Caroline Fleay** lectures in human rights at the Centre for Human Rights Education, Curtin University, and conducts research into Australian policy and human rights, transnational activism and human rights, and the rights of people seeking asylum.

**Daniel Ghezelbash's** research focuses on comparative refugee and immigration law. He has a particular interest in the diffusion of restrictive asylum seeker policies across jurisdictions. This is the topic of his book, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018). He has spent time as a Visiting Fellow at the Refugee Studies Centre at Oxford University and a Visiting Scholar at Harvard Law School, Brooklyn Law School and New York Law School.

**Elena Giacomelli** is a postdoctoral researcher at the Department of Sociology and Business of Law at the University of Bologna. She is now working on environmental change and migration dynamics. She obtained a PhD, conducting ethnographic research on social workers with asylum seekers and refugees. In order to anchor her research to practice, she worked for two years as a social worker with asylum seekers and refugees with the Association Centro Astalli. Her research and publications focus on social work with asylum seekers and refugees, migration dynamics, ethnography, cultural sociology. She has conducted many studying and working experiences abroad. In 2018 Elena was a visiting research fellow at the University of the Western Cape (South Africa). In 2016 she took an internship in the Australian Population and Migration Research Center (University of Adelaide). She conducted her Master dissertation in the Third World Studies Center, in The Philippines, focusing internally displaced people due to environmental change. During her Masters, she spent one semester in the Metropolitan University of Prague, where she took part in the research project “Current Migration to Europe: Research of Smart Population Dynamics”. In 2014, she was a Bachelor exchange student at the University of Melbourne.

**Maria Giannacopoulos** is Senior Lecturer in Socio-Legal Studies and teaches Criminology in the College of Business, Government and Law at Flinders University. Her law degree is from the University of Wollongong and her PhD in Critical and Cultural Studies from Macquarie University in Sydney. Her research addresses the coloniality of Australian law in two overlapping fields: Aboriginal sovereignty and refugee and asylum studies. She is currently working on a project, with Dr. Claire Loughnan, on carceral and imperial expansion on Manus Island and on a special issue of *Globalizations* titled ‘Law, Love and Decolonisation’ with Professor Biko Agozino. She is also author of a forthcoming book *Sovereign Debt, Austerity and the Endurance of Colonialism*, a study of the sovereign debt crises of Greece and Australia, identifying and naming coloniality as the thread interconnecting the power dynamics at play in these countries.

**Wenwen He:** Growing up in China, studying in the United States and Italy, Wenwen has always had an interest in exploring contemporary urban, aesthetic, political and technological culture in different social contexts. Wenwen holds a B.Arch. from Rensselaer Polytechnic Institute where she developed her interest in wearables and multimedia public art. She then expands the boundary of multimedia artwork to embody design, technology and sociology during her study at the Harvard Graduate School of Design and the Harvard Graduate School of Art and Science - Department of Sociology. She was a visiting PhD student, conducting research as part of her thesis work on immigration, refugees, human rights, and the empowerment of vulnerable populations through an artistic approach within the Department of Sociology and Business Law at the University of Bologna from August 2019 to July 2020.

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**Anna Szorenyi** is a Lecturer in Gender Studies, and a writer and researcher whose work explores questions of responsibility and representation in relation to historical and contemporary humanitarian issues, dislocations and trauma. Most of her published work explores artistic and visual representations of forced migration, particularly refugees/asylum seekers and human trafficking. Her most influential work is on refugee photography. She has also written on transgenerational responsibility in relation to the Holocaust and the invasion of Australia. All of her work pushes at the limits of the colonial habits of humanitarian discourse, and seeks more equitable, relational and responsible ways of living together with others and with our shared vulnerability.

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## Blog Contributions

### The Externalisation of Refugee Policies in Australia and Europe: The Need for a Comparative Interdisciplinary Approach

*Philomena Murray*

Published 2 June 2019

It is increasingly recognised that the movement of refugees is an urgent governance challenge. It is equally a test of the humanitarian principles, values and legitimacy of states and of regional bodies.

Refugee policy remains in the hands of states that, especially in the Global North, are increasingly seeking external solutions to the movement of those seeking asylum. This externalisation of asylum policy is carried out in a number of ways.

Firstly, states seek to deny access to their territory. Secondly, they endeavour to expel asylum-seekers from their territory to another state. Thirdly, the state determines access to its territory by not only refusing admission, but also by relocating people seeking asylum to another country. This is effectuated by deals made between richer states (the reluctant hosts) and poorer states in the region.<sup>1</sup> We see this in Australia, where there is an offshoring of refugees and asylum seekers in neighbouring states, and in the European Union (EU), which has deals with Turkey and Libya.<sup>2</sup>

These externalisation policies merit serious comparative and interdisciplinary research for a number of reasons. Firstly, several states in Europe currently regard the Australian case as a putative model rather than as a cautionary tale. Secondly, they de-legitimise the rights of asylum-seekers. Thirdly, they undermine the legitimacy of states and of state action - as they no longer take legal, political and social responsibility for those who seek to cross their borders. Fourthly, they deny access to processing of claims for protection and to health care and welfare. They also prevent access to scrutiny of their practices by civil society and the media, with an approach marked by secrecy.

The need to examine the externalisation of refugee policy in Australia and the EU is at the basis of the Jean Monnet Erasmus+ Network grant entitled *The Comparative Network on Refugee Externalisation Policies*.<sup>3</sup> The Network's comparative approach is warranted at a time of huge movement of asylum seekers and internal displacement of people.

Externalisation is not simply a policy. It is also a narrative of exclusion and part of a rhetoric that hardens borders. It is both agenda-setting and agenda-responsive. A range of externalisation policies is employed to control the access of arrivals to their territory by Australia, the EU and its member states. These policies operate beyond the state - and the EU - to disrupt migration pathways, preventing individuals from reaching or entering a state's territory, but they are carried out and financed by the state or the EU. They include offshoring and outsourcing of important legal and administrative responsibilities for refugee protection to third countries. While the offshoring state may retain considerable control and oversight of these third countries, there is little or inadequate public knowledge or legislative scrutiny of the effect of these policies. Examples include the interdiction of sea vessels and deployment of third countries and non-state actors in preventative policies of detention, as well as deportation and border policing. This externalisation accompanies a shift towards securitisation, with refugees increasingly framed as a security risk. The narrative of externalisation is thus one of risk, not protection. It is framed in ways that range from societal insecurity to terrorist threat, with a narrative that state and society are rendered more secure by denying access to people seeking asylum. The approach also enables states to externalise responsibility, obligations and duties, by partially placing these on third countries and blurring the lines of responsibility between the EU and its member states, and with third countries.

The policy of offshoring responsibilities transforms the governance of refugee protection and, equally, the responsibility for border control. Border control is now a matter of prevention of access rather than processing those seeking access. Even when processing does occur, it is not to be assumed that the processing of applications for asylum is carried out in or by the state. Further, even when processing does result in the positive determination of a refugee, the state can refuse entry and decide to detain the refugee offshore. This is the case of the current Australian system and of EU agreements with both Turkey and Libya.

The Comparative Network on Refugee Externalisation Policies therefore adopts a transnational, interdisciplinary examination of the scope, methods and impact of externalisation policies of Australia, the EU and its member states. It does so with five core themes, all of which illustrate the need for transnational policy-research nexus.

These themes are, firstly, governance, with an examination of the implications of policy that is delivered by state and non-state actors at different levels of governance; the militarisation and securitisation of migration control and the role and lack of solidarity among states and regions. Secondly, there is the theme of the legitimacy of

externalisation policies and implications for the legitimacy of states and regional bodies deploying them, and the implications for sovereign authority. The third theme that the Network examines is the exercise and delegation of legal and political responsibility for refugees who are affected by externalisation, in state and non-state actor settings. The fourth theme is democracy, with a focus on how externalisation shifts the “problem” away from the domestic scrutiny processes of states, deploying narratives for political gain. The fifth and final theme is the human rights implications of externalisation policies which disrupt migration pathways.

- 1 Halide Görgün Kilinc, 'Why are European Countries Reluctant to Accept Syrian Refugees?' *Digital Commons*, March 2, 2018. <https://digitalcommons.unomaha.edu/srcal/2018/schedule/120/>.
- 2 Tendayi Bloom, 'The Beginning of the End of Double-Offshoring? The Panama Papers, Asylum in Australia, and the PNG Supreme Court,' *Oxford Law Faculty (blog)*, May 2, 2016. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/beginning-end>; European Council, 'EU-Turkey Statement,' Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; EEAS, 'About the EU Border Assistance Mission in Libya (EUBAM),' September 15, 2019. [https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam\\_en?s=327](https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam_en?s=327).
- 3 CONREP, 'The Comparative Network on Refugee Externalisation Policies,' *CONREP*. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/the-externalisation-of-refugee-policies-in-australia-and-europe?a=2941913>.

## The Symbolic Frontiers of Border Externalisation: Interceptions, Information Campaigns, and Refugee Policies

*Pierluigi Musaró and Asher Hirsch*

Published 25 June 2019

Since the 1990s, European and Australian asylum and immigration government officials have adopted techniques of deterrence, repression and confinement to deter the irregular movement of asylum seekers. Simultaneously, national actors have presented the consequences of this border regime as a “humanitarian” crisis caused by troubles “elsewhere” - Africa, the Middle East and Asia - depicting these regions as desperate and chaotic places beyond the borders of Europe and Australia.

Australia’s externalisation policies aim to stop refugees and asylum seekers from travelling by boat through the Asia-Pacific region, and particularly to deter boats leaving from Indonesia, Sri Lanka and Vietnam for Australia.

In Italy, the conflict over the arrival of migrants and refugees across the Mediterranean Sea remains a deep political issue. Mare Nostrum, the military-humanitarian operation launched by the Italian Government in the Mediterranean targeted at rescuing migrants and arresting smugglers, has ended.<sup>1</sup> Now, the humanitarian narrative of saving lives has disappeared in the face of militarised borders.

While then Prime Minister Matteo Renzi repeatedly insisted that Italy and all of Europe have a humanitarian ‘duty’ to protect people making the journey, the newly elected Italian government has further hardened its approach to irregular arrivals by attempting to implement a tough “no disembarkation” policy.<sup>2</sup> This marks a shift in European governments’ priorities from rescue to pushback. Nationalist rhetoric by far-right political parties enabled this shift, by attacking the government’s policies in managing migration and raising the “danger of invasion.”

In Australia, a suite of policies aim to prevent irregular arrival of asylum seekers. These include interdiction of migrants at sea, naval towing or redirection of boats to country of departure (“turnbacks”), detention in Papua New Guinea and Nauru (“offshore processing”), capacity-building and interceptions in transit countries like Indonesia, and public messaging campaigns directed at potential migrants and smugglers. As in Italy, leaders and media use humanitarian language to justify harsh policies as a way to prevent exploitation of migrants by people-smugglers, and end drowning deaths at sea.

International agencies such as UNHCR, IOM, and the EU High-Level Working Group on Asylum and Migration acknowledge that asylum seekers travel side by side with people fleeing from poverty and seeking better opportunities. However, most European states are keen to show they are differentiating between refugees escaping war, and those seeking a better life and economic opportunities. Similarly, the Australian government has attacked refugees as “economic refugees”.<sup>3</sup>

This blurred distinction between forced and voluntary migration is at the basis of policy-making and is crucial for the future of newcomers. Media often represents newcomers without any historical or political framework, and presents irregular migration flows as a tragic game of fate.

Terms such as the migration/refugee “crisis”, “emergency”, or “wave” continue to define the daily lives of individuals on the move without investigating the real causes of their movement. In Australia, the government attacks any proposals to liberalise policy as a “disaster”, a potential “collapse” of Australia’s border regime, and as “weakening” border protection.

States have invested massively in border control, and made bilateral agreements for externalisation of borders (the Australia-Indonesia-IOM agreement made in 2001, the EU-Turkey agreement on March 2016 and the Memorandum of Understanding between Italy and Libya on February 2017).<sup>4</sup> Furthermore, successive European and Australian governments from both sides of the political spectrum have enacted draconian measures to prevent, deter, and punish those engaged in the smuggling of migrants - both as smugglers and smuggled migrants.

Public information campaigns have been implemented since the 1990s in Europe and Australia to prevent human trafficking and undocumented migration. They aim to normalise the extraterritorial border, and categorise migrants as voluntary/forced, desirable/undesirable, and regular/irregular. They attempt to prevent arrivals before migrants reach the border. Assuming that information plays a key role in migration decisions, these campaigns are designed to deter potential migrants from leaving by criminalising them a priori, or negatively stereotyping migration.

The Comparative Network on Refugee Externalisation Policies (CONREP) researches the impact and effects of border externalisation policies in two contexts: Australia’s activities in Southeast Asia and the Pacific; and the European Union and its member states’ activities in North Africa. We explore the following questions:

- What evidence is there of the impact of public information campaigns on deterring irregular migration?
- What are the effects and impacts of these campaigns when used to deter smuggled migrants, many of whom are fleeing persecution, torture, discrimination, war, poverty, and other humanitarian crises?
- How do these campaigns depict irregular and refugees?
- What relationship do awareness campaigns shape between human rights values, immigration policy, and projects of geo-political sovereignty?
- are the effects of these new bordering practices by states on our perceptions of citizenship and solidarity?

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- 1 Marina Militare. 'Mare Nostrum Operation,' *Ministero della Difesa*. <https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>.
  - 2 Pierluigi Musarò, 'The Political "Migration Crisis" and the Military-Humanitarian Response,' *The London School of Economics and Political Science* (blog), March 28, 2016. <https://blogs.lse.ac.uk/eurocrisispress/2016/03/28/the-political-migration-crisis-and-the-military-humanitarian-response/>; Claudia Torrisi, 'The Italian Government Has Approved a New Bill Targeting Migrant,' *Open Migration*, December 19, 2018. <https://openmigration.org/en/analyses/the-italian-government-has-approved-a-new-bill-targeting-migrants/>; BBC News, 'Italy's Matteo Salvini Shuts Ports to Migrant Rescue Ship,' *BBC News*, June 11, 2018. <https://www.bbc.com/news/world-europe-44432056>.
  - 3 Ben Doherty, 'Peter Dutton Launches Extraordinary Attack on "Economic Refugees" Sent to US,' *The Guardian*, September 28, 2017. <https://www.theguardian.com/australia-news/2017/sep/28/peter-dutton-lets-fly-at-armani-clad-economic-refugees-sent-to-us>.
  - 4 Asher Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia,' *The International Journal of Human Rights*, 22, no. 5 (2018): 681-708; European Council, 'EU-Turkey Statement,' Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; Anja Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Aimed at Closing All Doors to Europe?' *EU Migration Law Blog* (blog), October 2, 2017. <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.

## When Closure Isn't Closure: Carceral Expansion on Manus Island

*Maria Giannacopoulos and Claire Loughnan*

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The Manus Regional Processing Centre at Lombrum in PNG was closed by the Australian and PNG governments in November 2017. The ruling of the PNG Supreme Court in 2016 determined that the prison-like conditions of Manus Regional Processing Centre were unconstitutional, leading to the closure of the refugee detention centre at Lombrum. Over 600 of the men at this camp protested against the closure in October 2017.<sup>1</sup> The men held substantive fears of violence, emanating from riots at the centre in 2014 and local threats, notably from Port Moresby military-style police units. They resisted being moved out. Progressively, the Australian and PNG governments dismantled buildings, turned off electricity and water supplies and stopped the provision of food. The men remained for 23 days without these services.

**It might appear on face value that the transfer of the men to an 'open' centre comprised an end to detention as an element of Australia's 'externalisation' of refugee protection at Manus Island. But naming this as a 'closure' and end to confinement and punitive conditions in detention is misleading.**

The transfer of approximately 800 men at the time to the camp at East Lorengau has resulted in continued suffering, reaching crisis point for many of the men.<sup>2</sup> The effective punishment of the men persists. The 'closure' of Manus Island detention centre at Lombrum diverts attention away from continuing harms in the offshore detention regime at East Lorengau camp. The failure of the Medevac legislation to provide for necessary transfers for those in need of medical care, and the anxieties of detainees after the recent Federal election in Australia, has prompted a number of suicide attempts.<sup>3</sup> The injuries from these attempts cannot be managed adequately by the limited services on the island. If Medevac is repealed, it is likely that self harm will increase.

While ostensibly complying with a PNG Supreme Court ruling that the prison-like conditions of the Lombrum offshore processing centre were unconstitutional, the closure of the centre at Lombrum has simply reconfigured the carceral structure of the detention centre/prison for refugees into one which sees all the men confined to Manus as an 'open air' prison. This suggests an expansion to new forms of control. Despite allegedly being an 'open site', the East Lorengau camp is closed between 6am and 6pm,

men are required to seek approval to venture outside the camp, and they are often monitored closely when they do so.<sup>4</sup> No one can visit it without prior authority. The place is surveilled, inside and out. Some men have become so institutionalised that they have become clinically paranoid and will not venture beyond the compound.

The presentiment of death and suffering haunts these men even in the absence of conventional prison walls. This obsessive fear of death was conveyed by the men in the 2018 film *Remain*, made by Iranian photographer Hoda Afshar.<sup>5</sup> Behrouz Boochani, scholar and journalist still being detained on Manus Island and who co-produced the film with Afshar, recounts in the film that Manus is a green hell, a 'green hell that burns us to our deepest souls: it is a howling promise of death.' Twelve men have died at Manus and Nauru, another offshore site, due to suspected suicide, medical neglect, violence or misadventure. Some of the men have expressed the fear that they will die there. This fear is real, as death can result from the failure to provide adequate medical care, even for what are initially easily treatable illnesses. The tragic death of young Iranian man Hamid Khazei was caused by an infection resulting from a mosquito bite. The infection was not treated on Manus: Hamid Khazei's death was preventable.<sup>6</sup>

This suggests new patterns of externalisation: "closure" (or in Europe the "emptying out" of detention centres) is characterised by new openings and possibilities for externalising responsibility for refugee protection in more discrete ways. The harms of detention appear in new forms. In Italy, for example, the "closure" of detention centres has left refugees homeless, without access to means of support.<sup>7</sup>

Since the PNG ruling which led to the "closure" of the Lombrum camp, we are witnessing the expansion, rather than the end of carcerality, in which refugee men are confined to Manus as an "open air" prison. Disturbingly, responsibility for the harms that these policies produce is increasingly imposed on refugees themselves. If Australia's carceral expansionism is unable to be curbed by official judgements of unconstitutionality, then where do we look next to stop the punitive punishment of peoples who have committed no crime? Indeed, the testimonies of those detained on Manus bring to light that disjunction further: immigration detention is experienced through harm and acute suffering while those who have committed no crime are punished as though they are responsible for their own suffering.<sup>8</sup>

1 Namah v Pato, National Executive Council and the Independent State of Papua New Guinea. 2013. 84 SC1497 1; Behrouz Boochani and Omid Tofighian. 'The Last Days in Manus Prison,' *Meanjin*, December 9, 2018. <https://meanjin.com.au/essays/the-last-days-in-manus-prison/>.

2 Amnesty International. 'Manus Island: Australia Abandons Refugees to a Life of Uncertainty and Peril,' *Amnesty International*, February 1, 2018. <https://www.amnesty.org/en/latest/news/2018/02/manus-island-australia-abandons-refugees-to-a-life-of-uncertainty-and-peril/>; Herba Kassoua, "Death Is More Merciful": Manus Detainee's Desperate Plea among "Worsening" Medical Crisis,' *SBS Arabic*, February 6, 2019. <https://www.sbs.com.au/language/english/death-is-more-merciful-manus-detainee-s-desperate-plea-amid-worsening-medical-crisis>.

- 3 Refugee Council of Australia, 'Australia's Offshore Processing Regime: The Facts,' RCOA, May 20, 2020. <https://www.refugeecouncil.org.au/offshore-processing-facts/>; BBC News, 'Manus Island: Refugee "Suicide Attempts" in Wake of Australia Election,' *BBC News*, May 23, 2019. <https://www.bbc.com/news/world-australia-48375120>.
- 4 Maddee Clark, 'Hoda Afshar's Lens on Manus,' *The Saturday Paper*, November 10-16, 2018. <https://www.thesaturdaypaper.com.au/2018/11/10/hoda-afshars-lens-manus/15417684007107#hrd>.
- 5 Will Cox, 'Remain by Hoda Afshar,' *Broadsheet*, 2019. <https://www.broadsheet.com.au/melbourne/event/remain-hoda-afshar>.
- 6 Josh Robertson, 'Asylum Seeker Hamid Khazaei's Death from Leg Infection Was Preventable, Queensland Coroner Finds,' *ABC News*, July 30, 2018. <https://www.abc.net.au/news/2018-07-30/asylum-seeker-hamid-khazaei-coronial-inquest-death-preventable/10050512>.
- 7 Lorenzo Tondo and Angela Giuffrida, 'Vulnerable Migrants Left Homeless after Italy Passes "Salvini Decree",' *The Guardian*, December 7, 2018. <https://www.theguardian.com/world/2018/dec/07/vulnerable-migrants-made-homeless-after-italy-passes-salvini-decree>.
- 8 Tara Cosoleto, 'Forgotten Men on Manus Are "Broken" One Year since Detention Centre Closed,' *SBS News*, November 21, 2018. <https://www.sbs.com.au/news/article/forgotten-men-on-manus-are-broken-one-year-since-detention-centre-closed/z5r2d3zwt>.

## Flexible Borders: The Fiction of Non-Entry and Asylum Seekers in Germany

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Border definition is a central component of state externalisation of refugee protection around the world. According to the 1951 UN Refugee Convention, refugees have the right to seek asylum upon crossing an international border into another state.<sup>1</sup> Host states are then required under international law to provide certain protections and services to asylum seekers while their applications are being processed and if their application is successful. In order to avoid the obligation of providing such protections and services, many states take actions to inhibit asylum seekers from crossing into their territory.

**While there are many methods states employ to inhibit asylum seeker arrivals, one of the most creative is transit zones.**

Usually found in international airports between arrival gates and passport control, transit zones are fluid areas where the traditional rules of state territorial borders do not apply. Although a traveller has physically arrived within a state's official territory as defined by state borders, she is not considered to have legally entered until her visa has been checked and she has been cleared by border patrol officers at immigration control.

While most states only use transit zones to control immigration at airports, Germany has extended this control to include land crossings. By employing transit zones on land borders, Germany facilitates the externalisation of responsibility for processing asylum seeker claims to its neighbouring European states.

### ***Flexible borders and asylum seeker externalisation in Germany***

The 1997 German Aufenthaltsgesetz (Residency Law) paragraph 13, section 2, defines arrival in Germany as only occurring once a migrant has been legally approved to enter the country, regardless of the migrant's physical presence in the territory.<sup>2</sup> This idea of physical arrival, but not legal arrival is known as the "Fiktion der Nichteinreise" (fiction of non-entry).<sup>3</sup>

While originally created to govern transit zones in airports, the Christian Democrats (CDU) and the Christian Social Union (CSU) agreed in their 2018 Three Point Plan to extend the fiction of non-entry to include land crossings.<sup>4</sup>

The expansion of the law came as a direct response to the 1.2 million refugees who crossed into Germany in 2015/2016

and a renewed focus in German refugee policy on upholding the Dublin Regulation and deporting failed asylum seekers to other EU member states or the asylum seeker's country of origin.<sup>5</sup>

According to the Residency Law and the 2018 CDU/CSU interpretation of the law, transit zones are not confined to a set area, but rather are linked to the individual who crossed the border. Essentially, the transit zone could extend as far into Germany as the individual travels and remains valid until the immigration status of the individual is determined by border patrol and immigration authorities. This includes if the migrant is taken to an asylum seeker processing centre (so-called AnKER centers or other "Erstaufnahmeeinrichtung" processing centres) and could last as long as 18 months.<sup>6</sup> If the individual is deemed to have entered Germany illegally, then she would be sent back to the first EU state in which she arrived (in accordance with the Dublin Regulation). If the EU state lies within the Schengen Zone, then the asylum seeker is sent back as if she had never entered the Schengen Zone, therefore ensuring that she must pass through immigration control upon arrival in the EU state. This means that the transit zone, and by extension Germany's border, has not only become flexible enough to extend into Germany, but also across EU member states.

### ***What does this mean for transparency, human rights, and legitimacy?***

The existence of the fiction of non-entry and the fact of its use beyond airport arrival terminals indicates the fluidity of Germany's borders. The German border is no longer defined by traditional territorial boundaries, but rather by individual legal determination. This means that arrival is no longer an objective determination based on physical presence, but rather a subjective legal determination at the discretion of border patrol and immigration officers. The shifted focus from objective to subjective determination decreases the transparency of the asylum application process by obscuring when asylum seekers can lodge an application and access to rights usually afforded to asylum seekers. Furthermore, the shifted focus increases the power of individual border patrol officers to determine arrival and subsequent ability to apply for asylum in Germany.

Additionally, the fact that asylum seekers can be held in AnKER centres for up to 18 months and denied access to legal protections demonstrates that the new interpretation of the Residency Law (Article 2, Paragraph 13) is an "instrument of disenfranchisement" which restricts human rights for those seeking asylum.<sup>7</sup>

On an international level, the use of transit zones to legally justify restricting asylum seeker movements and access to rights challenges the current statist approach to international refugee protection. If borders continue to

be the primary delineator of “refugee” versus “internally displaced person”, and borders can be defined at the will of the host state, then the integrity of the international refugee regime is threatened. While sovereign states have an obligation to maintain control of their borders, legal fictions such as the “Fiktion der Nichteinreise” ultimately place asylum seekers at risk.

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- 1 United Nations High Commissioner for Refugees. 'The 1951 Refugee Convention.' *UNHCR*. <https://www.unhcr.org/1951-refugee-convention.html>.
  - 2 Federal Office of Justice, 'Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.' *Bundesministerium der Justiz* (2022). [https://www.gesetze-im-internet.de/englisch\\_aufenthg/englisch\\_aufenthg.html](https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html).
  - 3 Pierre von BedeutungOnline, 'Was Bedeutet "Fiktion der Nichteinreise"? Was Ist damit Gemeint?' *Bedeutung Online*, July 3, 2018. <https://www.bedeutungonline.de/was-bedeutet-fiktion-der-nichteinreise-was-ist-damit-gemeint/>.
  - 4 Deutsche Welle, 'Chancellor Angela Merkel and Horst Seehofer Agree on a Migration Compromise.' *Deutsche Welle*, July 2, 2018. <https://www.dw.com/en/chancellor-angela-merkel-and-horst-seehofer-agree-on-a-migration-compromise/a-44485481>.
  - 5 European Union, 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast); *Official Journal of the European Union L 180*, 26.6.2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>
  - 6 Chase Jefferson, 'Germany's Migrant Transfer Centers: What You Need to Know,' *Deutsche Welle*, August 1, 2018. <https://www.dw.com/en/germanys-migrant-transfer-centers-what-you-need-to-know/a-44541635-0>.
  - 7 Dana Schmalz, 'Die Fiktion der Nichteinreise Ist ein Instrument der Entrechtung,' *intr2dok*, July 4, 2018. [https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00003807](https://intr2dok.vifa-recht.de/receive/mir_mods_00003807).

## Italy's Current Externalisation Policy and the Role of Libya

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### *Externalising migration policies is not new for Italy.*

Under the terms of the Treaty of Friendship<sup>1</sup> between Italy and Libya, signed by Berlusconi and Gheddafi in 2008, Italian authorities intercepted boats in international waters and transferred asylum seekers and migrants back to Libya, where they were systematically detained and frequently ill-treated. This practice came to an end following, inter alia, the European Court of Human Rights judgement in the *Hirsi Jamaa v Italy*.<sup>2</sup> That decision made it crystal clear that, for a State party to the ECHR to stop boats directed towards its coast, even if these are still outside territorial waters, does not fall outside its jurisdiction under the terms of art.1 of the Convention. It may therefore result, should all requirements be met, in a violation of art.3 (prohibition of torture) and/or of art.4 of Additional Protocol n.4 (prohibition of collective expulsion of aliens).

Starting in late 2013, Italy carried out an ambitious search and rescue operation which resulted in saving the lives of a large number of persons, most of which were subsequently transferred to Italy. This operation *Mare Nostrum* was, however, terminated after about one year, partly as a result of pressure from countries of final destination of migrants, which considered it to be a “pull-factor”.

The end of *Mare Nostrum* marked what appears to be a long-term shift in the way European governments, including successive Italian governments, handle arrivals by sea. The priority changed from rescuing people to preventing their departure. A new Memorandum of Understanding<sup>3</sup> between Italy and Libya reflecting this approach, replacing the previous bilateral agreement, was signed by Gentiloni and Al-Serraj on 2 February 2017. This new agreement received the European Council's approval with the adoption of the Malta Declaration on the following day.<sup>4</sup>

The new form of externalisation differs from the previous one to the extent that it is not based on extra-territoriality alone. It consists of entrusting third parties, the Libyan Coast Guard in the first place, with the task of keeping people as far away as possible from Italy's (and Europe's) southern frontier.

In other words, not only are migrants prevented from reaching European territory, but they are also prevented from having any contact whatsoever with the authorities of a European state. The aim is simply to avoid responsibility, by creating an area which is beyond the reach of international human rights law.

More specifically, the current practice is aimed at circumventing the principle of non-refoulement in both its versions - the one which is instrumental to the right to seek asylum and, to the extent that it involves entrusting the Libyan Coast Guard with the task of bringing migrants back to detention centres in Libya, the broader - “prevention of torture” - version of the principle as well.

Detailed descriptions of the dire situation of irregular migrants in Libya have been provided by a variety of credible sources and are easily available.<sup>5</sup> The criminalisation of irregular entry stay and exit, and the lack of a national asylum law, as well as the fact that Libya has failed to ratify the 1951 Convention on the status of refugees, result in the fact that the only way of dealing with migration in Libya is arbitrary and indefinite mass detention. According to a report by Amnesty International, this “has paved the way for horrendous violations to be perpetrated in places of detention, in which refugees and migrants are at the mercy of authorities, militias, and armed groups, often working seamlessly with smugglers for financial gain.”<sup>6</sup> Furthermore, the report states that “the lack of any judicial oversight of the detention process and the near total impunity with which officials operate, has facilitated the institutionalization of torture and other ill-treatment in detention centres.”

Entrusting Libyan institutions with the role of guardians of Italy's (and Europe's) maritime frontier, as long as the human rights situation in Libya does not change, raises a number of legal questions. First, does the principle of non-refoulement result in the prohibition of carrying out (or directly participating in) push-back operations only or does it also include delegating such operations to others?

Second, does Italy's practice of funding, providing technical assistance and training to Libyan agencies which commit torture and other serious violations of human rights amount to a form of complicity, that is, to “aid or assistance in the commission of an internationally wrongful act” under art.16 of the Articles on the Responsibility of States for Internationally Wrongful Acts?<sup>7</sup>

Third, is it lawful to prevent vessels other than those of the Libyan Coast Guard (NGO vessels in particular) to carry out search and rescue (SAR) operations in the central Mediterranean? And, should these vessels be successful in rescuing people, is it lawful to prevent them from disembarking the people whose lives they have saved in Italian ports given that Libyan ports do not qualify as “places of safety”?

The answer to each of these questions requires a detailed legal analysis. Whatever the answers may be in legal terms, what is quite certain is that the human cost of Italy's current practice of externalisation is very high indeed.

- 1 'Treaty of Friendship,' August 30, 2008. <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7>
- 2 *Jamaa and Others v Italy*. 2012. 27765/09. A <https://www.refworld.org/pdfid/4f4507942.pdf>.
- 3 Stato di Libia e Repubblica Italiana, 'Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana.' February 2, 2017. <https://www.governo.it/sites/governo.it/files/Libia.pdf>.
- 4 European Council, 'Malta Declaration by the members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route,' *Press Release*, February 3, 2017. <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.
- 5 United Nations Office of the High Commissioner, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, (United Nations, 2018). [https://www.ohchr.org/sites/default/files/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf).
- 6 Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants* (Amnesty International, 2017). <https://www.amnesty.org.au/wp-content/uploads/2017/12/EMBARGOED-12-December-2017-Report-Libyas-Dark-Web-of-Collusion-1.pdf>.
- 7 Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy,' *Human Rights Law Review*, 19, no. 3 (November 2019): 435-465; United Nations, *Responsibility of States for Internationally Wrongful Acts* (United Nations, 2001). [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

## Race against Responsibility: Why Conflict over Migrant Disembarkation is an EU Problem

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With almost four years since the onset of the largest arrival of migrants to EU territory since World War II, tensions on how to tackle the new arrivals from North Africa and the Middle East remain high, as member states stand divided on the question of sharing responsibility.<sup>1</sup>

In 2015 over a million people arrived in the EU through Italy and Greece.<sup>2</sup> This mass arrival prompted an EU-wide crisis. The existing mechanism for dealing with asylum arrivals – the Dublin Regulation – became patently insufficient in channelling the asylum inflows.<sup>3</sup>

Although the EU's strategy of outsourcing responsibility to Turkey, under the 2016 EU-Turkey statement, has been credited for curbing asylum arrivals to Greece, it has not resolved the ongoing crisis at the EU's southern borders.<sup>4</sup>

A UNHCR report from the end of last year shows that while the total number of arrivals to the EU has dropped, the rate of deaths across the Mediterranean has sharply increased.<sup>5</sup> Rising from a ratio of 1 death per 269 arrivals in 2015 to 1 death for every 51 in 2018, the Mediterranean route remains the world's most dangerous maritime crossing for migrants.

The growing number of deaths in the Mediterranean Sea has been attributed to several factors, including the EU's agreement with the Libyan border and coast guard.<sup>6</sup> The humanitarian crisis in the Mediterranean is also, importantly, a product of intra-EU conflict over asylum responsibility.

In December, Italy's Deputy Prime Minister Matteo Salvini tweeted that "Italian ports are CLOSED."<sup>7</sup> His tweet followed on from a series of decisions taken by the right-wing government to close the country's ports to NGO and humanitarian ships carrying migrants.<sup>8</sup>

In June 2018, over 600 migrants on board of the rescue vessel Aquarius were refused disembarkation by the Italian and Maltese authorities. Six months later, the Italian government also denied entry to Proactive Open Arms and the German rescue vessel Sea Watch 3.<sup>9</sup>

The German migrant rescue group Sea Watch has recently lodged a complaint against Italy at the European Court of Human Rights for refusing to allow the rescue vessel to dock at its port.<sup>10</sup> The group decried the actions of the Italian government arguing that it can "no longer accept that the European states are jointly breaking the law of the sea."

The Italian government has, however, defended its migration strategy arguing that although "saving lives is a duty... turning Italy into a huge refugee camp is not."<sup>11</sup>

The refusal by Italy to allow NGO and humanitarian rescue ships to disembark on its territory is a part of the new populist government's migration strategy.<sup>12</sup> While Salvini's actions reflect the restrictive and xenophobic preferences of his far-right political party, the frustration over the disproportionate pressure on Italy to tackle migration inflows has been a long-standing national contention.

Even though the restrictive direction of the Italian government's migration policy warrants criticism, the crux of the political unrest over disembarkation lies within the EU's asylum laws.<sup>13</sup>

The EU does not have a system for the "fair sharing" of the administrative, legal, and financial costs associated with the processing of asylum applications and integration. In fact, the design of the EU's asylum responsibility allocation system has produced an unequal distribution of responsibilities.

By designating asylum responsibility on the basis of irregular entry, the system has placed additional pressure on frontline states who, because of their geographical position, constitute the main entry points into EU territory.

In his first speech as Italian Prime Minister, Giuseppe Conte called for the overhaul of the Dublin Regulation to "ensure that the principle of fair distribution of responsibilities is respected" and establish an "automatic and obligatory" system of resettlement for asylum seekers.<sup>14</sup>

Yet, the continued lack of agreement among member states on an alternative allocation system has impeded a more ambitious reform. Proposed by the European Commission in 2016, the European Council negotiations on a new Dublin system remain in deadlock.<sup>15</sup>

The three-year political impasse on the Dublin Regulation recast alludes to the depth of division among EU member states on the question of responsibility distribution and mandatory relocation.<sup>16</sup> Southern member states are demanding a fairer system to which all member state must contribute. However, some other countries refuse to accept different and fairer rules that may require them to take on more of the asylum "burden."

Some steps were taken last year under the Bulgarian and Austrian presidency to move toward a compromise, but Southern Mediterranean states have refused any agreement that does not include compulsory relocation.<sup>17</sup>

With member states increasingly focused on the external aspects of migration and cooperation with third countries, reforming the Dublin system is no longer a top priority.<sup>18</sup>

This indicates a worrisome lack of political will from the member states to tackle the divisive issue.

Even more alarming has been the retreat of the Commission's leadership on the overhaul of the EU's asylum system.

At the height of the refugee crisis, Commission President Jean-Claude Juncker announced that the Commission was adopting a new approach to asylum that would involve a "more fundamental change in the way we deal with asylum applications... notably the Dublin system." Initially positioning itself as a "very political" actor ready to challenge the "business as usual" approach to asylum, the Commission has now traded ambition for pragmatism.<sup>19</sup>

The recast proposal not only maintains the problematic rules on responsibility allocation, but it also introduces a new permanency to responsibility.

The European Commission's prioritization of the external aspects of migration also indicates a reluctance to push for a consensus on the Dublin system and a mandatory relocation scheme in fear of antagonizing unwilling member states. This in part stems from the backlash it experienced regarding the emergency relocation schemes that were adopted in 2015 without the full support of the Czech Republic, Hungary, Poland, and Slovakia.<sup>20</sup>

The European Parliament has conversely adopted an ambitious negotiating position that includes a permanent and immediate relocation system.<sup>21</sup> The European Parliament has criticized the Council's three-year delay in adopting a negotiating mandate, with prominent party leaders such as Guy Verhofstadt threatening to bring the Council to court under Article 265 of the Lisbon Treaty for the "failure to act."<sup>22</sup>

The promise of negotiating conflict between the European Parliament and the Council is, however, far off. Without a consensus in the Council, the progress of reform is stalled at an early stage.<sup>23</sup>

The inability to reach a consensus among the member states has been exacerbated by the domestic politics of some of the states where right-wing parties politicize the issue of migration for political gain.<sup>24</sup>

While the EU struggles to find a solution to its Dublin problem, migrants continue to risk their lives in perilous journeys across the Mediterranean Sea.<sup>25</sup> In the absence of a fairer system of distribution for migrant arrivals, these journeys are made even more treacherous by the steadfast willingness of member states to gamble on migrant lives in a race to avoid responsibility.

- 1 Marjoleine Zieck, 'International Community Needs Global Plan to Share Responsibility for Refugees,' *The Globe Post*, July 4, 2018. <https://theglobepost.com/2018/07/04/refugees-migrants-equitably-responsibilities/>.
- 2 Jonathan Clayton and Hereward Holland, 'Over One Million Sea Arrivals Reach Europe in 2015,' *UNHCR*, December 30, 2015. <https://www.unhcr.org/en-au/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015>.
- 3 European Union, 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast),' *Official Journal of the European Union L 180*, 26.6.2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>
- 4 European Council, 'EU-Turkey Statement,' *Press release*, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.
- 5 United Nations Refugee Agency. 2019. *Desperate Journeys*. <https://www.unhcr.org/desperatejourneys/>; Ivy Kaplan. 'Migrant Death Toll Doubles in the Western Mediterranean This Year,' *The Globe Post*, October 26, 2018. <https://theglobepost.com/2018/10/26/migrants-deaths-mediterranean/>.
- 6 Martin Plaut, 'Europe's Determination to Halt African Migration Makes Friends of Dictators,' *The Globe Post*, January 29, 2019. <https://theglobepost.com/2019/01/29/migration-eu-africa/>; EEAS, 'About the EU Border Assistance Mission in Libya (EUBAM),' September 15, 2019. [https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam\\_en?ns=327](https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam_en?ns=327).
- 7 Matteo Salvini (@matteosalvinimi). "#SeaWatch3", altra nave di un'altra Ong (bandiera olandese), chiede di portare in Italia decine di immigrati recuperati al largo delle coste libiche. La mia risposta non cambia: i porti italiani sono CHIUSI, stop al traffico di esseri umani! #portichiusi!, Twitter, December 23, 2018. <https://twitter.com/matteosalvinimi/status/107677736528674816>.
- 8 Staff Writer, 'Thousands Protest in Rome Over Italy's 'Anti-Migrant' Decree,' *The Globe Post*, November 10, 2018. <https://theglobepost.com/2018/11/10/italy-protest-migrant-decree/>; *The Local*, 'Italy Will Close Ports to NGO Migrant Ships 'All Summer' Despite Drownings,' *The Local*, June 29, 2018. <https://www.thelocal.it/20180629/italy-will-close-ports-to-ngo-migrant-ships-all-summer-despite-drownings/>.
- 9 Helen O'Nions, 'Aquarius Provides More Lessons, But Is the EU Really Learning?' *The Globe Post*, June 22, 2018. <https://theglobepost.com/2018/06/15/eu-migrants-italy-refugees/>; Staff Writer, 'Spain Offers to Take in Migrant Ship After Italy, Malta Refuse to Let it Dock,' *The Global Post*, June 11, 2018. <https://theglobepost.com/2018/06/11/spain-italy-migrant-ship/>.
- 10 Deutsche Welle. 'Sea Watch Sues Italy in European Rights Court,' *Deutsche Welle*, January 29, 2019. <https://www.dw.com/en/sea-watch-sues-italy-in-european-rights-court/a-47271834>.
- 11 BBC, 'Spain to Accept Disputed Migrant Ship Aquarius,' *BBC News*, June 12, 2018. <https://www.bbc.com/news/world-europe-44441386>.
- 12 BBC, 'Italy's Matteo Salvini Shuts Ports to Migrant Rescue Ship,' *BBC News*, June 11, 2018. <https://www.bbc.com/news/world-europe-44432056>.
- 13 Helen O'Nions, 'Migrant Containment at all Costs: What is Left of European Humanity?' *The Globe Post*, February 14, 2019. <https://theglobepost.com/2019/02/14/migrant-containment-europe/>.
- 14 *The Local*, 'Here Are the Main Things Italian PM Giuseppe Conte Said in His First Speech,' *The Local*, June 5, 2018. <https://www.thelocal.it/20180605/italy-giuseppe-conte-first-speech-summary/>.
- 15 EU Directorate-General for Migration and Home Affairs, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* (European Commission, 2016). [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2016\)270&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2016)270&lang=en).
- 16 Staff Writer, 'Tusk: EU Compromise on Migrants "Very Hard",' *The Globe Post*, December 15, 2017. <https://theglobepost.com/2017/12/15/tusk-eu-migrants/>.
- 17 Giulia Paravicini and David M. Herszenhorn, 'Southern Rim Rebels against EU Migration Proposal,' *Politico*, April 26, 2018. <https://www.politico.eu/article/eu-migration-crisis-italy-spain-rebels-bulgaria-dublin-quotas-proposal/>.
- 18 Nikolaj Nielsen, 'Asylum Reforms Derailed, as EU Looks to North Africa,' *EUObserver*, October 18, 2018. <https://euobserver.com/migration/143156>.
- 19 Jean-Claude Juncker, 'State of the Union 2015: Time for Honesty, Unity and Solidarity,' Speech, Strasbourg, September 9, 2015. [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_15\\_5614](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614).
- 20 Jacopo Barigazzi and Maia De La Baume. 'EU Forces through Refugee Deal,' *Politico*, September 21, 2015. <https://www.politico.eu/article/eu-tries-to-unblock-refugee-migrants-relocation-deal-crisis/>.
- 21 EU Committee on Civil Liberties, *Justice and Home Affairs, On the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* (European Parliament 2017). [https://www.europarl.europa.eu/doceo/document/A-8-2017-0345\\_EN.html?redirect#top](https://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.html?redirect#top).
- 22 Guy Verhofstadt (@guyverhofstadt) 'If EU leaders fail to agree to reform or common European migration & asylum system at #EUCCO, we have to bring the Council to Court under art.265 of the Treaty for "failure to act" #Aquarius #Eplenary', Twitter, June 12, 201. <https://twitter.com/guyverhofstadt/status/1006458453441818624?lang=en>.
- 23 Staff Writer, 'EU Elections Must Not "Paralyze" Asylum Reform: Commissioner,' *The Globe Post*, February 7, 2019. <https://theglobepost.com/2019/02/07/eu-asylum-reform/>.
- 24 Staff Writer, 'Germany to Refuse Migrants From July if No European Deal Found,' *The Globe Post*, June 18, 2018. <https://theglobepost.com/2018/06/18/germany-eu-migrant-deal/>.
- 25 Joanne Stocker, 'Int'l Migration Body: Over 118,000 Reached Europe Via Mediterranean This Year,' *The Globe Post*, August 15, 2017. <https://theglobepost.com/2017/08/15/migrants-118000-europe/>.

## Scorched Earth... in the Middle of the Sea: Italy's Fight against NGOs Saving Lives along the Central Mediterranean Route

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The shift from rescue to pushback highlighted by Pierluigi Musarò and Asher Hirsh in their blog contribution lies at the heart of the agendas of many European countries.

In particular, this is one of the top priorities of the current Italian government, which has always claimed that Italy is the EU Member State with the highest number of arrivals of asylum seekers.<sup>1</sup> As Italy deems to be excessively burdened by the well-known “Dublin III” system, the plan of the government is now to drastically reduce the number of migrants heading for the Italian coast.<sup>2</sup>

A first step towards the adoption of deterrence measures to prevent sea arrivals is represented by the 2018 Decree Law on Immigration and Security (d.l. n. 113/2018, “Security Decree I”), subsequently converted into a Law of the State (l. n. 132/2018). For brevity, the key points of the bill in terms of migration-related issues are the following: abrogation of “humanitarian protection”, restrictions on the national System of Protection of Asylum Seekers and Refugees (“SPRAR”), extension of the grounds and maximum duration of the foreigner’s detention.<sup>3</sup> Predictably, the Security Decree I raised many concerns because it contributes to undermining the multilevel rights recognised and guaranteed to asylum seekers and displaced people.<sup>4</sup>

Against this background, another Decree Law on Immigration and Security was adopted in June by the Council of Ministers (d.l. n. 53/2019), this time with a view to addressing the external dimension of migratory flows. The “Security Decree bis” was transposed into a national Law (Security Law bis) on 5 August; the procedures leading to the adoption of that Law were subject to a parliamentary vote of confidence.<sup>5</sup> The purpose of the bill is to prevent search and rescue activities carried out by NGOs in the Central Mediterranean Sea. The idea underpinning the measure at hand is that those NGOs are key drivers for illegal migration in Italy. The Security Decree has proved controversial for at least two reasons.<sup>6</sup> First, it implicitly “stigmatises” the mission of crucial actors that - for the record - have never been held responsible by the Italian judicial authorities. Second, it seems to be incompatible with the Italian Constitution and many international and EU law rules protecting fundamental rights of individuals in vulnerable conditions, like asylum seekers and migrants at sea.

Basically, the text of the new bill provides for fines of up to one million euros for ships that “ignore bans and limitations” on accessing Italian waters, plus the seizure of vessels failing to respect such orders more than once. It should be noted that under the Security Decree bis (and the Security Law bis) entry bans could be decided also by the Ministry of the Interior, namely, Matteo Salvini, who is the main promoter of the bill. Actually, this is not the only national measure targeting NGOs which deal with search and rescue close to Italian waters. To give just one example, two years ago the former Ministry of the Interior launched a code of conduct to regulate the activities of NGOs in the central Mediterranean Sea; the code itself was endorsed by the European Union.<sup>7</sup>

The core provisions of the Security Decree bis were immediately invoked against a ship of the Sea-Watch NGO after it rescued more than 50 people from a rubber dinghy off the Libyan coast.<sup>8</sup> The Sea-Watch 3 vessel bypassed the blockade of the Italian armed forces and reached the port of Lampedusa (Sicily). All migrants were disembarked, while the captain was first arrested and then released. The Sea-Watch 3 incident is not an isolate affair, as it brings back to mind other similar cases involving Italy in 2018 and 2019: to list but a few, Aquarius, Open Arms and Sea Watch (again).<sup>9</sup>

It has to be stressed that the Security Decree bis was “tested” in the middle of the new Libyan crisis, as the situation of this country has worsened again over last months. But despite the statements by the United Nations, the European Union and the Council of Europe that Libya is not a safe country, Italy’s entry ban against search and rescue NGOs has the effect of leaving many migrants in the hands of Libyan officials.<sup>10</sup> Needless to say that under the light of applicable multilevel rules and existing geo-political circumstances the Security Decree bis was widely criticised (primarily by the UNHCR and the OHCHR).<sup>11</sup>

The securitisation approach behind the national measure discussed in this post shows how the externalisation of asylum policy has been developing in the European Union, as already anticipated by Professor Philomena Murray’s blog contribution. Indeed, the growing socio-political consideration of migrants as security concerns contributes to fostering the nationalist rhetoric of far-right political parties. For instance, almost 60% of Italians supported Salvini’s decision to close national ports to NGO vessels.<sup>12</sup> This is not surprising given that immigration recently ranked first among the most worrying issues for the people living in the EU.<sup>13</sup> However, this way of carrying out the externalisation of asylum policy has ended up depriving migrants in vulnerable conditions of any form of assistance since they are left to die. Regrettably, Italy’s fight against

NGOs is a side effect of the repeated Member States' failure to bring about a solidarity-oriented legal reform on international protection at European level, thereby fuelling the "Orbanisation" process of EU asylum law, to use an expression of Professor Steve Peers. And until Member States refuse to give rise to a fruitful cooperation in the framework of the EU things are not likely to improve.<sup>14</sup>

- 1 European Parliament, *Parliamentary Questions*, April 20, 2018 E-002227-18, Mara Bizzotto. [https://www.europarl.europa.eu/doceo/document/E-8-2018-002227\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2018-002227_EN.html).
- 2 European Union, 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recase)', *Official Journal of the European Union L 180*, 26.6.2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>
- 3 European Council on Refugees and Exiles, 'Italy: Latest Immigration Decree Drops Protection Standards', *ECRE News*, September 28, 2018. <https://ecre.org/italy-latest-immigration-decree-drops-protection-standards/>.
- 4 Silvia Carta, 'Beyond Closed Ports: The New Italian Decree-Law on Immigration and Security', *EU Immigration and Asylum Law and Policy* (blog), October 31, 2018. <https://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/>.
- 5 Reuters Staff, 'Italy's Government Wins Confidence Vote on Decree Targeting Migrant Rescue Ships', *Reuters*, July 25, 2019. <https://www.reuters.com/article/us-italy-politics-migrants/italys-government-wins-confidence-vote-on-decree-targeting-migrant-rescue-ships-idUSKCN1UJ2E4>.
- 6 Silvia Sciorilli Borrelli, 'Italy Takes Further Steps to Clamp down on Immigration', *Politico*, June 12, 2019. <https://www.politico.eu/article/matteo-salvini-italy-takes-further-steps-to-clamp-down-on-immigration/>.
- 7 Euronews, 'Italy's Code of Conduct for NGOs Involved in Migrant Rescue', *Euronews*, August 3, 2017. <https://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue>; *ANSA Med*, 'Italy's Migrant NGO Code of Conduct OK'd by EC, Frontex', *ANSA Med*, July 17, 2017. [https://www.ansamed.info/ansamed/en/news/sections/politics/2017/07/17/italys-migrant-ngo-code-of-conduct-okd-by-ec-frontex\\_27ae4c7a-1738-4ec6-9887-2caff8719f22.html](https://www.ansamed.info/ansamed/en/news/sections/politics/2017/07/17/italys-migrant-ngo-code-of-conduct-okd-by-ec-frontex_27ae4c7a-1738-4ec6-9887-2caff8719f22.html).
- 8 ANSA, 'New Security Instruments Ready to Be Applied to Sea Watch Says Salvini', *ANSA*, June 12, 2019. [https://www.ansa.it/english/news/politics/2019/06/12/sea-watch-faces-new-instruments-salvini\\_5c4526fd-2e81-4aae-9de5-81b0734aa382.html](https://www.ansa.it/english/news/politics/2019/06/12/sea-watch-faces-new-instruments-salvini_5c4526fd-2e81-4aae-9de5-81b0734aa382.html).
- 9 ANSA, 'Aquarius: Closing Ports against Humanity - Paris Tells Rome', *ANSA*, September 25, 2018. [https://www.ansa.it/english/news/2018/09/25/aquarius-closing-ports-against-humanity-paris-tells-rome\\_5c6b4fd7-2433-42b1-a96a-b0743438a9b9.html](https://www.ansa.it/english/news/2018/09/25/aquarius-closing-ports-against-humanity-paris-tells-rome_5c6b4fd7-2433-42b1-a96a-b0743438a9b9.html); *The Local*, 'Rescued Migrants Face Christmas at Sea after Italy Closes Ports', *The Local*, December 22, 2018. <https://www.thelocal.it/20181222/italy-port-closes-to-rescued-migrants-face-christmas-at-sea/>; *The Local*, 'Italian Ports Are Closed', Salvini Warns Migrant Rescue Ship Seeking Shelter from Storm', *The Local*, January 24, 2019. <https://www.thelocal.it/20190124/italian-ports-are-closed-salvini-sea-watch-migrant-rescue-boat-sicily/>.
- 10 United Nations High Commissioner for Refugees, *UNHCR Position on Returns to Libya - Update II*, 2018. <https://www.refworld.org/docid/5b8d02314.html>; ANSA, 'Interior Min, EC Clash on "Libya Safe Port"', *ANSA*, March 29, 2019. [https://www.ansa.it/english/news/2019/03/29/interior-min-ec-clash-on-libya-safe-port\\_4f59645d-199f-436a-89c1-185e65c32619.html](https://www.ansa.it/english/news/2019/03/29/interior-min-ec-clash-on-libya-safe-port_4f59645d-199f-436a-89c1-185e65c32619.html); ANSA, 'Human Rights Chief "Seriously Worried" about Closed-Ports Policy', *Infomigrants*, June 20, 2019. <https://www.infomigrants.net/en/post/17649/human-rights-chief-seriously-worried-about-closedports-policy>.
- 11 UN High Commissioner on Refugees, 'UNHCR Urges Italy to Reconsider Proposed Decree Affecting Rescue at Sea in the Central Mediterranean', *Press Release*, June 12, 2019. <https://www.unhcr.org/news/press/2019/6/5d0124a74/unhcr-urges-italy-reconsider-proposed-decree-affecting-rescue-sea-central.html>; UN Human Rights Office of the High Commission, 'Joint Communication from Special Procedures', May 15, 2019. <https://www.statewatch.org/media/documents/news/2019/may/un-it-sr-letter-directive-sar-libya-human-rights-5-19.pdf>.
- 12 News Wires, 'Second Migrant Rescue Boat Docks in Italy, Defying Salvini', *France 24*, July 7, 2019. <https://www.france24.com/en/20190706-second-migrant-rescue-boat-docks-lampedusa-italy-matteo-salvini>.
- 13 Jan Strupczewski and Julia Echikson, 'Immigration, Terrorism Top Concern List of Europeans: Poll', *Reuters*, June 15, 2018. <https://www.reuters.com/article/us-eurobarometer/immigration-terrorism-top-concern-list-of-europeans-poll-idUSKBN1JA2FX>.
- 14 Steve Peers, 'The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals', *EU Law Analysis* (blog), May 6, 2016. <http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html>.

## Responsibility, Legitimacy and Accountability: Reflections on the CONREP Workshop in Prato 2019

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Responsibility, legitimacy and accountability were just some of the rich themes surrounding refugee externalisation policies discussed at the Comparative Network on Refugee Externalisation Policies (CONREP) workshop on 14 June 2019 at the Monash University campus in Prato, Italy.

The event brought together academics, civil society leaders, and those with lived refugee experience from around the world to investigate various forms of externalisation and the impact these policies have on refugees' access to protection.

The externalisation of refugee policy is an old and complex issue. According to Professor Jeff Crisp in his presentation for the workshop, externalisation is defined as "measures taken by states in locations beyond their territorial borders that are intended to obstruct, deter or otherwise avert the arrival and admission of foreign nationals." Externalisation manifests in forms such as information/deterrence campaigns, carrier sanctions, conditional development aid, and military deployments. Consequences of externalisation policies include physical and psychological harm to migrants; and refugees being used as bargaining chips between states. With such complex causes and consequences associated with refugee externalisation policies, changes to this policy area demand a holistic and multi-level approach.

While externalisation policies and their effects have become increasingly salient with the global rise of refugee numbers, the practice of externalisation is nothing new. As Professor David FitzGerald argued in his workshop presentation that every form of externalisation used today was already in use during the 1930s. Understanding the history of externalisation is therefore vital to conducting an effective evaluation of current policies.

By taking a holistic, multi-level approach to the analysis of current and historical cases of externalisation, presenters at the CONREP workshop examined the challenges to responsibility, policy legitimacy, and state accountability posed by externalisation policies.

The workshop facilitated a robust examination of different types of externalisation. States and governments use a variety of instruments, methods, and mechanisms to externalise refugee policies. Interdiction at sea,

communication campaigns, detention, third country interception, and containment were among the externalisation instruments and methods analysed throughout the workshop. Amir Taghinia, a refugee with lived experience from Iran, also gave a personal account of Australia's externalisation mechanisms through sharing his experiences detained on Manus Island.

The externalisation of responsibility was an especially prominent theme throughout the workshop presentations. Questions of how states shift and avoid responsibility for refugee protection - through delegation, interception, controlling narratives, or other form of redefining responsible actors - were of particular concern to presenters. While the exact mechanisms of shifting responsibility vary across states, there are patterns in the overall methods of externalisation. Italy and Australia both rely on interdiction to prevent asylum seekers from arriving in their respective territories by boat.<sup>1</sup> Because asylum seekers have not crossed into the state's sovereign territory, the state is not obligated under international law to provide protection to the asylum seekers. Therefore, by preventing such cross-border arrivals, both states are effectively able to avoid the responsibility of providing protection to the asylum seekers. Similarly, the detention of asylum seekers and refugees, either offshore as in the case of Australia, or in controlled areas such as in Europe, prove to be a persistent method by which states externalise responsibility. Presenters also analysed the nature of complicity in the humanitarian and migration-based crimes of other states which are perpetuated through externalisation policies, such as restricting search and rescue operations at sea or denying resettlement options which force refugees to remain in unsafe countries.<sup>2</sup>

Policy legitimacy was also examined extensively during the CONREP workshop. Desensitisation of the public, media campaigns, and changes to legislation have increased the cultural and legal legitimacy of many externalisation practices. For example, carrier sanctions, a form of migration control placed on third-party transportation providers, were initially met with shock by the refugee advocacy community.<sup>3</sup> Now, however, carrier sanctions are considered common place and accepted as a part of the realities of international travel. Over time, the extensive use of carrier sanction has effectively led to the normalisation of their use as an externalisation mechanism, thereby increasing the legitimacy of the practice of employing carrier sanctions.

State accountability also featured heavily in the externalisation policy analyses of the CONREP workshop. Often in the case of externalisation policies, domestic and international accountability mechanisms for ensuring the humane treatment of refugees and asylum seekers fail to mitigate harmful state action. As Dr Nikolas Tan suggests,

the courts of partner states on to which refugee protection is externalised can offer an additional source of accountability. However, such accountability instruments are yet to be used to their full potential.

### ***The future of research and externalisation policies***

Given our current understanding of the causes and effects of externalisation policies as developed in the CONREP workshop, how should we respond to the challenges raised by the perpetuation of such policies? Inhumane and unfair externalisation policies should be fought through legal challenges and integrated advocacy. Civil society should also be supported in its efforts to provide services to refugees despite externalisation policies. Addressing the root causes of these policies, such as anaemic international protection laws, is central to tackling the challenges raised

by harmful externalisation policies. Further research is also needed to better understand the root causes of externalisation and what constructive alternatives may be utilised to ensure the protection of refugees in the future.

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- 1 Ben Doherty, 'Asylum Seeker Boat Turnbacks Illegal and Don't Deter People, Report Finds,' *The Guardian*, May 3, 2017. <https://www.theguardian.com/world/2017/may/03/asylum-seeker-boat-turnbacks-illegal-and-dont-deter-people-report-finds#targetText=The%20interdiction%20of%20Asylum%20Seekers,are%20viable%20long%20term%20strategies>.
  - 2 Lorenzo Tondo, 'Italy Plans to Fine NGO Boats up to €5,500 per Rescued Migrant,' *The Guardian*, May 14, 2019. <https://www.theguardian.com/world/2019/may/13/italy-fine-ngo-boats-migrants-salvini>; Paul Farrell, I and Nick Evershed, 'Australia Is Blocking Refugees Registered in Indonesia. What will Happen Now?,' *The Guardian*, November 19, 2014. <https://www.theguardian.com/australia-news/2014/nov/19/-sp-what-impact-will-banning-refugees-registered-in-indonesia-really-have>.
  - 3 UN High Commissioner for Refugees, *UNHCR Position: Visa Requirements and Carrier Sanctions*, (United Nations, 1995). <https://www.refworld.org/docid/3ae6b33a10.html>.

## A Feeble Light in the Shadow: The Recognised Need to Protect Environmental Migrants

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The 2018 World Bank report, the first one to evaluate both the rapid- and slow-onset impacts of climate change, foresees that by 2050 around 143 million people from the ‘global South’ will be potentially forced to migrate because of sea level rise, crop failure, and water stress.<sup>1</sup> In June 2019, the UN Special Rapporteur on extreme poverty and human rights, Philip Alston, shared a prediction for the near future, where we could face a ‘climate apartheid, where the wealthy pay to escape overheating, hunger, and conflict while the rest of the world is left to suffer’.<sup>2</sup>

Although the international community has been regulating states’ conduct toward environmental protection since the ‘60s, it is only in the ‘90s that international and regional bodies began to acknowledge the connection between environmental threats and their drastic effect on people’s enjoyment of human rights.

Respectively, the UN Human Rights Council, the Inter-American Commission on Human Rights and the European Committee of Social Rights found the environment to be a fundamental component of the right to life and to health.<sup>3</sup> The African Commission on Human and Peoples’ Rights also identified human rights violations in the government’s negligence to ensure adequate environmental protection to its population.<sup>4</sup> Finally, the European Parliament Resolution on Climate Diplomacy noted that fighting against climate change is necessary for the protection of human rights.<sup>5</sup>

In spite of these developments, the international system of protection still fails to provide solid foundations for the protection of people compelled to leave because of environmental factors. The debate on an internationally agreed definition of this category of protection is still ongoing.

To fill this gap, several scholars - Myers, Docherty and Giannini among others - argued that environmental disasters could amount to persecution and called for an extension of the traditional refugee definition enshrined in the 1951 Convention Relating to the Status of Refugees to include so-called environmental (or climate change) refugees.<sup>6</sup> The widely highlighted lack of a legal basis in international refugee law for such a definition also relates to its particular context, as it is firstly very unlikely to find the environment ‘intentionally’ responsible for the persecution of a targeted population. Secondly, most people hit by an

environmental disaster do not leave their country of origin, thus remaining under the primary responsibility of their national authorities.<sup>7</sup>

Alternatively, the IOM working definition of environmental migrant succeeds in recognising a direct, causal link between the environment and migration, reflecting the complexity of the issue. If further explored, it may have the potential to first qualify them in legal terms, to then be able to build, or to extend, a suitable protection frame.<sup>8</sup>

The growing awareness that the prevention and limitation of environmental threats was not only a matter of international environmental law, but also of international human rights law finally reached a breakthrough with the 2016 New York Declaration for Refugees and Migrants. The Declaration explicitly identifies environmental disasters as causes of forced migration (par. 1, and 7 of Chapter II in Annex II), and pledges signatory states to address their adverse impacts.<sup>9</sup>

The Global Compact on Refugees further separates the environmental cause from the refugee definition by clearly asserting that environmental threats cannot be seen as valid grounds for the application of the Refugee Convention (Introduction, D8).<sup>10</sup> On its part, the Global Compact for Safe, Orderly and Regular Migration (GCM) represents another relevant turning point, as it is the first ever inter-governmentally negotiated agreement that simultaneously recognises environmental threats as drivers of forced migration and the urgency to provide protection to their victims.<sup>11</sup>

Most importantly, GCM’s Objective 5(g,h) commits participating states to use protection mechanisms ‘[...] based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin owing to sudden-onset natural disasters’, as well as to devise planned relocation. Regrettably, it does not include the victims of slow-onset disasters, such as environmental degradation, coastal erosion, or desertification. The GCM thus confirms the environment to be a cause of forced migration, but not of refugee movements.

The common issue for the protection of migrants compelled to leave due to environmental factors is therefore the official recognition of the issue. Jurisprudence, international and regional case law, as well as international and regional non-binding instruments indicate that environmental threats represent both a breach of human rights and a cause of forced migration. They also argue that states should thus combine their obligations under international environmental law to those related to international human

rights law, as inevitably interlinked. The next reasonable step should be to internationally agree on a comprehensive definition of environmental migrants to provide them with adequate protection mechanisms.

This goal is however still far from being achieved, as implementing common strategies for the protection against adverse environmental impacts seems not to be among states' priorities. In this regard, states, overall responsible for climate change worsening will continue to neglect part of their responsibilities as long as they use externalisation policies towards migrants compelled to leave their home because of an unbearable environment that those states have contributed to creating. In seeking to reverse this trend, the New York Declaration, the GCM, and other single statements represent a feeble light in the shadow

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- 1 World Bank, *The World Bank Annual Report 2018*, (World Bank, 2018). <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/630671538158537244/the-world-bank-annual-report-2018>.
  - 2 Damian Carrington, "Climate apartheid": UN Expert Says Human Rights May not Survive' *The Guardian*, June 25, 2019. <https://www.theguardian.com/environment/2019/jun/25/climate-apartheid-united-nations-expert-says-human-rights-may-not-survive-crisis>.

- 3 United Nations Human Rights Council, *Resolution 10/4. Human Rights and Climate Change*, (United Nations, 2009). [https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf); Inter-American Commission on Human Rights- 'The Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities,' (Inter-American Commission on Human Rights, 1997). <http://www.cidh.org/countryrep/ecuador-eng/chaper-8.m#THE%20HUMAN%20RIGHTS%20SITUATION%20OF%20THE%20INHABITANTS%20OF%20THE%20INTERIOR%20OF%20ECUADOR%20AFFECTED%20BY%20DEVELOPMENT%20ACTIVITIES>; Marangopoulos Foundation for Human Rights (MFHR) v. Greece. 2007. 30/2005. [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070607\\_Complaint-No.-302005\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070607_Complaint-No.-302005_decision-1.pdf).
- 4 Socio-Economic Right and Accountability Project v. Federal Republic of Nigeria and Universal Basic Education Commission. 2009. ECW/CCJ/APP/08/08. <https://www.escri-net.org/caselaw/2010/socio-economic-rights-and-accountability-project-serap-v-federal-republic-nigeria-and>.
- 5 *Climate Diplomacy* 2018 (European Parliament). P8\_TA-PROV(2018)0280. [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0280\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0280_EN.html).
- 6 Norman Myers, 'Environmental Refugees: A Growing Phenomenon of the 21st century'. *The Royal Society* no. 357 (2001):609-613; Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees,' *Harvard Environmental Law Review*, 33 (2009): 349-403; United Nations High Commissioner for Refugees. 'The 1951 Refugee Convention.' *UNHCR*. <https://www.unhcr.org/1951-refugee-convention.html>.
- 7 World Bank, *The World Bank Annual Report 2018*, (World Bank, 2018). <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/630671538158537244/the-world-bank-annual-report-2018>.
- 8 International Organization for Migration, *Migration and the Environment*, (International Organization for Migration, 2007). [https://www.iom.int/sites/g/files/tmzbd486/files/jahia/webdav/shared/shared/mainsite/about\\_iom/en/council/94/MC\\_INF\\_288.pdf](https://www.iom.int/sites/g/files/tmzbd486/files/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf).
- 9 United Nations General Assembly, 'New York Declaration for Refugees and Migrants.' September 19, 2016. [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf).
- 10 United Nations, *The Global Compact on Refugees*, (New York: United Nations, 2018). <https://www.unhcr.org/5c658aed4>
- 11 Office of the United Nations High Commissioner for Human Rights. 'The Global Compact for Safe, Orderly and Regular Migration.' *OHCHR*. <https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm>.

## Why Is Australia Adopting the Global Refugee Compact and not the Migration Compact?<sup>1</sup>

*Azadeh Dastyari*

19 August 2019

Australia was one of 176 countries to vote in favour of the Global Compact on Refugees (refugee compact) in mid-November this year. The United Nations General Assembly will adopt it by the end of 2018.

However, Australia did not join the Global Compact for Safe, Orderly and Regular Migration (migration compact) at a conference in Morocco on December 10-11.<sup>2</sup>

There is much confusion about the two compacts, with commentators often conflating the two documents. However, they are distinct agreements with differing subjects.

The term “refugee” used in the refugee compact has a specific meaning under international law. It refers to a person outside their own country who fears persecution because of their race, nationality, membership of a particular social group or political opinion.<sup>3</sup>

As a signatory to the Refugee Convention and Refugee Protocol, Australia has particular obligations to refugees under these two treaties. The refugee compact does not replace these obligations. Instead, it is a non-binding agreement that “intends to provide a basis for predictable and equitable burden- and responsibility-sharing”.<sup>4</sup>

The Refugee Compact lists four objectives. They are to:

1. ease pressures on host countries
2. enhance refugee self-reliance
3. expand access to third country solutions
4. support conditions in countries of origin for return in safety and dignity

Unlike the term “refugee”, the term “migrant” does not have a precise meaning under international law. Australia does not have any specific international legal obligations to migrants beyond respecting their human rights under the human rights treaties to which it is a party.

The migration compact does not create any new binding legal obligations on states such as Australia. Instead, it has a range of 23 objectives for safe, orderly and regular migration. These include the collection and better use of data on migration; strengthening responses to smuggling and trafficking; eliminating discrimination; using detention as a last resort; saving lives; managing borders in an integrated, secure and coordinated manner; addressing and reducing vulnerabilities in migration; and strengthening international cooperation.

The two compacts have emerged from a need for the international community to better cooperate and respond to unprecedented numbers of people on the move, particularly into Europe. This includes refugees fleeing persecution from conflicts such as Syria.

In September 2016, the United Nations General Assembly unanimously adopted the New York Declaration for Refugee and Migrants to address such concerns.<sup>5</sup> The declaration contained a commitment to begin two separate tracks of negotiations: the refugee compact and the migration compact.

Australia has been relatively silent on the refugee compact, but has objected to the migration compact on the grounds that it would compromise Australia’s sovereignty.<sup>6</sup>

The migration compact has also been accused of failing to:

adequately distinguish between people who enter Australia illegally and those who come to Australia the right way.

In addition, Australia has cited its success with migration as a reason for its refusal to adopt the migration compact. It has stated:

when we are asked to sign up to international agreements that we believe will compromise our successful way of doing things, we will pass.

The criticisms regarding the threat to Australia’s sovereignty and the lack of distinction between categories of migrants is surprising. As has been explained by Goodwin-Gill and McAdam, it is a misrepresentation of the document.<sup>7</sup>

As with the refugee compact, the migration compact does not create any binding legal obligations on states. It affirms that “within their sovereign jurisdiction, States may distinguish between regular and irregular migration status.”

Furthermore, irrespective of whether Australia signs the migration compact, it is obliged to protect the human rights of migrants under existing international law. This includes, for example, the obligation to refrain from arbitrary detention. Thus the illegality of arbitrary detention, including on Nauru and Manus Island, under international law will not change whether Australia signs the migration compact or not.

The United States is the only country to vote against the Refugee Compact. In contrast, the United States, Australia, the Netherlands, Austria, Bulgaria, Hungary, Czech Republic, Poland, Dominican Republic, Chile, Latvia, Slovakia, Estonia and Italy either withdrew from the migration compact negotiations or expressed reservations, often citing concerns about sovereignty as the reason.

But rather than being a real threat to sovereignty, the migration compact appears to have taken on a symbolic meaning that the refugee compact has not. Its opponents are governments with strong anti-immigration and asylum seeker policies. For such states, the migration compact has become a convenient strawman against which states can demonstrate a show of power and resistance to serve domestic political interests.

A reason why the migration compact has been used as a foil in this way may simply be in the timing. The United States has led the rejection of the migration compact. It was early to withdraw from the process. In contrast, it continued to support the refugee compact until close to the last minute.<sup>8</sup>

The earlier withdrawal of the US may have contributed to the galvanisation against the migration compact. Each state rejecting the migration compact adds to its perception as problematic, even if such a characterisation is unreasonable.

There may also be a fear that signing the migration compact may lead to new binding international obligations to migrants in the future. By contrast, the refugee compact may be viewed as less of a threat since states have existing obligations to refugees under international law.

However, adopting any hypothetical additional binding legal obligations will be a choice that governments can make in the future. Signing the migration compact does not bring an obligation to sign any future binding agreements.

In addition, the reluctance to join the migration compact but vote for the refugee compact may be because of the perception that the refugee compact requires less of states. The refugee compact has been criticised for lacking concrete mechanisms for governments to take on burden and responsibility sharing.<sup>9</sup>

This may be true, and is an issue that has been addressed in part in the latest version of the refugee compact, which calls for indicators that will track progress by states. But again, the non-binding nature of the agreements means that states do not have to do anything they do not wish to do.

As the opening lines of the New York Declaration attest:

since earliest times, humanity has been on the move.<sup>10</sup>

Rejecting international cooperation cannot and will not stop people from fleeing danger, migrating for better economic opportunities or moving to be with loved ones.

However, without international cooperation the system is uneven, dangerous and unsustainable. The migration and refugee compacts are not perfect. But they offer countries the opportunity to do better for themselves, for those on the move and for the international community as a whole.

- 1 Originally published in *The Conversation*, (Azadeh Dastiyari, 'Explainer: why is Australia adopting the global refugee compact but not the migration compact?', *The Conversation*, December 11, 2018, <https://theconversation.com/explainer-why-is-australia-adopting-the-global-refugee-compact-but-not-the-migration-compact-108167>).
- 2 United Nations, *Global Compact for Safe, Orderly and Regular Migration*, (United Nations, 2018) <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>.
- 3 United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, (United Nations, 2010), <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.
- 4 Azadeh Dastiyari, 'Explainer: Australia's Obligations under the UN Refugee Convention,' *The Conversation*, July 18, 2013, <https://theconversation.com/explainer-australias-obligations-under-the-un-refugee-convention-16195>.
- 5 United Nations General Assembly, 'New York Declaration for Refugees and Migrants,' September 19, 2016, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf).
- 6 Peter Dutton, 'Joint Media Release with the Prime Minister and Minister for Foreign Affairs – Global Compact for Migration,' Media release, November 21, 2018, <https://minister.homeaffairs.gov.au/peterdutton/Pages/joint-global-compact-migration.aspx>.
- 7 Jane McAdam and Guy Goodwin Gill, 'Nothing Surrendered but Much to Be Gained from UN Migration Pact,' *The Sydney Morning Herald*, November 27, 2018 [https://www.smh.com.au/national/nothing-surrendered-but-much-to-be-gained-from-un-migration-pact-20181126-p50if5.html?utm\\_source=Refugee+Law+Initiative&utm\\_campaign=f22950ad5a-EMAIL\\_CAMPAIGN\\_2017\\_10\\_03\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_304c0b75a9-f22950ad5a-525851613](https://www.smh.com.au/national/nothing-surrendered-but-much-to-be-gained-from-un-migration-pact-20181126-p50if5.html?utm_source=Refugee+Law+Initiative&utm_campaign=f22950ad5a-EMAIL_CAMPAIGN_2017_10_03_COPY_01&utm_medium=email&utm_term=0_304c0b75a9-f22950ad5a-525851613).
- 8 Faith Karimi, 'US Quits UN Global Compact on Migration, Says It'll Set Its Own Policy,' *CNN Politics*, December 3, 2017, <https://edition.cnn.com/2017/12/03/politics/us-global-compact-migration/index.html>; Nayla Rush, 'U.S. Continues to Back UN Refugee Compact that Contradicts Administration Goals,' *Center for Immigration Studies* (blog), September 25, 2018, <https://cis.org/Rush/US-Continues-Back-UN-Refugee-Compact-Contradicts-Administration-Goals>.
- 9 Centre for International Governance Innovation and World Refugee Council, 2018. *Keeping the Promise: Three Proposed Accountability Mechanisms for the Global Refugee Regime*, (Centre for International Governance Innovation, 2018), [https://www.cigionline.org/static/documents/documents/WRC%20Discussion%20Paper%20no.1\\_2.pdf](https://www.cigionline.org/static/documents/documents/WRC%20Discussion%20Paper%20no.1_2.pdf).
- 10 United Nations General Assembly, 'New York Declaration for Refugees and Migrants,' September 19, 2016, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf).

## We Don't Know How Many Asylum Seekers Are Turned Away at Australian Airports

Asher Hirsch, Daniel Ghezelbash and Regina Jeffries

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The immigration department doesn't keep a record of how many people apply for asylum at Australian airports, and how many are turned away. Documents released under Freedom of Information show a lack of accountability and oversight by Australian immigration officials with regard to people who request asylum at airports.<sup>1</sup>

This means the ultimate decision to admit or deny an asylum seeker entry into Australia rests with the Border Force official who interviews them. Without oversight, an asylum seeker could be turned away and sent back to a country where they may be at harm, after being interviewed behind closed doors and without access to lawyers.

Last week, ABC's Four Corners reported that two Saudi women were turned back at Sydney Airport after letting customs officers know they intended to apply for asylum. This has led to concerns Australian Border Force officers may be deliberately targeting and blocking Saudi Arabian women, who they suspect may apply for asylum, from entering the country.<sup>2</sup>

Until 2014, a person could apply for a permanent protection visa before being cleared at customs, also known as immigration clearance. However, amendments passed in 2014 mean those stopped before being cleared can only apply for a three-year temporary protection visa or a five-year safe haven visa.<sup>3</sup>

Had the two women not disclosed their intention to seek asylum at the airport, they would generally have been cleared at customs and allowed to enter Australia. They would be able to apply for a permanent protection visa after leaving the airport.

But by making an asylum claim at the airport, they were subsequently detained and then deported from Australia without a chance to apply for protection, or access to lawyers, in violation of Migration Act.

The ABC report suggested at least 80 Saudi women have sought asylum in Australia in recent years, many of them fleeing Saudi Arabia's male guardianship laws, which allow their husbands, fathers, brothers, uncles and sons to control their lives.

A response from the Department of Home Affairs to a Freedom of Information request for the number of

individuals who have made protection claims before, or at, immigration clearance at airports since 2008, said:

the location of the applicant in Australia at the time of lodgement ... is not relevant to the assessment of the applicant's asylum claims, and therefore is not recorded in the Department's database. As such, the Department does not hold existing documents as falling in the scope of the request.

But this can't be correct given the disparity between the safeguards available before and after an asylum seeker clears customs.

Asylum seekers who have passed through customs can appeal their application for protection if it is rejected in the first instance.

Australia has non-refoulement obligations under the 1951 Refugee Convention, various human rights treaties and customary international law. These prohibit the return of asylum seekers to places where they would face certain types of persecution or harm.<sup>4</sup>

This extends to returning asylum seekers to transit countries where they may fear harm, or be at risk of being returned to their home country where they fear harm.

As part of the non-refoulement obligation, Australia must fairly and efficiently assess the claims of any person who applies for asylum under its territory or jurisdiction. Australia may not remove, or refuse admission at the border to, an asylum-seeker while considering that individual's claim.

The demarcation of immigration clearance zones, or international zones has no consequence to Australia's obligations under international law.

The Department of Home Affairs sets out the procedures to follow when an asylum claim is made at immigration clearance. The policies – which cannot be accessed publicly, but we have provided screenshots here – require that “if the person raises protection related claims, the interviewing officer should interview the person for a second time and explore the protection claims”.<sup>5</sup>

If the person “makes a *prima facie* protection claim that is not considered to be ‘far-fetched and fanciful’, they are considered to be a person who potentially engages Australia's non refoulement obligations” and must be permitted to enter Australia.

We do not know whether the department followed its own policies in the case of the two Saudi women. The interviews took place behind closed doors, and the minister has not made a comment on the cases. Even if the policy was followed, it still leaves much discretion to the interviewing officer.

There are no clear standards that must be followed when determining whether a claim meets the threshold of not being “far-fetched and fanciful”. The words are not found in the Migration Act, or the Migration Regulations, which govern migration determinations.<sup>6</sup>

If Australia returned these women without a proper consideration of their asylum claims, it will be in breach of its international obligations. The failure to keep or share these statistics compounds the lack of accountability.

- 1 Department of Home Affairs, 2019, *Decision 24A FA18.11.01551*. [https://www.righttoknow.org.au/request/policies\\_and\\_procedures\\_regardin#incoming-14213](https://www.righttoknow.org.au/request/policies_and_procedures_regardin#incoming-14213).
- 2 McNeill, Sophie, Sharon O'Neill and Mary Fallon. 'Australian Border Force Accused of Targeting Women Suspected of Fleeing Saudi Arabia.' *ABC News*. February 4, 2019. <https://www.abc.net.au/news/2019-02-04/border-force-accused-of-targeting-saudi-women-traveling-alone/10768036>.
- 3 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Commonwealth of Australia), Bills Digest no. 40 2014–15. [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1415a/15bd040](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd040).
- 4 United Nations High Commissioner for Refugees, 'The 1951 Refugee Convention,' *UNHCR*. <https://www.unhcr.org/1951-refugee-convention.html>; Office for the High Commissioner for Human Rights. N.d, *The Principle of Non-refoulement under International Human Rights Law*. <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.
- 5 Department of Home Affairs, 'Annexure 2: Unauthorised Arrival Entry Screening Guidelines,' *Imgur*, February 11, 2019. <https://imgur.com/a/81vHmil>.
- 6 Commonwealth of Australia, Migration Act 1958, Compilation no. 142. <https://www.legislation.gov.au/Details/C2019C00046>; Commonwealth of Australia, *Migration Regulations 1994*. <https://www.legislation.gov.au/Details/F2018C00957>.

## Refugee Externalisation Policies: Some Reflections from the First CONREP Workshop 2019

Rashaam Chowdhury

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I was able to attend the Comparative Network on Refugee Externalisation Policies Masterclass and Workshop in Italy this year after receiving the CONREP Travel PhD Scholarship. As a reflective piece of this experience, this blog presents themes of refugee externalisation that resonated with my work on Bangladesh's response to the Rohingya refugee crisis. I argue that EU and Australia's narratives and policies of externalisation highlighted by the academics, researchers, practitioners and activists in the workshop have trickled down to refugee host countries in the global South which continue to host the majority of asylum seekers.

The speakers of the workshop and masterclass highlighted the multitude of ways in which the EU and Australia have abrogated their obligations towards refugees through externalisation processes that actively pass on responsibilities to neighbouring less powerful states. In presenting the practices and impacts of externalisation, various common analytical themes emerged from the presentations. I focus on three of these here and refer to them as the "architecture of externalisation". The first analytical theme prompted us to think beyond externalisation as a set of practices, but as actions rooted in political discourses and narratives reproduced in the public sphere which ultimately results in a process of exclusion of refugees. This includes exclusion through containment, exclusion through othering, and so forth.

Another analytical theme highlighted the use of the law as a tool to facilitate and legitimise externalisation. From interception and interdiction at sea to organised secrecy in offshore detention facilities, the law has been utilised to enable the lived experiences of harm by refugees.

The final common theme locates this intentionality of harm of externalisation policies as a rationale for their existence. Through detention, the militarised policing of borders, and the reality of death at sea by preventing humanitarian rescue efforts, externalisation policies operate as threats of harm to prevent and deter refugees to travel to the EU and Australia.

While researchers and academics presented these themes in terms of theory and research, the workshop also provided activists, practitioners and those with lived refugee experiences a platform to share their perspectives. For example, an ex-Manus Island detainee believed that the medical neglect in Manus was a purposeful strategy

of Australia's refugee externalisation regime. Similarly, a representative from *Médicins Sans Frontières* provided an overview of how their relationship with states shifted through these processes of externalisation from one of coordination to criminalisation in their sea rescue operations in the Mediterranean.<sup>1</sup> These perspectives demonstrate the intermingling nature of elements within the architecture of externalisation.

Being part of the workshop facilitated reflections on my Master's research regarding Bangladesh's experiences with Rohingya refugees. Bangladesh's responses to Rohingyas can be situated within Australia's externalisation policies of the region. Australia has repeatedly presented refugee flows as a 'problem' within South East Asia. The policy frameworks have legitimised and perpetuated the security lens through which refugee movements have been viewed within the region.

Bangladesh's initial response to those fleeing genocidal violence in Myanmar was to close down its borders.<sup>2</sup> Between 2012 - 2016 an ad hoc policy framework was pursued. This included: intercepting and pushing back boats carrying the Rohingya; banning NGOs providing emergency assistance to Rohingyas arriving at the country's shores; and the banning of marriage between Rohingyas and Bangladeshis.<sup>3</sup>

During this time, the government reproduced the rhetoric of the global North, framing refugees as security threats and burdensome outsiders who must be contained; garnering popular support to push back refugees to Myanmar.<sup>4</sup> Knowing that the borders in Bangladesh were closed, refugees sought to reach Thailand/Malaysia via the Bay of Bengal, a route which the UNHCR called three times more dangerous than crossing the Mediterranean.<sup>5</sup> In addition, Amnesty International suggested that "hundreds, maybe thousands, more refugees and migrants have perished at sea than first estimated."<sup>6</sup>

The number of Rohingyas who have died are not unintended consequences of Bangladesh's overarching refugee refusal strategy. The Bangladeshi government utilised the reality of death, disease and violence against refugees as a tool to deter Rohingyas in Myanmar who were thinking of making the journey to Bangladesh. These refusals can be viewed as acts that directly enable deliberate killing, starving, spreading of disease and brutalisation of women in Rohingya populations by Bangladesh. Furthermore, they appear to mimic the architecture of refugee externalisation practiced by the global North.

Since 2017, as the numbers of refugees arriving grew exponentially and pushbacks were no longer feasible, the borders were opened. Some estimates suggest over

1 million Rohingyas are currently residing in Bangladesh.<sup>7</sup> While the country has rightfully gained international praise housing and caring for such a large population of refugees, the broader policy frameworks pursued continue to criminalise and harm Rohingya populations.<sup>8</sup> The government practiced containment policies placing refugees in camps with no freedom to leave them. Attempts have been made to move refugees 'offshore' to an uninhabitable remote island (previously unpopulated), called Bhasan Char (the name of which literally translates to flooded delta), mimicking Australia's infamous offshore policy.<sup>9</sup>

Conditions of exclusion remain in place: children are banned from attending local schools; refugees are prevented from joining the local workforce or attain local medical services and so forth.<sup>10</sup> While the EU and Australia pass on responsibilities to states like Libya and Indonesia to physically house refugees; Bangladesh has sought to distance refugees from the general population as much as possible through these means of containment.

Bangladesh's emulation of the rhetoric and policy frameworks of the EU and Australia along with the broader transformation of refugee governance structures within the region (facilitated by Australia's externalisation frameworks) - have allowed for the growth of Bangladesh's restrictive and punitive refugee regime.<sup>11</sup> Thus, externalisation policies do not just undermine refugee protection frameworks in countries directly involved in the externalisation frameworks, but also undermine refugee frameworks in neighbouring countries like Bangladesh. The architecture of externalisation through exclusionary narratives and discourses; the use of the law; and intentional harms towards refugees are being replicated in the global South - albeit in different ways.

- 1 Médecins Sans Frontières, *Médecins Sans Frontières (Doctors Without Borders)*, 2022. <https://msf.org.au/>.
- 2 Amnesty International, 'Bangladesh Pushes back Rohingya Refugees amid Collective Punishment in Myanmar', *Amnesty International*, November 25, 2016. <https://www.amnesty.org.au/bangladesh-pushes-back-rohingya-refugees/>.
- 3 Human Rights Watch, 'Bangladesh: Stop Boat Push-backs to Burma', *Human Rights Watch*, June 19, 2012. <https://www.hrw.org/news/2012/06/19/bangladesh-stop-boat-push-backs-burma>; Al Jazeera, 'Dhaka Bans NGOs from Helping Rohingya', *Al Jazeera*, August 3, 2012. <https://www.aljazeera.com/news/2012/8/3/dhaka-bans-ngos-from-helping-rohingya>; Antonia Blumberg, 'Rohingya Muslim Refugees Can No Longer Wed in Bangladesh under New Marriage Ban: Report', *Huffington Post*, July 10, 2014. [https://www.huffpost.com/entry/rohingya-muslims-bangladesh\\_n\\_5574415](https://www.huffpost.com/entry/rohingya-muslims-bangladesh_n_5574415).
- 4 The New Humanitarian, 'Rohingya Refugees Face More Restrictions', *The New Humanitarian*, October 12, 2012. <https://www.thenewhumanitarian.org/report/96526/bangladesh-rohingya-refugees-face-more-restrictions>; Al Jazeera, 'PM Says Bangladesh Cannot Help Rohingya', *Al Jazeera*, July 28, 2012. <https://www.aljazeera.com/news/2012/7/28/pm-says-bangladesh-cannot-help-rohingya>.
- 5 United Nations, 'Bay of Bengal "Three Times More Deadly" Than Mediterranean for Migrants and Refugees - UN', *UN News*, February 23, 2016. <https://news.un.org/en/story/2016/02/522902-bay-bengal-three-times-more-deadly-mediterranean-migrants-and-refugees-un>.
- 6 Steve Herman, 'Amnesty: Thousands of Rohingya Perished at Sea', *VOA News*, October 20, 2015. <https://www.voanews.com/a/rights-group-thousands-rohingya-perished-sea/3016384.html>.
- 7 Hannah Ellis-Petersen, 'Rohingya Crisis: Bangladesh Says It Will Not Accept Any More Myanmar Refugees', *The Guardian*, March 1, 2019. <https://www.theguardian.com/world/2019/mar/01/rohingya-crisis-bangladesh-says-it-will-not-accept-any-more-myanmar-refugees>.
- 8 Dhaka Tribune, 'UN Praises Bangladesh for Supporting Rohingya Refugees', *Dhaka Tribune*, October 5, 2017. <https://archive.dhakatribune.com/bangladesh/foreign-affairs/2017/10/05/un-praises-bangladesh-rohingya-refugees>.
- 9 Elise Thomas, 'The "Floating" Island that Has Refugees Terrified', *ABC News*, April 12, 2019. <https://www.abc.net.au/news/2019-04-12/rohingya-bhasan-char-floating-island-bangladesh/10900998>.
- 10 Human Rights Watch, 'Bangladesh: Rohingya Refugee Students Expelled', *Human Rights Watch*, April 1, 2019. <https://www.hrw.org/news/2019/04/01/bangladesh-rohingya-refugee-students-expelled>; Victoria Milko, '"Conditions Here are inhumane": Rohingya in Bangladeshi Camps', *Al Jazeera*, August 22, 2019. <https://www.aljazeera.com/news/2019/8/22/conditions-here-are-inhumane-rohingya-in-bangladeshi-camps>.
- 11 Amy Nethery, Brynna Rafferty-Brown and Savitri Taylor, 'Exporting Detention: Australia-Funded Immigration Detention in Indonesia', *Journal of Refugee Studies* 26, no. 1 (2013): 88-109.

## Natural Law and International Refugee Law

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Writing in 1899, Sir Sherston Baker argued that laws that violate natural and divine law 'have no binding force'. Baker's exposition was to emphasise the importance of morality and ethics to the formulation and application of the law.

Baker was writing at a time when the natural law tradition, a pillar of western civilisation, was being challenged by a new legal tradition - positivism. Though discussion on *jus positivum* was found in some medieval writings including that of Peter Abelard in his famed Dialogue, it was Jeremy Bentham and John Austin who pushed for this new approach.

Bentham and Austin emphasised that laws must emanate from an independent, sovereign political entity, because as Austin argued the law should be what 'men' posit it to be, which also meant that the law was changeable. This was in direct opposition to natural law advocates who identified key rights (*ius*) that transcended time as they are found in nature.

The Great Wars of the twentieth century questioned the positivist tradition that Bentham, Austin, Morgenthau, and Kelsen advocated for, as international society recognised that allowing states to operate with impunity undermined peace and security based on an international legal order (*ius gentium*) that served as a higher and compelling law (*ius cogens*).<sup>1</sup>

International refugee law (IRL) evolved out of the recognition as to the presence of some basic rights (natural law), interconnectedness of humanity and the need to help others.

In 1951, states came together to adopt the Convention Relating to the Status of Refugees, which laid down an international protection regime. Under the Refugee Convention and the 1967 Protocol a person is a refugee if, inter alia, they flee persecution and they are deemed to be a member of one or more of the five enumerated groups (race, religion, nationality, membership of a particular social group or political opinion, Art. 1A(2) 1951 Refugee Convention).<sup>2</sup>

The end of the Cold War and the proliferation of new wars placed the international protection regime under enormous pressure, as civilians were increasingly targeted by warring factions.<sup>3</sup> Many states reacted to mass population movements by adopting legislation limiting their

responsibility for those seeking refuge from persecution and human insecurity. This was in stark contrast to what took place during the Cold War. During that time states proved more willing to accept people fleeing persecution as seen with the 1956 Hungarian Uprising, which saw over 180,000 people cross over to Austria. Within 10 weeks of the uprising around 100,000 people were resettled in the UK, USA, Canada, Australia, Switzerland, and other countries.<sup>4</sup>

Under the current protection regime, states limit and reinterpret their responsibilities and duties in protecting those fleeing persecution. They adopt domestic legislation providing for new ways to assess whether one is a bona fide refugee (and thus reduce numbers). They sign bilateral extraterritorial migration controls (non-entrée policies) aimed at making it harder for those seeking refuge to assert their legal rights as the physical border no longer begins at the water's edge.<sup>5</sup> They also welcomed procedures that permit the repatriation to 'safe' third countries, even though those countries have questionable human rights records.

In defending their actions, western policymakers claim that the measures are legal for several reasons. First, they were adopted through a democratic process. Second, the laws do not alter the protection regime, but rather implement the law. They emphasise that only those fleeing persecutions and can prove it are entitled to protection. This argument rests on two pillars: it is the responsibility of each state to look after their inhabitants if they face human insecurity (which is known as 'In Place' objection).<sup>6</sup> Secondly, many host countries assert that to extend protection to non-persecuted individuals places a huge strain on them (this is understood as the 'Overwhelm' objection).<sup>7</sup>

In challenging the Refugee Convention protection regime, Western policymakers also argue that voters want to stop irregular migration and permit only bona fide refugees' entry. The bona fide refugee is the individual that lodged their claims at the country of origins and did not use illegal means to enter the host country. Those that enter the host country illegally are deemed illegitimate claimants or queue-jumpers, even though Article 31 of the Refugee Convention prohibits the Contracting Parties from imposing penalties on those that enter and even stay at a host country illegally (see for example the *travaux préparatoires* of the Convention).<sup>8</sup>

Senior policymakers seem to have forgotten the lessons of the Great Wars, as we increasingly take a transactional approach to inter-state relations, which seem to intensify cultural sovereignty and encourage populism and a rejection of established political ideologies and systems.<sup>9</sup> If we are to restore faith in the liberal, democratic political system, we must return to a more natural law interpretation, which emphasises the existence of inalienable rights and that we all have a responsibility to protect and help those

facing grave harm. It would serve us well to recall Hegel's famed exposition 'a human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc.'<sup>10</sup>

Natural law rejects socio-political-economic-cultural inequalities as it upholds the existence of fundamental 'rights' (ius) that each human has by virtue of being human and that these rights exist in nature, placing them above the law of humans. In this vein it is worth remembering Emmanuel Kant idealism best expressed in this well-known quote:

Humanity is by its very nature capable of constant progress and improvement without forfeiting its strength ... no one can or ought to decide what the highest degree may be at which mankind may have to stop progressing, and hence how wide a gap may still of necessity remain between the idea and its execution. For this will depend on freedom, which can transcend any limit we care to impose.<sup>11</sup>

- 1 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd Ed. (London: Red Globe Press, 1977).
- 2 United Nations High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (United Nations, 2011). <https://www.unhcr.org/en-au/about-us/background/4ec262df/1951-convention-relating-status-refugees-its-1967-protocol.html>.
- 3 Mary Kaldor, 'In Defence of New Wars,' *Stability* 2, no. 1 (2013): 1-16.
- 4 Robert Colville, 'Fiftieth Anniversary of the Hungarian Uprising and Refugee Crisis,' *UNHCR News*, October 23, 2006. <https://www.unhcr.org/en-au/news/latest/2006/10/453c7adb2/fiftieth-anniversary-hungarian-uprising-refugee-crisis.html>.
- 5 Thomas Gammeltoft-Hansen, *The Law and Politics of Non-Entrée*. Annual Harrell-Bond Lecture. Lecture given at the University of Oxford Refugee Studies Centre on June 4, 2014, 90min. <https://www.rsc.ox.ac.uk/events/the-law-and-politics-of-non-entree>.
- 6 Matthew Lister, 'Who are Refugees?' *Law and Philosophy* 32, no. 5 (2013):645-671.
- 7 Kristen Walker, 'Defending the 1951 Convention Definition of Refugee,' *Georgetown Immigration Law Journal* 17, no. 4 (Summer 2003): 583-610.
- 8 Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection,' 2001. <https://www.unhcr.org/419c778d4.html>; Paul Weis, 1995. *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, (UNHCR, 1995). <https://www.unhcr.org/en-au/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>.
- 9 Jennifer Rubin, 'Why Transactional Foreign Policy Is Destined to Fail,' *The Washington Post*, October 19, 2018. <https://www.washingtonpost.com/news/opinions/wp/2018/10/19/why-transactional-foreign-policy-is-destined-to-fail/?noredirect=on>.
- 10 Georg Wilhelm Fredrich Hegel. *Hegel: Elements of the Philosophy of Right*, ed Allen W. Wood. Translated by H. B. Nisbet. (Cambridge: Cambridge University Press, 1991).
- 11 Immanuel Kant. *Kant: Political Writings*, ed H. Reiss. (Cambridge: Cambridge University Press, 1991), 189-191.

## Information Campaigns to Deter Migrants as New Bordering Practices

*Pierluigi Musaró*

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In our previous article of this series we argued that, since the 1990s, Europe and Australia started to implement the so-called awareness campaigns to deter irregular migration. These campaigns are considered an essential tool in fighting human trafficking and undocumented migration, as they contribute to raising awareness among potential victims regarding the risks of being caught in criminal networks and thus reduce their vulnerability. Several European states, as well as the Australian government, supported by the International Organization for Migration (IOM), have launched numerous campaigns to inform the population of sending regions of the risks of migrating, mostly in central and eastern Europe - Romania (1992 to 1996), Albania (1992 to 1995), and Ukraine (1998) -, the Philippines (1997 to 1999) and Vietnam (1998 to 1999), with an increase since 2000 in Morocco, Gambia, Ghana, Senegal, Nigeria, Cambodia, Colombia and the Dominican Republic.

In their attempt to reduce emigration before migrants reach the border by convincing them not to leave their home, these campaigns complement traditional methods of migration control, such as the surveillance of borders. In other words, for achieving its goal of deterring would-be migrants and refugees from leaving their countries, these campaigns depict them in very specific ways, operating as 'new bordering practices' that are in conjunction with extraterritorial border policies. Nevertheless, these symbolic and imaginary dimensions of border externalisation have received little scholarly consideration.

There is now a rich literature exploring extraterritorial border management, while focussing on two different aspects of this practice: the securitisation of territory adjacent to physical borders; and the topologies of biopolitics governing racialised bodies. This latter aspect emphasises the disciplining of undesired migrants through the toll deflection, detention, surveillance and deportation take on migrant bodies.

Yet, what requires greater attention is how states attempt the symbolic control of unwanted migrants. This occurs through the use of extraterritorial subjugation as a practice of preemptive border security, the implementation of border externalisations through extraterritorially acting upon people's perceptions of migration, and depiction of irregular migration in a negative light. This detailed analysis of the efforts by states to govern international migration through spreading imaginaries that symbolically reshape certain spatial associations is lacking.

Beyond the physical aspect of the border, it is fundamental to consider the symbolic aspects of it. Images and discourses reporting the European and Australian ways to tackle the 'migration crisis', while illegalising those who attempt to cross the border - focussing on their endeavour in terms of risks, death, prohibitions, acts of breaking the law, failure of the arrival - are part of how the media and communication contribute to shape and spectacularise the border.

The media portrayals of people crossing the border, through narratives and images of security and salvation, for example, can be understood as representational barriers, that construe their identities as 'desirable' or 'undesirable'. This is what we can call the 'narrated' border, which is part of the wider 'mediatized border', intended as a regime of reception characterised by the fusion of caring compassion for and military protection from mobile populations.

The mediatised border can be considered as a techno-affective network of mediations around migrants and refugees, where emotions of fear and empathy co-exist through digital connectivities, ritualising our relationship with the other through discourses of difference and superiority.

To capture the symbolic and affective role of media in managing human mobility we need to investigate the border not as a place, rather as a process, a socially constructed and shifting structure of practices and discourses that produces norms of difference and exclusion across bodies and voices of would-be migrants, with a view to sustaining projects of geo-political sovereignty.

As several scholars highlight, the border is always 'a process of bordering' that seeks to rhetorically identify and control the (very) mobility of certain people, services and goods that operate around its jurisdiction. As a technologically-driven process of 'rhetorical identification and control', the process of bordering thus systematically produces its own discursive or emotional landscapes of social power.

These affective spatial imaginaries are extraterritorially disseminated by the states to symbolically normalise certain territorial relationships. Through their normalisation, these imaginary geographies - created by performative discourses and socially held narratives about spaces and places circulated in language and performed in material practice - are used as a 'positive power' by the states to normalise human behaviour. A power that contributes to aid the policing of migration, through the shaping of the choices, desires, needs, and wants of people.

Using this schema, information campaigns to deter irregular migrants should be understood as new forms of delocalised migration control. These can be intended as new bordering practices that work extending the subject-making power of

the state beyond its sovereign borders to redefine the ‘truth’ of irregular migration. A redefinition that aims to modify the choices, desires, needs, and wants of potential irregular migrants in ways discouraging them from migrating.

According to this perspective, we can argue that traditional methods of migration control, such as the surveillance of borders, are thereby complemented by attempts to convince migrants not to leave their home. Thus, to understand how information campaigns contribute to prevent arrivals before migrants reach the border, it is fundamental to explore the ways in which these new bordering practices are part of the complex dichotomies of care and control, the absence and presence of law, transparency and darkness, solidarity and indifference, which mark contemporary border regimes.

## Active Neglect: The New Tool for the 'Externalisation' of Refugee Protection<sup>1</sup>

*Claire Loughnan*

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Over the last twenty years, nation states, many of which are signatory to the Refugee Convention, have utilised increasingly punitive strategies in response to refugee movement for protection, rather than devote their resources to refugee protection and resettlement.<sup>2</sup> This has included the use of immigration removal centres and offshore detention centres, boat turn backs and refusals to rescue stranded asylum seekers at sea.<sup>3</sup>

Many of these measures have externalised the responsibility of signatory states, including by locating this responsibility with refugees themselves. In their 2014 analysis of Australian policies targeting unauthorised refugee movement, Leanne Weber and Sharon Pickering identified two examples which effectively shifted responsibility to refugees for their own movement, and for the harms arising from deterrent state policies.<sup>4</sup> These have comprised pre-emptive border control measures: rather than using physical and legal measures, the authors argued that border security aims are achieved by manipulating the intentions of refugees through what they have termed 'thought policing'. Media campaigns, for example, warned of the supposed dangers of living in Australia and of refugees being refused resettlement if they arrived in Australia without prior authorisation.<sup>5</sup> Similarly, the authors identified practices which sought to influence the repatriation decisions of those already present in a signatory country, either irregularly or while awaiting a visa. For those undocumented, the authors argued that 'access to work and essential public services is so constrained that unlawful non-citizens' are driven to report 'voluntarily' to authorities' and to 'volunteer for repatriation.' Both policy approaches sought to manufacture a 'choice' which conformed with government border protection objectives while minimising the appearance of government intervention in that supposed choice. Some of these trends attest to the structurally embedded border described by Leanne Weber but also point to more disturbing elements, notwithstanding evidence of resistance to these forms of control.<sup>6</sup>

However, the management of intent is now being executed in more harmful ways and with deeper implications than commonly assumed, both within and at/outside the border. Although it continues to be exacted through the removal of government support services for asylum seekers and refugees in Australia awaiting finalisation of their visa applications, we also see the erosion of hope and wellbeing amongst refugees and asylum seekers, through promises of

resettlement elsewhere not being met, and the refusal, or meagre provision of medical care for those in offshore and onshore detention.<sup>7</sup>

These trends comprise what I term 'active neglect'. Neglect suggests the absence of doing anything, or simply the absence of care. In this sense, neglect is imbued with passivity even while it refers to a failure to care for something/someone for whom we have responsibility. The implication is that the state holds no responsibility for the suffering which emanates from neglect; services are merely withdrawn. However, this failure is more adequately described as an active practice: states intend to produce suffering. The charge of criminal intent has recently been applied to the actions of nation states, and their governments, in a June 2019 submission to the International Criminal Court by Omer Shatz and Juan Branco.<sup>8</sup> The authors claimed that criminal liability for harms should be borne by the European Union and its member states, as an outcome of a 'pre-meditated' policy of deterrence, including deportations and ignoring requests for assistance at sea.

We might point to other examples of this, including the Hungarian government 'systematically denying food to failed asylum seekers' while they remain detained in transit zones.<sup>9</sup> Similarly, policies dedicated to producing a hostile environment for illegalised migrants in the UK and the emptying of refugees from reception centres in Italy under the Salvini decree are indicative of intentional neglect.<sup>10</sup> This has left many families and individuals made homeless, forced to live on the streets or seek shelter with charitable organisations while humanitarian protections are withdrawn.<sup>11</sup>

In offshore processing centres operated by Australia (but for which Australia denies responsibility) orders by the Nauruan government for the forced removal of medical services and organisations like Médecins Sans Frontières have had especially severe consequences on the mental health of those detained.<sup>12</sup> In 2018 the Australian government announced cuts to medical services for those in the Manus Island detention centre, leaving refugees and asylum seekers without medical care for broken limbs, mental illness, infections and other illnesses.<sup>13</sup> The contract with health provider International Health and Medical Services (IHMS) for services at Manus Island and Port Moresby was not renewed after it expired in April 2018. In April 2019, the Australian Government commenced cuts to supports for those awaiting resettlement and processing who are living within Australia, to amount to \$A80 million. This affects access to services for newly arrived refugees, many of whom are now seeking emergency housing and food, sleeping rough and unable to access medicine and other basic supports.<sup>14</sup>

For those in need of medical care, neglect has arguably also been achieved in the Australian case through patterns of endless delays, where refugees and asylum seekers wait for services without a guarantee of anything being delivered. The proposed medical evacuation of refugees from Australian offshore processing centres to access urgent medical care under the Medevac Legislation exemplifies this pattern: until recently it has resulted in minimal evacuations, with frustrations at incomprehensible delays to evacuate and treat critically ill refugees at Manus Island detention centre.<sup>15</sup> While there have been some promising outcomes of the Medevac Bill, with a number of refugees evacuated for medical care, there are concerns about the future of this legislation with the Coalition Government keen to repeal the bill.<sup>16</sup> Refugees at Nauru describe the wait in accessing medical care through Medevac as like a slow death, with hopes dashed by continual delays and bureaucratic obstacles.<sup>17</sup> As Akuol Garang has commented in a recent blog post, Australia has a ‘long history of obstructing medical transfers’ and it is likely that many will not receive the treatment they require.<sup>18</sup>

Writing from Manus Island, Kurdish scholar and writer Behrouz Boochani describes this as an ‘implicit violence’. Attempts by refugees to get medical care reveal how it works:

Ultimately, a sick refugee can do nothing other than endlessly search for his name on waiting lists for treatment. But no one ever receives medical care. Over time, the rules and regulations of the system wear down the prisoners’ mental health, producing psychological torture.<sup>19</sup>

It is also ironic that evacuation is often necessary as an effect of the conditions, and delayed and indefinite ‘processing’ in offshore detention sites, evidenced by the high rates of mental illness associated with places which are concretely experienced as punishment. This is also evident in onshore detention sites.<sup>20</sup>

In theory, refugees should be able to access the health services they require and the support they need to live within the community. Current policies in many states signal growing departures from this principle, even though such effective support was emphasised by the 1950 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.<sup>21</sup> In many cases, these services are rarely delivered until it is too late, as the preventable death of refugee Hamid Khazei at Manus Island showed.<sup>22</sup> The effect is one of a slow death (or removal/ departure). The gradual yet unremitting effect of these policies renders them hard to discern as violence. At Manus Island, Behrouz Boochani has observed that ‘the system in these prisons has been created so that incarcerated refugees experience an unbearable amount of pressure,

reach the point of hopelessness, and finally decide to return to their country of origin.’ In his study of Norwegian responses to ‘unruly’ inhabitants such as irregular migrants, Johansen describes this as a ‘funnel of expulsion’: refugees and illegalised migrants are forced through the ‘funnel’ to a narrow end point where their only ‘choice’ is to leave.<sup>23</sup> The indirect character of this form of expulsion is the most potent element of such policies. Not only does it potentially relieve government of having to commit extensive resources to keep unwanted refugees and migrants out, it shifts the responsibility for that expulsion on the body of the refugees themselves. Where geographies have been increasingly utilised to control movement (and to punish) it is the geography of the body, the placement of the body and the imposition of suffering on the body which effectively comprise the border. The body is thus the new vanishing point where biopolitical and sovereign powers converge as Alison Mountz has shown.<sup>24</sup>

Scott Veitch’s tracing of legal practices of irresponsibility provides insights into the mechanisms facilitating the avoidance of legal and political accountability for harm resulting from punitive responses to refugee movement.<sup>25</sup> For example, we could argue that the ‘voluntary departures’ of refugees and asylum seekers on bridging visas are the culmination of a set of social practices that ‘allow irresponsibility to proliferate through forms of ‘responsibility transference’. This results in the disavowal and dispersal of obligations rather than their acknowledgement. Funnels of exclusion, intent management and the practice of active neglect are crucial mechanisms in contemporary border protection, joining the list of externalisation policies like interception at sea, boat pushbacks, and offshore detention. However, they introduce a new element. By locating responsibility for removal (or death) on the body of the refugee, we are seeing the internalisation of externalisation policies. Non-citizens not only ‘cooperate in their own exclusion’: they produce it, as the outcome of intentional policies of active neglect. Yet active neglect seeks not only to sanitise violence, but to invisibilise it.

1 Originally published in *Border Criminologies* (Claire Loughnan, ‘Active Neglect: The New Tool for the ‘Externalisation’ of Refugee Protection’, *Border Criminologies* (blog), July 16, 2019). <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/07/active-neglect>.

2 Refugee Council of Australia., *The Federal Budget: What It Means for Refugees and People Seeking Humanitarian Protection*, (Refugee Council of Australia, 2020). <https://www.refugeecouncil.org.au/federal-budget-summary/>.

3 Richard Hall, ‘EU “Letting Refugees Die” at Sea after Cancelling Mediterranean Rescue Missions’, *Independent*, March 28, 2019. <https://www.independent.co.uk/news/world/europe/eu-refugee-migrant-crisis-libya-mediterranean-rescue-missions-a8843556.html>.

4 Leanne Weber and Sharon Pickering, ‘Constructing Voluntarism: Technologies of “Intent Management” in Australian Border Controls’, in *New Border and Citizenship Politics. Migration, Diasporas and Citizenship Series*, eds. Helen Schwenken and Sabine Rulß-Sattar (London: Palgrave Macmillan, 2014), 17-18.

5 Rebecca Carmody, ‘Sharks, Crocodiles and Snakes to Scare off Illegal Immigrants’, *The World Today*. Aired on ABC News Radio, June 15, 2000. <https://www.abc.net.au/worldtoday/stories/s140600.htm>.

6 Leanne Weber, ‘From State-Centric to Transversal Borders: Resisting the “Structurally Embedded Border” in Australia’, *Theoretical Criminology* 23, no. 2 (2019): 228-246; Leanne Weber, ‘Resisting the “Structurally Embedded Border” in Australia’, *Border Criminologies* (blog), May 14, 2019. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/05/resisting>.

- 7 Andrew & Renata Kaldor Centre for International Refugee Law, 'Australia–United States Resettlement Arrangement,' Fact Sheet, *Kaldor Centre*, August 10, 2021. <https://www.kaldorcentre.unsw.edu.au/publication/australia%E2%80%93united-states-resettlement-arrangement>.
- 8 Omer Shatz and Juan Branco, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute*, (2019). <https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>.
- 9 Shaun Walker, 'Hungary Denying Food to Asylum Seekers, Say Human Rights Groups,' *The Guardian*, April 26, 2019. <https://www.theguardian.com/world/2019/apr/26/hungary-denying-food-to-asylum-seekers-say-human-rights-groups>.
- 10 James Kirkup and Robert Winnett, 'Theresa May Interview: "We're Going to Give Illegal Migrants a Really Hostile Reception,"' *The Telegraph*, May 25, 2012. <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/>; Lorenzo Tondo and Angela Giuffrida, 'Vulnerable Migrants Left Homeless after Italy Passes "Salvini Decree",' *The Guardian*, December 7, 2018. <https://www.theguardian.com/world/2018/dec/07/vulnerable-migrants-made-homeless-after-italy-passes-salvini-decree>.
- 11 Megan Iacobini de Fazio, 'After "Salvini decree" Evictions, Refugees in Italy Face an Uncertain Future,' *The World*, February 1, 2019. <https://theworld.org/stories/2019-02-01/after-salvini-decree-evictions-refugees-italy-face-uncertain-future>.
- 12 Luke Henriques-Gomes, 'Nauru Orders MSF to Stop Mental Health Work on Island,' *The Guardian*, October 6, 2018. <https://www.theguardian.com/world/2018/oct/06/nauru-orders-msf-to-stop-mental-health-work-on-island/>; Médecins Sans Frontières, 'NAURU: New MSF Report Shows the Disastrous Mental Health Impact of Australia's Offshore Processing Policy,' *Médecins Sans Frontières*, December 3, 2018. <https://msf.org.au/article/statements-opinion/nauru-new-msf-report-shows-disastrous-mental-health-impact-australia%E2%80%99s>.
- 13 Helen Davidson, 'Australia's Cut to Healthcare on Manus Island "Inexplicable",' *Amnesty Says*, *The Guardian*, May 18, 2018. <https://www.theguardian.com/australia-news/2018/may/18/australias-cut-to-healthcare-on-manus-island-inexplicable-amnesty-says>.
- 14 Luke Henriques-Gomes, 'Cuts to Asylum Seeker Welfare Create Surge in Demand for Food and Housing,' *The Guardian*, April 23, 2019. <https://www.theguardian.com/australia-news/2019/apr/23/asylum-seeker-welfare-cuts-surge-in-demand-for-food-and-housing-report-says>.
- 15 *Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018* (Commonwealth of Australia) 8619. [https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6069\\_amend\\_daa31cc4-f3cb-44ba-b10d-fd7ad1ec0f9a/upload\\_pdf/8619%20CW%20Home%20Affairs%20Legislation%20Amendment%20\(Miscellaneous%20Measures\)%20Bill%202018%20Storer%20McKim.pdf?fileType=application/pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6069_amend_daa31cc4-f3cb-44ba-b10d-fd7ad1ec0f9a/upload_pdf/8619%20CW%20Home%20Affairs%20Legislation%20Amendment%20(Miscellaneous%20Measures)%20Bill%202018%20Storer%20McKim.pdf?fileType=application/pdf).
- 16 Helen Davidson, 'Medevac Law Repeal a Priority, Coalition Says, as Self-Harm Rises among Refugees,' *The Guardian*, May 22, 2019. <https://www.theguardian.com/australia-news/2019/may/22/medevac-law-repeal-a-priority-coalition-says-as-self-harm-rises-among-refugees>.
- 17 Ben Smees and Saba Vasefi, 'Nauru Refugees Still Waiting for Medical Care Months after "Urgent" Warnings about Threat to Life,' *The Guardian*, July 15, 2019. <https://www.theguardian.com/world/2019/jul/15/it-is-like-a-slow-death-seriously-ill-nauru-refugees-remain-trapped-amid-delays>.
- 18 Akuol Garang, 'Australia's Duty of Care to Detained Refugees and Asylum Seekers in Nauru and Papua New Guinea,' *Border Criminologies* (blog), June 19, 2019. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/06/australias-duty>.
- 19 Behrouz Boochani, 'Manu Prison Theory,' *The Saturday Paper*, August 11-17, 2018. <https://www.thesaturdaypaper.com.au/opinion/topic/2018/08/11/manus-prison-theory/15339096006690#hrd>.
- 20 Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia,' *Transcultural Psychiatry* 44, no.3 (2007): 359-393.
- 21 United Nations High Commissioner for Refugee. *Convention and Protocol Relating to the Status of Refugees*.
- 22 Human Rights Law Centre, "'Preventable" Death of Hamid Khazaei Exposes Politicisation of Medical Care in Offshore Detention,' *Human Rights Law Centre*, July 30, 2018. <https://www.hrc.org.au/news/2018/7/30/preventable-death-of-hamid-khazaei>.
- 23 Nicolay B Johansen, 'Governing the Funnel of Expulsion: Agamben, the Dynamics of Force, and Minimalist Biopolitics,' in *The Borders of Punishment*, eds. Katja Franko Aas and Mary Bosworth (Oxford: Oxford University Press, 2013), 257-272.
- 24 Alison Mountz, 'Shrinking Spaces of Asylum: Vanishing Points Where Geography Is Asked to Inhibit and Undermine Access to Asylum,' *Australian Journal of Human Rights* 19, no.3 (2013): 29-50.
- 25 Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*. 1st ed. (London: Routledge-Cavendish, 2007).

## Secrecy and Abuse in Australia's Immigration Detention Systems<sup>1</sup>

*Amy Nethery*

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Australia operates two distinct immigration detention systems. The 'onshore' or 'mainland' detention centres detain two groups of people: asylum seekers, and people whose visa is no longer valid, including those who have had their visas cancelled on character grounds. The 'offshore' system, on Nauru and Papua New Guinea (PNG), confines people seeking asylum who have travelled to Australia by boat since 2012. Now, seven years on, the detention centres on Nauru and PNG are closed, and most of the people remaining confined within this system live in various forms of accommodation in Nauru and PNG with freedom of movement during the day. Some, however, are still confined: approximately 50 men with failed claims to protection were re-detained in August 2019 and are currently held in a prison complex in Port Moresby.

Australia's asylum policies, and particularly immigration detention, have been designed to achieve a high degree of secrecy. Secrecy creates environments that are harmful. They are harmful to the people subject to them: substantial international evidence shows that secretive sites of incarceration are places in which human rights abuses will – inevitably – occur. These secretive policies are also fundamentally harmful to Australia's liberal democracy. By stymieing transparency, the usual checks and balances over executive power by legal, parliamentary, media, and citizen oversight become impossible. In so doing, Australia's executive governments have escaped accountability for the poor management, the high financial cost, and the devastating human harm caused by the policy.

### ***In secret carceral regimes, human rights abuses are inevitable***

Behavioural studies and social psychology research has demonstrated the critical importance of external oversight, openness and transparency for the protection of human rights of people in closed institutions, and the inevitability of human rights abuses where such transparency is lacking. That human rights abuses will inevitably occur within unregulated, closed institutions is well-established in social psychology, and reflected in national and international laws: for example, the need for independent external oversight is the core idea of the Optional Protocol to the Convention Against Torture. Abuse occurs not because of the inherent cruelty of prison guards, but because of environmental factors inherent to closed institutions.

Ideally, several levels of independent external oversight should form a framework designed to protect the human

rights of people imprisoned, including national and international monitoring and auditing bodies, citizen groups and domestic and international human rights organisations. In Western democracies external oversight over prisons is both extensive and taken for granted. In Australia, a range of formal and informal processes creates opportunities for external oversight over prisons, but the lack of these same opportunities for immigration detention means that life within these centres is obscured from view.

### ***The exceptional status of immigration detention centres***

Before turning to the question of external oversight in Australia's offshore detention centres, it is worth establishing the exceptional status of these centres within the broader category of closed institutions. We can apply much of what we learn from prison research to detention centres, but there are a number of important ways that immigration detention is unique, and thus requires special attention.

First, as an extra-judicial form of incarceration, immigration detention centres are not subject to the same regulatory framework as Australia's prison system, affecting the conditions under which people are held, their length of detention, and their avenues for appeal.

Second, the people subject to immigration detention are particularly vulnerable because of their non-citizen status, their history of persecution or other trauma, and their uncertain future.

Third, the mandatory and indefinite application of immigration detention in Australia has a distinct and negative impact on detainees' psychological health.

Finally, Australia's offshore detention centres are effectively private businesses operating in foreign countries which means geography, and several levels of agreements, contracts and operating procedures stymie transparency and external oversight.

Furthermore, the governments of Nauru and PNG – both of whom have precarious democracies – have been disinclined to facilitate measures for protecting the human rights of people detained on their territory. In short, while Australia's offshore detention centres share many characteristics with prisons and other closed institutions, offshore detention centres have unique features that further jeopardise the human rights of detainees.

### ***Secrecy is established in five ways:***

#### **1. Securitisation and militarisation of offshore processing.**

The introduction of Operation Sovereign Borders (OSB) in 2013 marked a turning point in the militarisation,

and related secrecy, of asylum policy. OSB is a suite of policy measures designed to stop people from arriving in Australian territorial waters by boat, including the use of the Navy for boat turn-backs, and offshore processing for the management of people seeking asylum. By treating the arrival of people seeking asylum by boat as a national emergency, the government has justified a high degree of secrecy on the grounds that disclosure would undermine the success of the military operation. For example, when introducing OSB, then Prime Minister Abbott replied to media queries by stating “If we were at war we wouldn’t be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves.” The first head of the Australian Border Force, Roman Quadvelieg, explained in 2015 that ‘operational security is paramount to conducting effective strategic and tactical operations’.

Secrecy is built into the Australian Border Force Act 2015.

## 2. Lack of accountability for service providers.

Australia’s immigration detention network is the world’s largest privatised network of carceral sites. The detention centres on Nauru and Manus Island are private businesses operating in foreign countries. The privatisation contributes to their opacity. There are few avenues for transparency regarding all aspects of the relationship between the Australian government and the companies it hires to implement its policies. We know nothing about the process of procuring a service provider. This was point highlighted by the 2018 appointment, without a tender process, of Paladin, an unknown company with no experience in detention operations.<sup>2</sup> The million-dollar contracts between Australia and companies such as Paladin, including whatever conditions are set for the companies to achieve successful service delivery, are protected by commercial-in-confidence agreements.

More troubling, however, is the substantial evidence that service providers work in a wholly unregulated environment, within which some staff have perpetrated abuse upon detainees, including children. Several Parliamentary Inquiries and the leaked Nauru files, show how incidents about which we should be gravely concerned are not addressed sufficiently by the responsible organisations, and have been dismissed by government leaders.<sup>3</sup>

For example, a Senate inquiry in 2015 found that there existed in these offshore sites a ‘pervasive culture of secrecy’, including instances where Wilson Security officers had regularly destroyed incident reports, including reports of staff mistreatment of detainees.<sup>4</sup> The staff had joked as they filed the incident reports in what they referred to as File 13, which was their codename for the shredder.

## 3. Restrictions placed on the media

In addition to not answering journalist’s questions about ‘on water matters’, the government has also been active in suppressing media oversight. At least 8 journalists reporting on OSB have been referred to the Australian Federal Police for investigation into their sources, including when they had reported on the sexual assault of detainees on Nauru.<sup>5</sup>

It is impossible for the media to travel to Nauru to speak with people caught up in the policy without a special government exemption. In 2014 Nauru raised the cost of a journalistic visa to \$8000, non-refundable if it was rejected, and they all are: the Nauruan government no longer grants visas to any Australian or NZ passport holder unless they are employed by the Department of Immigration.

## 4. Access blocked to independent observers

The Australian Human Rights Commission conducts annual inspections of the mainland detention centres and Christmas Island. However, it does not have jurisdiction to inspect offshore detention sites. Many other requests for access by international organisation, including Amnesty International and Medecins Sans Frontiers, have been rejected, as have delegations of government ministers from Denmark and New Zealand. The United Nations Special Rapporteur for the rights of Migrants cancelled a planned visit to Nauru and PNG in 2015, citing concerns that the secrecy requirements under the ABF Act meant he wouldn’t be able to speak to staff without putting them at risk of sanctions.

Informal independent observation is also provided by supporters and family members who visit people detained in the mainland centres. Changes to the visiting rules in early 2018 has made it much harder to visit: visitors are restricted to seeing one person at a time for a maximum of two hours under strict conditions, and must apply for that visit using a lengthy online form a week in advance. As a result, the numbers of people who informally provide an oversight role over the mainland centres have dramatically declined.

## 5. Democratic deficit on Nauru benefits secrecy

Offshore, the relationship with Nauru and PNG, both former colonies of Australia, has been complicated by the impact of the vast sums of money that Australia has paid in return for their compliance. Both of these states were facing economic distress in 2001 when Australia first approached them for their assistance. In both states, the money and ongoing support from Australia has been a problem for these democracies. In Nauru, in particular, the country has descended quickly into democratic decline: in 2014 it removed its judiciary, its opposition party, and its independent media. States around the world have condemned this development, but Australia has remained steadfast in its support of Nauru’s autocratic government.

### OPCAT and the UN inspection of detention centres

The Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT) is an international instrument built on the evidence that independent, external oversight is the key to protecting against human rights abuse in closed institutions, such as detention centres. Australia signed OPCAT in 2009, and ratified in 2017. UN Inspectors are planning to visit Australian-run detention centres, onshore and on Nauru, by the end of 2019. Inspectors have ‘the right of unannounced access to any place of detention or any place we believe people might be being deprived of their liberty’.

Australia’s detention system has a long history of international criticism by bodies such as the United Nations, all of which have failed to make the policy less punitive and inhumane. But let us be optimistic that the inspections under OPCAT will be a positive development.

- 1 Originally published in *Asylum Insight* (Amy Nethery, ‘Secrecy and Abuse in Australia’s Immigration Detention Systems’, *Asylum Insight* (blog), 2019. <https://www.asyluminsight.com/c-amy-nethery>).
- 2 Christopher Knaus and Helen Davidson, ‘Paladin Controversy Prompts Renewed Scrutiny of \$591m Nauru Deal’, *The Guardian*, February 19, 2019. <https://www.theguardian.com/australia-news/2019/feb/19/paladin-controversy-prompts-renewed-scrutiny-of-591m-nauru-deal>.
- 3 Andrew & Renata Kaldor Centre for International Refugee Law. n.d. ‘Key reports on offshore processing’, *Kaldor Centre*. <https://www.kaldorcentre.unsw.edu.au/key-reports-offshore-processing>; Nick Evershed, Ri Liu, Paul Farrell, and Helen Davidson. ‘The Lives of Asylum Seekers in Detention Detailed in a Unique Database’, *The Guardian*. August 10, 2016. <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>.
- 4 Commonwealth of Australia. *Taking responsibility: conditions and circumstances at Australia’s Regional Processing Centre in Nauru* (Canberra: Commonwealth of Australia, 2015). [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Final\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report).
- 5 Nicole Hasham, ‘Federal Government Asks Australian Federal Police to Find Nauru Whistleblowers’, *The Guardian*, October 2, 2015. <https://www.smh.com.au/politics/federal/federal-government-asks-australian-federal-police-to-find-nauru-whistleblowers-20150930-gjyj0i.html>.

## Externalisation and the Erosion of Refugee Protection

*Jeff Crisp*

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In 1992, Australian Immigration Minister Gerry Hand stated that “the government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.” Nine years later, the practical outcome of that policy became clear, when Prime Minister John Howard blocked the Norwegian freighter MV Tampa from entering the country after it had rescued 433 asylum seekers at sea.

Following days of uncertainty about their fate, the passengers, many of them Afghans, were forced onto an Australian naval vessel and transported to the small island state of Nauru, where they were to be detained and their asylum claims processed. They were later joined by hundreds of other asylum seekers who had attempted to reach Australia by boat.

As Australia’s so-called ‘Pacific Solution’ evolved, it also became much harsher. While some of the asylum seekers on board the Tampa were eventually allowed to settle in Australia, later arrivals were not, even if they were recognized as refugees. As current Prime Minister Scott Morrison has said, “they must return to the countries they have fled from or spend a very, very long time in detention.”

Australia’s refugee policy is emblematic of an approach that has becoming increasingly popular amongst the industrialized states, and which is encapsulated in the notion of ‘externalisation’. For the purposes of this article, that concept will be defined as ‘measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees, asylum seekers and other migrants who do not have prior authorization to enter their intended country of destination’.

The interception of people travelling by boat, followed by their detention and processing in offshore locations, is perhaps the most common form of externalisation. But this strategy has also been manifested in a number of other ways. These include information and deterrence campaigns in countries of origin and transit; the use of visa controls, carrier sanctions and the outposting of immigration officers at foreign airports to prevent the embarkation of unwanted passengers; and deals with developing countries in which financial aid and other incentives are offered, in return for their cooperation in stemming the onward movement of people.

There is nothing particularly new about externalisation. In the 1930s, for example, a number of maritime interceptions were undertaken by states to prevent the flight and arrival of Jews escaping from the Nazi regime. And in the 1980s, the USA introduced interdiction and offshore processing for asylum seekers from Cuba and Haiti, some of whom had their refugee claims assessed aboard coastguard vessels, and others who were held at the US base of Guantanamo Bay on the island of Cuba.

In subsequent decades, EU countries became increasingly attracted to the strategy of externalisation, and spent a considerable amount of effort trying to work out how it might be adapted to the European context. Those efforts finally bore fruit in 2016, when Turkey agreed to obstruct the onward movement of Syrian and other refugees, in exchange for financial support and other rewards from the EU.

More recently, the EU and its member states have provided funding, training and other assets to the Libyan Coastguard, allowing it to intercept, return and detain asylum seekers trying to cross the Mediterranean. In October 2019 this was coupled with a programme to release some of those who had been placed in detention and to evacuate them to Rwanda, where their eligibility for refugee status will be assessed.

At the same time, the Trump administration has enthusiastically joined the externalisation bandwagon, refusing admission to asylum seekers at the USA’s southern border and obliging them to remain in Mexico or return to Central American countries where they are at serious risk of human rights violations. And to impose this strategy on its southern neighbours, the USA has exerted all of the economic and diplomatic might at its disposal, including the withdrawal of aid and the threat of trade sanctions.

The industrialized states have generally justified the externalisation process by arguing that their primary intention is to save lives at sea, to prevent people from undertaking difficult and dangerous journey from one country and continent to another, thereby introducing what they often describe as ‘effective migration management’. At the same time, they have suggested that the most rational and efficient means of responding to the movement of refugees is to support them within their own region, where the costs of assistance are lower, the culture is familiar to the new arrivals and where it is easier to organize repatriation once peace has returned to their country of origin.

In reality, a number of other (and less altruistic) considerations have contributed to the externalisation process amongst the industrialized states, including a

concern that the arrival of asylum seekers represents a serious threat to their sovereignty, security and public services, as well as a xenophobic fear that the admission of such people might undermine national identity and social harmony.

Most fundamentally, however, externalisation is the product of a determination by governments in the Global North to avoid the obligations they have agreed to accept as signatories to the 1951 UN Refugee Convention and other human rights instruments.

In simple terms, if an asylum seeker arrives on the territory of a signatory state, there is a duty on the authorities of that country to consider their asylum request, to support them while their refugee claim is examined, to facilitate their integration if they are successful in their application, and to find an alternative solution for them if their claim is refused. In this context, many of the industrialized states appear to have concluded that it is far more convenient to obstruct the arrival of such people in the first place by confining them to countries in the Global South.

More convenient perhaps, but at what cost to the laws, principles and ethics of the international refugee regime? As seen in relation to the policies pursued by Australia, the EU and US, the externalisation process has prevented people from exercising their right to seek asylum in another state, subjecting them to many human rights violations in the process and causing them serious physical and psychological harm.

By closing down borders, externalisation has actually encouraged refugees to undertake risky journeys involving human smugglers, traffickers, fraudsters and corrupt government officials.

It has also placed even greater responsibilities on developing countries, where some 85 per cent of the world's exiles are already to be found. And it has encouraged refugees to be used as bargaining chips in inter-state relations, leading countries in the Global South to extract funding and other concessions from the Global North in exchange for restrictions on refugee mobility.

Looking to the future, a number of questions can be posed with respect to this issue. Can externalisation practices such as interception and detention be subject to legal challenges, and to what extent would such challenges attract the support of UNHCR? Are there other advocacy strategies could be used to oppose the erosion of refugee protection associated with the externalisation process, and what role might civil society play in that process? And could externalisation be implemented in ways that respect human rights and which build the protection capacity of countries in the Global South?

## Australia's other "Offshore Policy": Containing Refugees in Indonesia through the International Organisation for Migration<sup>1</sup>

Asher Hirsch and Cameron Doig

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Australia's offshore detention centres on Nauru and Manus Island have gained international notoriety. However, less focus has been paid to Australia's other offshore policy: creating a "buffer zone" in Indonesia to stop refugees' onward travel, particularly to Australia. The goal of the policy is to keep refugees stranded in Indonesia, with no other option but to return home.<sup>2</sup>

Most of this work is done by the International Organization for Migration (IOM), an intergovernmental organisation.<sup>3</sup> While IOM has promoted itself as the UN Migration Agency, it does not have a human rights mandate and is not formally part of the UN system.<sup>4</sup> In the words of a former chief of mission for IOM Indonesia, "IOM is not, strictly speaking, a humanitarian organization".<sup>5</sup>

Most of IOM's work in Indonesia involves migration control. This includes expanding and servicing detention centres, returning refugees and asylum seekers to their home countries, strengthening Indonesia's border controls, and implementing public information campaigns to dissuade people from taking boats to Australia to seek asylum. This includes broadcast advertising on television and radio, and warnings in newspapers and on billboards.<sup>6</sup>

But in practical effect, this work might be termed "blue-washing" - using UN branding to present a humanitarian veneer while carrying out rights-violating activities on behalf of Western nations.

Indonesia is not a signatory to the Refugee Convention, and does not provide any durable legal solutions for the estimated 14,000 refugees stranded there.<sup>7</sup> Refugees have no right to work, limited education opportunities, and face detention and destitution.

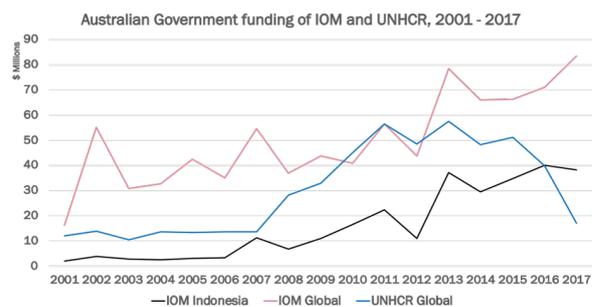
In 2000, Australia, Indonesia, and IOM established the three-way Regional Cooperation Agreement (which has never been publicised). IOM describes the agreement as an "ongoing programme...to provide care and voluntary repatriation of intercepted irregular migrants" (as per IOM produced booklet produced in 2015, on file with authors). Under the Agreement, Indonesian police and immigration officials intercept and detain migrants "thought to be intent on travelling irregularly to Australia or New Zealand".<sup>8</sup> Indonesian authorities refer these asylum seekers to IOM

for "case management and care" while in detention. If they wish to claim asylum, IOM then refers them on to the United Nations High Commissioner for Refugees (UNHCR).

### Australia's funding of IOM

Australia's annual global funding of IOM has increased from US\$17 million in 2001 to \$72 million in 2016. Of Australia's global IOM funding, most goes to Indonesia. Australia has contributed \$238 million to IOM Indonesia since 2001. IOM Indonesia has thus come to rely on Australia for more than 80% of its funding. While some of this funding can be described as "humanitarian", over 90% of funding has focused on migration control.<sup>9</sup>

Australia's IOM funding can be compared with the money that Australia gives to UNHCR, as seen in this graph. In 2016, Australia gave as much to IOM in Indonesia alone as it gave to UNHCR globally.



### Migrant Care Management

IOM Indonesia describes a number of its programs using a seemingly contradictory phrase "Migrant Care Management".<sup>10</sup> These projects aim to facilitate the "care and management" of what Australia calls "Potential Illegal Immigrants" intercepted on their way to Australia.<sup>11</sup> They involve monitoring and funding detention centres, providing supplies to intercepted asylum seekers, and facilitating "Assisted Voluntary Returns".

Australia's funding of IOM has enabled Indonesia to detain asylum seekers, refugees and other migrants in conditions which violate their human rights. As Antje Missbach has argued, "without the very generous Australian funding channelled through IOM, it is unlikely that Indonesia would detain thousands of transit migrants".<sup>12</sup>

Through IOM, Australia funds the detention of over 4000 asylum seekers in detention centres and makeshift facilities. Australian money also contributes the 42 community housing facilities for asylum seekers in across Indonesia, which IOM presents as alternatives to detention.<sup>13</sup>

Australia has also provided significant funding to IOM to refurbish and expand Indonesia's two largest immigration

detention facilities, and improve standards in detention.<sup>14</sup> However, the conditions in detention remain harrowing.<sup>15</sup> Detainees face violence, overcrowding, inadequate access to medical care, and insufficient nutrition, particularly for children.

### Assisted Voluntary Returns

One of the most concerning aspects of IOM Indonesia's operations is the Assisted Voluntary Return program.<sup>16</sup> Under this program, IOM organises the removal of refugees, asylum seekers and other migrants to their countries of origin by facilitating return travel and offering a \$2000 financial inducement.

Australian funding has helped IOM return over 5000 migrants from Indonesia since the year 2000, according to documents released under FOI.<sup>17</sup> IOM Indonesia returns most people to Afghanistan, Iraq and Iran. These are also the main nationalities of boat arrivals in Australia, indicating that IOM is doing Australia's work by preventing those asylum seekers from arriving on Australian shores.

Detained refugees may accept offers of return to unsafe conditions, because of their precarious legal position, difficult living conditions and lack of knowledge about their right to seek asylum. This blurs the line between "voluntary" return and refoulement (returning refugees to harm).

Asylum seekers and refugees in Indonesia have very few options, apart from returning to their countries of origin. While resettlement is open to those whom UNHCR finds to be refugees, this can take more than 15 years, with UNHCR saying that most refugees in Indonesia will never be resettled.<sup>18</sup> Australia has refused to resettle refugees who registered with UNHCR in Indonesia after June 2014, further reducing the resettlement places available.<sup>19</sup>

Refugees in Indonesia are often confined to indefinite and arbitrary detention, may face restrictions on their movement, and may experience violence both in detention and in the community. As no other option except return exists, IOM Indonesia's voluntary return program may constitute refoulement under international law.

### Outsourcing and offshoring control

Australia's funding of IOM highlights a pattern of Australia outsourcing its border controls to non-state actors and third countries, as also seen on Nauru and Manus Island.<sup>20</sup> While Australia attempts to hide behind its funding of IOM, it still remains responsible for the harms that refugees face in Indonesia.<sup>21</sup>

Instead of spending millions on controlling migration in Indonesia through IOM, Australia should be investing in refugee protection through UNHCR Jakarta, which is has no direct funding and faces a funding gap of \$7.2 million.<sup>22</sup>

- 1 Article based on: Asher Hirsch Lazarus and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia', *The International Journal of Human Rights* 22 no.5 (2018): 681-708.
- 2 Joe Cochrane, 'Refugees in Indonesia Hoped for Brief Stay. Many May Be Stuck for Life', *The New York Times*, January 26, 2018. <https://www.nytimes.com/2018/01/26/world/asia/indonesia-refugees-united-nations.html>.
- 3 International Organization for Migration. *IOM UN Migration*, 2022. <https://www.iom.int/>.
- 4 International Organization for Migration, 'IOM – UN Migration', Flickr. 2022. <https://www.flickr.com/photos/iom-migration/>.
- 5 Human Rights Watch, 'By Invitation Only': *Australian Asylum Policy*. (New York: Human Rights Watch, 2002). <https://www.hrw.org/reports/2002/australia/australia1202.pdf>.
- 6 Kevin Sun, 'Australia Is Making Covert Propaganda Videos to Scare off Asylum Seekers', *Quartz*, April 19, 2017. <https://qz.com/960950/australia-is-making-covert-propaganda-videos-to-scare-off-asylum-seekers/>.
- 7 Kate Lamb, "'It's Impossible to do anything': Indonesia's Refugees in Limbo as Money Runs out", *The Guardian*, September 14, 2019. <https://www.theguardian.com/world/2019/sep/13/its-impossible-to-do-anything-indonesias-refugees-in-limbo-as-money-runs-out>.
- 8 Amy Nethery, Brynna Rafferty-Brown and Savitri Taylor, 'Exporting Detention: Australia-Funded Immigration Detention in Indonesia', *Journal of Refugee Studies*, 26, no. 1 (2013): 88-109.
- 9 Hirsch and Doig, 'Outsourcing Control'.
- 10 International Organization for Migration, *Factsheet: Immigration and Border Management*, 2018. <https://web.archive.org/web/20181129171838/http://indonesia.iom.int/sites/default/files/Factsheet%20-%20IBM.pdf>.
- 11 Department of Home Affairs, *The Home Affairs Portfolio*, (Commonwealth of Australia, 2018). <https://www.homeaffairs.gov.au/foi/files/2018/fa180100175-fa-80200897-fa180500104-document-released.PDF>.
- 12 Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, (Singapore: ISEAS-Yusof Ishak Institute, 2015).
- 13 International Organization for Migration Indonesia, 'Sekupang Refugee Shelter,' *Alternatives to Detention – IOM Indonesia*, Issue 4, September 2014. [https://www.iom.int/sites/g/files/tmzbd1486/files/migrated\\_files/Country/docs/IOM-Indonesia\\_Alternatives-to-detention-September-2014.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/migrated_files/Country/docs/IOM-Indonesia_Alternatives-to-detention-September-2014.pdf).
- 14 Janet Phillips and Elibritt Karlsen, *Budget 2010–11: Immigration Border Protection and Detention*, (Canberra, Australian Parliament, 2011). [https://www.hrw.org/news/2013/07/01/confronting-refugee-abuse-indonesias-detention-centers](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201011/BorderProtection; Nethery, Rafferty-Brown and Savitri, 'Exporting Detention'.</a></li>
<li>15 Human Rights Watch, 'Confronting Refugee Abuse in Indonesia's Detention Centers', <i>Human Rights Watch</i>, July 1, 2013. <a href=).
- 16 International Organization for Migration, 'Assisted Voluntary Return and Reintegration Program.' *IOM*, 2022. <https://australia.iom.int/assisted-voluntary-return-and-reintegration-program>.
- 17 Department of Immigration and Border Protection, *Briefing – Border Protection Taskforce Assisted Voluntary Returns (AVR) of Potential Irregular Immigrants (PIIs)*, (Canberra: Commonwealth of Australia, 2015). <https://www.righttoknow.org.au/request/3689/response/11363/attach/3/FA%2017%2007%200010%20Documents%20released.pdf>.
- 18 Jewel Topsfield, 'Most Refugees in Indonesia Will Never Be Resettled: UN Refugee Agency', *The Sydney Morning Herald*, October 31, 2017. <https://www.smh.com.au/world/most-refugees-in-indonesia-will-never-be-resettled-un-refugee-agency-20171031-gzbznh.html>.
- 19 Sarah Whyte, 'Scott Morrison Cuts off Access to Australia for Refugees in Indonesia', *The Sydney Morning Herald*, November 18, 2014. <https://www.smh.com.au/politics/federal/scott-morrison-cuts-off-access-to-australia-for-refugees-in-indonesia-20141118-11p7ww.html>.
- 20 Sara Dehm, 'Outsourcing, Responsibility and Refugee Claim-Making in Australia's Offshore Detention Regime,' in *Asylum for Sale: Profit and Protest in the Asylum Industry*, eds. Siobhan McGuirk and Adrienne Pine (Oakland: PM Press, 2020), 47-65.
- 21 Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy,' *Human Rights Law Review*, 19, no. 3 (November 2019): 435-465.
- 22 United Nations High Commissioner for Refugees, *South East Asia 2018 Funding Update as of 7 March 2018*. <https://reporting.unhcr.org/sites/default/files/South%20East%20Asia%20Funding%20Update%2007%20March%202018.pdf>.

## How Refugees Went from Heroes to Villains and the Politics of Nostalgia

*Isaac Kfir*

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From the late 1940s to the collapse of the Berlin Wall in 1989, the world experienced an ideological competition between two main blocs, each claiming that its political-social-economic-cultural system was supreme.

The competition between the two blocs was fierce. New and old states had to choose between American or Soviet hegemony, understood in Gramscian's *Weltanschauung* terms.<sup>1</sup>

During this time, the West (understood through an Orientalist construction) presented itself as the bastion of Liberal Democracy (a reference to Lockeanism) and Capitalism.<sup>2</sup> The East, identified with the Soviet Union, was described as antithetical to Liberal, democratic values as its political system was socialist, committed to a planned economy, which meant undermining individualism and innovation.

Key to the Western powers campaign against the East was a transformative process that saw the political, social, economic, and cultural elites constructing a specific narrative of Western supremacy. The image, promoted aggressively by the United States through cultural diplomacy, was that the Soviet Union, was with much justification, an abusive, oppressive, dictatorial, 'evil empire', whereas the West and especially the U.S. was a socially-liberal, economically-advanced, politically-free, and culturally-inclusive.<sup>3</sup>

The United States was able to undertake such a massive propaganda campaign that involved mass media because it had the financial muscle and a cohort of devotees determined to project the American Dream. The problem was that much of the message was not based on fact, but rather on an imagined City on the Hill, that ignored the actions of the House Un-American Activities Committee, the lack of civil and political rights, police abuses, the use of eugenics, and other violations.<sup>4</sup>

Looking back at the Cold War, those who were fleeing the Soviet Union and such systems were therefore invaluable assets to Western political leaders as they helped promote the claim that the western socio-economic-political-cultural system was superior to that of the USSR, as people seemed to only want to escape from the East to the West and not vice versa.

The narratives these migrants projected became vital for the Western political-cultural elites who were seeking to construct a quasi-Kantian cosmopolitan society based on their perception of western civilisation that in 1989 heralded the 'end of history' and proclaimed that ideology was dead because liberal, capitalism had defeated socialism.<sup>5</sup>

The identities of the regular and irregular migrants during the Cold War became ascriptive, as these men and women assumed imagined archaic identities of their adoptive states. In doing so they ignored the discrimination they faced (for example many Jewish émigré celebrated and promoted Americanism, even though anti-Semitism was rife in 1950s and 1960s America, which may also explain why many 'Americanised' their religion in the hope of fitting in).<sup>6</sup>

In the U.S., this was seen most clearly with the first generation of neoconservatives many of whom begun their political journey as Soviet political dissidents, hawkish Democrats and even Marxists or Trotskyites before switching to support Ronald Reagan.<sup>7</sup> The migrants that came to the U.S. were expected to (and many did) embrace new identities, becoming more nationalist and hostile towards their country of origin. The recent fiasco surrounding Colonel Vindman is a stark reminder of how these migrants worked hard to assimilate and integrate, leading Brigadier General (retd.) Peter Zwack to remind many that question the loyalties of these migrants "Totally self-made, as you often get with immigrants. They're hungry. There's a drive to pay back the opportunity that your new nation gave you."<sup>8</sup>

The legacy of the way the West presented itself to its people helps explain the current rise of the anti-immigrant, populist, socially conservative momentum across the Western World that is challenging the political establishment that 'won' the Cold War. Principally, it is argued that the old political parties have lost their way as they embrace political correctness, a euphemism for abandoning an imagined community and of an imagined past.<sup>9</sup> In other words, we are seeing a persistent move towards the nostalgic paradigm, with its four principal strands: a sense of historical decline and loss; a sense of absence of personal wholeness and moral certainty; a sense of a loss of individual freedom and genuine social relationship; and a sense of loss of simplicity, if not of innocence.<sup>10</sup>

For right-wing populists, many of whom lead the charge against migration, the cause of the decline is uncontrolled migration which has led to the dilution of 'Western Civilisation' or Judeo-Christian West, as captured by President Trump during his July 2018 State visit to London when he declared 'I think you are losing your culture. Look around. You go through certain areas that didn't exist 10 or

15 years ago' and 'I think allowing millions and millions of people to come into Europe is very, very sad.'<sup>11</sup>

The nostalgia and the normative transformation rely on the assumption that when civilisations, cultures, and traditions come together there is only one outcome: conflict (best seen through Samuel Huntington's Clash of Civilisations thesis) as opposed to the recognition that such interactions lead to progress and development. The narrative is ahistorical and anti-humanist in its outlook, rejecting centuries of inter-communal relations that facilitated the rise of Venice and made medieval Córdoba a centre of learning and of economic prosperity (which should be compared to the economic consequences of the Spanish Inquisition).<sup>12</sup>

Increasingly, political parties and movements such as the AfD, the Dutch VVD, the Brexiters, and arguably even President Trump, claim to present the norms of the bygone times. An integral element in their narrative is that the infusion of regular and irregular migrants has undermined the many of the social-economic-political-cultural values of the past; the same values that helped the West defeat the USSR. Key to their agenda is a need to restore Western, European civilisation to its former glory which requires the removal of the 'other', even though during the Cold War, embracing the 'other' was seen as a good thing because it helped undermine the USSR and what it stood for.

- 1 Sonja Buckel and Andreas Fischer-Lescano, 'Gramsci Reconsidered: Hegemony in Global Law,' *Leiden Journal of International Law* 22, no.3 (2009): 437-454.
- 2 Louis Hartz, *The Liberal Tradition in America*. 2nd ed. (Boston: Mariner Books, 1991).
- 3 Ronald Reagan, 'Evil Empire Speech.' Speech given at the National Association of Evangelicals, March 8, 1983. <https://voicesofdemocracy.umd.edu/reagan-evil-empire-speech-text/>.
- 4 Spencer Ackerman, 'Inside Chicago's Legacy of Police Abuse: Violence "as Routine as Traffic Lights"', *The Guardian*, March 4, 2015. <https://www.theguardian.com/us-news/2015/mar/03/chicago-police-violence-homan-square>; Edwin Black, 'Eugenics and the Nazis: The California Connection,' *SF Gate*, November 9, 2003. <https://www.sfgate.com/opinion/article/Eugenics-and-the-Nazis-the-California-2549771.php>.
- 5 Francis Fukuyama, *The End of History and the Last Man*. (New York: The Free Press, 1992).
- 6 Irving Kristol, 'Liberalism & American Jews,' *Commentary*, October 1988. <https://www.commentary.org/articles/irving-kristol/liberalism-american-jews/>; Steven R Weisman, 'How America's Jews Learned to Be Liberal,' *The New York Times*, August 18, 2018. <https://www.nytimes.com/2018/08/18/opinion/american-jews-israel-liberals.html>.
- 7 Lee Edwards, 'The Origins of the Modern American Conservative Movement,' *Heritage Lectures*. November 21, 2003. <http://www.mafhoum.com/press6/170C32.pdf>.
- 8 Marc Fischer, 'Alexander Vindman: Soviet Emigre and Decorated U.S. Army officer Wanted to Be as American as Can Be. Now the President Questions His Motives,' *The Washington Post*, November 8, 2019. [https://www.washingtonpost.com/politics/alexander-vindman-soviet-emigre-and-decorated-us-army-officer-wanted-to-be-as-american-as-can-be-now-the-president-questions-his-motives/2019/11/08/6ded69d4-fff8-11e9-8501-2a7123a38c58\\_story.html](https://www.washingtonpost.com/politics/alexander-vindman-soviet-emigre-and-decorated-us-army-officer-wanted-to-be-as-american-as-can-be-now-the-president-questions-his-motives/2019/11/08/6ded69d4-fff8-11e9-8501-2a7123a38c58_story.html).
- 9 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Rev. ed. (London: Verso, 2016).
- 10 Bryan S Turner, 'A Note on Nostalgia,' *Theory, Culture & Society* 4, no. 1 (February 1987): 147-56.
- 11 Tina Nguyen, 'The Far-Right Rejoices as Trump Says Immigrants Are Destroying European "Culture",' *Vanity Fair*, July 13, 2018. <https://www.vanityfair.com/news/2018/07/donald-trump-culture-wars-britain>.
- 12 Roderick Conway, "'Venice and Islam': An alliance of Paradoxes,' *The New York Times*, August 30, 2007. <https://www.nytimes.com/2007/08/30/arts/30iht-conway.1.7320712.html>; Jordi Vidal-Robert, 'Long-Run Effects of the Spanish Inquisition,' in *Working Paper Series: Centre for Competitive Advantage in the Global Economy*, June 2014, 1-57. Warwick: Centre for Competitive Advantage in the Global Economy Department of Economics, The University of Warwick.

## The Shifting Borders Experienced by People Who Are Refugees with Disabilities

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The world has become acutely aware of the public health powers that restrict freedom of movement. Screening people for infectious diseases at borders, quarantining and denying entry to those unwell, is a long-established practice of states. People with disabilities and their families are very familiar with the power of health assessments to categorise and divide at borders. Visa medical assessments in some jurisdictions extend beyond public health threats to screen for non-communicable diseases and disabilities to categorise and divide visa applicants.

Economic productivity and the Australian migration program have long been linked. People who are assessed as less likely to contribute to the economy, or to be a burden on it, have a higher bar to meet to secure a visa or are denied a visa entirely. The Australian Migration Act 1958(Cth) and Migration Regulations 1994(Cth) are exempt from the Disability Discrimination Act 1992(Cth), therefore people who are assessed to have conditions that 'result in significant healthcare and community service cost' or 'place a demand on health care or community services that are in short supply' are denied a permanent residency visa no matter their personal circumstances, i.e. personal wealth.<sup>1</sup> Until 2012, these criteria also extended to people resettling through the Australian Refugee and Humanitarian Program.<sup>2</sup>

Discrimination against people who are refugees with disabilities was not unique to Australia's resettlement program. During the post-World War II reconstruction, countries gave preference to 'healthy and skilled' people who were refugees.<sup>3</sup> Therefore, during 1959-60 World Refugee Year the UNHCR highlighted the situation of 'handicap refugees' waiting for 'durable solutions.' Three-and-a-half decades later, a UNHCR manual 'Assisting Disabled Refugees' (1996) directed that the: '[r]esettlement of disabled refugees should be the last option. It is more advisable to help the integration of the disabled in their own communities'.<sup>4</sup>

Today, it is estimated that approximately a fifth of the world's refugee population have disabilities (although the UNHCR do not report on this statistic, NGOs have undertaken surveys).<sup>5</sup> For this group, the 2008 United Nations Convention on the Rights of Persons with Disabilities (CRPD) has been life changing.<sup>6</sup> In 2010, ExCom responded to the CRPD delivering a powerful Conclusion that acknowledged the social model of disability and aligned the work of the UNHCR to the new convention.<sup>7</sup> Further, states party to

the CRPD are obligated to assess their own practices and policies to comply with the convention. In Australia this led to a process resulting in a waiver of the health requirements for Refugee and Humanitarian Program visa applicants.<sup>8</sup>

The Australian government does not publish the number of health waivers that it grants, nor is it a precise proxy for disability. But, following the introduction of the 2012 waiver services noticed increased diversity in humanitarian entrants both in age and ability.<sup>9</sup> Australia has committed to 18,750 visas annually in its Refugee and Humanitarian Program.<sup>10</sup> If the visas are offered without discrimination, and accurately reflect human diversity, we could reasonably estimate one fifth of the people arriving through the program will have disabilities.

Mindful that borders are 'made and remade according to a host of shifting variables' (Nail, 2016), over the past 18 months I have been following the Australian government's policy developments that focus on employment outcomes for Refugee and Humanitarian Program entrants.<sup>11</sup> The Australian government intends to 'drive... better results around labour market outcomes, English language acquisition and integration.'<sup>12</sup> These are terrific aspirations and align with the CRPD, including: 'the right of persons with disabilities to work' (article 27), 'the right of persons with disabilities to education' (article 24) (regarding language acquisition, Australian Sign Language (Auslan) must also be offered for people who are deaf or hard of hearing [article 21, Freedom of Expression]), and 'the right of person with disabilities to take part on an equal basis with others in cultural life' (article 30).

The Australian government's communications about the policy changes do not include strategies to engage with diverse groups or provide details about investment to implement measures (reasonable accommodation, universal design, accessibility measures [CRPD, article 2 & 9]) to ensure that people who are refugees with disabilities can access employment, learn English or Auslan, and participate in their new community. Inclusion of Disabled Persons Organisations to provide technical advice may be a good first step to ensuring the rights of people who are refugees with disabilities are considered.<sup>13</sup>

To add further complexity, a large proportion of the increased employment, language acquisition and community participation, is to happen in regional areas. The government has set a 50% target for humanitarian settlement in regional Australia by mid-2022.<sup>14</sup> Regional areas, compared to cities, often have less diverse labour markets, less infrastructure, and smaller health and disability support service systems. New humanitarian arrivals with disability often need a range of appointments with specialist services, some in tertiary hospitals, to gain access to aids and equipment, and other disability support services.<sup>15</sup>

I am concerned that the Australian government, in order to meet their targets for rural settlement, jobs, language acquisition, and community participation, may renege on its waiver of the health requirements for Refugee and Humanitarian Program visa applicants, instead providing priority to ‘healthy and skilled’ applicants. The 2012 health waiver was only implemented at the policy level, the details of which are published in an internal manual that has only been made accessible to the public through a successful Freedom of Information application.<sup>16</sup> This, along with the lack of data on health waivers, makes it difficult to monitor changes.

- 1 Department of Home Affairs. *Protecting Health Care and Community Services*. (Canberra: Commonwealth of Australia). <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/health/protecting-health-care-and-community-services>.
- 2 Department of Home Affairs. ‘Refugee and Humanitarian Program.’ Department of Home Affairs. <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program>.
- 3 Veronika Flegar, ‘UNHRC’s Shifting Frames in the Social Construction of Disabled Refugees: Two Case Studies on the Organization’s Work During the World Refugee Year (1959–1960) and the International Year of Disabled Persons (1981);’ *Diplomatica* 1, no. 2 (2019): 157–179.
- 4 United Nations High Commissioner for Refugees, *Assisting Disabled Refugees. A Community-Based Approach*, (United Nations, 1996). <https://www.refworld.org/docid/49997ae41f.html>.
- 5 Handicap International – *Humanity & Inclusion, Removing Barriers: The Path towards Inclusive Access* (Jordan Report, July 2018). <https://reliefweb.int/report/jordan/removing-barriers-path-towards-inclusive-access-jordan-report-july-2018>.

- 6 United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities – Articles* (United Nations, 2006). <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>.
- 7 UNHCR Executive Committee of the High Commissioner’s Programme, *Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR No. 110 (LXI) – 2010* (United Nations, 2010). <https://www.unhcr.org/en-au/excom/excon/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html>; Australian Federation of Disability Organisations. *Social Model Of Disability*. <https://www.afdo.org.au/social-model-of-disability/>.
- 8 Philippa Duell-Piening, ‘Refugee Resettlement and the Convention on the Rights of Persons with Disabilities,’ *Disability & Society* 33, no.5(2018): 661–684.
- 9 Refugee Council of Australia *Barriers and Exclusions: The Support Needs of Newly Arrived Refugees with a Disability*, (Refugee Council of Australia, 2019). <https://www.refugeecouncil.org.au/disability-report/>.
- 10 Harriet Spinks and Henry Sherrell, *Immigration: Budget Review 2019–20 Index*, (Canberra: Parliament of Australia, 2019) [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201920/Immigration](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201920/Immigration).
- 11 Thomas Nail, *Theory of the Border*, (Oxford: Oxford University Press, 2016).
- 12 Australian Government, *Australian Government’s Response to Recommendations in the Report: Investing in Refugees, Investing in Australia: The Findings of a Review into Integration, Employment and Settlement Outcomes for Refugees and Humanitarian Entrants in Australia* (Canberra: Commonwealth of Australia, 2019). <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/the-shifting-borders-experienced-by-people-who-are-refugees-with-disabilities?a=3360183>.
- 13 Disabled Person’s Organisations Australia. ‘About.’ Disabled Person’s Organisations Australia. <https://dpoa.org.au/about/>.
- 14 Australian Government, *Australian Government’s Response to Recommendations in the Report*.
- 15 Refugee Council of Australia, *Barriers and Exclusions*.
- 16 Department of Home Affairs, *[Ref-Offshore] Offshore Humanitarian Program - Visa Application and Related Procedures*, (Canberra: Commonwealth of Australia, 2019). <https://www.homeaffairs.gov.au/foi/files/2019/fa-190301219-document-released.PDF>.

## Replacing Asylum or Leaving No-One Behind?

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Many countries in the developed world are borrowing practices that externalise their borders: interception; offshore detention; building walls. These practices exploit the absence of an explicit right to enter any state in the key legal instrument for refugee protection – the 1951 Convention relating to the Status of Refugees, as well as its lack of binding mechanisms to fairly allocate responsibility for refugee protection.<sup>1</sup>

Australia, which is well-shielded from refugee flows and in danger of generating its own climate-induced forced migration, has nevertheless been a ‘leader’ in these retrograde approaches. The Pacific Solution, Operation Sovereign Borders, and other Australian attempts to shift responsibility, have attracted emulators.<sup>2</sup>

The number of stand-offs between European countries over the reception of asylum seekers rescued in the Mediterranean remind us of the arrival of the Tampa in 2001 when Prime Minister Howard refused to allow the rescued asylum seekers to set foot on Australian soil.<sup>3</sup> Former Italian Interior Minister, Matteo Salvini was particularly intransigent and expressly invoked Australian policy as a model.<sup>4</sup>

In other cases, while the Australian example is not openly acknowledged, the rhetoric hints that countries are avidly following Australian efforts. The ‘EU-Turkey agreement’, pursuant to which irregular migrants/asylum seekers are supposedly returned to Turkey, with one Syrian resettled in Europe for every Syrian returned to Turkey, seems familiar to Australian eyes.<sup>5</sup> It resembles the failed ‘Malaysia swap’ under which 800 asylum seekers arriving by boat in Australia were to be returned to Malaysia in exchange for 4000 refugees recognised by UNHCR.<sup>6</sup> A High Court decision prevented the return of the 800, while in Europe, returns to Turkey have been low as compared with resettlement numbers. The accompanying rhetoric also sounds familiar to Australian ears: the EU-Turkey statement was to ‘break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk.’<sup>7</sup>

In 2018, the European Council proposed a particularly ill-considered conceit, ‘regional disembarkation platforms’.<sup>8</sup> This sounded suspiciously similar to the Pacific Solution, the Council again declaring its determination to ‘break the business model of the smugglers thus preventing tragic loss of life’. Another unfortunate similarity with Australian proposals was the lack of consultation with the

supposed host countries. The African Union ensured that the proposals went no further, although returns of migrants and asylum seekers to Libya, among other places, occur regardless.

Although the rhetoric has a humanitarian flavour – the worthwhile aim of ‘saving lives at sea’ – the end result is fundamentally inhumane and counter-productive. Boat arrivals may be down in Europe, but this does not mean asylum seekers are safe from either persecution or the risks of flight, and deaths at sea continue. Meanwhile the men on Manus still wait, seven years on, for a real, humane solution to their plight.

In this context, the United Nations’ attempt at a different approach through the New York Declaration for Refugees and Migrants, the Global Compact on Refugees and the Marrakech Compact on Migration is welcome.<sup>9</sup> Using the mantra underpinning work on the 2030 Agenda for Sustainable Development, the international community has reiterated the intention to ‘leave no one behind’, including refugees and the predominantly poor countries that host them.<sup>10</sup>

Whether the world will succeed in the espoused aims of preserving asylum, offering more regular and safe pathways for cross-border movement, and achieving ‘a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees’, depends on political will.<sup>11</sup> The will to articulate these aims was there in 2016, fuelled by a sense of crisis and the powerful image of the little body of three-year-old Alan Kurdi, but what of their implementation?<sup>12</sup>

We now have an Indicator Framework to measure such things as the legal right to work and education for refugees, the amount of Official Development Assistance, and the numbers of refugees resettled, but it is premature to assess progress against these indicators.<sup>13</sup> The First Global Refugee Forum held at the end of 2019 was a modest step towards solidarity, with \$3 billion promised and an additional 50,000 resettlement places pledged, but again it is too early to assess the realisation of these pledges.<sup>14</sup> Some of the pilots of the Comprehensive Refugee Response Framework – Ethiopia springs to mind – are promising.<sup>15</sup> Again, assessment of their implementation and the international community’s support is necessarily a task for the future.

More fundamentally, we may ask whether the plan to leave no one behind will tackle the deep inequalities within and among countries. The idea that refugees should be viewed as an opportunity for development, leveraging resources from the developed world has met with some scepticism. In the lead-up to the adoption of the Global Compact on Refugees, one host state delegate expressed reservations,

saying he looked forward to other states seizing these ‘opportunities’. The ‘development turn’ in migration could easily tie in neatly to externalisation processes, unsurprisingly to critics of development and its links to colonialism.

To my mind, these multilateral efforts are worth pursuing in light of current realities. However, the extent to which there are improvements in the lives of refugees and those of citizens of the countries that host them, particularly relative to others, remains to be seen. Will we be able to say we have left no one behind, or will the Global North have externalised or replaced asylum with precarity elsewhere?

- 1 United Nations High Commissioner for Refugees. ‘The 1951 Refugee Convention.’ UNHCR. <https://www.unhcr.org/1951-refugee-convention.html>.
- 2 Ariane Rummery, ‘Australia’s “Pacific Solution” Draws to a Close,’ *UNHCR News*, February 11, 2008. <https://www.unhcr.org/en-au/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html>; Department of Home Affairs, ‘Operation Sovereign Borders,’ *Operation Sovereign Borders*. <https://osb.homeaffairs.gov.au/>.
- 3 National Museum of Australia, ‘Defining Moments: “Tampa Affair”,’ NMA. <https://www.nma.gov.au/defining-moments/resources/tampa-affair>.
- 4 Nick Miller, “No Way”: Italy’s Leader Takes Australian Cue on Refugees,’ *The Sydney Morning Herald*, August 24, 2018. <https://www.smh.com.au/world/europe/no-way-italy-s-leader-takes-australian-cue-on-refugees-20180824-p4zzfy.html>.

- 5 Ignazio Corrao, ‘EU-Turkey Statement & Action Plan,’ *European Parliament*. May 20, 2022. <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>.
- 6 Associated Press, ‘Australia and Malaysia Sign Asylum Seeker Swap Deal,’ *The Guardian*, July 25, 2011. <https://www.theguardian.com/world/2011/jul/25/australia-malaysia-immigration-swap-deal>.
- 7 Ignazio Corrao, ‘EU-Turkey Statement & Action Plan’.
- 8 European Parliament, ‘Parliamentary Questions: Guido Reil,’ August 1, 2019. [https://www.europarl.europa.eu/doceo/document/E-9-2019-002505\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2019-002505_EN.html).
- 9 United Nations General Assembly, ‘New York Declaration for Refugees and Migrants.’ September 19, 2016. [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf); United Nations, *The Global Compact on Refugees*, (New York: United Nations, 2018). <https://www.unhcr.org/5c658aed4>; United Nations, ‘Intergovernmental Conference on the Global Compact for Migration,’ (Marrakech: United Nations), December 10-11, 2018. <https://www.un.org/en/conf/migration/>.
- 10 Department of Economic and Social Affairs, *Transforming our world: the 2030 Agenda for Sustainable Development* (United Nations, 2015). <https://sdgs.un.org/2030agenda>.
- 11 United Nations High Commissioner for Refugees, *Burden and Responsibility Sharing*, 2015. <https://www.unhcr.org/5de682284.pdf>.
- 12 Brian Walsh, ‘Alan Kurdi’s Story: Behind the Most Heartbreaking Photo of 2015,’ *Time*, December 29, 2015. <https://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/>.
- 13 United Nations, *Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development*, A/RES/71/313 E/CN.3/2018/2. 2018. [https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%20refinement\\_Eng.pdf](https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%20refinement_Eng.pdf).
- 14 United Nations High Commissioner for Refugees, ‘Global Refugee Forum,’ *UNHCR*, 2019. <https://www.unhcr.org/en-au/global-refugee-forum.html>.
- 15 United Nations High Commissioner for Refugees, *Comprehensive Refugee Response Framework: from the New York Declaration to a Global Compact on Refugees*, 2016. <https://www.unhcr.org/en-au/events/conferences/584687b57/comprehensive-refugee-response-framework-new-york-declaration-global-compact.html>.

## The Role of Multimedia Public Art in Challenging Refugee Dehumanisation and Externalisation

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The 2015 European Refugee “Crisis” has attracted an unprecedented level of political and media attention in the European Union (EU) and has also become a topic of much discussion worldwide, in part from the overwhelming amount of media coverage. Images of asylum seekers in despair, overloaded boats sinking in the Mediterranean Sea, conflicts between border police and asylum seekers; these are repeatedly presented and disseminated with implications of the dangers and illegality of crossing the border. The mainstream representation of the refugees and asylum seekers falls between humanitarian victimisation and security criminalisation. This dehumanisation in media representations makes asylum seekers even more vulnerable since as a group they are reduced to numbers and statistics and marginalised through abstraction as an undesired population.

In order to combat the oversimplification cast on their experiences, multimedia public art can serve as an alternative, transformative communication tool in the contemporary urban environment for refugees and asylum seekers to explain the complexity of their lives. The rise of individual stories and diverse voices from different cultures and all genders in this new media aims to reduce prejudice and discriminatory attitudes against refugees and promote cultural diversity in the EU. These multimedia public artworks create a novel experience for the audience to be more engaged with the new media technology and provide a new platform for refugees and asylum seekers to speak for themselves instead of being represented by others.

One recent example is a project by artist Krzysztof Wodiczko, who shares individual stories of refugees and immigrants in Milan utilising a swarm of drones with LED screens and amplified speakers (June 2019). This multimedia project, “Loro (Them)”, generates conversations between individuals from different backgrounds, experience, ages and genders with drones hovering near to the audience at a low altitude.<sup>1</sup> The participants are no longer the “others”, spoken about and represented in image as silent actors, victims or criminals. The eyes of the speakers face the audience directly in the attempt to reduce the divisive space between the participants and the public by creating a face-to-face conversation.

The drones bring real and frank stories of the participants in the European territory, opposite from the many media

campaigns that reinforce the concepts of criminality of border crossings to deter potential migrants from entering the EU from their home countries. This media project creates a welcome space in Europe that challenges the idea of border externalisations. In this case, the drone dissolves the sense of borders, reducing fear on both sides: the fear inside Europeans who imagine masses of strangers entering Europe and do not acknowledge the refugee’s experiences and culture and the fear among asylum seekers and refugees who face the dangers of crossing the borders themselves and arriving voiceless. With modern media technology, “Loro” represents its participants in a fearless, frank and unique way that attracts the public’s attention in order to create a discussion in a European city regarding concepts of citizenship, hospitality, representation and cohabitation in the new era.

Both the physical and imaginary borders are not fixed, as the enforcement of bordering and the effort of de-bordering coexist in European society. The process of bordering provides many images in the media that generate an atmosphere of fear and insecurity, in turn contributing to further securitisation, enforcement and externalisation of the European border. Aside from the physical border, the imaginary border in many Europeans’ minds has been constructed through rapid dissemination in the mainstream media and social media. The weakened regime of refugee protection presented in the media also results in more anxiety among refugees and asylum seekers fleeing their home country to enter an unwelcome or even hostile EU through a more dangerous route.

Multimedia public art projects equipped with advanced media technology, with their unique configuration and interactivity in the public space, attract the public’s attention and open doors for conversation and reflection. In this format, refugee participants are thrust into the core of the project, with the artist away from the spotlight. The artist’s role in curating and channelling these stories through technical and aesthetic means provides a long form that gives space and room for careful consideration, in contrast to the contemporary social and mass media format.

Working with refugees and asylum seekers, multimedia art projects investigate the critical role of the outsider in interrogating and delineating the concept of identity, strangeness and belonging in the EU. These art forms challenge the dehumanisation of the “other” in media representation and attempt to dissolve the border by re-introducing the outsiders to European cities.

<sup>1</sup> Krzysztof Wodiczko, 2019. ‘Loro (Them),’ *More Art*, 2019. <http://moreart.org/projects/loro-them/>

## What Impact Does the EU's Recent Approach towards Externalisation and Readmission Have on the EU's Institutional Order?

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There is some concern about the EU's engagement with third countries on the subject of migration. The EU has established migration dialogues with third countries, and recently launched a "new Partnership Framework" with those states. The EU's external migration policy remains highly politicised, and the political motivations behind its design have come into conflict with the EU's legal obligations.

### **Background**

Since 2005, the EU has established many dialogues on migration and mobility partnerships with third countries under the umbrella of the EU Global Approach to Migration and Mobility.<sup>1</sup>

In 2016, the EU launched the "new Partnership Framework" (PF), based on the use of new instruments called "migration compacts" modelled on the much-debated EU-Turkey statement (Peers; Idriz; Cannizaro).<sup>2</sup>

These soft law instruments create cooperation frameworks between the EU and origin or transit states. They do not entail legally binding commitments, and so negotiating such agreements is easier than for typical international treaties. While this approach aims to enhance the effectiveness of international partnerships, it does raise some concerns.<sup>3</sup>

### **Readmission arrangements**

The PF process produced a new type of bilateral instrument called "readmission arrangements", which have been established with some countries along the migration routes, including Afghanistan, Ethiopia, and Bangladesh.<sup>4</sup>

The text of these instruments explicitly describes them as non-binding and their content focuses specifically on readmission and return. They are similar to traditional EU readmission agreements (EURAs), with the main difference being that these new readmission arrangements are non-binding.

The new arrangements provide for technical practices and procedural details for returns. Both the pre-existing, binding standard EURAs and the new soft acts ultimately aim to make the duty of readmission operational and effective.<sup>5</sup>

Therefore, the agreeing parties' use of the new readmission arrangements rather than EURAs appears to be motivated by their non-binding character, rather than any qualitative difference between the content of the two instruments.

### **Legal analysis of procedural issues**

Article 218 of the Treaty on the Functioning of the European Union (TFEU) sets out the procedure that must be followed in the negotiation and conclusion of agreements between the EU and third countries. However, this article is not applicable to the readmission arrangements as they are non-binding. Thus, there is no specific division of powers between EU institutions adopting them.

However, the Court of Justice of the European Union (CJEU) has ruled that the distribution of power and the institutional balance must 'be duly taken into account' in concluding non-binding acts.<sup>6</sup>

In the more recent Swiss MoU case, the CJEU clarified the scope of this point: articles 16 and 17 of Treaty on European Union (TEU) provide for the distribution of powers, instead of article 218 of TFEU.<sup>7</sup> This means that the European Commission is responsible for negotiation, while the Council of the European Union is responsible for the signature. This allocation of powers is confirmed also by the Council legal service.<sup>8</sup>

Applying this approach to the readmission arrangements, the first of them (between the EU and Afghanistan) was concluded in an informal manner and its text has been released without any record of the procedural details. However, all subsequent arrangements were concluded in line with the procedure outlined above. Thus, the institutional balance seems to be respected, notwithstanding the soft nature of those acts.

### **Involvement of European Parliament**

The European Parliament remains excluded from the negotiation and conclusion of these new arrangements.<sup>9</sup> The European Parliament is sometimes not even informed about the Council's approval of draft arrangements.<sup>10</sup> This is one effect of the use of soft law instruments, instead of binding ones. Notably, the Swiss MoU judgement does not mention the European Parliament either. Particularly given the sensitivity of this policy area, we should expect the European Parliament to be fully involved in the adoption of non-binding arrangements in accordance with article 14 of the TEU, which enumerates the European Parliament's legislative, budgetary, political control, and consultation functions. Furthermore, article 218(6) of the TFEU requires the European Parliament's consent for the conclusion of treaties in such a sensitive field, that is the migration policy.

## Redistribution of power

The new readmission arrangements are different from EURAs in another respect: their impact on Member States' acts. Traditional EURAs contained non-affectation clauses, according to which they would prevail over member states' acts. Migration is a field covered by shared competence as included in the "area of freedom, security and justice" under article 4(2)(j) of the TFEU. This means that member states can act to the extent that the EU does not, otherwise the competence is pre-empted by EU action.

Conversely, the new arrangements usually contain an opposite clause, whereby they would not prevent nor affect member states' deals with those same third countries concerning readmission and return. That is, the arrangements aim to facilitate member state action. The terms used in the arrangements' text, to define the scope of this facilitation, are "complement", "support", "reinforce". These terms are equal to the verbs used by the TFEU in describing the category of parallel competence in article 2(5) of the TFEU, whereas the competence in this field should be shared.

As a result, the arrangements reverse the allocation of powers enshrined in the treaties, at the expense of the EU prerogatives, in a field that is often critical for national governments.

- 1 European Commission, Migration and Home Affairs, *Communication on the Global Approach to Migration and Mobility (GAMM)*, European Commission, 2011. [https://ec.europa.eu/home-affairs/pages/glossary/global-approach-migration-and-mobility-gamm\\_en](https://ec.europa.eu/home-affairs/pages/glossary/global-approach-migration-and-mobility-gamm_en).
- 2 European Commission, *Communication from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*, COM(2016) 385 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-3A52016DC0385>; European Council, 'EU-Turkey Statement,' Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; Steve Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?' *EU Law Analysis*, March 16, 2016. <http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html>; Narin Idriz, 'The EU-Turkey Statement or the "Refugee Deal": The Extra-Legal Deal of Extraordinary Times?' in *The Migration Crisis?: Criminalization, Security and Survival*, eds. Dina Siegel and Veronika Nagy (The Hague: Eleven Publishing, 2017); Enzo Cannizzaro, 'Disintegration Through Law?' *European Papers* 1, No 1 (2016): 3-6.
- 3 European Parliament, Directorate General for Internal Policies, *EU Cooperation with Third Countries in the Field of Migration*, PE 536.469, 2015. [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL\\_STU%282015%29536469\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU%282015%29536469_EN.pdf).
- 4 European Commission, *Managing Migration in All Its Aspects: Progress under the European Agenda on Migration*, COM(2018) 798 final, 2018. [https://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2018/0798/COM\\_COM\(2018\)0798\\_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0798/COM_COM(2018)0798_EN.pdf); Islamic Republic of Afghanistan and the European Union, *Joint Way Forward on Migration Issues between Afghanistan and the EU*, 2016. [https://www.eeas.europa.eu/sites/default/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf); Council of the European Union, *Admission Procedures for the Return of Ethiopians from European Union Member States*, 15762/17, 2017. <https://www.statewatch.org/media/documents/news/2018/jan/eu-council-refugees-return-ethiopians-15762-17.pdf>; The People's Republic of Bangladesh and the European Parliament, *EU - Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay*, 2017. [https://arts.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/3409830/Bangladesh-1.pdf](https://arts.unimelb.edu.au/_data/assets/pdf_file/0009/3409830/Bangladesh-1.pdf).
- 5 Sergio Carrera, *Implementation of EU Readmission Agreements*, (Cham: Springer, 2016).
- 6 French Republic v Commission of European Communities. 2004. Case C-233/02. <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=490111&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10271023>.
- 7 Council of the European Union v European Commission. 2016. Case C-660/13. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=182295&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=659465>.
- 8 Council of the European Union, *Procedure to Be followed for the Conclusion by the EU of Memoranda of Understanding, Joint Statements and Other Texts Containing Policy Commitments, with Third Countries and International Organisations*, 5707/13, 2013. <https://data.consilium.europa.eu/doc/document/ST-5707-2013-INIT/en/pdf>.
- 9 Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2),' *EJIL:Talk!*, April 18, 2016. <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>.
- 10 European Parliament, 'Parliamentary Questions: Judith Sargentini,' February 15, 2018. [https://www.europarl.europa.eu/doceo/document/E-8-2018-000958\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/E-8-2018-000958_EN.html?redirect)

## Australia's Offshore Processing Arrangements: A Form of Neo-Colonialism?

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### ***Neo-colonialism and refugee externalisation policies***

When we survey refugee externalisation policies around the world, it is striking that many are forged upon old colonial relationships. Australia's two partners in its offshore processing policy, Nauru and Papua New Guinea (PNG) are its two former colonies. Similar histories lie beneath externalisation arrangements between the EU and its member states in North Africa, such as Libya.

Given these relationships, this contribution examines the extent to which an analysis of the colonial histories can help us understand contemporary refugee externalisation policies.

The persistent influence of colonialism in the post-colonial world was first anticipated in 1965 by the revolutionary, and later first President of Ghana, Kwame Nkrumah.<sup>1</sup> This concept, which he termed 'neo-colonialism', still provides us with a clear framework for assessing colonialism's legacy on contemporary refugee externalisation policies. Nkrumah understood neo-colonialism as the final, most lingering, and damaging stage of imperialism.

From Nkrumah's ideas, first published in 1965, we identify three components of neo-colonialism that provide a helpful framework for analysing refugee externalisation policies. For Nkrumah, colonialism would persist as 'neo-colonialism', and thus continue to undermine state sovereignty, when:

1. Former colonies exploited relationships of dependency to use aid to "purchase" policy and ensure compliance of elites;
2. These arrangements created opportunities for exploitation by foreign corporations, with little reinvestment, resulting in low levels of long-term economic improvement to local communities;
3. The arrangements created an environment with a high risk of corruption, undermining democratic processes, economic development, and state sovereignty.

### ***Neo-colonialism and Australia's offshore processing on PNG***

Since 2001, and except for an intermission between 2008 and 2012, Australia and PNG have had an arrangement

for the 'offshore processing' of people seeking asylum by boat.<sup>2</sup> Using Nkrumah's three components to analyse the arrangement with PNG, we can see how the former colonial relationship formed the foundation for the contemporary arrangement, which today fulfils his definition of neo-colonialism.

PNG gained its independence from Australia in 1975, and since that time has relied heavily on Australia for aid.<sup>3</sup> Offshore processing has secured for PNG additional aid and a substantial stream of direct funding.<sup>4</sup> As a result, the policy has enjoyed consistent political support from PNG's leadership. Although this arrangement is implemented on PNG territory, Australian government officials or delegates make the substantial policy decisions.

Manus Province, in which the offshore processing facilities were located, is PNG's most remote island province. It is clear that not much of the benefit for hosting the detention centre has stayed within Manus Province. Under current arrangements, 45% of security jobs, for example, are quarantined for locals; but locals are paid at a much lower rate than international staff (who come mostly from Australia and New Zealand).<sup>5</sup> Local procurement has resulted in some benefit to the local economy, but locals have pointed out the many detrimental impacts of the policy: key among these are the rising cost of some basic foods, damage to local roads by frequent heavy trucks, and destabilising social impact of a large population of fly-in-fly-out workers.<sup>6</sup> Meanwhile, significant allegations of corruption have passed seemingly unnoticed by Australia.<sup>7</sup>

### ***PNG Supreme Court intrudes into neo-colonial story, but cooperation continues***

In 2016, the PNG Supreme Court demanded the closure of the Manus detention facility, finding that the centre breached PNG's constitutional right to liberty.<sup>8</sup> In so doing, the PNG judiciary asserted PNG policy sovereignty. This fissure in the neo-colonial narrative sets the case of PNG apart from other states of externalisation, such as Nauru and Libya, in which judiciaries have had less power or inclination to push back against their wealthy patrons.<sup>9</sup>

The cooperation continues, however. After the 2016 Supreme Court decision, the Australian government prevaricated for a further 18 months. However, at the end of 2017 the detention facility was finally closed. With few options for resettlement, however, the people caught up in the system remain trapped in PNG. In 2019 over 50 men, all of whom have failed in their applications for refugee status, were re-detained in Port Moresby's Bomana Prison, held incommunicado in allegedly torturous conditions, before being released in January 2020.<sup>10</sup> Without a decisive policy on the future of this group of people, who remain in PNG on Australia's behest, these men's liberty will continue to be vulnerable to politics with few legal protections.

### ***The ongoing importance of colonial histories for refugee externalisation policies***

Scholars who ignore the ongoing importance of colonial histories on refugee externalisation policies fail to paint the full picture of why some states are willing to cooperate with their wealthy neighbours to keep refugees at bay. There is little doubt that half a century of persistent poverty and economic dependence, and the ongoing political and person-to-person relationships, increased PNG's readiness to cooperate with Australia when it was approached in 2001. Inconveniently for Australia, PNG's Supreme Court asserted its constitutional protections of liberty and international law in 2016. However, the failure of the PNG government to unambiguously reflect that decision in policy demonstrates the persistent power of Australia's influence. Writing in 1965 of neo-colonialism, Nkrumah may not have foreseen refugee externalisation policies, but in these policies, his predictions have been wholly realised.

- 1 Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism*, (New York: International Publishers, 1966).
- 2 Refugee Council of Australia, 'Australia's Offshore Processing Regime: The Facts,' *RCOA*, May 20, 2020. <https://www.refugeecouncil.org.au/offshore-processing-facts/>.
- 3 Donald Denoon, *A Trial Separation: Australia and the Decolonisation of Papua New Guinea*, (Canberra: ANU E Press, 2012).
- 4 Lisa Button and Shane Evans, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives*, (Save the Children and UNICEF, 2016). <https://resourcecentre.savethechildren.net/pdf/at-what-cost-report-final.pdf/>.
- 5 Joanne Wallis and Steffen Dalsgaard, 'Money, Manipulation and Misunderstanding on Manus Island,' *The Journal of Pacific History* 51, no. 3 (2016): 301-329.
- 6 Jo Chandler, 'Manus in the Balance,' *The Monthly*, February, 2015. <https://www.themonthly.com.au/issue/2015/february/1422709200/jo-chandler/manus-balance#mtr>.
- 7 Department of Foreign Affairs and Trade, *DFAT Country Information Report: Papua New Guinea*, 2017. <https://www.dfat.gov.au/sites/default/files/country-information-report-papua-new-guinea.pdf>; Mike Seccombe, 'The Failed State of PNG,' *The Saturday Paper*, April 30-May 6, 2016. <https://www.thesaturdaypaper.com.au/news/immigration/2016/04/30/the-failed-state-png/14619384003181#hrd>.
- 8 Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah,' *Monash University Law Review* 42, No. 2 (2016): 308-338.
- 9 Anne Davies and Ben Doherty, 'Nauru: A Nation in Democratic Freefall Propped up by Australia,' *The Guardian*, September 3, 2018. <https://www.theguardian.com/world/2018/sep/03/nauru-a-nation-on-the-cusp-of-democratic-calamity>.
- 10 Jo Chandler, "Designed to Torture": Asylum Seeker Chooses Iranian Prison over PNG Detention Centre,' *The Guardian*, November 11, 2019. <https://www.theguardian.com/world/2019/nov/10/designed-to-torture-asylum-seeker-chooses-iranian-prison-over-png-detention-centre>; Radio New Zealand, 'Last Manus Island Asylum Seekers Released from PNG's Bomana,' January 24, 2020. <https://www.rnz.co.nz/international/pacific-news/408044/last-manus-island-asylum-seekers-released-from-png-s-bomana>.

## Banning Humanitarian Visas, Supporting Resettlement: The European Commission's Veil of Maya

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It is well known that at EU level the 'first-arrival' criterion provided for by Regulation 604/2013 ("Dublin III Regulation") is proving controversial. In an effort to tackle (at least in part) this issue, the European Commission and the European Parliament engaged in receiving potential asylum seekers through two different paths. This change of direction might *prima facie* appear as a response to the EU and its Member States' urgent need to respect human rights. Yet, at a closer look, these institutions are primarily supporting their own programme, with the self-evident result that neither a legislation on humanitarian visas nor on common provisions on resettlements have been adopted so far. As a result, the risk of death along migration routes is still a persisting reality.

In 2016 the European Parliament made a first attempt to establish humanitarian visas, i.e. visas allowing persons in need of international protection to reach the territory of EU Member States and file their request. The Parliament's resolution, amending the Commission's proposal for a recast of the EU Visa Code, called Member States to issue humanitarian visas through their embassies in foreign countries.<sup>1</sup> However, the Parliament's request remained unheard.

In December 2018, acknowledging the persistent lack of a legal framework for safe and legal pathways at the EU level, the Parliament passed a new resolution on Humanitarian Visas, this time requesting the Commission to submit a proposal for a regulation to allow persons seeking international protection to regularly enter the territory of the Member States.<sup>2</sup> In brief, according to the Parliament, an EU humanitarian visa system is the sole mechanism able not only to decrease the soaring cost in human lives along migration routes, but also to facilitate the harmonisation of humanitarian admissions, which have, until now, worked through highly discretionary practices (i.e. resettlement or sponsorship programmes and humanitarian corridors) owing to a lack of common, regular pathways to access international protection.

The Commission rejected again the Parliament's request. The decision was based on two grounds: firstly, by mentioning the Case X and X v. État belge, where the Court of Justice found that Member States are not required under EU law to grant humanitarian visas to persons who wish to enter their territory for asylum purposes (in contrast to the position supported by the Advocate General Mengozzi

in his conclusions); secondly, by affirming that its Union Resettlement Framework Proposal of July 2016 sufficed the purpose.<sup>3</sup>

Resettlement thus emerged as an offshore processing of asylum requests akin to humanitarian visas, allowing the admission of third country nationals and stateless persons to the territory of Member States for international protection purposes.<sup>4</sup> However, these mechanisms are marked with notable differences. In the humanitarian visas system conceived in the Parliament's last resolution, third country nationals file their international protection request by choosing the embassy of a Member State. Resettlement, instead, operates in the opposite direction, with Member States leading the process. On account of a range of criteria, EU States concerned identify and register those who they intend to resettle, and only in a second moment assess whether the selected individuals are eligible for international protection, following UNHCR and IOM referral.

In addition, resettlement is based on points (d) (common procedures), and (g) (partnership and cooperation with third countries) of Article 78.2 TFEU. In its Proposal, the Commission finds third countries' effective cooperation with the Union in the area of migration and asylum an 'important element on which the Commission will base its decision'. Article 4 of the Proposal indicates some key points concerning third countries from which resettlement shall take place: 1) their efforts to reduce the number of irregular migrants crossing the Union's border from their territory; 2) their cooperation on readmission and return of migrants irregularly staying in the territory of the Member States; 3) their commitment to create the conditions for the use of the safe third country notions; and 4) their capacity for the reception and protection of people seeking international protection.

These conditions unveil a deeply asymmetric cooperation, where third countries need to adapt their migration policies not much to comply with human rights laws, rather to accommodate to the EU externalisation attitude. This conditional aid towards third countries is moreover reflected in Article 10.1(b) of the Proposal which clearly allows Member States to give preference to migrants whose social and cultural characteristics can facilitate their integration. This ultimately risks turning resettlement from a tool of international solidarity and humanitarian relief into a cherry-picking practice. On the matter, the Parliament has expressed deep concern in its 2017 report: 'The strategic use of resettlement should not be interpreted as migration control or used as a means to achieve the Union's foreign policy objectives. The lack of strategic use of resettlement should not be used as a reason to exclude a country or region as a geographical priority.'<sup>5</sup>

In Arthur Schopenhauer's philosophy, the veil of Maya hides reality and shows only a superficial appearance. As things stand, the Commission's veil of Maya might be represented by the willingness to resettle people in need of international protection as a way to alleviate migratory pressure on third countries. However, it should remain a complementary programme for international protection, and not its replacement, attracting all the EU Commission's attention and efforts. Moreover, underneath the surface, the real Commission's priorities seem to be others. Curbing irregular migration to the EU through conditional cooperation and establishing an admission procedure that allows Member States to select third country nationals on account of their socio-cultural affinity risks to overcome the legal duty to protect people from severe damages.<sup>6</sup> As conceived, resettlement may turn out to be the umpteenth externalisation policy that serves foreign policy objectives rather than international protection purposes.

- 1 European Parliament, *The Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*, P8\_TA(2016)0102, 2016. [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0102\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0102_EN.pdf).
- 2 European Parliament, *European Parliament Resolution of 11 December 2018 with Recommendations to the Commission on Humanitarian Visas* (2018/2271(INL)), P8\_TA(2018)0494, 2018. [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0494\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.pdf).
- 3 X and Y v Etat belge. 2017. In Case C-638/16 PPU. <https://curia.europa.eu/juris/document/document.jsf?jsessionid=36F5FA5E865A6CTF18DC79B8857E923D?-text=&docid=188626&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3733226>; Evelien Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal Integrity vs. Political Opportunism?' *CEPS*, March 16, 2017. [https://www.ceps.eu/wp-content/uploads/2017/03/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary\\_0.pdf](https://www.ceps.eu/wp-content/uploads/2017/03/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf); European Commission, *Enhancing legal channels: Commission proposes to create common EU Resettlement Framework*, 2016. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2434](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2434).
- 4 Mario Savino, 'Refashioning Resettlement: From Border Externalization to Legal Pathways for Asylum,' in *The EU External Policies on Migration, Borders and Asylum in an Era of Large Flows: Policy Transfers or Intersecting Policy Universes?*, eds. Sergio Carrera, Leonhard den Hertog, Dora Kostakopoulou and Marion Panizzon (Leiden: Brill, 2018), 81-104.
- 5 Malin Björk, *Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and Amending Regulation (EU) No 516/2014 of the European Parliament and the Council (COM(2016)0468 – C8-0325/2016 – 2016/0225(COD))*, 2017. [https://www.europarl.europa.eu/doceo/document/A-8-2017-0316\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-8-2017-0316_EN.pdf).
- 6 European Council on Refugees and Exiles, *Untying the EU Resettlement Framework*, POLICY NOTE #01 – 2016P, 1, 2016. <https://ecre.org/wp-content/uploads/2016/10/Policy-Note-01.pdf>.

## How Can Academics Help? Conclusions from the Collaborative Meeting with Researchers and Civil Society Leaders

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Academics can play a significant role in society by developing knowledge, providing analysis and informing public debate, thereby having an impact in the community. This is particularly important in an area such as refugee policy where there is a great deal of misinformation.

In order to reflect on the role of academics in this context, the Comparative Network on Refugee Externalisation Policy (CONREP) held a forum of the CONREP research partners with civil society leaders from a wide variety of local, national, and international organisations operating in refugee protection and assistance. Through constructive dialogue and engagement, the participants gained deeper insights into what civil society actors regard as the most effective ways that academics can support and contribute to refugee advocacy and assistance efforts.

### Teaching

Teaching is a central competence of academia and a useful place to provide added value to civil society advocacy and refugee assistance efforts. Academics play a key role in educating students about refugee issues based on research and evidence, thereby helping to shape future narratives and policy-maker preferences. It is also an important site to contest anecdotal and hate-based media reporting. Inviting civil society leaders to contribute to lectures, both in content and presentation, helps to amplify civil society voices and brings practical knowledge to university lectures. Civil society leaders also reported that staffing challenges in preparing court cases create obstacles to providing legal support to refugees. One civil society leader suggested that academics could assist in this area by supporting students in providing the backend resources that might be required to help build cases to be brought to the courts. This could potentially take the form of group projects or internships.

### Research

Research is another central competence of academia which can support civil society advocacy and refugee assistance efforts. Although there is a rich literature analysing the causes and consequences of forced migration, there remains much room for further research. Further analysis is needed of the drivers of refugee movement and how this relates to changes in migration

patterns. For example, in the case of Australia, an investigation into the causes of the observed decrease in boat arrivals is needed. Given the Australian Government’s claims that Operation Sovereign Borders is the cause of the decrease, such analyses are necessary to assess the validity of these claims.<sup>1</sup>

### Expanding the regional focus of research

Another area of research is the role of asylum in the greater context of Southeast Asia and the Pacific. Extensive literature exists examining asylum and asylum policies in Australia. However, a lacuna in the literature exists regarding the impact of Australian externalisation policies in Southeast Asia and the Pacific. This expands the focus of research beyond Papua New Guinea and Nauru as sites of externalisation to include Thailand, Indonesia, and Pacific island nations amongst others. Furthermore, analysis is needed regarding how Australia’s externalisation policies affect local populations in Southeast Asia and the Pacific. For example, research is needed examining the impact of the Medevac process on the people of Nauru and Papua New Guinea.<sup>2</sup> Such analysis of Australia’s policies in a regional context illuminates the broader impacts of externalisation policies which may have far-reaching political, social and economic consequences.

### Research and reframing the narrative

Framing and narrative-shaping are another area of research and activity in which academics can provide added value to civil society efforts. Academic research provides the foundations for data-driven policy decision-making and narrative-shaping. Through objective data collection and analysis, academics provide increased transparency – a necessary component of accountability in asylum governance. Data and research findings also provide legitimacy to framing and narrative-shaping, especially concerning public opinion. Academic research can also contribute to broader understandings of framing and narrative-shaping, such as investigating what it means to change public opinion and the best strategies to shape a given narrative. Academics can also actively participate in narrative-shaping by engaging with public debate in the media. Increased visibility and approachable dissemination of research findings contribute to shaping public narratives. One area of narrative-shaping research in which academics can contribute is investigating further the place of individual human experiences in deterrence agendas. For example, personal story telling places the person at the centre of the narrative. This can help re-frame the narrative to highlight injustice and harm in externalisation policies. As one civil society leader indicated, people are concerned with their own lives and the impact that refugees would have on them. Re-framing the narrative to focus on the individual may therefore facilitate increased public support for more humanitarian refugee policies. There is also a need to

re-frame this narrative in terms of a “decent society” and show how refugee issues can fit within the idea of making a decent society on an individual level.

### **Researching the role of NGOs**

Pursuing further research into the role of non-governmental organisations (NGOs) in asylum policy externalisation constitutes another way in which academics can also contribute to civil society activities. Civil society leaders cited the need for a deeper understanding of the effects, both beneficial and detrimental, of NGO actions in refugee externalisation. In particular, one civil society leader noted the need to better understand the role of the International Health and Medical Services (IHMS) in providing support to offshore detainees. Civil society leaders also raised the need for further research in assessing the role and benefits of UN bodies such as UNHCR and the Global Compacts in addressing externalisation.<sup>3</sup>

### **Activism and lobbying**

Activism and lobbying are another area in which, according to civil society leaders, academics can contribute to refugee advocacy and support. Increased public dissemination of academic research helps reshape public narratives and add scientific legitimacy to policy change demands. An

increased presence of academics in the public debate can also help to hold governments accountable to policy promises. For example, the Australian Government set a goal of zero detention population in “early 2020”, which it has not achieved.<sup>4</sup> Academics can help hold the Government accountable by drawing attention to this policy failure.

### **Conclusions**

We hope that this can provide an agenda going forward to guide the way in which academics can best support and assist civil society in the context of refugee law and policy.

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- 1 Julie Doyle, 'Immigration Minister Scott Morrison Suggests Operation Sovereign Borders Has Reduced Asylum Seeker Arrivals in Indonesia,' *ABC News*, February 4, 2014. <https://www.abc.net.au/news/2014-01-15/morrison-says-asylum-seeker-boat-arrivals-dropping/5201116?nw=0>.
  - 2 Reilly, Alex. 2019. 'Explainer: The Medevac Repeal and What It Means for Asylum Seekers on Manus Island and Nauru,' *The Conversation*. December 4, 2019. . <https://theconversation.com/explainer-the-medevac-repeal-and-what-it-means-for-asylum-seekers-on-manus-island-and-nauru-128118>.
  - 3 International Health and Medical Services. 'Welcome to International Health & Medical Services.' <http://www.ihms.com.au/>; United Nations High Commissioner for Refugees. 'Main Page.' <https://www.unhcr.org/en-au/>; United Nations, *The Global Compact on Refugees*, (New York: United Nations, 2018). <https://www.unhcr.org/5c658aed4>.
  - 4 Stephanie Borys, 'Federal Government under Mounting Pressure to Resettle Refugees on Manus Island and Nauru,' *ABC News*, June 17, 2019. <https://www.abc.net.au/news/2019-06-17/pressure-on-federal-government-resettle-refugees-manus-nauru/11215064>.

## Internal Border Controls: Australia's Domestic Policies to Deter Refugees

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Australia does have a positive human rights record on many fronts. It has a strong multicultural society built on shared democratic values, resilient economy and successful migration settlements. However, since the late 1990s and particularly in the past decade, Australia's refugee externalisation policies have been harmful to asylum seekers and refugees and deteriorated Australia's social cohesion and human rights record. While there has been much focus on Australia's external border controls, including offshore detention and boat turnbacks, less attention has been paid to its internal deterrence policies, including temporary visas and denial of family reunion.

### *Focus on boat arrivals*

Australia's externalisation policies have mostly targeted vulnerable asylum seekers and refugees that have arrived by boats in Australia. This is despite the fact that historically the majority of asylum seekers have arrived by air on valid visas and then applied for protection in Australia.<sup>1</sup> The exceptions are 2011-2013 and 2012-2013 during which boat arrival applicants were more than those that arrived by air. More importantly, as Khalid Koser has argued, boat arrivals have been found to be genuine refugees at a much higher rate than those who have arrived in Australia by air in the past two decades.<sup>2</sup>

Nonetheless, refugee externalisation policies in Australia have constructed boat arrivals as threats to national sovereignty and state security. In the past two decades, successive Australian governments have imprisoned asylum seekers in offshore camps in Nauru and Manus Island. As Human Right Watch has found, 'at least 12 refugees and asylum seekers have died in Australia's offshore processing system since 2013, six of them suicides. Self-harm and suicide attempts surged in PNG following the Australian election in May 2019, with media reporting dozens of attempts, and local authorities struggling to respond to the crisis'.<sup>3</sup>

Australian governments also provided border control and surveillance trainings and equipment to security departments and officials and funded massive Overseas Public Information Campaigns (OPICS) in source and transit countries to deter asylum seekers and, more significantly, to prevent 'potential' asylum seekers from leaving their villages and towns.<sup>4</sup>

### *Internal border controls*

Since the late 1990s, Australia's refugee externalisation policies has also had domestic dimensions, which have been strengthened under the Coalition-led governments after the election of former Prime Minister Abbott in September 2013. Australian governments have introduced 3- and 5-years temporary protection visas and have prolonged citizenship and family reunion visas for onshore asylum seekers and refugees who have arrived by boats.

For example, there are around 30,000 asylum seekers in Australia, who have arrived by boats after 13 August 2012, on different temporary protection visas or bridging visas. The temporary protection visa holders have the right to attend schools and work in Australia. However, if they wish to pursue tertiary education, they are required to pay international fees in Australian higher education institutions. As part of their externalisation policies, Australian governments have made it harder for temporary protection visa holders to earn higher qualifications and start a meaningful life.<sup>5</sup>

The 3- and 5- years temporary visas allow asylum seekers to travel to certain countries for family reasons at least once a year. But, the Department of Home Affairs have shown inconsistencies in granting travel permission to some temporary visa holders but not others to countries where their families reside mostly without any legal status.<sup>6</sup> In some cases, they have been kept in limbo for several months because of lengthy and unpredictable visa renewal processes and obtaining Australian travel documents.

Moreover, on 19 December 2013, Scott Morrison, the then Minister for Immigration and Border Protection, issued a Ministerial direction which gave 'lowest priority' to family stream visas for boat arrivals.<sup>7</sup> Effectively, the Department made it conditional for permanent visa holders, who arrived by boats before 12 August 2012, to get their Australian citizenships before applying for family reunion visas. During this time, the majority of family reunion visa applications were put on hold because of delays in the processing of citizenship applications.

Despite the removal of Ministerial direction in mid-2018, there are former refugees who have arrived by boats over a decade ago and are still waiting to sit for their mandatory citizenship tests in order to bring their families to Australia.<sup>8</sup> For the majority of these refugees, the prolonged processing of citizenship and family reunion applications have added to their existing mental health issues and made it difficult for them to have positive settlement experiences in Australia. Most still live in overcrowded shared accommodations with ongoing fears about the safety and wellbeing of their families back home or in transit countries.

The increased partner visa cost and prolonged processing of citizenship and family reunion visa applications have resulted in family separation, where the Department have excluded children aged 18 or over from family reunion visa applications of refugees who have arrived by boats.<sup>9</sup> The Department's argument has been that those children are financially 'independent' of their parents. While most parents with children wish for them to become 'independent' and capable adults, the socio-political and economic conditions in fragile and conflict zones, where most of these refugees have escaped from, make it impossible for their children to live independent lives from their parents. More broadly, Eastern cultures, in which most of these refugees and asylum seekers have grown up, emphasise interdependence relations and reciprocal care between elderly parents and children.<sup>10</sup> As such, family separation has exacerbated personal and social anxieties amongst refugee communities in Australia and have made them less satisfied with their settlement experiences in Australia. As the government's own study in Building a New Life in Australia demonstrates, the degree of life satisfaction alongside English language, access to education, health and employment make enormous differences in social cohesion and belonging in Australia.<sup>11</sup>

### **Weakening moral authority**

These internal border control policies have contributed to the weakening of Australia's moral authority in promoting human rights abroad. When Australia accepted the seat in UN Human Rights Council in 2018, at least 70 nations raised concerns about Australia's treatments of asylum seekers and refugees. The UN has also been critical of how Australian governments have treated asylum seekers and refugees in the past decade.<sup>12</sup>

Apart from bilateral dialogues about human rights, Australia has not raised human rights issues with our immediate neighbours such as the Philippines, Vietnam and Laos. In recent years, China, Indonesia and Japan have publicly criticised Australia's treatments of asylum seekers.

In a rapidly changing world, the weakening moral authority caused by hard externalisation policies of refugees and asylum seekers is a serious threat to Australia's human rights records and cohesive society.

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- 1 Janet Phillips, *Asylum Seekers and Refugees: What Are the Facts?*, Parliament of Australia, 2015. [https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/rp/rp1415/asylumfacts](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts).
  - 2 Khalid Koser, *Responding to Boat Arrivals in Australia: Time for a Reality Check*, Lowy Institute for International Policy, December 2010. [https://www.lowyinstitute.org/sites/default/files/pubfiles/Koser%2C\\_Responding\\_web\\_1.pdf](https://www.lowyinstitute.org/sites/default/files/pubfiles/Koser%2C_Responding_web_1.pdf).
  - 3 Human Rights Watch, 2019. *Australia: Events of 2019*. <https://www.hrw.org/world-report/2020/country-chapters/australia#5a664c>.
  - 4 John Watkins, 'Australia's Irregular Migration Information Campaigns: Border Externalization, Spatial Imaginaries, and Extraterritorial Subjugation', *Territory, Politics, Governance* 5 no.3 (2017): 282-303.
  - 5 Lisa Hartley, Caroline Fleay, Sally Baker, Rachel Burke and Rebecca Field, 2018. *People Seeking Asylum in Australia: Access and support in Higher Education*, (Perth: National Centre for Student Equity in Higher Education, 2018). [https://www.ncsehe.edu.au/wp-content/uploads/2018/11/Hartley\\_PeopleSeekingAsylum.pdf](https://www.ncsehe.edu.au/wp-content/uploads/2018/11/Hartley_PeopleSeekingAsylum.pdf).
  - 6 Anna Cody and Maria Nawaz, 'UN Slams Australia's Human Rights Record', *The Conversation*, November 10, 2017. <https://theconversation.com/un-slams-australias-human-rights-record-87169>.
  - 7 Refugee Council of Australia, 'Family Separation and Family Reunion for Refugees: The Issues', *RCOA*, March 1, 2021. <https://www.refugeecouncil.org.au/family-reunion-issues/5/>.
  - 8 Refugee Council of Australia, 'Delays in Citizenship Applications for Permanent Refugee Visa Holders', *RCOA*, January 26, 2019. <https://www.refugeecouncil.org.au/delays-citizenship-applications/>.
  - 9 Refugee Council of Australia, 'Family Separation and Family Reunion for Refugees.'
  - 10 Rakesh K Chadda and Koushik Sinha Deb, 'Indian Family Systems, Collectivistic Society and Psychotherapy', *Indian Journal of Psychiatry* 55, suppl. 2 (2013): S299-309.
  - 11 Rebecca Jenkinson, Michelle Silbert, John De Maio and Ben Edwards, *Settlement Experiences of Recently Arrived Humanitarian Migrants*, Australian Institute of Family Studies, 2016. <https://aifs.gov.au/publications/settlement-experiences-recently-arrived-humanitarian-migrants>.
  - 12 Cody and Nawaz, 'UN Slams Australia's Human Rights Record.'

## The Dangers of Offshore Processing: Questioning the Australian Model

*Maria O'Sullivan*

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The 'Australian Solution' of offshore processing has been in the news recently due to the leaking of a report which shows that the UK Home Office is proposing to process migrants off the UK mainland. Unsurprisingly, this has led to concerns from human rights groups and other commentators. For instance, Amnesty International has called the proposal 'entirely immoral and inhumane'.<sup>1</sup>

In this paper I strongly argue against the use of offshore processing in light of the experiences in Australia.

The hallmarks of the Australian model are that it is designed to inhibit the operations of people smugglers by stopping people arriving by boat and it is based on outsourcing protection and processing obligations to a third state.

But this comes with complications. In particular, Australia lacks proper control over what happens to refugees in these offshore areas and, as a result, it has been implicated in human rights breaches carried out at the centres. Furthermore, Australia has been required to pay compensation to asylum seekers and refugees held in these centres in response to class actions lodged in Australia alleging a breach of the duty of care to those persons.

I therefore argue here that the Australian example clearly demonstrates that extraterritorial processing is not a sustainable, long term solution for the UK.

### **Human Rights Concerns with Offshore Processing**

Australia first adopted extraterritorial processing and detention of refugees in 2001 when its former protectorates of Nauru and PNG agreed to host such facilities in exchange for significant increases in aid.

Since then the centres have been the subject of controversy and litigation. One problem has been the human rights abuses and deaths which have occurred in the offshore processing centres. For instance, in 2014, an asylum seeker - Reza Barati - died of head injuries on the way to hospital following protests at the Manus Island Immigration Detention Centre in PNG. The riot prompted an Australian Senate inquiry which concluded that 'the Australian Government failed in its duty to protect asylum seekers including Mr Barati from harm'.<sup>2</sup>

Due to these significant problems, the UN and many human rights groups have argued that offshore processing as undertaken by Australia breaches a number of human rights laws.

For instance, in 2015, the UN Special Rapporteur Against Torture found that numerous aspects of Australia's policies in PNG violate the right of detainees to be free from torture or 'cruel, inhuman or degrading treatment' under arts 1 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*:

[T]he Rapporteur concludes that there is substance in the allegations presented in the initial communication, reiterated above, and thus, that the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment.<sup>3</sup>

The UN High Commissioner for Refugees also stated in 2016 that '[t]here is no doubt that the current policy of offshore processing and prolonged detention is immensely harmful'.<sup>4</sup>

This criticism has continued more recently, with the UN High Commissioner for Human Rights Michelle Bachelet raising serious concerns about Australia's offshore processing regime whilst on a visit to Australia in 2019.<sup>5</sup>

### **Legal Difficulties and Complexities**

To illustrate the problems with establishing and maintaining offshore processing regimes, I wish to examine the legal confusion and complexities which arose in relation to the detention of asylum seekers on Manus Island in PNG.

The legal difficulties with establishing offshore processing systems is demonstrated by the 2016 decision of the PNG Supreme Court in *Namah v Pato* where the viability of a key component of the PNG offshore processing regime was called into question.<sup>6</sup> The case also created further litigation, confusion and tension between Australia and PNG.

Moreover, this is an important case to examine because that dealt with a provision of the PNG Constitution which is very similar to the European Convention on Human Rights.<sup>7</sup> As such, it serves as an important reminder to the UK that it will also be subject to constraints in establishing offshore processing.

### ***The Right to Liberty in the PNG Constitution and the European Convention on Human Rights***

In the *Namah* case, The PNG Supreme Court, in a unanimous decision of five judges, held that detention of refugees and asylum seekers in the Australian-funded centres in that country was unconstitutional under the right to liberty set out in section 42 of the *PNG Constitution*. This provides that '[n]o person shall be deprived of his personal liberty', except in defined, limited circumstances.<sup>8</sup>

It is important to note that the Supreme Court did not simply focus on the fact of detention in rendering the detention unconstitutional, it also considered the conditions of detention to be relevant. For instance, in considering the restriction of liberty pursuant to s 38, the Court noted that an additional consideration was whether 'the conditions of detention are such as to damage the rights and dignity of the detainees or, worse, causes physical or mental suffering.'

This case provides a very good reason for the UK government to reconsider establishing any sort of offshore processing system as similar protections to that of s 42 of the *PNG Constitution* are set out in article 5 of the European Convention on Human Rights.

The case also illustrates the problems with the allocation of responsibility between countries who seek to set up offshore processing arrangements. The PNG Supreme Court confirmed in its ruling in *Namah* that in its opinion both PNG and Australia were jointly responsible for complying with the ruling. However, the Australian Minister for Immigration argued that the court decision was not binding on Australia and the asylum seekers and refugees in the centre were solely PNG's responsibility.<sup>9</sup> Therefore, there was a great deal of uncertainty and confusion as to which country was in fact responsible. Ultimately, the detention centre on Manus Island was shut down in October 2017 and refugees transferred to a transit centre. However, the process was extremely concerning. Some were removed by force by PNG police.<sup>10</sup>

More recently, the offshore regime has caused significant diplomatic tensions between Australia and PNG, with the PNG Prime Minister calling on Australia to act urgently to remove the remaining refugees from the island.<sup>11</sup>

Therefore, the PNG Supreme Court's finding as to the unlawfulness of the detention centre and the aftermath demonstrates the legal and political failure of the extraterritorial detention and processing regime in PNG.

In addition to the uncertainty and confusion that this litigation created, the costs associated with litigation have been significant. A class action lodged in Australia on behalf of a group of asylum seekers and refugees held in PNG -

*Kamasae v Commonwealth of Australia & Ors* - was settled in 2017 for AUD\$70 million.<sup>12</sup> This compensated 1,905 asylum seekers and refugees on Manus for being illegally detained and for negligence in the Australian Government's involvement in their care. Other class actions have been lodged.<sup>13</sup>

### ***Conclusions – The UK should not emulate the Australian Offshore System***

What does this mean for the UK proposal to introduce offshore processing?

The above analysis should discourage UK authorities from emulating the 'Australian model'. I would counsel UK policy makers to look more deeply at the Australian model and the costs, both human and financial, of offshore processing.

Despite the fact that the Australian model is held up as a success because it has 'stopped the boats', the true story is far more complex than this. Whilst it is true that there are very few boat arrivals on Australian territory, the Australian navy regularly intercepts and pushes back vessels into Indonesian territory.

Furthermore, the costs of offshore processing are extraordinarily high. In 2019 the Asylum Seeker Resource Centre, Save the Children and GetUp! published a report titled 'At What Cost?', outlining the human and financial cost of Australia's offshore system.<sup>14</sup> The report found that offshore detention and processing cost around \$AUD 9 billion over the period 2016 to 2020. This means that offshore detention costs Australia approximately \$573,000 a person each year.

Thus, in light of all these aspects, the Australian example is not a model to be copied. As myself and Azadeh Dastyari argued in a journal article about the PNG situation:

the number of legal challenges; the criticism of the extraterritorial processing regime from numerous national and international bodies; and the political tensions caused in PNG and Australia are illustrative of the unsustainability of extraterritorial models more generally as a means of addressing refugee flows. Australia's approach is no solution to the growing displacement of people globally and should not be seen as an attractive option by any state tackling large numbers of people seeking its protection.<sup>15</sup>

I would reiterate those concerns and restate this argument: that in 2020, these problems with the Australian offshore regime have not been solved and therefore the Australian 'solution' is no solution at all and should not be replicated in the UK or elsewhere.

- 1 Amnesty International UK, 'UK: Offshore Asylum Processing Proposal "Entirely Inhumane"', Press release, October 1, 2020. <https://www.amnesty.org.uk/press-releases/uk-offshore-asylum-processing-proposal-entirely-inhumane>.
- 2 Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, Senate, Commonwealth of Australia, December 2014. [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Manus\\_Island/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report).
- 3 Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/28/68/Add.1, United Nations General Assembly, March 5, 2015. <https://digitallibrary.un.org/record/793910?ln=en>.
- 4 United Nations High Commissioner for Refugees Regional Representation in Canberra, 'UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions,' Press release, May 2, 2016. <https://www.unhcr.org/afr/572862016.pdf>.
- 5 Eliza Laschon, 'United Nations Human Rights Commissioner Criticises Australia's Asylum-Seeker Policies,' *ABC News*, October 9, 2019. <https://www.abc.net.au/news/2019-10-09/un-bachelet-criticises-australia-asylum-seeker-policies/11588084>.
- 6 *Namah v Pato*, National Executive Council and the Independent State of Papua New Guinea. 2013. 84 SC1497 1.
- 7 Pacific Islands Legal Information Institute, *Constitution of the Independent State of Papua New Guinea*. [http://www.pacilii.org/pg/legis/consol\\_act/cotisopng534/](http://www.pacilii.org/pg/legis/consol_act/cotisopng534/).
- 8 *Namah v Pato*, National Executive Council and the Independent State of Papua New Guinea.
- 9 Francis Keany and Louise Yaxley, 'Manus Island Detention: PNG Responsible for Asylum Seekers, Peter Dutton Says,' *ABC News*, April 28, 2016. <https://www.abc.net.au/news/2016-04-28/png-responsible-for-manus-island-asylum-seeker-dutton-says/7369032>.
- 10 Ben Doherty, 'Manus Detention Centre Cleared of All Refugees and Asylum Seekers,' *The Guardian*, November 24, 2017. <https://www.theguardian.com/australia-news/2017/nov/24/manus-detention-centre-cleared-of-all-refugees-and-asylum-seekers>.
- 11 Phil Mercer, 'Papua New Guinea Demands Australia Remove Refugees,' *VOA News*, July 19, 2019. <https://www.voanews.com/a/east-asia-pacific-papua-new-guinea-demands-australia-remove-refugees/6172205.html>.
- 12 *Kamasae v Commonwealth of Australia & Ors*. 2017. S CI 2014 6770. <https://www.supremecourt.vic.gov.au/court-decisions/case-list/manus-island-detention-centre-class-action>.
- 13 Helen Davidson, 'Peter Dutton to Face New Class Action Alleging Unlawful Detention,' *The Guardian*, October 26, 2017. <https://www.theguardian.com/australia-news/2017/oct/26/peter-dutton-to-face-new-class-action-alleging-unlawful-detention>.
- 14 Asylum Seeker Resource Centre, Save the Children and GetUp!, *At What Cost? The Human and Economic Cost of Australia's Offshore Detention Policies 2019*, 2019. <https://www.asrc.org.au/wp-content/uploads/2013/04/1912-At-What-Cost-report.pdf>.
- 15 Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah*,' *Monash University Law Review* 42, No. 2 (2016): 308-338.

## COVID-19 and the Relentless Harms of Australia's Punitive Immigration Detention Regime<sup>1</sup>

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Calls for the urgent release of people seeking asylum, refugees and other non-citizens held in immigration detention centres began as soon as the magnitude and reach of the global health crisis associated with COVID-19 became clear. Public health organisations quickly identified detention centres, as sites of mandatory and often overcrowded social confinement, as extremely high risk places for both infection and onward transmission of COVID-19.

In Australia, before the end of March 2020, over 1180 health care professionals and epidemiologists called for the Government to release people from immigration detention, flatly stating that, '[f]ailure to take action to release people seeking asylum and refugees from detention will ... put them at greater risk of infection (and possibly death).<sup>2</sup>

Similar statements were made by the Australasian Society for Infectious Diseases, the Australian College of Infection Prevention and Control and over 1100 Australian and international academics in an open letter to the Australian Government initiated by Academics for Refugees.<sup>3</sup> Common to all expert advice were warnings that a failure to take action would not only endanger the health and lives of those in detention, but would inevitably put the broader community at risk, since detention centres are porous locations with staff and other personnel frequently moving in and out of them.

Despite the Australian Government's willingness to follow the advice of public health experts in relation to the broader community, it has not heeded expert recommendations regarding this group of people. There is a consistent refusal to include refugees, people seeking asylum and other non-citizens in the urgent, national public health response to the pandemic. The Government's response to refugees and 'irregular migrants' continues to be primarily framed by questions of national security, criminality and border policing/control, and is wholly inconsistent with the approach adopted in relation to the broader community.<sup>4</sup>

As we outline below, the response to people seeking asylum, refugees and other non-citizens has varied across jurisdictions; in Australia the Government's refusal to take

responsibility for the protection of people in detention has led to protest and resistance from both within and outside sites of detention.

### *Mandatory confinement in a global pandemic*

At the same time as mandatory social distancing measures were adopted across Australia to control the spread of COVID-19, the Australian Government refused to provide proper protections for many groups most at risk, including those who were forced to remain in sites of immigration detention.

Since March 2020 the Minister for Home Affairs Peter Dutton, who himself contracted COVID-19 early that month, ignored advice that urgent action was needed to protect people in detention and by extension, the broader community. The Government's most direct response in this period came from a Departmental Spokesperson at the end of March, who confirmed detainees would not be released and stated that '[i]nfection control plans [were] in place in detention', a claim contested by immigration detainees.<sup>5</sup> The Department for Home Affairs has reiterated this position on its website.<sup>6</sup>

Although specific Guidelines were adopted for the management of COVID-19 risks in prisons and immigration detention in late March, the primary focus of the Guidelines is on limited prevention measures and outbreak management, rather than focused on what the World Health Organization and other human rights bodies have strongly urged states to do: act swiftly to implement non-custodial measures and reduce the size of populations within high-risk closed environments.<sup>7</sup>

The Australian Government's failure to act on such public health advice is glaring and the government has been criticised for its double standards.<sup>8</sup> Although there are contrasts between Australia and international practice, even 'proactive' responses are subject to critique. In Europe, some temporary efforts have been made, with the British Home Office releasing people from immigration detention to stem a potential escalation of their public health crisis. Some 400 people had been released by the end of April.<sup>9</sup> But release is not automatically a positive outcome. For some asylum seekers, it has led to homelessness, and a loss of means of support.<sup>10</sup> For others, it has put them in more vulnerable positions, housed in accommodation where it is impossible to practice social distancing.<sup>11</sup> Many of those released in the UK were granted 'freedom' with nowhere to go.<sup>12</sup> Accordingly, some government responses which might appear positive, are soon revealed as putting migrants and refugees at risk of other kinds of violence.

Refugees and non-citizens have also been released from detention in the United States. However, this is due to Government-opposed litigation and legal activism. To stall

the spread of infection, several courts ordered the release of people who are at particular risk of COVID-19 infection from immigration prisons. One judge found that US immigration officials had:

likely exhibited callous indifference to the safety and well-being of the [detained immigrants at risk]. The evidence suggests system-wide inaction that goes beyond a mere 'difference of medical opinion or negligence'.<sup>13</sup>

If there is any prospect for people seeking asylum, refugees and other non-citizens to be released from sites of immigration detention in Australia, it will similarly be as a consequence of contested legal proceedings and public campaigning. In April 2020 lawyers mounted a court case on behalf of a detained refugee, seeking protection from COVID-19.<sup>14</sup> Their preliminary submissions argued that the government has a duty of care to refugees, which cannot be met in immigration detention due to crowded conditions and the absence of public health protections. However, this particular case has since been withdrawn owing in part to the drastic reduction of COVID-19 infections in Australia by mid-2020.

This individualised, case-by-case strategy to bring about compliance with public health advice for those detained is at odds with both the register and substance of the Government's general response, which has consistently emphasised the need for a collective approach and collective compliance in managing COVID-19. The sentimental refrain 'we are all in this together' has been a common catchphrase, though it clearly does not extend to detained non-citizens. And, as have noted, the non-response for those in immigration detention is in sharp contrast to Australia's world-leading management of the pandemic, including record testing rates and swift implementation of social distancing and disease control measures in the community.<sup>15</sup>

### ***The impossibility of social distancing in immigration detention***

About 1400 people are currently in immigration detention in Australia.<sup>16</sup> This includes Alternative Places of Detention (APODs), where many refugees have been detained for prolonged periods, including in commercial hotels located in or on the outskirts of major Australian cities. This number remained largely unchanged in the first 3 months after Australia recorded its first COVID-19 infection, indicating that there have been no significant discretionary releases of people from immigration detention to date.

Social distancing has not been possible in detention centres and APODs. There are serious and obvious risks due to overcrowding, and reports received from inside Australian immigration detention sites in April indicated

that staff have adopted limited or no protective measures, and that those detained have limited or no access to hand sanitiser or adequate hand-washing facilities.<sup>17</sup> The lack of transparency and oversight of immigration detention facilities, run by the large multi-national for-profit operator Serco, has meant that there is little public information about the availability of COVID-19 testing in immigration detention nor the use of other measures such as medical quarantine. Instead, the few publicly-acknowledged measures – such as prohibiting visitors to centres – have had a punitive effect on incarcerated non-citizens in the name of 'protection'.<sup>18</sup>

Notably, the inherent risks of exposure in confined settings are heightened in conditions where people are unable to engage in individual-level preventative behaviours, such as regularly washing hands with soap and water. People in Australian immigration detention are often required to share sleeping quarters (often with four to six people in one room as set out in a complaint filed by those detained to the Ombudsman), as well as bathrooms, laundries and areas where food is consumed.<sup>19</sup> Even within the confines of detention centres the population is not static, as people are often transferred into and between centres at different times, for varying durations.

### ***Protest and resistance within and outside Australia's hotel 'APODS'***

Somewhat perversely, the COVID-19 pandemic has led to increased visibility of the hyper-incarceration of non-citizens in Australia and of the detrimental risks posed within immigration detention, where social distancing is impossible. Some of the most urgent concerns regarding COVID-19 and immigration detention apply to hotels designated as APODs. Here, refugees are detained in small hotel rooms with limited or no ventilation.<sup>20</sup>

As commercial hotels began to be occupied by returned travellers placed in mandatory quarantine in compliance with Australian public health orders, non-citizens indefinitely detained in hotel APODs commenced protests to highlight the impossibility of social distancing in their overcrowded hotel rooms. Recent reports have emerged of COVID-19 infections amongst security guards who are said to have refrained from practising adequate protective measures in 'quarantine hotels' in Melbourne. This illustrates the real, and everyday health risk to refugees held in immigration transit centres and 'detention hotels', especially for many who have pre-existing health conditions.

Refugees and non-citizens detained in rooms in the well-known hotel chain Mantra, and in the Kangaroo Point Hotel, engaged in (at times daily) peaceful protests and utilised social media campaigns to call for their urgent release into safe accommodation. The hotel chains, contracted to

detain people seeking asylum in Brisbane and Melbourne, are profiting daily from their involvement. They are also ignoring direct appeals from advocates and experts to terminate their contracts with the Australian Government. As the risk of COVID-19 in Australia intensified, Amnesty International launched a campaign to encourage supporters to post negative online reviews of participating hotels on sites such as Tripadvisor. One 'one star' Google review for an APOD hotel asked:

Is it true the Government is detaining people who are refugees and asylum seekers here? Please allow them to go to safe community-supported accommodation instead of being trapped in dangerous conditions in hotels.<sup>21</sup>

Neither contracted hotel chain responded to the campaign, and at the time of writing no reviews mentioning either of the hotels' role in Australia's detention centre network remained on their Tripadvisor or other 'review' pages. However, some reports remain which suggest that hotel customers are aware that there is something amiss in the operations of the hotels and the 'clientele' they 'serve'.<sup>22</sup>

Other protests calling for the release of those detained have taken place inside and outside of these hotels. In early April 2020, protestors formed a car motorcade to highlight the conditions faced by detainees held in the Mantra Hotel in an inner north Melbourne suburb. Those detained at the Mantra 'Bell City' hotel simultaneously protested from within the hotel. Aiming to comply with the public health orders in force at the time, the protestors outside the hotel maintained social distance by remaining in their cars at all times. Police nonetheless issued \$43,000 worth of fines to protestors for breaching the 'stay at home' direction put in place by the Victorian Government.<sup>23</sup> Protestors argued they had left their home for 'compassionate reasons', a reasonable excuse to travel under the orders, and they are contesting the fines.

At the time of writing, further protests at the APOD sites, while still navigating social distancing requirements, have taken place in both Melbourne and Brisbane. Those who are detained there continue to protest the failure of the government to extend the same public health safety measures they extend to the community, which enhances their risk of infection. Many are using Twitter and Facebook to document their protests and conditions.

## Conclusion

It is clear that this virus is not the social leveller claimed by early reports. The Government's response to COVID-19 illustrates persistent inequalities and discrimination against those not deemed worthy of any form of adequate protection. The experience of those incarcerated in immigration detention is a concrete reminder of COVID-19's

'disproportionate impact' on people seeking asylum, refugees and other non-citizens. As the UNHCR highlights, the pandemic has exacerbated existing inequalities for those on the move in relation to socio-economic precarity, access to health, and protection needs, as border closures leave people trapped in dangerous and life-threatening situations. Migration pathways have been seriously and detrimentally disrupted. At the same time the UN agency has somewhat optimistically suggested that the impact of the virus has presented an opportunity to 'reimagine human mobility for the benefit of all'.<sup>24</sup>

Against such optimism, Boochani and Tofighian argue that Australia's refugee and detention policies represent 'a perverse kind of obstinacy' and a 'political program feeding a border industrial complex that ensures the continued incarceration of human beings'. As they note, the Australian government has long been privy to evidence of extreme violence in places of detention and nothing has been done to address it.<sup>25</sup> The pre-pandemic conditions in detention are a critical factor in both analysing and explaining the Australian Government's stubborn refusal to respond to the risks of infection and illness faced by those in detention – and the ways in which the pandemic has, so far, reinforced rather than 'reimagined' Australia's regime of mandatory immigration detention.

- 1 Originally published in *Crime, Media, Culture* (Anthea Vogl, Caroline Fleay, Claire Loughnan, Philomena Murray, and Sara Dehm, 'COVID-19 and the Relentless Harms of Australia's Punitive Immigration Detention Regime,' *Crime, Media, Culture* 17, no. 1 (March 2021): 43–51).
- 2 Special Broadcasting Service, 'Australian Doctors Call for Refugees to Be Released amid Coronavirus Fears,' *SBS News*, April 2, 2020. <https://www.sbs.com.au/news/article/australian-doctors-call-for-refugees-to-be-released-amid-coronavirus-fears/bj7lw151>.
- 3 Joshua Davis and Phillip Russo, 'Joint Announcement by the Australasian Society for Infection Diseases and the Australasian College for Infection Prevention and Control,' Press release, March 19, 2020. <https://www.asid.net.au/documents/item/1868>; Academics for Refugees, 'COVID-19 Open Letter,' Open letter, April 2020. <https://academicsforrefugees.wordpress.com/covid-19-open-letter/>.
- 4 Angelina Ferdinand, Claire Loughnan and Philomena Murray, 'Refugees and Australia's Double Standards on COVID-19,' *Arena*, June 16, 2020. <https://arena.org.au/refugees-and-australias-double-standards-on-covid-19/>.
- 5 Essam Al-Ghalib, 'Home Affairs Rejects Calls to Release Immigration Detainees Fearful of Coronavirus,' *SBS News*, March 27, 2020. <https://www.sbs.com.au/news/article/home-affairs-rejects-calls-to-release-immigration-detainees-fearful-of-coronavirus/g6nk3dtoc>.
- 6 Department of Home Affairs, 'COVID-19 and the Border,' <https://www.homeaffairs.gov.au/covid19/>.
- 7 Commonwealth of Australia. Department of Health, *Coronavirus Disease 2019 (COVID-19) Outbreaks in Correctional and Detention Facilities*, 2020. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/covid-19-and-the-relentless-harms-of-australias-punitive-immigration-detention-regime?a=3513253>.
- 8 Claire Loughnan, Anthea Vogl, Caroline Fleay, Philomena Murray and Sara Dehm, 'Refugees Need Protection from Coronavirus Too, and Must Be Released,' *The Conversation*, April 24, 2020. <https://theconversation.com/refugees-need-protection-from-coronavirus-too-and-must-be-released-136961>.
- 9 Diane Taylor, 'Home Office Releases 300 from Detention Centres amid Covid-19 Pandemic,' *The Guardian*, March 22, 2020. <https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>.
- 10 Jon Ironmonger, 'Coronavirus: UK Detention Centres "Emptied in Weeks",' *BBC News*, May 7, 2020. <https://www.bbc.com/news/uk-52560093>.
- 11 Libby Brooks, 'Glasgow Asylum Seekers Moved into Hotels Where Distancing Is "Impossible",' *The Guardian*, April 23, 2020. <https://www.theguardian.com/uk-news/2020/apr/22/glasgow-asylum-seekers-told-to-pack-up-with-an-hours-notice>.
- 12 Nicola Kelly, 'UK Frees Hundreds of Immigration Detainees with Nowhere to Go,' *Al Jazeera*, April 17, 2020. <https://www.aljazeera.com/news/2020/4/17/uk-frees-hundreds-of-immigration-detainees-with-nowhere-to-go>.
- 13 Southern Poverty Law Centre, 'In Victory for Detained Immigrants, Federal Judge Orders ICE to Review for Release Every Person with Covid-19 Risk Factors,' Press release, April 20, 2020. <https://www.splcenter.org/prescenter/victory-detained-immigrants-federal-judge-orders-ice-review-release-every-person-covid>.
- 14 Human Rights Law Centre, 'Legal Challenge Filed to Protect Refugee at COVID-19'

- Risk in Immigration Detention,' HRLC, April 22, 2020. <https://www.hrlc.org.au/news/2020/4/21/legal-challenge-refugee-at-covid-19-risk>.
- 15 Ferdinand, Loughnan and Murray, 'Refugees and Australia's Double Standards on COVID-19.'
  - 16 Department of Home Affairs, *Immigration Detention and Community Statistics Summary 29 February 2020*, (Commonwealth of Australia, 2020). <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-28-february-2021.pdf>.
  - 17 Holt, Rebekah and Saba Vasefi. 2020. "We Are Sitting Ducks for Covid 19": Asylum Seekers Write to PM after Detainee Tested in Immigration Detention.' *The Guardian*. March 24, 2020. <https://www.theguardian.com/australia-news/2020/mar/24/we-are-sitting-ducks-for-covid-19-asylum-seekers-write-to-pm-after-detainee-tested-in-immigration-detention>.
  - 18 Hannah Ryan, 'Australia Is Banning All Visitors to Immigration Detention Centres Because of the Coronavirus,' *Buzzfeed News*, March 23, 2020. <https://www.buzzfeed.com/hannahryan/visits-banned-immigration-detention-coronavirus-covid19>.
  - 19 Claudia Farhart, 'Asylum Seekers Lodge Complaint with Ombudsman over "Catastrophic" Coronavirus Concerns,' *SBS News*, May 7, 2020. <https://www.sbs.com.au/news/article/asylum-seekers-lodge-complaint-with-ombudsman-over-catastrophic-coronavirus-concerns/q1w2fztd>.
  - 20 Commonwealth Ombudsman, *Immigration Detention Oversight*, 01/2020 (Commonwealth of Australia, 2020). [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0017/109700/Immigration-Detention-Oversight-Report\\_January-to-June-2019.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf).
  - 21 Hannah Ryan, 'The Latest Tactic for Getting Refugees out of Detention Hotels? Leaving Negative Online Reviews,' *Buzzfeed News*, May 1, 2020. <https://www.buzzfeed.com/hannahryan/coronavirus-australia-hotel-apods-amnesty-reviews>.
  - 22 Claire Loughnan, "Not the Hilton": "Vernacular violence" in COVID-19 Quarantine and Detention Hotels,' *Arena*, September 2020. <https://arena.org.au/not-the-hilton-vernacular-violence-in-covid-19-quarantine-and-detention-hotels/>.
  - 23 Jarni Blakkarly, 'Melbourne Refugee Protesters Fined \$43,000 for Breaching Coronavirus Rules,' *SBS News*, April 11, 2020. <https://www.sbs.com.au/news/article/melbourne-refugee-protesters-fined-43-000-for-breaching-coronavirus-rules/rmz96eh4e>.
  - 24 António Guterres, 'Launch of Policy Brief on the Impact of COVID-19 on Refugees, IDPs and Migrants,' Press release, June 3, 2020. <https://www.un.org/en/coronavirus/covid-19-crisis-opportunity-reimagine-human-mobility>.
  - 25 Berhouz Boochani and Omid Tofighian, "A Human Being Feels They Are on a Precipice": COVID-19's Threshold Moment,' *Kaldor Centre*, June 16, 2020. <https://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98human-being-feels-they-are-precipice%E2%80%99-covid-19%E2%80%99s-threshold-moment>.

## Refugees Need Protection from Coronavirus Too, and Must Be Released

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Pressure is growing to release people from immigration detention, with lawyers from Australia's Human Rights Law Centre mounting a court case on behalf of a refugee seeking protection from COVID-19.<sup>3</sup> They argue the federal government has a duty of care to refugees, which cannot be met in immigration detention due to the crowded conditions there.<sup>4</sup>

This test case illustrates the urgency of the need to release people from detention.

### *The forgotten people*

The social distancing measures adopted across Australia appear to be halting the spread of the coronavirus in the general community. But the Australian government continues to fail to provide proper protections for many groups who are most at risk.<sup>5</sup> They include Aboriginal and Torres Strait Islander people in remote communities, people in prisons and youth detention centres, and those who are forced to remain in sites of immigration detention.

This leaves them, and the rest of us, at serious risk of infection.

The British Home Office has begun releasing people from immigration detention to stem a potential escalation of their public health crisis. Some 400 people have been released to date.<sup>6</sup>

In the US, rates of infection in immigration and prison sites have dramatically increased in recent weeks. One prison in Ohio reported 73% of inmates have tested positive to coronavirus.<sup>7</sup>

To stall the spread of infection, several US courts have ordered the release from immigration prisons of people who are at particular risk of COVID-19 infection.<sup>8</sup> One judge found US immigration officials had:

likely exhibited callous indifference to the safety and well-being of the [detained immigrants at risk]. The evidence suggests system-wide inaction that goes beyond a mere 'difference of medical opinion or negligence'.<sup>9</sup>

The Australian government can no longer ignore calls throughout Australia to take similar action to protect people in detention and the broader community.<sup>10</sup> In February this year, the Commonwealth Ombudsman's report on

monitoring places of detention had already flagged the need for stronger protections for people who have been deprived of their liberty.<sup>11</sup>

The situation in Singapore shows what can happen when measures are not taken to protect everyone.<sup>12</sup> The pandemic escalated there through its rapid spread in migrant worker dormitories. They had been overlooked in Singapore's "gold standard" response to COVID-19.<sup>13</sup>

Public health experts around the world, including the World Health Organisation, have established that confined sites like detention centres provide ideal conditions for infections to spread rapidly.<sup>14</sup>

### *The impossibility of social distancing in detention*

About 1,400 people are in immigration detention in Australia.<sup>15</sup> This includes Alternative Places of Detention (APODs), where many refugees have been detained for prolonged periods, including in confined hotel settings.<sup>16</sup>

People held in the crowded detention centres and APODs in Australia have highlighted the impossibility of social distancing. They are using daily protests and social media to call for their urgent release into safe accommodation.

There is also widespread concern in the Australian community about the lack of protection being provided to people in immigration detention. Over 1,000 academics, doctors and health professionals signed an open letter, initiated by Academics for Refugees, Doctors for Refugees and Librarians for Refugees, calling for the release of people from onshore and offshore immigration detention.<sup>17</sup>

### *What are the risks?*

Transmission of COVID-19 occurs mainly through respiratory droplets, as well as through contact with skin and other surfaces. It is highly contagious and spreads quickly in closed spaces.<sup>18</sup>

Reports received from inside immigration detention sites indicate staff have adopted limited or no protective measures. Those detained have limited or no access to hand sanitiser.<sup>19</sup>

There are serious risks due to overcrowding and people are often transferred from one immigration detention centre to another. These factors magnify the risks and are in conflict with government guidelines to control the virus.<sup>20</sup>

These concerns also apply to APODs such as hotels.<sup>21</sup> Here refugees are detained in small, confined spaces with limited or no ventilation.<sup>22</sup> These conditions are even more likely to promote the spread of viruses and disease.

COVID-19 infection is a particular threat for those whose health is already compromised or who have underlying medical conditions, as they are at higher risk of developing

serious complications.<sup>23</sup> This includes people detained in Australia who have compromised immune systems as a result of inadequate access to medical care over a number of years.<sup>24</sup>

There are also concerns for the health of those held in offshore detention. Refugees and asylum seekers currently in Nauru and Papua New Guinea are particularly vulnerable because of their living arrangements, the limits on their ability to take proactive preventive measures to protect their own health, their status as non-citizens, and their limited access to medical care.<sup>25</sup>

Recent reports indicate a spike in infections in Papua New Guinea.<sup>26</sup> Should an outbreak occur that is beyond the capacity of the country to respond, the impact for refugees living there would be disastrous.

As most detainees have varying contact with people outside detention, the risk extends to the broader community. Failure to prevent and control the spread of COVID-19 among detainees will not only expose these groups to unacceptable risk, it will inevitably have a detrimental impact on the community at large.

### **What action is urgently required from the government?**

Immediate government action is required to prevent and control the spread of COVID-19 among people forced to remain in immigration detention.

These measures must include:

- immediately using alternatives to detention to provide those who are in immigration detention with appropriate accommodation in the community
- ensuring those who remain in detention are informed in a language they understand about the risks of COVID-19, the availability of testing and measures they can take to prevent the spread of infection
- enforcing best-practice sanitation measures and social distancing in immigration detention to maintain the health and safety of detainees and staff
- applying enhanced testing procedures in places of immigration detention and ensuring all staff are appropriately screened – similar procedures should apply for Nauru and PNG
- ensuring all people on bridging visas have access to appropriate medical care that matches Australian community standards
- ensuring asylum seekers and refugees with a suspected or confirmed case of COVID-19 in Nauru and PNG are assessed and treated in accordance with Australian standards. If necessary, they should be transported to Australia for medical care.

They need the government's protection as much as the rest of us.

- 1 Originally published in *The Conversation* (Claire Loughnan, Anthea Vogl, Caroline Fleay, Philomena Murray and Sara Dehm, 'Refugees Need Protection from Coronavirus Too, and Must Be Released,' *The Conversation*, April 24, 2020. <https://theconversation.com/refugees-need-protection-from-coronavirus-too-and-must-be-released-136961>).
- 2 We thank Mary Anne Kenny, Madeline Gleeson and Angeline Ferdinand for their advice.
- 3 Human Rights Law Centre, 'Legal Challenge Filed to Protect Refugee at COVID-19 Risk in Immigration Detention,' *HRLC*, April 22, 2020. <https://www.hrlc.org.au/news/2020/4/21/legal-challenge-refugee-at-covid-19-risk>.
- 4 David Crowe, 'Refugee Applies for Release from Detention to Avoid Coronavirus,' *WA Today*, April 21, 2021. <https://amp.watoday.com.au/politics/federal/refugee-applies-for-release-from-detention-to-avoid-virus-20200421-p54lwi.html>.
- 5 Human Rights Law Centre, 'Explainer: Prisons and COVID-19,' *HRLC*. <https://www.hrlc.org.au/prisons-and-covid19>.
- 6 Nicola Kelly, 'UK Frees Hundreds of Immigration Detainees with Nowhere to Go,' *Al Jazeera*, April 17, 2020. <https://www.aljazeera.com/news/2020/4/17/uk-frees-hundreds-of-immigration-detainees-with-nowhere-to-go>.
- 7 Bill Chappell and Paige Pfeleger, '73% of Inmates at an Ohio Prison Test Positive for Coronavirus,' *NPR*, April 20, 2020. <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus>.
- 8 Camillo Montoya-Galvez, 'Courts Order ICE to Free Some Immigrants, but Lawmakers Call for More Action amid Pandemic,' *CBS News*, March 31, 2020. <https://www.cbsnews.com/news/coronavirus-ice-releases-immigrants-lawmakers-federal-courts/>.
- 9 Southern Poverty Law Centre, 'In Victory for Detained Immigrants, Federal Judge Orders ICE to Review for Release Every Person with Covid-19 Risk Factors,' *SPLC Press Center* April 20, 2020 <https://www.splcenter.org/presscenter/victory-detained-immigrants-federal-judge-orders-ice-review-release-every-person-covid>
- 10 Michelle Foster and Katie Robertson, 'Detention Increases COVID-19 Health Risk,' *Pursuit*, April 17, 2020. <https://pursuit.unimelb.edu.au/articles/detention-increases-covid-19-health-risk>.
- 11 Commonwealth Ombudsman, 'Monitoring places of detention – OPCAT,' *Commonwealth Ombudsman*. <https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>.
- 12 Namita Bhandare, 'Singapore's Coronavirus Success Story Hits a Snag,' *Foreign Policy*, April 21, 2020. <https://foreignpolicy.com/2020/04/21/singapore-coronavirus-response-snag/>.
- 13 Rebecca Ratcliffe, Rebecca, 'Singapore's Cramped Migrant Worker Dorms Hide Covid-19 Surge Risk,' *The Guardian*, April 17, 2020. <https://www.theguardian.com/world/2020/apr/17/singapores-cramped-migrant-worker-dorms-hide-covid-19-surge-risk>.
- 14 World Health Organization, 'Home,' *WHO*. <https://www.who.int/europe/home?v=welcome>.
- 15 Department of Home Affairs, *Immigration Detention and Community Statistics Summary 29 February 2020*, (Commonwealth of Australia, 2020). <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-28-february-2021.pdf>.
- 16 Refugee Council of Australia, 'Statistics on People in Detention in Australia,' May 24, 2022. <https://www.refugeecouncil.org.au/detention-australia-statistics/2/>.
- 17 Academics for Refugees, 'COVID-19 Open Letter,' Open letter, April 2020. <https://academicsforrefugees.wordpress.com/covid-19-open-letter/>.
- 18 Department of Health, 'Australian Health Protection Principal Committee (AHPPC) coronavirus (COVID-19) statement on 17 March 2020,' Press release, Commonwealth of Australia, March 17, 2020. <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-coronavirus-covid-19-statement-on-17-march-2020-0>.
- 19 Ali MC, 'Australia's Detained Medical-Evacuation Refugees Fear Coronavirus,' *The Guardian*, April 17, 2020. <https://www.aljazeera.com/news/2020/4/17/australias-detained-medical-evacuation-refugees-fear-coronavirus>.
- 20 Commonwealth Ombudsman, *Immigration Detention Oversight*; Department of Health, 'Australian Health Protection Principal Committee (AHPPC) coronavirus (COVID-19) statement on 17 March 2020,' <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-coronavirus-covid-19-statement-on-17-march-2020-0>
- 21 Andrew Burrige, 'Hotels Are No 'Luxury' Place to Detain People Seeking Asylum in Australia,' *The Conversation*, April 14, 2020. <https://theconversation.com/hotels-are-no-luxury-place-to-detain-people-seeking-asylum-in-australia-134544>.
- 22 Commonwealth Ombudsman, *Immigration Detention Oversight*.
- 23 Department of Health, 'Coronavirus Disease 2019 (COVID-19),' Department of Health, Commonwealth of Australia. <https://www1.health.gov.au/internet/main/publishing.nsf/Content/cdna-song-novel-coronavirus.htm>.
- 24 Public Interest Advocacy Centre, *In Poor Health: Health Care in Australian Immigration Detention*, (Sydney: Public Interest Advocacy Centre, 2018). <https://piac.asn.au/2018/06/13/in-poor-health-health-care-in-australian-immigration-detention/>.
- 25 Rebekah Holt and Meg Watson, 'New Fears for Asylum Seekers in PNG and Nauru,' *The Saturday Paper*, April 4-10, 2020. <https://www.thesaturdaypaper.com.au/news/immigration/2020/04/04/new-fears-asylum-seekers-png-and-nauru/15859188009645#hd>.
- 26 Monica Minnegal and Peter Dwyer, 'God, Health and COVID-19 in Remote Papua New Guinea,' *Devpolicy Blog*, April 16, 2020. <https://devpolicy.org/god-health-and-covid-19-in-remote-papua-new-guinea-20200416/>.

## Refugees and Australia's Double Standards on Covid-19<sup>1</sup>

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Australia has led the world in testing rates and social-distancing measures to limit the impact of COVID-19.<sup>2</sup> Leaders have been largely transparent, communicating regularly with the community about the spread of the disease and protective measures being taken. The government's push to implement social distancing and widespread testing has been vital to Australia's fortunate position of being able to suppress, and even potentially eliminate, the disease.<sup>3</sup> However, the Australian government's response to COVID-19 is an example of double standards when it comes to refugees held in immigration detention. This pandemic raises public health challenges, yet it should not be reduced to the game of politics; health is a human right.

### **Failure to protect people in immigration detention**

Australia has an obligation under the International Covenant on Economic, Social and Cultural Rights to protect the health of people within its borders and those under its authority, including refugees in immigration detention.<sup>4</sup> Public health experts around the world, including the Australasian College for Infection Prevention and Control, have warned that confined sites like detention centres provide dangerous conditions for infections to spread rapidly.<sup>5</sup> People in immigration detention are often required to share overcrowded sleeping quarters, bathrooms, laundries and areas where food is consumed, all of which are contrary to current government guidelines to control COVID-19.<sup>6</sup> In some 'alternative places of detention' (APODS), like hotels, people are detained in spaces with limited or no ventilation, which is likely to facilitate the spread of the virus. People in immigration detention are at higher risk of developing serious complications if they contract COVID-19, as many have existing health conditions such as diabetes and upper respiratory infections.<sup>7</sup>

Australia has one of the highest per capita rates of testing in the world and has widened the criteria for people to be tested.<sup>8</sup> In March, an immigration detention centre guard tested positive for COVID-19, presenting a risk for detainees at that facility.<sup>9</sup> Yet there is so little government transparency that it is unknown whether testing of people in immigration detention has been undertaken in line with practices for the wider community. Although the government has indicated that no detainees have tested positive, this is meaningless if few or no tests have been conducted, and amounts to dodging the issue altogether.

### **International comparisons**

In some European countries, refugees have been released in order to provide them with protection from the virus. In March, the UK released 350 people from detention centres due to the COVID-19 pandemic, in response to a legal challenge. The UK Home Office has also introduced a series of protective measures that include enhanced screening, identification and monitoring of those at risk of COVID-19, ensuring that persons susceptible to the virus are provided with facilities to self-isolate in single-occupancy rooms, as well as a review of cleaning practices and the introduction of social-spacing measures in communal areas.<sup>10</sup>

Spain has released refugees from detention centres, and in Portugal all foreigners who have pending applications will temporarily be treated as permanent residents with access to healthcare.<sup>11</sup> In Italy, 'judges released detainees because of the suspension of asylum procedures or lack of prospect of return'. This has also occurred in France and Germany, where decisions have been made by courts or administrative authorities to bring about the release of refugees.<sup>12</sup> The swift actions taken by these countries to release refugees from detention in order to protect them from COVID-19 provide an example of what could just as easily be accomplished in Australia.

### **Transparency not in evidence**

In relation to the wider community, Australian governments have been transparent in communicating regular, detailed advice about the risks of COVID-19, protective measures undertaken, where there have been outbreaks, and schedules for the introduction, maintenance and suspension of lockdowns.<sup>13</sup> This contrasts sharply with the lack of transparency surrounding those in immigration detention. It reveals fundamental inconsistencies in how Australia has responded to the crisis for some of those under its care.<sup>14</sup>

In Australia we do not know enough about what is happening in immigration centres/APODS. To date, there has been no official release of information on what measures might be under consideration or being implemented in places of detention. The only information available about what is happening in detention has been provided by those who are currently detained. Based on this, we know that Australia appears to have failed to take action to provide protection to people in detention centres. This is inconsistent with Australia's carefully crafted approach to the virus in the rest of the country. It is also inconsistent with international standards of healthcare for protection from COVID-19.

Calls for the protection and release of those in immigration detention have so far gone unheeded and unacknowledged by the Australian government.<sup>15</sup> There has been no

statement issued by the Commonwealth Ombudsman or by the Office of the Australian Information Commissioner. Proposed laws to seize the phones of detainees, on the pretext that they might access pornographic websites, will remove vital sources of information—information that is critical in the absence of effective scrutiny and transparency.<sup>16</sup> Mobile phones provide the only means of contact with the outside world, including with family and friends. This is especially important at a time when visits to the centres have been suspended. These phones are also a ‘lifeline’ for those in detention, whose mental health is already compromised due to prolonged detention.<sup>17</sup> Two men in immigration detention attempted suicide in May, exposing the mental health risk of prolonged detention.<sup>18</sup>

In April this year, the UK government released a clear statement on how it is responding to the potential for COVID-19 outbreaks in detention centres.<sup>19</sup> New Zealand’s Chief Ombudsman announced a detailed policy on inspections and control of COVID-19 in places of detention.<sup>20</sup> This level of transparency and detailed advice is starkly absent in the Australian case.

An Australia that is consistent would need to demonstrate its commitment to health as a human right, especially for the most vulnerable, such as those in immigration detention. Our pressing questions are: Why has the Australian government failed to apply the principles and standards of health protection that are upheld in the wider community to places of detention? Why not release those in detention to safety?

The Australian government’s failure to act to protect a group under its jurisdiction and legal obligation constitutes a double standard. The conduct underpinning this double standard might even comprise what some have described as ‘organised hypocrisy.’<sup>21</sup> Urgent action is required to address Australia’s betrayal of human rights, which is being played out in real time, right now.’

- 1 Originally published in *Arena* (Angeline Ferdinand, Claire Loughnan and Philomena Murray, ‘Refugees and Australia’s Double Standards on COVID-19’, *Arena*, June 16, 2020. <https://arena.org.au/refugees-and-australias-double-standards-on-covid-19/>).
- 2 Edmund Tadros, Tom McIlroy and Jill Margo, ‘Australia’s Virus Testing Rate Leads World’, *Australian Financial Review*, April 1, 2020. <https://www.afr.com/politics/federal/australia-s-testing-is-key-to-slower-infection-rate-20200401-p54fx7>.
- 3 Calla Wahlquist and Daniel Hurst, ‘New Coronavirus Cases in Australia Could Number Almost Zero by July, Modelling Suggests’, *The Guardian*, April 6, 2020. <https://www.theguardian.com/world/2020/apr/06/new-coronavirus-cases-in-australia-could-number-almost-zero-by-july-modelling-suggests>.
- 4 United Nations Office of the High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.
- 5 Joshua Davis and Phillip Russo, ‘Joint Announcement by the Australasian Society for Infection Diseases and the Australasian College for Infection Prevention and Control’, Press release, March 19, 2020. <https://www.asid.net.au/documents/item/1868>.
- 6 Commonwealth Ombudsman, *Immigration Detention Oversight*, 01/2020 (Commonwealth of Australia, 2020). [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0017/109700/Immigration-Detention-Oversight-Report-January-to-June-2019.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report-January-to-June-2019.pdf).
- 7 Janette P. Green and Kathy Eagar, ‘The Health of People in Australian Immigration Detention Centres’, *Medical Journal of Australia* 192, no. 2 (2010): 65-70.
- 8 Australian Broadcasting Corporation, ‘Australian Coronavirus Testing Hits World-Leading Levels above 1 per cent of Population, Scott Morrison Says’, *ABC News*, April 2, 2020. <https://www.abc.net.au/news/2020-04-02/coronavirus-covid-19-testing-1-per-cent-australia-population/12114004>.
- 9 Ben Smees, Ben Doherty and Rebekah Holt, ‘Fears for Refugees after Guard at Brisbane Immigration Detention Centre Tests Positive for Coronavirus’, *The Guardian*, March 19, 2020. <https://www.theguardian.com/australia-news/2020/mar/19/fears-for-refugees-as-guard-at-brisbane-immigration-detention-centre-tests-positive-for-coronavirus>.
- 10 Refugee Council, ‘Changes to Asylum & Resettlement policy and practice in response to Covid-19’, *Refugee Council*. <https://www.refugeecouncil.org.uk/latest/news/changes-to-home-office-asylum-resettlement-policy-and-practice-in-response-to-covid-19/>.
- 11 European Council on Refugees and Exiles, *Information Sheet 5 May 2020: COVID-19 Measures Related to Asylum and Migration across Europe*, 2020. <https://ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>; Reuters Staff, ‘Portugal to Treat Migrants as Residents During Coronavirus Crisis’, March 29, 2020. <https://www.reuters.com/article/uk-health-coronavirus-portugal-idUKBN21F0MC>.
- 12 European Council on Refugees and Exiles, *Information Sheet 5 May 2020*.
- 13 Department of Health, ‘Coronavirus (COVID-19) Pandemic’, <https://www.health.gov.au/health-alerts/covid-19>.
- 14 Human Rights Law Centre, ‘Legal Challenge Filed to Protect Refugee at COVID-19 Risk in Immigration Detention’, *HRLC*, April 22, 2020.
- 15 Claire Loughnan, Anthea Vogl, Caroline Fleay, Philomena Murray and Sara Dehm, ‘Refugees Need Protection from Coronavirus Too, and Must Be Released’, *The Conversation*, April 24, 2020. <https://theconversation.com/refugees-need-protection-from-coronavirus-too-and-must-be-released-136961>.
- 16 Matthew Doran and Stephanie Borys, ‘Federal Government Pushing for Greater Search and Seize Powers in Immigration Detention Centres’, *ABC News*, May 14, 2020. <https://www.abc.net.au/news/2020-05-14/new-powers-for-abf-to-search-immigration-detention/12244950>.
- 17 Asylum Seeker Resource Centre, ‘ASRC Submission to Senate Inquiry Finds Mobile Phones Are a Lifeline in Immigration Detention’, Press release, June 11, 2020. <https://asrc.org.au/2020/06/11/asrc-submission-to-senate-inquiry-finds-mobile-phones-are-a-lifeline-in-immigration-detention/>.
- 18 Refugee Action Coalition, ‘Attempted Refugee Suicide in Kangaroo Point Exposes Mental Health Danger in Detention’, *Refugee Action*, May 6, 2020. <https://www.refugeeaction.org.au/?p=14171>.
- 19 HM Inspectorate of Prisons, ‘COVID-19 Update’, *HM Inspectorate of Prisons*. <https://www.justiceinspectorates.gov.uk/hmiprison/2020/03/covid-19-update/>.
- 20 Ombudsman, *Expectations for OPCAT COVID-19 Inspections*, Ombudsman (New Zealand), April 15, 2020. <https://www.ombudsman.parliament.nz/resources/expectations-opcat-covid-19-inspections>.
- 21 Sandra Lavenex, ‘“Failing Forward” Towards Which Europe? Organized Hypocrisy in the Common European Asylum System’, *Journal of Common Market Studies* 56, no. 5 (2018): 1195-1212.

## Externalisation and Human Rights in the Context of the 2020 EU Pact on Migration and Asylum: Paradigm Shift or Optical Illusion?

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On 23 September, the European Commission launched the New Pact on Migration and Asylum (hereinafter, “EU-PMA”) which had been advanced in July 2019.<sup>1</sup> Although the EU-NPMA does not set forth binding commitments it is still the 5-year general strategy of the “von der Leyen Commission”. This initiative prompted discussions for some time already, especially with regard to the externalisation of EU migration and asylum policies (eg Refugee Rights Europe ).<sup>2</sup> Therefore, the question arises whether the EU-PMA is expected to change the approach concerning the externalisation of those policies.

Indeed, it is assumed that the 2015 Agenda on Migration – which is a sort of predecessor of the EU-PMA – contributed to preventing the arrival of (vulnerable) migrants, including asylum seekers.<sup>3</sup> The 2015 strategy stresses more than ever the need to involve third countries in the management of migratory flows towards the EU. The ultimate goal of the Partnership Framework with third countries, drafted by the Commission to implement the Agenda on Migration more efficiently, is:

a coherent and tailored engagement where the Union and its Member States act in a coordinated manner putting together instruments, tools and leverage to reach comprehensive partnerships (compacts) with third countries to better manage migration in full respect of our humanitarian and human rights obligations.<sup>4</sup>

Accordingly, “the full range of policies and EU external relations instruments have to be brought to bear”, which means “a change in approach and fresh thinking with a mix of positive and negative incentives and the use of all leverages and tools” (p. 6).

For sure, it cannot be denied that the Commission also sought to foster development assistance in third countries of origin and transit. However, the Partnership framework under the Agenda on Migration is at the root of controversial undertakings. Above all:

- a) the texts of some compacts are not available;
- b) the compacts are based on the so called “migration control conditionality” and imply containment measures that are frequently implemented by the armed forces of unsafe “partner” countries;
- c) these countries have received huge amounts of development funds and the use of those resources has often been diverted.

The EU’s *modus operandi* attracted criticism from academics (for example, D’Humières, Kipp, Moreno-Lax and Lemberg-Pedersen, Palm), experts (as Frelick, Kysel and Podkul), NGOs (see Concord, EuroMed Rights) and international organisations (like the Council of Europe).<sup>5</sup> Even within the EU concerns were raised.<sup>6</sup> To put it briefly, the externalisation of EU migration and asylum policies is negatively affecting migrants in vulnerable conditions to the point that the above mentioned “full respect of [EU] humanitarian and human rights obligations” seems to have been disregarded.

Against this background, the President of the European Commission announced that the EU-PMA would “take a human and humane approach”, thereby suggesting that the existing cooperation schemes between the Member States and between the EU (alongside its Member States) and third countries need to be rethought for the benefit of migrants.<sup>7</sup>

In fact, some major changes were announced even though they mainly concern the internal dimension of EU migration and asylum policies. In particular, the idea was to get rid of the “first entry” criterion provided by the “Dublin III” Regulation, with a view to promoting solidarity among Member States and, by extension, towards individuals. Instead, this has not been the case. The Commission failed to propose clear obligations directly enforcing the solidarity principle enshrined in Art. 80 of the Treaty on the Functioning of the European Union.<sup>8</sup> At most, the 2020 strategy envisages voluntary and flexible solidarity mechanisms in terms of relocations, return procedures or operational support.<sup>9</sup>

Therefore, the management of the EU migration policies will essentially rest on two pillars which imply the involvement of third countries. In the first place, the EU-PMA is focused on returns of irregular migrants. Now, this priority is neither new nor unlawful but investing in return should not be the primary option to make up for Member States’ systemic deficiencies in the management of migratory movements and for lack of mutual assistance. Furthermore, returning irregular migrants generally proves extremely challenging.

So, the second pillar can only be the externalisation of EU migration and asylum policies. The 2020 strategy reaffirms the need to resort to a wide range of flexible policy tools to secure the cooperation of partner countries. Nothing in the words of the Commission lead to the conclusion that the EU will address the critical issues characterising these instruments. On the contrary, some ambiguous or regrettable initiatives, such as the deals between the EU and certain African countries or the 2016 EU-Turkey Statement, keep being supported.

In sum, the EU-PMA shows that rhetorical commitment to mutually beneficial international partnerships centred on the prevention of migratory movements will continue. Some critics are thus of the view that the Commission proposed a pact “against migration”.<sup>10</sup> Apparently, the most voiced opinion is that, as long as the external dimension of the EU migration and asylum policies is concerned, the EU-PMA contains “unrealistic proposals which risk undermining human rights”.<sup>11</sup> The point is that, as rightly observed by Sergio Carrera, the EU-PMA gives priority to the agendas of the Member States in areas where the EU enjoys competence, so that the “intergovernmentalisation” of the EU migration and asylum policies shines through the whole strategy.<sup>12</sup> But after all, it is no mystery that when it comes to the governance of migration “security approach is the only point of consensus between Member States”.<sup>13</sup> The European Commission is probably aware that it cannot avoid coming to terms with this issue. With all due respect to humanitarian and human rights.

- 1 European Commission, *Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020*, European Commission, 2020. [https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020\\_en](https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en); Ursula von der Leyen, *Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission*, July 16, 2019. [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_4230](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_4230).
- 2 Refugee Rights Europe, ‘The New Asylum and Migration Pact: Risks of Externalisation of EU Asylum’, *Refugee Rights Europe*, March 4, 2020. <https://refugee-rights.eu/2020/03/04/the-new-asylum-and-migration-pact-risks-of-externalisation-of-eu-asylum/>.

- 3 European Commission, *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions*, COM(2015) 614 final, 2015. [https://eur-lex.europa.eu/resource.html?uri=cellar:8a8ef5e8-99a0-11e5-b3b7-01aa75ed71a1.0012.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:8a8ef5e8-99a0-11e5-b3b7-01aa75ed71a1.0012.02/DOC_1&format=PDF); Euromed Rights, ‘New EU pact on Migration and Asylum: An Opportunity for Human Rights’, *Euromed Rights*, August 26, 2020. <https://euromedrights.org/publication/new-eu-pact-on-migration-and-asylum-an-opportunity-for-human-rights/>.
- 4 European Commission, *Communication from the Commission to the European Parliament, the European Council, The Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*. COM(2016) 385 final, 2016. [https://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2016/0385/COM\\_COM\(2016\)0385\\_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0385/COM_COM(2016)0385_EN.pdf).
- 5 Victoire D’Humières, ‘European Union/African Cooperation: The Externalisation of Europe’s Migration Policies’, *Fondation Robert Schuman / European Issues*, no. 472 (30 April 2018): 1-9; David Kipp, *From Exception to Rule – The EU Trust Fund for Africa*. SWP Research Paper 2018/RP 13, 18.12.2018. <https://www.swp-berlin.org/en/publication/eu-trust-fund-for-africa/#hd-d17099e1879>; Violeta Moreno-Lax, and Martin Lemberg-Pedersen, ‘Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation Through Externalization’, *QIL, Zoom-in* 56 (2019): 5-33; Anja Palm, *Did 2016 Mark a New Start for EU External Migration Policy, or Was It Business as Usual?* 2016. <https://www.iai.it/sites/default/files/iaiwp1633.pdf>; Bill Frelick, Ian M. Kysel and Jennifer Podkul, ‘The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants’, *Journal on Migration and Human Security* 4, no. 4 (2016): 190-220; Coordinamento Italiano NGO Internazionali and the European NGO Confederation for Relief and Development, *Partnership or Conditionality?: Monitoring the Migration Compacts and EU Trust Fund for Africa*, 2018. [https://beta.concordeurope.org/wp-content/uploads/sites/3/2020/06/CONCORD-EUTrustFundReport\\_2018\\_online.pdf](https://beta.concordeurope.org/wp-content/uploads/sites/3/2020/06/CONCORD-EUTrustFundReport_2018_online.pdf); Euromed Rights, *New Pact on Migration and Asylum*, 2020. <https://euromedrights.org/wp-content/uploads/2020/08/New-EU-Pact-on-Migration-and-Asylum-EuroMed-Rights-Entry.pdf>; Tineke Strik, ‘Human Rights Impact of the “External Dimension” of European Union Asylum and Migration Policy: Out of Sight, out of Rights?’ Report, June 13, 2018. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24808&lang=en>.
- 6 European Parliament, *European Parliament Resolution of 13 September 2016 on the EU Trust Fund for Africa: The Implications for Development and Humanitarian Aid (2015/2341(INI))*, 2016. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016I0337>.
- 7 Ursula Von der Leyen, ‘Let’s Make Change Happen: Op-Ed Article by Ursula von der Leyen, President of the European Commission’, *European Commission*, September 20, 2020. [https://ec.europa.eu/commission/presscorner/detail/en/AC\\_20\\_1698](https://ec.europa.eu/commission/presscorner/detail/en/AC_20_1698).
- 8 European Union, *Consolidated Version of the Treaty on the Functioning of the European Union Part Three – Union Policies and Internal Actions Title V – Area of Freedom, Security and Justice – Chapter 2 – Policies on Border Checks, Asylum and Immigration: Article 80*, 2016. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E080>.
- 9 European Commission, 2020. *Communication from the Commission from the to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*. COM(2020) 609 final. [https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC\\_3&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF).
- 10 Charles Heller and Bernd Kasperak, ‘The EU’s Pact against Migration, Part One.’ *Open Democracy* (blog), October 5, 2020. <https://www.opendemocracy.net/en/can-europe-make-it/the-eus-pact-against-migration-part-one/>.
- 11 European Council on Refugees and Exiles, ‘Joint Statement: The Pact on Migration and Asylum: to Provide a Fresh Start and Avoid Past Mistakes, Risky Elements Need to Be Addressed and Positive Aspects Need to Be Expanded’, Press release, October 6, 2020. <https://ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>.
- 12 Sergio Carrera, *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, *CEPS policy insight*, No.2020-22/ September 2020. <https://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf>.
- 13 Anne-Lise Tabaud, ‘The New Pact on Migration and Asylum: What Is at Stake?’ *EULogos Athens*, September 30, 2020. <https://www.eu-logos.org/2020/09/30/the-new-pact-on-migration-and-asylum-what-is-at-stake/>.

## Nothing New from the Western Front: Solidarity à la Carte: The Continuation of the Dysfunctional Dublin Regulation

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The European Union decisions number 1523 and 1601 establishing provisional measures to aid Italy and Greece in managing the asylum-seekers influx, stipulated that each Member State should accept a certain number of asylum seekers from these countries in line with the principles of solidarity and fair sharing of the responsibility.<sup>1</sup> This was seen as a solution to the European migrant crisis, aiming to share the responsibility proportionally between the member states, according to their population and financial means. To date most of the members states have not complied with the assigned quotas and have accepted less than 3%, leaving the Greek and Italian asylum systems overwhelmed.<sup>2</sup> The situation is caused mostly by the Dublin III Regulation that sustained an unfair system of responsibility distribution within the EU.<sup>3</sup> The Regulation stipulates that the first Member State where fingerprints are registered, or an asylum claim is lodged is responsible for a person's asylum claim. That resulted in five member states reviewing 72% of all the asylum seekers applications lodged in the European Union.<sup>4</sup>

When member states cannot cope with the influx of the asylum applications, they might resort to measures that are incompatible with cornerstone human rights, simply because they don't have the means to proceed otherwise. In 2018, the Italian government did not permit a humanitarian ship with 629 people on board to dock at an Italian port.<sup>5</sup> On March 1, 2020, the Greek government decided not to accept any asylum application during a 30-day period by individuals that had come into the country irregularly.<sup>6</sup> An unprecedented decision that breached different conventions and the Dublin III Regulation. Previously, the Grand Chamber of the European Court of Human Rights in *M.S.S v Belgium and Greece* 30696/09, found that Greece had breached the Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading treatment or punishment.<sup>7</sup> Other national courts like the court of Appeal of England and Wales and the Irish Higher Court, expressed their concern on transferring asylum seekers to Greece.

To resolve the deadlock caused by the Dublin III the European Commission in its new Pact on Migration and

Asylum calls for “flexible solidarity,” a voluntaristic approach to the placement of the asylum seekers.<sup>8</sup> The pact is promoted by the European Commission as a fresh start on migration in Europe, but it follows on the same lines of the dysfunctional Dublin Regulations and the Visegrad Group's joint statement, submitted in 2016 at the Bratislava Summit.<sup>9</sup> The statement called among other things, for the halting of irregular migrants to guarantee the security of the EU, the Member States and individual citizens. The language employed had military connotations eg “combat”, “external threat”, “protection of external borders” and above all it introduced the concept of “flexible solidarity” proposing that every distribution mechanism should be voluntary.

In the EU migration and asylum context this would mean that a substantial share of the responsibility will be taken upon from the same countries; Italy and Greece mostly due to their geographic location, and France and Germany, due to their ability and will. It is to be expected that under such system the Visegrad Group countries (Poland, Hungary, Czech Republic and Slovakia) will not opt to process any substantial number of asylum application, as they have done until now. The EU's constant indecisiveness on implementing a coherent EU Asylum policy remains the greatest obstacle that has caused so far EU's failure in addressing effectively the refugee crisis.

The shortcomings of the new proposal are many. The proposal does not foresee any sanctions for those EU Members who would not opt to welcome asylum seekers, it allows member states to choose the nationality of the asylum seekers it will accept and there is no provision for the resumption of sea rescue missions. This gives a wide margin of discretion to countries with neoliberal governments to avoid their responsibilities under the EU Treaties (Article 80 TFEU).<sup>10</sup> Transposing the “flexible solidarity” concept from the joint-statement to the Commission's proposal is decidedly a retrograde step in the EU's efforts to harmonise the member state's stance on the asylum-seekers situation.

This voluntarist conception of the EU's asylum and migration future policy will not work. It cannot succeed where even the quota system, agreed upon in 2015, failed. The fact that Member States challenged the quota system before the CJEU (Cases C-643/15 and C-647/15) is a clear indication of the European Union's solidarity crisis and that solidarity is not enough to ensure a fair sharing of responsibilities between member states.<sup>11</sup>

Large-scale migrations will be part of our future due to immense global inequalities, cultural polarisation and religious fundamentalism. Sharing fairly the responsibility between the member states, will remain an ongoing

challenge for the EU. Its commitment should lie principally in the human rights standards as stipulated in the treaties and the international agreements it is party of. Such standards should be safeguarded at any cost. Therefore, provisions on sanctions and infringement procedures, on non-complying member states should be a sine qua none of future proposals on immigration and asylum policies.

- 1 European Parliament, *Decision (EU) 2015/1523 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece, and Decision (EU) 2015/1601 Establishing Provisional Asylum Measures for the Benefit of Italy and Greece*, 2015. <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32015D1523>.
- 2 Francesca Astorri, 'Refugee Crisis: Is the European Quota System Working at All?' *Al Arabiya News*, May 20, 2016. <https://english.alarabiya.net/features/2016/11/02/Refugee-crisis-is-the-European-quota-system-a-solution->
- 3 European Union, 'Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)', *Official Journal of the European Union* L 180, 26.6.2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>
- 4 Mathilde Schmitt, 'The Dublin Regulation, a Nightmare for Asylum Seekers,' *Sensus*, October 19, 2019. <https://sensusjournal.org/2019/10/19/the-dublin-regulation-a-nightmare-for-asylum-seekers/>.

- 5 Cain Burdeau, 'Italy Closes Its Borders to Refugees, Turns away 629 on Ship,' *Courthouse News*, June 11, 2018. <https://www.courthousenews.com/italy-closes-its-borders-to-refugees-turns-away-629-on-ship/>.
- 6 Office of the High Commissioner for Human Rights, 'Greece: Rights Violations against Asylum Seekers at Turkey-Greece Border Must Stop – UN Special Rapporteur,' Press Release, March 23, 2020. <https://www.ohchr.org/en/press-releases/2020/03/greece-rights-violations-against-asylum-seekers-turkey-greece-border-must?LangID=E&NewsID=25736>.
- 7 Migration and Home Affairs, 'Together Against Trafficking in Human Beings,' *Migration and Home Affairs*. [https://ec.europa.eu/home-affairs/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings\\_en](https://ec.europa.eu/home-affairs/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings_en); European Court of Human Rights, *European Convention. On Human Right*, 2021. [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).
- 8 European Commission, 'New Pact on Migration and Asylum,' European Commission. [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en).
- 9 Visegrad Group, 'Joint Statement of the Heads of Governments of the V4 Countries,' Press release, September 16, 2016. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/nothing-new-from-the-western-front?a=3573514>.
- 10 European Union, *Consolidated Version of the Treaty on the Functioning of the European Union Part Three*.
- 11 Slovak Republic and Hungary v Council of the European Union, 2017. ECLI:EU:C:2017:631. <https://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d587df222e8d8e49fa9e60eb04d00b562a.e34kaxilc3eQc40LaxqMBN-4PaN8Le0?text=&docid=194081&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1293456>.

## How Does Border Externalisation Relate to the Climate Emergency?

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The spectre of the ‘climate refugee’ has routinely been leveraged by a range of actors promoting policies ranging from reducing greenhouse gas emissions to investing in military capabilities to protect external borders.<sup>1</sup> Often advanced by voices from within the ‘climate security’ community, the perceived threat of large-scale, cross-border human mobility is also framed by voices from the natural sciences who see this prospect as one symptom of the climate breakdown that is the predicted consequence of contemporary emissions pathways. According to this narrative, countries in the global North can expect ‘substantially increased migratory pressure’ as a consequence of climate change.<sup>2</sup> Although methodologies for predicting numbers and trajectories have been cogently criticized by migration scholars who see no past parallels and who question underlying assumptions about when, why, how and where people move within and across borders as the climate emergency escalates, there is no escaping the thought that, perhaps, some people are going to have to leave severely degraded environments and try to live somewhere else.<sup>3</sup>

A challenge for researchers is trying to isolate climate from other factors inducing people to leave their countries. A case in point is Senegal. The last months have seen a dramatic increase in the number of migrants and refugees arriving by boat to the Canary Islands. During the first 11 months of 2020, about 20,000 people arrived, with over 8,000 in November alone. These figures are drastically higher than those of 2019, when 2,557 people arrived during the course of the year.<sup>4</sup> A large percentage of these arrivals are Senegalese. According to IOM, at least 563 people have died on the Atlantic route this year.

What is driving these people to make this very dangerous journey away from home? Many are coming from the fishing communities dotted along the Senegalese coast. One example is Guet Ndar, a fisherfolk neighbourhood in the port city of St. Louis.<sup>5</sup> Rising sea levels and more extreme Atlantic storms are causing up to 5 or 6 metres of beach loss every year, with one particularly severe sequence of storms in 2017 and 2018 displacing over 2,500 people. The government estimates that 150,000 people will ultimately have to leave the city.<sup>6</sup> Warmer temperatures are also causing currents to shift northwards, pushing essential sardine stocks with them.<sup>7</sup> There is, however, another crucial human factor at play as well. Overfishing by foreign

industrial trawlers, including from the EU, has wreaked havoc on fish stocks. In Saint-Louis, ministry data shows an 81 per cent drop in fish caught between 2016 and 2018.<sup>8</sup> It is this complex interplay of climate and other, more immediate, human impacts that are forcing fishers to set out in their boats; not to fish, but to seek a better future across on the Canary Islands and onwards to mainland Spain.

How are the already exclusionary immigration and asylum policies of countries in the global North responding to this unfolding climate emergency?<sup>9</sup>

The picture is complicated and nuanced. Climate change is increasingly recognised as a factor that contributes to displacement, but policy responses at international and regional levels do not reflect the climate security logic that fears ‘waves’ of climate refugees. Rather, documents that expressly focus on cross-border displacement in the context of disasters and climate change tend overwhelmingly to reflect a far milder, managerial approach focusing on ‘effective practices’ that host countries can adopt, complemented with support for disaster risk reduction and climate change adaptation initiatives to help tackle some of the ‘root causes’ of cross-border human mobility. This, more dominant, policy framing is reflected in the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, the Global Compact on Safe, Orderly and Regular Migration (GCM), the Framework for Resilient Development in the Pacific, the African Union Declaration on Durable Solutions to Forced Displacement in Africa, the Regional Committee on Migration Guide to Effective Practices, the EU Staff Working Document on Climate Change, Environmental Degradation and Migration, amongst others.<sup>10</sup> These documents also tend to recognise the currently prevailing view amongst migration scholars that most people who move in the context of disasters and climate change tend to move within their own countries, and that this pattern is likely to continue, including as climate change, interacting with other factors that contribute to exposure and vulnerability, traps some people without the resources to move in increasingly degraded environments.<sup>11</sup>

Considering the wide range of policy commitments that reflect scientific understanding of current and projected future patterns of internal and cross-border displacement in the context of disasters and climate change, one may be forgiven for indulging a sense of mild optimism that, perhaps, the international community is, together with regional institutions, on track to develop and implement effective practices that respect human dignity and promote sustainable livelihoods, including even through the development of ‘migration as adaptation’ initiatives. However, one need only to check international headlines

in Europe, North America, or Australia, including those reflecting the experience on the Atlantic route between West Africa and Europe, to feel optimism replaced with a kind of cognitive dissonance. Why is the rhetoric so at variance with the reality? The recent report by the UN Special Rapporteur on contemporary forms of racism, which examines racial discrimination and digital border technologies, demonstrates clearly how states are investing heavily in new technologies of deterrence.<sup>12</sup> Externalisation initiatives expand the borders of the global North deep into the lives of people in the global South. Crops fail. Sea levels rise. Fish migrate. Livelihood opportunities diminish. People are on the move, and dying at sea and on land.

Understanding global North responses to climate- and disaster-related human mobility in the 21st century needs to start with the conduct of those states, rather than the (predominantly non-binding) commitments expressed in documents such as the Global Compacts. The overwhelming priority for the governments of rich states in the global North is to prevent the irregular movement of people into their jurisdiction. If climate change adaptation and disaster risk reduction initiatives can reduce 'push factors', then such initiatives form a welcome alternative to harder edged deterrence mechanisms. If migration as adaptation initiatives can be developed in a manner that respects the human rights of those affected, then such initiatives would also sit comfortably with the priority of preventing people from choosing to risk their lives as the only available option to facing environmental catastrophe.

Thus, the cognitive dissonance is unfounded. For governments, the deterrence paradigm remains predominant, with other global and regional policy commitments a clear complement, rather than contrast. Looking again at Senegal, however, a key step must be to unravel the complex web of factors that leads thousands to opt for the perilous voyage across to the Canary Islands, and to leverage the full range of policy responses, including those relating to safe, orderly and regular migration, in response. Contemporary priorities of countries in the global North relating to 'prevent[ing] dangerous journeys and irregular crossing', or 'combatting migrant smuggling' can only result in further border deaths and increasing xenophobia directed towards those who, against the odds, manage to scale the wall or cross the sea. Commitments to 'enhance[d] availability and flexibility of pathways for regular migration' reflected in the Global Compact on Safe,

Orderly and Regular Migration, and other international and regional documents referred to above need to be complemented by the consultative development of mobility schemes facilitating access to international protection, as well as employment, education, and family unity, as a necessary complement to climate change adaptation, disaster risk reduction, sustainable development, and other measures.<sup>13</sup>

- 1 Sean Illing, 'Bill McKibben Has Been Sounding the Climate Alarm for Decades. Here's His Best Advice,' *Vox*, May 4, 2019. <https://www.vox.com/2019/5/3/18307660/climate-change-green-new-deal-bill-mckibben-falter>; Timothy Doyle and Sanjay Chaturvedi, 'Climate Refugees and Security: Conceptualizations, Categories, and Contestations,' in *The Oxford Handbook of Climate Change and Society*, eds. John S. Dryzek, Richard B. Norgaard, and David Schlosberg (Oxford: Oxford University Press, 2011).
- 2 High Representative and the European Commission to the European Council, *Climate Change and International Security*, 2008. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/how-does-border-externalization-relate-to-the-climate-emergency?a=3619097>.
- 3 Hein De Haas, 'Climate Refugees: The Fabrication of a Migration Threat,' *Hein de Haas, Blogspot*, January 31, 2020. <https://heindehaas.blogspot.com/2020/01/climate-refugees-fabrication-of.html>.
- 4 Eduardo Robaina and Sam Jones, "'This Lack of Humanity Can't Go on': Canary Islands Struggle with Huge Rise in Migration,' *The Guardian*, November 30, 2020. <https://www.theguardian.com/world/2020/nov/29/canary-islands-struggle-with-huge-rise-in-migration-arguinequin>.
- 5 Carl Söderbergh, 'Senegal: The Impact of the Climate Crisis on the Fisher Community of St. Louis,' *Minority Rights Group International*, November 13, 2019. <https://minorityrights.org/2019/11/13/senegal-impact-of-the-climate-crisis/>.
- 6 Monika Pronczuk, 'How the "Venice of Africa" Is Losing Its Battle against the Rising Ocean,' *The Guardian*, January 28, 2020. <https://www.theguardian.com/environment/2020/jan/28/how-the-venice-of-africa-is-losing-its-battle-against-the-rising-ocean>.
- 7 Climate & Development Knowledge Network, 'Ocean Temperature Increase along Senegalese Coast Could Reduce Sardine Fisheries,' *CDKN*, July 29, 2019. [https://cdkn.org/story/feature-ocean-temperature-increase-along-senegalese-coast-could-reduce-sardine-fisheries?loclang=en\\_gb](https://cdkn.org/story/feature-ocean-temperature-increase-along-senegalese-coast-could-reduce-sardine-fisheries?loclang=en_gb).
- 8 Zach Campbell, 'Senegal's Fishermen Say European Overfishing Is Crippling Them,' *Euronews*, April 13, 2018. <https://www.euronews.com/2018/04/09/senegal-s-fishermen-say-european-overfishing-is-crippling-them>.
- 9 Thomas Gammeltoft-Hansen and Nikolas Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy,' *Journal on Migration and Human Security* 5, no.1 (2017): 28-56.
- 10 The Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, Volume 1, 2015. <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>; United Nations, *Global Compact for Safe, Orderly and Regular Migration*; Pacific Community, Geosciences, Energy and Maritime Division, 'Framework for Resilient Development in the Pacific (FRDP): An Integrated Approach to Address Climate Change and Disaster Risk Management' <https://gem.spc.int/projects/frdp>; African Union, 32nd Ordinary Session of the Assembly, 10-11 February 2019, Addis Ababa, Ethiopia: *Decisions, Declarations, Resolution and Motions*. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/how-does-border-externalization-relate-to-the-climate-emergency?a=3619099>; The Nansen Initiative, *Protection for Persons Moving across Borders in the Context of Disasters*, 2016. <https://disasterdisplacement.org/wp-content/uploads/2016/11/PROTECTION-FOR-PERSONS-MOVING-IN-THE-CONTEXT-OF-DISASTERS.pdf>; European Commission, *Climate Change, Environmental Degradation, and Migration*, SWD(2013) 138 final 2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0138>; Dug Cubie, Marlies Hesselman, and Anastasia Telesetsky, eds. *Yearbook of International Disaster Law*, (Leiden, The Hague: Brill | Nijhoff, 2019).
- 11 The United Kingdom of Great Britain and Northern Ireland. Government Office for Science, *Foresight: Migration and Global Environmental Change, Final Project Report*, 2011 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/287717/11-1116-migration-and-global-environmental-change.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf).
- 12 United Nations Office of the High Commissioner for Human Rights, 'Special Rapporteur on Contemporary Forms of Racism,' <https://www.ohchr.org/en/special-procedures/sr-racism>.
- 13 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final 2020. [https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-f113-11ea-b44f-01aa75ed71a1.0002.02/DOC\\_3&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-f113-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF).

## Invisible to the Legal System: The Policies Adopted in Italy Concerning Citizenship for Children of Immigrants

Anna Siniscalchi

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“We are defined as second generation immigrants. Lately, I see it everywhere. Immigrants from where? From our mothers’ womb? [...] It seems like immigration is a genetic defect, something that is passed on generation to generation, like a life long sentence that you pay for your whole life.” (Translated into English by the author)

This is how Igiaba Scego, daughter of two Turkish immigrants, describes the situation of children of immigrants who are born in Italy or are brought to Italy at a young age in an article for Internazionale.<sup>1</sup> According to the report of the Italian national statistical institute (ISTAT), on January 2018 the number of minors falling within these categories was one million 316. 75 per cent of this figure were children belonging to the so-called “second generation”, while the 25 per cent were children who came to Italy at a young age and are defined in academia as “1.5 generation” immigrants.<sup>2</sup> These children are still labeled as immigrants and are not considered Italian citizens by the State, even if they live their life as their Italian born peers and they speak the same language.

Italian citizenship is currently regulated by Law No. 91/1992, which foresees two main different ways for children of immigrants to acquire citizenship:

- Ius soli – children born in Italy to foreign parents acquire the citizenship through application within one year after coming of age 18 and providing uninterrupted and legal residence in Italy since birth
- Ordinary naturalization – children not born in the country become citizens after 10 years of residency for non-EU immigrants; 5 for refugees and stateless persons; 4 for EU immigrants; 3 (2 if minor) for immigrants of Italian origin. In these cases the State requires a minimum income limit

Both procedures require an application that can be rejected and can cost between 300 and 400 euros. The whole process can last up to six years. This means that children born in Italy to foreign parents are not considered Italians in their own country. Furthermore, until the age of 18 they will have to renew the visa to stay in Italy.

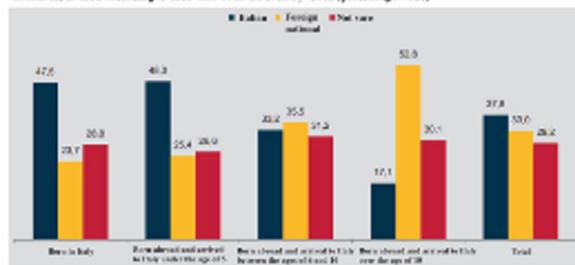
A law reform was discussed several times during the past 10

years, but no major amendments to the above-mentioned legal framework have been made so far. In 2012 the topic arose to the public eye with the campaign “L’Italia sono anch’io” (I’m Italy too). It consisted of several public events aimed to collect the over 200-thousand signatures required to present a citizens’ initiative bill to the Italian Parliament.<sup>3</sup> Three years later, the bill was approved by one of the two Chambers of the Italian Parliament, “Camera dei Deputati”, even if with a modified text. Unfortunately, it was ultimately delayed on the Senate floor, the other House of the Parliament. The two main points foreseen by the proposal were: the extension of ius soli to children born to immigrants parents that would acquire the citizenship at birth if one of the parents has permanent European visa; and the introduction of a new category ius culturae: minors born in Italy of parents without a permanent visa or arrived in Italy before the age of 12 could acquire the citizenship after attending for at least 5 years a school cycle.

Year after year the political sphere overlooked the topic, while associations as “G2”<sup>4</sup> and “Italiani senza cittadinanza”<sup>5</sup> (Italians without citizenship) have been raising their voice for this considerably big part of the population that seem to be treated like ghosts. Ghosts, that is how this group feels like and how it has been described several times by major Italian newspapers.

Having the right to vote when at age, being free to go on a school trips without having to go back and forth to get all the visas and documents, being able to participate to public tenders, not living with the terror to be deported to a country they barely know, not having a passport in a language that in many cases they don’t understand, not feeling excluded and forgotten. These are some of the things that children of immigrants cannot do.

Figure 2.1 - Foreign students attending secondary school who stated to consider themselves as Italian or as foreign nationals, divided according to their arrival in the country, 2018 (percentage value)



Source: Istat, *Indagine sull'immigrazione e le seconde generazioni*. (Translated by the author)

As shown by the statistics provided by ISTAT, most of these individuals already feel Italian and a part of the society.<sup>6</sup> Furthermore, migration is questionably a choice for adults, but is for sure not a choice for children. It is rather something they passively experience. Consequently one may wonder: why should that penalise their life? It seems only fair for Italian policies to become more inclusive.

- 1 Igiaba Scego, 'Siamo ancora pecore nere,' *Internazionale*, January 21, 2015. <https://www.internazionale.it/opinione/igiaba-scego/2015/01/21/siamo-ancora-pecore-nere>.
- 2 Istituto Nazionale di Statistica, *Identità e percorsi di integrazione delle seconde generazione in Italia* (Roma: Istituto nazionale di statistica, 2020). <https://www.istat.it/it/files/2020/04/Identit%C3%A0-e-percorsi.pdf>.
- 3 'Proposta de legge di iniziative popolare: Modifiche alla L.5 Febbraio 1992, N.91 "Nuove Norme Sulla Cittadinanza"', <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/invisible-to-the-legal-system?a=3626003>.
- 4 'La Rete G2', <https://www.secondegenerazioni.it/>.
- 5 'Italiani senza cittadinanza', Facebook. <https://www.facebook.com/italianisenzacittadinanza>.
- 6 Istituto Nazionale di Statistica, *Identità e percorsi di integrazione delle seconde generazione in Italia*.

## The EU Loop: Linking Migration to Security in the Sahel Region

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Generally speaking, the European Union (EU) approach to Africa was shaped by the perception of the “need” of decreasing migration flows towards the EU as a security priority and as a necessity to safeguard the EU order. Notably, the interest in the Sahel region enshrined in the 2011 EU Strategy for Security and Development in the Sahel (henceforth ‘Strategy’) was a result of the advocacy of eight Member States to step up the EU engagement in the region, following the continuous unrest in the area.<sup>1</sup> The involvement of DG Migration and Home Affairs of the European Commission (HOME) as one of the main actors implementing this security-related Strategy speaks for itself about the multilevel conceptualisation of migration as a securitarian threat, endorsed by the Member States as well as from the EU institutions.

As a matter of fact, the EU engagement substantially grew after the outburst of conflict in Mali in 2012 and the migration crisis unfolding in 2014-15. As Bøås puts it, those events pushed the Sahel at the top of the EU agenda, but also contributed to forging an ‘emergency’ approach based on short term priorities, neglecting long term considerations.<sup>2</sup> In this sense, the EU initiatives in the region share the same rationale as the one behind the 2016 EU-Turkey deal: on the one hand, the agreement with Turkey intended to drastically reduce migrations through the Eastern Mediterranean Route; on the other hand, the EU approach to the Sahel region focus on reducing the number of migrants crossing the sea through the Central Mediterranean Route, whereof Sahel countries, notably Niger and Mali, are the main transit countries.<sup>3</sup> This is linked to the fact that three states belonging to this region, namely Mali, Niger and Burkina Faso, are part of the ECOWAS Treaty which eases the circulation of citizens of member countries in the territory of other members.<sup>4</sup>

Nonetheless, the reduction in the number of migrants from this region directed towards the EU is not per se a proof of effectiveness of the EU externalisation of migration policy. Quite the contrary. Indeed, research shows that the EU approach to migration in the Sahel undermined the social and political systems of the Sahel countries leading to increased instability, which in turn encourages migration towards Europe. This could be interpreted as a by-product of the EU bias in favour of security and migration control rather than promotion of good governance, which has been demonstrated in the literature.<sup>5</sup> This argument supports the consideration put forward by Papagianni, according to which the current externalisation of EU migration

policy consists mainly in tackling third countries’ border management problems rather than the root causes of migration.<sup>6</sup>

Moreover, the projects financed through the European Union Emergency Trust Fund for Africa are a showcase for this point, whereas the support given to the G5 Sahel, formed in 2014 by Mali, Mauritania, Niger, Chad and Burkina Faso, tends to neglect the development aspects of the regional cooperation and seems to concentrate mainly on its security priorities, with the aim of ensuring border management and addressing the jihadist menace.<sup>7</sup>

When it comes to the EU missions in the Sahel, namely EUCAP Sahel missions and EUTM Mali, the same tendency can be observed.<sup>8</sup> The recent modifications of the EUCAP Sahel Mali mandate approved by the Council on the 7th January 2021 and the renewed and expanded 5th mandate of EUTM Mali confirm the EU support addressed predominantly at the security aspects of the G5 Sahel at the expenses of an approach based on fostering development to tackle the country’s problems.<sup>9</sup> Similarly, the amendments approved by the Council Decision (CFSP) 2020/1254 of 7 September 2020 to the mandate of EUCAP Sahel Niger stress the need to “support of the Union’s objectives on migration, strengthen the Nigerian security forces’ capacities in border management and in the fight against irregular migration”.<sup>10</sup>

What Hintjens and Bilgic call ‘EU proxy war on migrants’ ultimately offers more problems than solutions since it does not make the European citizens feel safer and at the same time it undermines the legitimacy of the EU.<sup>11</sup> Indeed, the EU does lose a great degree of legitimacy in consideration of the fact that the securitisation of migration and the policy of externalisation of border management led to the creation of a context where the rights of migrants and refugees are continuously violated with complete impunity.

In conclusion, it can be noticed that the EU is caught in a loop whereby it strives to fulfil its need of preventing migration by controlling its management in third countries, with the effect of taking an ‘emergency approach’ and focusing mainly (if not only) on short-term priorities related to border management, while avoiding to tackle the root causes of migration. Therefore, instability persists or increases and so do migration flows, creating a lose-lose situation. Furthermore, as argued by Venturi, the EU actions in the Sahel demonstrated how the EU is not anymore guided by a normative approach, but rather by functional considerations.<sup>12</sup> And what is worse is that those latter are not even dictated by reasons of efficiency or interest, but by the willingness to show responsiveness to the perceptions of its domestic constituencies’ needs resulting from a process of securitisation of the migration issue.

- 1 European Union External Action Service, *Strategy for Security and Development in the Sahel*, 2016 [https://www.eeas.europa.eu/sites/default/files/strategy\\_for\\_security\\_and\\_development\\_in\\_the\\_sahel\\_en\\_0.pdf](https://www.eeas.europa.eu/sites/default/files/strategy_for_security_and_development_in_the_sahel_en_0.pdf); Directorate-General for External Policies, *A Coherent EU Strategy for the Sahel*, European Parliament, 2012. [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433778/EXPO-DEVE\\_ET\(2012\)433778\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433778/EXPO-DEVE_ET(2012)433778_EN.pdf).
- 2 Morten Bøås, 'EU migration Management in the Sahel: Unintended Consequences on the Ground in Niger?' *Third World Quarterly* 42 no.1 (2021): 52-67.
- 3 European Council, 'EU-Turkey Statement,' Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.
- 4 Economic Community of West African Nations, *Revised Treaty*, 2010. <https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>.
- 5 Bøås, 'EU migration Management in the Sahel.'
- 6 Georgia Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' *European Journal of Migration and Law* 15 (2013): 283-299.
- 7 Bøås, 'EU migration Management in the Sahel.'
- 8 Bernardo Venturi, *An EU Integrated Approach in the Sahel: The Role for Governance*, IAI Papers 19/03 – February 2019. <https://www.iai.it/sites/default/files/iaip1903.pdf>.
- 9 European Union, *Council Decision (CFSP) 2021/14 of 7 January 2021 amending Decision 2014/219/CFSP on the European Union CSDP Mission in Mali (EUCAP Sahel Mali)*, L 5/1, 2021. [https://eutmmali.eu/mandates/#:~:text=FIFTH%20MANDATE%20\(2020-2024\),a%20period%20of%20four%20years](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.005.01.0016.01.ENG&toc=OJ%3AL%3A2021%3A005%3ATOC; EEAS, 'EUTM Mali Mandates', <a href=).
- 10 European Union, *Council Decision (CFSP) 2020/1254 of 7 September 2020 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger)*, L 294/3, 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020D1254>.
- 11 Helen Hintjens and Ali Bilgic, 'The EU's Proxy War on Refugees,' *State Crime Journal* 8, no. 1 (2019): 80-103.
- 12 Venturi. *An EU Integrated Approach in the Sahel*.

## What Future for the EU's Controversial Migration Deal with Turkey?

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A civil war, the rise of ISIS and an urgent search for protection: this is what drove approximately one million Syrian refugees to Europe's doorstep in 2015, throwing the European Union into the midst of migration crisis that not only challenged its external credibility, but equally put its ability to craft consensus and internal stability to the test.<sup>1</sup> To alleviate pressure on frontline Member States, such as Italy and Greece, and balance often diametrically opposed national narratives, the EU came to an agreement with Turkey.<sup>2</sup> However, whilst commonly referred to as the "EU-Turkey Deal", this decision to cooperate was never a formally concluded agreement. Instead, the EU's Member States agreed upon this instrument with Turkey without any legal ratification. In short, this "agreement" enforced a 1:1 resettlement scheme: with every Syrian returned to Turkey from Greece, another would be resettled from Turkey into the EU.<sup>3</sup> Yet, over four years after its creation, the deal has come been subject of much public scrutiny. With tensions running high between Turkish President Erdoğan and the Union and its Member States since the former's decision to open the Greek-Turkish border in March last year, it remains unclear what future remains for the EU-Turkey Deal. What is clear, however, is that something must give: with refugee lives at stake, the current state of the deal is not sufficient, as this paper will explore.

### *On paper, in practice*

If we are to purely assess the EU-Turkey Deal as a mechanism to alleviate the burden placed upon national governments across Europe, particularly those frontline Member States, then indeed, the deal can be classed as a success.<sup>4</sup> The so-called "agreement" was born in response to a spike in refugee deaths in the Eastern Mediterranean route. Thus, at surface-level, this was a humanitarian response. For example, with the maximum number of refugee returns capped at 72,000, there was a near instant reduction in arrival rates in Greece, with the overall figure dropping by 98% between 2015 and 2016.

Unfortunately, however, this is only one side of the coin. Statistically speaking, from 2016-2017, only 3,656 Syrians were resettled from Turkey to the EU. At this pace, reaching the originally promised figure of around 50,000 resettled refugees would take approximately 13 years. Furthermore, the deal has been deemed "morally problematic";<sup>5</sup> Despite European commitments to the protection of refugees under the 1951 Geneva Convention, and its 1967 Protocol

(UNHCR), Turkey's commitment is less binding.<sup>6</sup> In short, it has a "geographical limitation" from the 1951 Geneva Convention, meaning that refugee status in Turkey is only offered to those fleeing events in Europe. This has had serious consequences on the living conditions of Syrian refugees in Turkey, rendering them often unable to obtain work permits and forced to resort to low skilled, informal work, hampering their wider integration process.

### *The chaotic gatekeeper?*

Yet, it is perhaps all too easy to place fault solely on Erdoğan's practices. Indeed, Turkey's human rights record has always been a cause for concern, but the fact of the matter stands: Turkey has shouldered much of the EU's migratory burden over the past few years with little in return.<sup>7</sup> Following the death of 36 Turkish citizens in Syria last year, Erdoğan opened the Greek-Turkish border, arguing that the EU has not lived up to its promises.<sup>8</sup> This notion has become embedded in political narratives, and such action seems to be a response to a perceived sentiment of disregard for the safety of Turkish citizens. With this in mind, it was naïve of the Union and its Member States to assume that the deal was durable, particularly given the fact that previous conditionality efforts have resulted in little, if any, shift in attitudes.

The harsh reality of the situation is that the EU is equally to blame. In publishing the deal with no more than a press release, one cannot help but reach the assumption that it was a rushed, last minute effort to externalise an internal crisis.<sup>9</sup> In fact, the deal itself was largely pioneered by Germany, who managed to gain the support of many apprehensive states on the premise that Schengen's survival depended on Turkey's gatekeeping powers.<sup>10</sup> The EU has always been hesitant towards Turkey's potential accession given their poor human rights records. Yet, the Union agreed to open new chapters in Turkey's turbulent accession process only undermines its position as champion of human rights. Combined with poor living conditions and integration experiences of Syrian refugees in Turkey, this paints a very bleak picture overall.

### *What future?*

The above begs the question: what are the next steps for the EU-Turkey Deal? With an ongoing pandemic, likely global economic downturn and tensions rising once more in Syria, something must change. At the core of the issue is the EU-Turkey relationship. In reality, both are co-dependent in the management of migration flows, and thus a robust, perhaps even binding agreement must be crafted that respects the rights of refugees.

More broadly, it has been argued that the escalation at the Greek-Turkish border in March last year has only exacerbated existing cracks in the surface. The European Parliament have demanded that the EU must look inwards and revise its entire

common asylum system.<sup>11</sup> This would involve reforming the controversial Dublin Regulation and its “country of first arrival” policy, as well as strengthening burden-sharing initiatives between Member States. Going forward, statements and lowest common denominator approaches do not suffice. It is ultimately time for the EU to recognise the inherent flaws of its migration and asylum policy, steer clear of stop-gap solutions and make realistic commitments on which can be delivered to those most in need.

1 Syrian Refugees, ‘Syrian Refugees.’ <http://syrianrefugees.eu/>. 5

2 European Council, ‘EU-Turkey Statement,’ Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

3 Arne Niemann and Natascha Zuan, ‘EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives,’ *Journal of Common Market Studies* 56, no. 1 (2018): 3-22.

4 Elena Becatoros, ‘3 Years on, What’s Become of the EU-Turkey Migration Deal?’ *AP News*, March 20, 2019. <https://apnews.com/article/2eb94ba9aee14272bd99909be2325e2b>.

5 Nannette Funk, ‘A Spectre in Germany: Refugees, a “Welcome Culture” and an “Integration Politics”,’ *Journal of Global Ethics* 12, no.3 (2016): 289-299.

6 United Nations High Commissioner for Refugees, ‘The 1951 Refugee Convention.’ *UNHCR*. <https://www.unhcr.org/1951-refugee-convention.html>.

7 Kati Piri, ‘Blame Europe, Not Just Turkey, for Migration Deal Collapse,’ *Politico*, March 5, 2020. <https://www.politico.eu/article/blame-europe-not-just-turkey-for-migration-deal-collapse/>.

8 Zia Weise, ‘Turkey Says It Will No Longer Stop Refugees from Entering Europe,’ *Politico*, February 27, 2020. <https://www.politico.eu/article/turkey-says-it-will-no-longer-stop-refugees-from-entering-europe/>.

9 European Council, ‘EU-Turkey Statement,’ Press release, March 18, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

10 Asli Okyay and Jonathan Zaragoza-Cristiani, ‘The Leverage of the Gatekeeper: Power and Interdependence in the Migration Nexus between the EU and Turkey,’ *The International Spectator* 51, no. 4 (2016): 51-66.

11 European Parliament, ‘EU Asylum Rules: Reform of the Dublin System,’ *European Parliament News*, July 24, 2019. <https://www.europarl.europa.eu/news/en/headlines/world/20180615ST005927/eu-asylum-rules-reform-of-the-dublin-system>.

## Women at the Border: The Silent Scream of Modern Wounded Amazons

*Daniela Caracostas*

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The externalisation of asylum policies, in their attempt to control migration flows - and actually keep away unwanted immigration – has generated a spiral of violence whose victims are those millions of people forced to abandon their homeland, due to conflicts or natural causes, that everyday seek shelter and safety elsewhere.

The increased vulnerability of women at the border represents a major side-effect of these widespread externalisation policies.

Most of the time, in fact, fleeing means experiencing terrible conditions of life for women, even worse – if possible – than the daily difficult situations they had to face in their countries of origin, such as discrimination and denial of fundamental rights. This is because reaching and crossing the border of the alleged “safe” countries becomes a real path of suffering, characterised by violence and fear.

During the journey towards the “promise land” they are pushed into the hell: sea crossing in small crowded inflatable boats risking shipwreck at any time, assaults along the routes, tortures in detention centres, violence at the hands of security forces and border guards, insecurity and fear in reception centres where women have to share tents, toilets and showers with no privacy at all.<sup>1</sup> Moreover, the COVID-19 pandemic has significantly aggravated the dramatic situation.<sup>2</sup>

In this continuous struggle to survive, to reach peace and freedom, women become modern Amazons facing the power of injustice, the violation of human rights, the bestiality of the “enemies”.

These modern Amazons are seriously wounded and deeply hurt in their body, in their mind and in their soul.

...I asked what the work would be and she said connection work [sex work]. Then I started crying, a friend of mine and I refused to do it. They started to beat us saying we must do it. That's the scar on my face. They beat us and said we must do it.<sup>3</sup>

This is the story of a Nigerian woman on her journey to Libya, just one of hundreds of witnesses that give a clear testimony of the dangerous situation that women are exposed to when they are forced to leave their homeland.

There are gender- specific forms of violence and insecurity occurring when women try to cross the borders or when they reach the reception centres.<sup>4</sup> Sometimes the level of insecurity even increases if they are alone or with their children, because they are considered dissolute and their children objects of exploitation. Sometimes even the men who accompany women, and who should be protective and caring companions in misfortune, somehow become accomplices of the perpetrators of abuses, because of the exacerbation of existing forms of physical and psychological domestic violence.<sup>5</sup>

But, generally, a widespread centuries-old misogynic attitude that considers women inferior and just reproductive machines or sexual objects with no rights, leads to terrible abuses. During conflicts, for example, rape is constantly used as a weapon of war, as a form of subjugation and annihilation, and it is frequently perpetrated in detention centres.<sup>6</sup>

Rape is the violation of the delicate intimacy of a female human, it is an attack against a secret and unique world made of emotions, not only physical sensations. It is an abuse against the intimate sphere of emotions and feelings that causes long-term physical and mental disorders. In a few words, through a “simple” mechanical brutal act the perpetrator exercises his power by dehumanising the victim-object and seriously altering her future vital balance.

Moreover, many women have to face an unwanted pregnancy resulting from rape, sexual infections and even stigmatisation in societies where women abused are considered guilty.<sup>7</sup>

Forced contacts with smugglers and traffickers, whose number has increased after the closing of the borders in many countries, expose women to “transactional sex”, the exchange of a sex act to assure and facilitate the crossing of the borders towards what they imagine to be a safer place to live.<sup>8</sup>

Unfortunately, despite the awareness of the negative consequences women are expected to undergo during the journey towards “safety”, until today not too much has been done to support women facing violence and gender-related abuses.

Guides have been created to train border guards on fundamental rights issues and to support survivors of gender-based violence; recently UNICEF, OIM and UNHCR have adapted the guide to support migrant women survived to violence for operators in the field of human rights, taking into account the increased vulnerability as a result of the COVID-19 pandemic.<sup>9</sup> But much more should be done to prevent violence against women and guarantee protection

and professional aid to victims of human rights violations. This is now a big challenge for the EU facing the migrant crisis in the Mediterranean area.<sup>10</sup>

In the meantime, modern Amazons continue their determined struggle with strength and dignity, despite the atrocities they face every day, in the name of freedom.

- 1 Lorenzo Tondo, 'Journeys of Hope: What Will Migration Routes into Europe Look Like in 2021?' *The Guardian*, January 14, 2021. <https://www.theguardian.com/global-development/2021/jan/14/journeys-of-hope-what-will-migration-routes-into-europe-look-like-in-2021>.
- 2 Alice Berkeley, 'A Triple Crisis: The Impact of COVID-19 on Female Refugees in the Aegean Island,' *Human Rights Pulse*, February 14, 2021. <https://www.humanrightspulse.com/mastercontentblog/a-triple-crisis-the-impact-of-covid-19-on-female-refugees-in-the-aegean-islands>.
- 3 United Nations High Commissioner for Refugees, 'On This Journey, No One Cares if You Live or Die,' *Abuse, Protection, and Justice along Routes between East and West Africa and Africa's Mediterranean Coast*, 2020. <https://www.unhcr.org/protection/operations/5f2129fb4/journey-cares-live-die-abuse-protection-justice-along-routes-east-west.html>.
- 4 Jane Freedman, 'Sexual and Gender-Based Violence against Refugee Women: A Hidden Aspect of the Refugee "Crisis"', *Reproductive Health Matters* 24, no. 47 (2016): 18-26; Human Rights Watch, 'Greece: Camp Conditions Endanger Women, Girls,' Human Rights Watch, December 4, 2019. <https://www.hrw.org/news/2019/12/04/greece-camp-conditions-endanger-women-girls>.

- 5 Global Health Institute, 'Risk of Intimate Partner Violence Increases among Refugees,' *Global Health Institute*, March 16, 2018. <https://globalhealth.duke.edu/news/risk-intimate-partner-violence-increases-among-refugees>.
- 6 Elisabeth Jean Wood, 'Rape as a Practice of War: Toward a Typology of Political Violence,' *Politics & Society* 46, no. 4 (December 2018): 513-37; Patrick Wintour, 'Refugees Report Brutal and Routine Sexual Violence in Libya,' *The Guardian*, March 26, 2019. <https://www.theguardian.com/world/2019/mar/25/refugees-face-routine-sexual-violence-in-libyan-detention-centres-report>.
- 7 Briony Harris, 'This Heroic Doctor Is Waging War on Rape and the Stigma around It,' *World Economic Forum*, March 7, 2019. <https://www.weforum.org/agenda/2019/03/rape-the-war-crime-that-is-perpetuated-by-silence/>.
- 8 Europol, 'Migrant Smugglers and Human Traffickers to Become More Ruthless and Clandestine Says New Europol Report,' *Europol News*, May 15, 2020. <https://www.europol.europa.eu/media-press/newsroom/news/migrant-smugglers-and-human-traffickers-to-become-more-ruthless-and-clandestine-says-new-europol-report>.
- 9 Gender Based Violence Guidelines, *How to Support a Survivor of Gender-Based Violence When There Is No GBV Actor in Your Area*, 2018. [https://gbvguidelines.org/wp/wp-content/uploads/2018/03/GBV\\_UserGuide\\_021618.pdf](https://gbvguidelines.org/wp/wp-content/uploads/2018/03/GBV_UserGuide_021618.pdf); United Nations High Commissioner for Refugees, 'Comunicato congiunto OIM-UNHCR-UNICEF "Come fornire un primo supporto alle persone sopravvissute a violenza di genere": tutte le indicazioni nella guida rivolta agli operatori in prima linea,' November 6, 2020. <https://www.unhcr.org/it/notizie-storie/comunicati-stampa/comunicato-congiunto-oim-unhcr-unicef-come-fornire-un-primo-supporto-alle-persone-sopravvissute-a-violenza-di-genere-tutte-le-indicazioni-nella-guida-rivolta-agli-operatori-in-prima/>.
- 10 European Parliament, *European Parliament Resolution of 12 April 2016 on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration (2015/2095(INI))*, C 58/9. [https://news.un.org/en/story/2021/01/1083192](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2018.058.01.0009.01.ENG&toc=OJ.C:2018:058:TOC; UN News, 'Asylum Seekers Subject to Systematic Pushbacks at Europe's Borders, Says UNHCR,' <i>UN News</i>, January 28, 2021. <a href=).

## Her Body, No Choice: What the Atrocities against Immigrant Women Mean for the US

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On the first day of his presidency, Joe Biden had already begun to roll back Trump-era policies.<sup>1</sup> After four years punctuated by protests, riots and deep crises, there is no doubt that the new President will have a lot to do – and to undo, especially when it comes to immigration.

The Trump administration's policies have attracted criticism from Amnesty International for their violation of human rights and international immigration laws.<sup>2</sup> The Immigration and Custom Enforcement (ICE) agency came often under fire for carrying out warrantless searches and unlawfully detaining people.<sup>3</sup> In particular, ICE's detention facilities have become infamous for their mistreatment of immigrants. Medical issues were the most documented form of abuse: according to Homeland Security, detainees had no access to soap or places to wash themselves.<sup>4</sup>

In 2020, with the COVID-19 pandemic, things were bound to get worse: a report by the organization Project South exposed jarring medical neglect at the Irwin County Detention Center (ICDC) in Georgia, where detainees were not distanced nor given masks.<sup>5</sup> One whistleblower nurse, Dawn Wooten, declared that health professionals refused to test detained immigrants for COVID-19, ignored their complaints or requests for examinations, had fabricated medical records or destroyed existing ones.<sup>6</sup> But the most unsettling allegations concern the medical abuses suffered in particular by the women detained.

According to the report, corroborated by follow-up investigations, at least 19 women were either pressured to undergo invasive gynaecological surgeries, or had one without their knowledge or consent.<sup>7</sup> As most of them only spoke Spanish, many recounted not understanding what was happening to them. Doctors and nurses reportedly urged them to agree to the operations, growing frustrated when the detainees asked questions or refused, and often threatening them to withhold future medical care. Some detainees stated that they woke up from unrelated minor surgeries to find that the doctor had removed part of their reproductive organs.<sup>8</sup>

A board of external medical professionals deemed the procedures unnecessary and “overly aggressive”, as they resulted in the impossibility for the patients to have children.<sup>9</sup>

The first investigations were initiated by members of the US Congress through a letter to the Department for Homeland

Security. However, judging that the US Government had failed “to take these allegations seriously”, they later appealed to the United Nations to investigate the “clear pattern of alleged human rights violations by DHS.”

More cases have surfaced in the past months, now adding up to 57 victims in the course of two years; however, investigations were hindered by the withdrawal of the detainee's medical records and the deportations of at least six women who testified against ICDC.<sup>10</sup>

This kind of abuse is sadly not new in the US. Governmental eugenic programs were widespread in the 20th century: at least 70,000 forced sterilization that mostly targeted Black and Native American women were performed since the 1930s; between the 1960s and 1970s, a federal program allowed doctors to arbitrarily sterilize 25% of Native women.<sup>11</sup> In a sobering parallel with modern events, they were also lied to about their medical procedures.<sup>12</sup>

Some variations of these programs still operated as late as the 2010s, especially on detainees: between 2006 and 2010, 148 state-funded tubal ligations were performed on women after they gave birth while incarcerated.<sup>13</sup> Only three years ago, a judge offered inmates reduced sentences in exchange for ‘voluntary agreeing’ to using birth control implants.<sup>14</sup>

These recent events are too often erased from the history of the US. It would be easy to ascribe all responsibility to Trump's presidency, or to argue that Trump's rhetoric aggravated pre-existing racism and intolerance towards immigrants, making it easier for such things to happen. However, the violence against minorities in general and women in particular is not new, nor attributable to a single person; on the contrary, it unearths deeply rooted prejudices that are part of the United States.<sup>15</sup> The abuse on women detained at the ICDC was not responsibility of a single doctor, but of widespread silent acquiescence or active malpractice: the blame rests in the system – one that targets people that are vulnerable because of their origins, their ethnicity, their economic conditions, the language they speak, or their gender. The very same system that still decides who can “perpetuate the species” by forcing sterilizations for some and banning abortions for others.<sup>16</sup>

These problems are ingrained in American society and did not vanish once Trump left the White House. His presidency cannot be seen as an ‘exception’ in US history; if anything, it should be a moment of awakening. 2020 has seen an unprecedented mobilization, both in protests and at the ballots: here's to hoping that the people will recognize that while the blame cannot be conveniently put on an individual, power does not belong to a single person, either.

- 1 Janet Janowski, 'Here's the Full List of Biden's Executive Actions so Far,' *NBC News*, January 26, 2021. <https://www.nbcnews.com/politics/white-house/here-s-full-list-biden-s-executive-actions-so-far-n1255564>.
- 2 Amnesty International, 'USA Treatment of Asylum Seekers Southern Border,' *Amnesty International*, October, 2018. <https://www.amnesty.org/en/latest/news/2018/10/usa-treatment-of-asylum-seekers-southern-border/>.
- 3 Deborah Sontag and Dale Russakoff, 'Who Polices the Immigration Police?' *ProPublica*, April 16, 2018. <https://www.propublica.org/article/pennsylvania-ice-who-polices-the-immigration-police>.
- 4 Madeleine Joung, 'What Is Happening at Migrant Detention Centers? Here's What to Know,' *Time*, July 12, 2019. <https://time.com/5623148/migrant-detention-centers-conditions/>.
- 5 Project South, 'Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center,' September 14, 2020. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/her-body-no-choice?a=3773121>.
- 6 MSNBC, 'ICE Whistleblower Speaks Out, Alleges Mass Hysterectomies Performed on Migrant Women | MSNBC,' Uploaded on September 16, 2020. All in with Chris Hayes. *YouTube*. <https://www.youtube.com/watch?v=EilOudbglIA&t=180s>.
- 7 Molly O'Toole, '19 Women Allege Medical Abuse in Georgia Immigration Detention,' *Los Angeles Times*, October 22, 2020. <https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention#:~:text=At%2520least%252019%2520women%2520at,report%2520and%2520other%2520records%2520obtained>.
- 8 Caitlin Dickerson, Seth Freed Wessler and Miriam Jordan, 'Immigrants Say They Were Pressured into Unneeded Surgeries,' *New York Times*, September 29, 2020. <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>.
- 9 Renee Feltz, *Executive Summary of Medical Abuse Findings about Irwin Detention Center*, 2020. <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center>.
- 10 John Washington, José Olivares, 'Number of Women Alleging Misconduct by ICE Gynecologist nearly triples,' *The Intercept*, October 28, 2020. <https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/>.
- 11 Moira Donegan, 'Ice Hysterectomy Allegations in Line with US's Long and Racist History of Eugenics,' *The Guardian*, September 18, 2020. <https://www.theguardian.com/commentisfree/2020/sep/17/ice-hysterectomy-allegations-us-eugenics-history>.
- 12 Erin Blakemore, 'The Little-Known History of the Forced Sterilization of Native American Women,' *Jstor Daily*, August 25, 2016. <https://daily.jstor.org/the-little-known-history-of-the-forced-sterilization-of-native-american-women/>.
- 13 Donegan, 'Ice Hysterectomy Allegations in Line with US's Long and Racist History of Eugenics.'
- 14 Danielle Campoamor, 'Mass hysterectomies' at ICE Happened on Trump's Watch. But they're America's Problem,' September 17, 2020. <https://www.nbcnews.com/think/opinion/mass-hysterectomies-ice-happened-trump-s-watch-they-re-america-ncna1240238>.
- 15 Justin Worland, 'America's Long Overdue Awakening to Systemic Racism,' *Time*, June 11, 2020. <https://time.com/5851855/systemic-racism-america/>.
- 16 Jessica Glenza, 'Republicans Employ New "Extremely Aggressive" Tactics to Ban Abortion,' February 12, 2021. <https://www.theguardian.com/world/2021/feb/12/anti-abortion-activists-womens-rights>.

## The Pandemic Paradox: Covid-19 Does not Discriminate, but Externalisation Policies Do

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One of the humbling lessons that this pandemic has allegedly taught us has been one on discrimination and the need to care for the most fragile and vulnerable people. Along with this, Covid-19 has been defined by many as ‘the great equaliser’ because anyone can be infected. However, if we look more closely at the impact of the virus on people’s health and financial condition, we realise that ‘the great divider’ might be a more appropriate description. Pre-existing social and economic inequalities have in fact been exacerbated both within and between countries.

### *The last will be the last within countries*

The measures adopted by most countries around the world have shown us precisely that if on one hand Covid-19 acted as a magnifier of existing social inequalities, on the other hand social inequalities themselves have made the spread of the virus quicker and easier. As a matter of fact, it is precisely the lowest-waged workers doing essential jobs that they cannot do remotely who are most exposed to the risk of getting as well as of transmitting the infection. These people, especially in large cities, are usually members of stigmatized racial and ethnic minorities whose socioeconomic status forces them to travel to work and maybe even live in crowded or unsafe conditions, thus making them those who take the brunt of exposure to the virus as well as of the measures (i.a. quarantines) that are supposed to be protecting everyone from it.<sup>1</sup> The living conditions imposed by a lower socioeconomic status are in fact often associated to the impossibility of staying home from work, social distancing as well as having access to affordable medical care, which further highlights how social inequalities play a major role not only in the spread of the virus but also in the worsening of the already precarious living conditions of stigmatized minorities.<sup>2</sup>

### *The last will be last between countries*

Understanding this pattern of social inequality on a national scale may in fact shed light on how the same pattern is characterizing the relationships between richer and poorer countries on a global scale as well. Lacking the resources that advanced economies have in facing the health and economic crisis, low-developed countries have been suffering a further exacerbation of their precarious situation as Covid-19 acts as a magnifier of already existing inequalities and as a further threat to aspiring migrants.

It is not hard to imagine the catastrophic impact the pandemic can have on camps for refugees and displaced people, generally already suffering conditions of crowding, malnutrition, chronic stress, and chronic diseases. And along with the risk of contracting the virus, there is a growing stigma towards these people. In addition to the suspension of asylum applications, those living in refugee camps have in fact been the target of discriminatory policies. In moments of pan(dem)ic – history has taught us – humanity tends to look for an external explanation, a scapegoat to blame for what can hardly be explained. As a matter of fact, since the lockdown began, many European countries have begun using the Covid-19 pandemic as a reason to further push migrants back into Libya and block the borders.<sup>3</sup> Although the virus arrived in the West as a “regular migrant”, probably traveling from China to Europe in business class, this same virus has only exacerbated already hostile stances towards migrants, identifying them as the personification of the invisible enemy.<sup>4</sup> All this has resulted in the externalisation of migration policies as well as the exacerbation of racism.

The Indian government has targeted Muslim communities, Italy issued a Decree Law closing ports for the entire duration of the national health emergency, former President of the U.S. Donald Trump has carefully framed SARS-CoV2 as the ‘Chinese virus’, thus fuelling the rampant Anti-Asian racism which has been soaring ever since the outbreak of the Covid-19 pandemic.<sup>5</sup>

Low-developed countries are unable to compete with high-developed countries not only in the run for personal protective equipment and vaccines but also for the financial help provided by international institutions.<sup>6</sup> Facing a pandemic in an already vulnerable condition, these countries depend on support from elsewhere more than ever, but only 7 per cent of the \$143 billion in financing from the international financial institutions has been committed to low income countries.<sup>7</sup> Despite their pledges for debt relief and expanded programs, the World Bank and International Monetary Fund have failed to translate their alleged commitment into meaningful support, thus leaving less-affluent countries struggling with limited resources and unreasonable debts.

On the other hand, in such a complex scenario, it is also true that throwing resources at the economy might not suffice, as it would only perpetuate, if not exacerbate, the pattern whereby less-affluent countries are struggling with untenable debts. The world is changing as it is facing the worst human crisis since WWII and so should our support to the world’s poorest countries.<sup>8</sup> In times of pan(dem)ic, what was supposed to teach us the humbling lesson of no-border solidarity has become – in what we may call a pandemic

paradox – a chance for our primordial selves to come to light and show us that, after all, our own survival is our only imperative. And yet if this virus has taught us anything it is precisely the collective responsibility to keep each-other safe in order to be safe ourselves, whether it is a question of using a mask rather than reviewing international policies. In detail, we talk about immediate debt cancellation of poor countries, as well as getting a global agreement so that vaccines and cures could be quickly available to everyone – for free, thus preventing big pharma and other big companies from profiting from a crisis that is killing millions. Overall, the key objective should be designing policies that deal with the current compound crisis while looking at the world through an equity lens, ultimately understanding that we will not make it unless we do it together.

- 1 Centre for Disease Control, *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CS319360-A, 2021. <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/the-pandemic-paradox2?a=3773128>.
- 2 Elise Gould and Heidi Shierholz, 'Not Everybody Can Work from Home: Black and Hispanic Workers Are Much Less Likely to Be Able to Telework,' *Economic Policy Institute*, March 19, 2020. <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>.
- 3 Marion MacGregor, 'Concern at EU's Growing Push to Return Rejected Asylum Seekers,' *Infomigrants*, December 17, 2020. <https://www.infomigrants.net/en/post/29162/concern-at-eus-growing-push-to-return-rejected-asylum-seekers>.
- 4 University of Arizona, 'How Coronavirus Took Hold in North America and in Europe,' *Science Daily*, September 10, 2020. <https://www.sciencedaily.com/releases/2020/09/200910150245.htm>.
- 5 Hannah Ellis-Petersen and Shaikh Azizur Rahman, 'Coronavirus Conspiracy Theories Targeting Muslims Spread in India,' *The Guardian*, April 13, 2020. <https://www.theguardian.com/world/2020/apr/13/coronavirus-conspiracy-theories-targeting-muslims-spread-in-india>; Human Rights Watch, 'Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide,' *HRW*, May 12, 2020. <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide>.
- 6 Statista, *Rich Countries Have Bought up the Bulk of COVID-19 Vaccines*, 2020. <https://cdn.statcdn.com/Infographic/images/normal/22945.jpeg>.
- 7 United Nations Security Council, 'Weakest, Most Fragile States Will Be Those Worst Affected by COVID-19 in Medium, Long Term, Humanitarian Chief Tells Security Council,' Press release, September 9, 2020. <https://www.un.org/press/en/2020/sc14296.doc.htm>.
- 8 Edith M Lederer, 'UN Chief Says COVID-19 Is Worst Crisis since World War II,' *ABC News*, April 1, 2020. <https://abcnews.go.com/US/wireStory/chief-covid-19-worst-crisis-world-war-ii-69905340>.

## Italian Quarantine-Ships: Floating Totalitarian Institutions in the Central Mediterranean Sea

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“We’re all in the same boat” became a common refrain in response to the ongoing Covid19 pandemic, referencing the global and indiscriminate nature of the pandemic. Except, we are not. Instead the pandemic has exposed the deep rooted and racialised global inequalities in health and access to mobility.<sup>2</sup> Here, we take the image of the boat to expose these inequalities and reveal how people are quite literally and metaphorically on very different boats indeed. Our analytic focus is the cruise ship repurposed as a quarantine-ship under Italian ‘emergency’ migration policy triggered by the COVID-19 pandemic. We present how these former cruise ships, devoid of their usual tourist passengers as a result of the pandemic, have been transformed into sanitary surveillance spaces in which migrants’ bodies are subjected to racialised biopolitical practices of control.

The Central Mediterranean Sea is now one of the most dangerous maritime migration routes, with 232 deaths already recorded since January 2021.<sup>3</sup> These deaths need to be understood in the context of the politics of abandonment and European governmentality, as a result of which the sea ‘has been made to kill’.<sup>4</sup> Something Forensic Oceanography’s compelling ‘Left-to-die boat’ shows as the deadly natural forces of the sea must be faced by this vessel.<sup>5</sup> Yet, as Enrica Rigo has shown, still people embark on this journey more than once, knowing full well the risks that await.<sup>6</sup> This has not changed during the COVID-19 pandemic.<sup>7</sup>

### ***The ‘Italian Solution’ for the isolation of migrants***

Italian policies have sanctioned a state of emergency; legitimate public health concerns are used as an excuse to detain people in poor conditions on the ferries and to restrict access to asylum. Measures implemented by the Italian government were immediate and first included port closures, declaring them ‘unsafe’, the reduced presence of search and rescue vessels, followed by the creation of ‘quarantine-ships’. On 7 April 2020, an inter-ministerial decree declared that as a result of the COVID-19 emergency, Italian ports are unable to meet requirements as a Place of Safety whilst the pandemic continues. The decree was approved the day after the Alan Kurdi ship (flying the German flag), requested to dock in Lampedusa.<sup>8</sup> 150 migrants intercepted in the Libyan SAR area were on board.

The Italian Association for Legal Studies on Immigration (ASGI) evidenced the dubious legitimacy of the decree with respect both to international legislation - the principle of non-refoulement - and to the Italian Constitution.<sup>9</sup> On 12 April 2020, under the decree of the Head of the Civil Protection department, quarantine-ships were prepared for containment with the aim of providing accommodation assistance and health surveillance of people rescued at sea. The ASGI points out its very rationale is flawed in that those same cruise ship spaces now used to quarantine migrants unable to access a ‘Place of Safety’, were closed to tourists as a health risk due to their spatiality that encourages the spread of disease, are being utilised as a quarantine space for migrants.<sup>10</sup> Unsurprisingly, this has led to concerns from human rights groups and others on discriminatory measures<sup>11</sup> and poor conditions.

For Elena, this was starkly apparent during her time on as a caseworker for an humanitarian organization on two missions on quarantine-ships during December 2020 to March 2021, what was immediately apparent on boarding the ship, was that these supposed health-centred spaces had become spaces of surveillance and control of unwanted bodies. Migrants were subject to: identity checks, assessment of intention to seek asylum, and documenting of vulnerabilities, such as minor age, pregnancy. These features are the precise administrative processes that the Italian authorities requested when they asked for ‘floating hotspots’ in 2016, a proposal rejected by the EU.<sup>12</sup> The proposal was rejected as unlawful both from an administrative and from a human rights point of view: the identification process takes usually weeks and the health care on board would have been insufficient.<sup>13</sup> Floating hotspots enhance deportation practices, restricting access to protection both temporally and administratively. Amnesty International described it as “useless and cruel”.<sup>14</sup>

### ***Totalitarian institutions***

A diary entry from Elena explains:

In the end, this is securitarian control disguised - barely - as health control. You can feel it in your body. It is a disproportionate and totally unreasonable health control, as migrants with a negative COVID-19 test are also contained. It is also extremely expensive. A time-space suspension, devoid of legal regulation or any human rights guarantee.

Analyzing the onboard diary, the feeling that emerges is of a totalitarian institution (Goffman, 1961) that adopts bio-political techniques that act on the body and mind of all on board, both migrants and workers. In the words of a colleague: “you understand that it is a sick system when, as you board the migrants, you no longer think about the people boarding, but about the number of rolls of toilet

paper that you will have to buy.” The quarantine ship is a space that leaves no room for critical thinking, which disables the ability to put oneself in someone else’s shoes (Arendt, 2019).

Quarantine-ships immediately became another piece of the wider externalisation of European borders process, facilitated by the COVID-19 pandemic.<sup>15</sup>

### What’s next?

The emergency arising from the COVID-19 has legitimised the enhanced securitization of the management of migratory flows along the Mediterranean border space. The question is now: what will happen after the COVID-19 pandemic? Will these quarantine-ships officially become ‘floating hotspots’?

- 1 Originally published in *Routed Magazine* (Elena Giacomelli and Sarah Walker, ‘The Quarantine ship as “Floating Hotspot”: Racialised Border Practices in the Mediterranean Sea in the Time of COVID-19’, *Routed Magazine*, May 8, 2021. <https://www.routedmagazine.com/omc21-7floating-hotspots>).
- 2 Yize Wan and Vanessa Apea, “49% More Likely to Die” – Racial Inequalities of COVID-19 Laid Bare in Study of East London Hospitals, *The Conversation*, January 28, 2021. <https://theconversation.com/49-more-likely-to-die-racial-inequalities-of-covid-19-laid-bare-in-study-of-east-london-hospitals-153834>; Joanna Kakissis, ‘Asylum-Seekers Make Harrowing Journeys in Pandemic, only to Be Turned back’, *NPR*, February 13, 2021. <https://www.npr.org/2021/02/13/949182773/the-harrowing-journeys-to-safety-of-asylum-seekers-during-a-pandemic?t=1618758066877>.

- 3 International Organization for Migration, ‘COVID-19 Control Measures, Gap in SaR Capacity Increases Concern about “Invisible Shipwrecks”’, *IOM News*, May 12, 2020. <https://www.iom.int/news/covid-19-control-measures-gap-sar-capacity-increases-concern-about-invisible-shipwrecks>; International Organization for Migration, ‘Migration within the Mediterranean’, 2022. [https://missingmigrants.iom.int/region/mediterranean?migrant\\_route%5B%5D=1376](https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376).
- 4 Charles Heller and Lorenzo Pezzani, ‘Liquid Traces: Investigating Deaths of Migrants at the EU’s Maritime Frontiers’ in *The Borders of “Europe”: Autonomy of Migration, Tactics of Bordering*, ed. Nicholas De Genova (Durham: Duke University Press, 2017); 96
- 5 Forensic Architecture, ‘The Left-to-Die Boat’. *Forensic Architecture*, 2012. <https://forensic-architecture.org/investigation/the-left-to-die-boat>.
- 6 Enrica Rigo, ‘Migration, knowledge production and the humanitarian agenda in times of crisis’, *Journal of Modern Italian Studies* 23, no. 4 (2018): 507-521.
- 7 Fondazione ISMU, ‘Ventiseiesimo Rapporto sulle migrazioni 2020’, *Rapporti*, 2020. <https://www.ismu.org/ventiseiesimo-rapporto-sulle-migrazioni-2020/>.
- 8 RAI News, ‘Alan Kurdi salva 150 persone al largo della Libia. La ONG: “L’Italia nega un porto”’, *RAI News*, Aprile 7, 2020. <https://www.rainews.it/archivio-rainews/articoli/alan-kurdi-salva-150-migranti-in-due-operazioni-libia-italia-porto-a62f78c0-49a9-467c-92fd-f1e0b516b922.html>.
- 9 Associazione per gli Studi Giuridici sull’Immigrazione, ‘ASGI chiede l’immediata revoca del decreto interministeriale del 7 aprile 2020 L’Italia è sempre vincolata all’obbligo di fornire un porto sicuro alle persone salvate in mare’, *ASGI Statement* April 15, 2020. <https://www.asgi.it/wp-content/uploads/2020/04/Nota-ASGI-porti-e-accoglienza-porti-sicuri-COVID14-4-2020-def.pdf>.
- 10 Kara Tardivel, Stefanie B. White, Krista Kornylo Duong, ‘Chapter 8: Cruise Ship Travel’. *Centres for Disease Control and Prevention*, 2020. <https://wwwnc.cdc.gov/travel/yellowbook/2020/travel-by-air-land-sea/cruise-ship-travel>.
- 11 *Criticità del Sistema Navi-Quarantena per persone migranti: Analisi e richieste*, December 10, 2020. <https://drive.google.com/file/d/1Vg8slhh4mlgXpJY91LaHh6vBapAEC6W/view>.
- 12 European Parliament, *Parliamentary Questions*, May 26, 2016. P-004213-16. [https://www.europarl.europa.eu/doceo/document/P-8-2016-004213\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-8-2016-004213_EN.html).
- 13 European Council on Refugees and Exiles, ‘Italy’s Proposed Idea of “Hotspots at Sea” Is Unlawful, Says ASGI’, *ECRE*, May 20, 2016. <https://ecre.org/italys-proposed-idea-of-hotspots-at-sea-is-unlawful-says-asgi/>.
- 14 Amnesty International, ‘Quarantene in mare per i migranti, una prassi inutile e crudele’, *Amnesty International (Italia)*, May, 25, 2020. <https://www.amnesty.it/quarantene-in-mare-per-i-migranti-una-prassi-inutile-e-crudele/>.
- 15 Actionaid, ‘The Big Wall’, *The Big Wall*. <https://thebigwall.org/en/>.

## Why Border Enforcement Might not Be the Right Solution

*Valeria Qualatrucci*

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Throughout human history, the movement and displacement of people from one country to another has always been present. It also remains controversial as it did hundreds of years ago. Many different push and pull factors are the reasons for which people migrate, and these can be classified as economic, social, political or environmental. From 2015 onwards, migration to Europe has been quite tumultuous due to a global rapid increase of labour and forced migration, and these movements are expected to last for decades due to various geopolitical dynamics. The arrival in 2015 of almost one million refugees and migrants to Europe prompted much research, as it gave life to social issues and humanitarian crises. One of these crises is exacerbated by the so-called externalisation of borders.

One of the founding strategies of European immigration policy for the past ten years has been the “externalisation of borders”, which is the transfer of border management to third countries. The first step of this strategy concerns the identification of key partner countries to cooperate with on migratory issues and the definition of the kind of cooperation to establish with each of them. The main objective of the policy is to support the countries of origin and transit to block migration flows through militarization of the borders and promoting development projects that should eradicate the causes of migration. Clearly, these agreements between countries are far removed from a real development, as they focus only on improving border control and on facilitating readmission to both countries of origin and transit.

### *What is the risk in adopting these strategies?*

Blocking at departure both economic migrants and asylum seekers (i.e. those fleeing from wars and persecution) makes it easy to reject even those who would be entitled to asylum. By making this type of agreements operational, people who could obtain refugee status or some form of protection would be sent back or blocked before leaving. Through the externalisation of borders and controls, any semblance of interest in human rights is abandoned, relieving Europe from the responsibility to give protection to people who are entitled to it. Not to mention the dangers of a form of criminalization upon return, whereby those who emigrate are considered deserters and risk prison and other forms of persecution upon return.

The mechanism of militarization of borders is also strongly linked to unacceptable violations of the principle of international law of non-refoulement of asylum seekers

and refugees, as well as a violation of EU directives on international protection that allow everyone access to the territory to have their applications for protection or asylum examined. By allowing and accepting this life-threatening strategy, it is thus forgotten that the increase in arrivals from Africa to Europe is due to wars or internal conflicts fuelled by Western interests and to environmental crises that devastate those territories. Border externalisation thus contributes to crimes against humanity: the monetization of the relationship with African countries seems to forget the human rights and the fate of thousands of people on the African continent.

History shows us that people move when the conditions of their lives are difficult, they look for a better place to live, but what is certain is that we cannot take everyone without proper organization, and we cannot allow people to die at sea either.

What should we do, then? Europe could be the only answer and it should organize with at least two solutions: the first one would be a proper reception, integration and development plan. In fact, Europe is still lacking an efficient reception system for migrants, refugees and asylum seekers. The second would be strong and decisive action in the countries from which one migrates. Only by improving the living conditions of these countries will there be a decrease to migration. Therefore, by acting and improving the quality of life in African countries may we be able to decrease the natural flows of migrants in a fairer way that respects fundamental human rights.

Migration constitutes an expanding phenomenon that so far has not found effective answers in terms of management by institutions. It cannot be considered only in the case of tragic events, in the same way it should not be faced without investing in solidarity. To think of solving the phenomenon of migratory flows without a global approach is a failure. Instead, long-distance support combined with strategies for co-development could be a way to guarantee concrete action towards a real and participated development by the whole population.

## Anti-Colonial Refugee Stories

*Anna Szorenyi*

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I'd like to pay my respects to the Kaurna people, on whose land I wrote these words, and to the Ngadjuri and Nukunu peoples of the mid-North of South Australia, whose land and water my colonising ancestors stole.

In the current global situation, major refugee crises seem to proliferate continually as conflicts erupt, and can be expected to continue increasing as the climate warms up. Meanwhile, more and more nations are choosing to try to defend themselves by becoming 'fortress' nations, building walls and keeping asylum seekers offshore. In this context, the question of how to shift discourses – and hence hopefully policies – seems always urgent, if we are not to create a world filled with dislocated and desperate people.

In this effort to create solidarity with refugees and avert violence and exclusion, there is no doubt that stories and images have long been one of the most effective efforts pursued by NGOs, activists, advocate and refugees themselves. But there is also no doubt that such stories have also always been accompanied by doubts, debates and critiques. Inevitably there are power relations involved in the collection and circulation of stories of those who are dependent on the support – political, legal or social – of the very systems that ask for those stories. Inevitably there are power relations when the stories at stake are told from a position of being stateless, homeless or without citizenship, without easy access to a legitimate global platform through which to share stories of their own. So many questions arise in relation to 'refugee stories', including: whose story is this? Who decided that it should be told? Who decided on its shape and form? In what way should this story be seen as 'representative', and in what ways is it unique? Is this how the person represented here would like to be represented? And perhaps the underlying question of all of these: will these representations help them? And by extension, help others also in their situation?

Of course, if those who ask these questions had the answer – a magic formula that would create global solidarity with asylum seekers and refugees, and therefore force changes in policy and politics so that large sections of the world's population would not be left as stateless and homeless precariats – then we would have already used that formula, and the 'problem' of refugees would have been solved (in an ideal world, it would no longer be thought to be a problem). So we do not have this magic formula. We only have various methods which seem to work sometimes, unpredictably, and through which some space for solidarity seems to stubbornly and recurrently emerge – but never, so far, widely enough. It is not always easy to predict which story or image

will 'cut through' and provoke a response, and even when they do, often the response seems to be temporary.

But this unpredictability is itself reason to make sure that refugee stories keep circulating, even imperfectly. What I want to reflect on here, then, is some brief thoughts about what makes a 'representation' effective, and conversely what makes it liable to be counterproductive, implicitly reproducing the very kinds of power relations it had hoped to reconfigure. Ultimately, these reflections finish not so much on what the perfect representation looks like, but instead on what is needed in order to respond to the representations we already have. Much is always written about politics of voice – but there is no voice without someone to listen to it.<sup>1</sup>

To explore these thoughts, I want to start by outlining the classic 'refugee story'. These are the familiar stories commonly circulated by the UNHCR, the IOM, the Refugee Council of Australia. They are stories that are often explicitly organised around a pre-existing 'refugee narrative': from 'persecution', to 'flight', to 'rescue', and 'resettlement', often with multiple examples under each heading, as though they are interchangeable, as though the story always goes the same way. Often they are accompanied by smiling photographs of grateful refugees looking forward to new lives. As Liisa Malkki points out, they are stories that cover over myriad histories, politics, and identities, turning them all into a single homogenous story.<sup>2</sup> They are packaged, translated, and mediated stories. Often they are celebrated for 'giving voice', as if refugees cannot talk until an aid worker interviews them.

These are 'humanitarian' stories, but I'd like to problematise what that word is usually taken to mean. The 'human' in 'humanitarian' is a double-edged sword. It seems to bestow the status of 'humanity' on suffering people, but at the same time it positions those people as 'others' – defined by their suffering, and by their distance from an 'us' called 'the audience', who get to view the suffering on display and make decisions about it. It has the structure of a 'politics of pity', as defined by Hannah Arendt and Luc Boltanski – a politics based on proving one's own compassion by feeling for others who are always imagined as distant.<sup>3</sup> This is a deeply colonial way of thinking and of imagining the world. Problematically, it divides humans into victims, perpetrators and bystanders – and this is how apparently compassionate stories can actually contribute to violence against asylum seekers and refugees, because they create an image of the 'true' refugee, against which the merely human refugees, and particularly those who take action on their own behalf and don't stay conveniently distant, can only appear illegitimate.

So how do we challenge that allocation of suffering and that assumption that the audience are uninvolved bystanders? If any testimony, any representation, is to work, then it has

to be a two-way process. It has to put into question not only the aspiring refugee, but the audience. It has to open the question of who each of them is and might become. We need to problematise the vision that the audience to refugee stories is inevitably made up of privileged, impervious and insulated people, who have to be opened up and made to care. Certainly there are usually real and very unequal power relations involved, and that has to be taken into account. But as Judith Butler would say, no-one is invulnerable.<sup>4</sup> Without relationality and vulnerability, life is not possible. We unavoidably live in contingency, alongside one another, and our actions affect each other. A body that takes nothing in, that has no openings, is not a living body. (And I'm quite open to metaphors about nations as bodies here). So we need instead to begin from a premise that exposure to one another is unavoidable, that we need each other, and that the question is how to live together with that fact.<sup>5</sup> If we begin from there, then the question of how to represent people caught up in refugee determination systems becomes not 'how can the indifferent be opened up and be made to care', but instead 'how has the intrinsic openness of life here been made to shut down and fortify itself?' And then, with this question in mind, we can go hard on challenging those forces of isolation and denial which tell people they are uninvolved. In the settler colonial context of Australia that I write from – but not only in that context – these are often the habits of colonial violence and the racism invented to justify it and deny it.

I don't like to give a formula for how to do this, because it's about breaking down formulae. But that question: why doesn't the national citizen care about us, is fundamental to many artworks and stories created by asylum seekers; In the Australian context, a short list would include Behrouz Boochani's OpEd pieces in *The Guardian* and novel, *No Friend but the Mountains*, the cartoons of *Eaten Fish*, and the many poets and story writers who have emerged from the prisons, all refusing to take for granted that no-one cares – instead demanding an explanation, and a response.<sup>6</sup>

These are stories that don't deny suffering – but they show it in ways that break the distancing colonial frame. Often they speak to us directly, in the second person: looking back at us, including us in the picture. They ask pointed questions about exactly who is in need of more 'humanity'. They reconfigure the narrative, stopping at violence, instead of rescue, and show us perpetrators, instead of rescuers, and often those perpetrators look quite a bit like ourselves. They foreground relationality – not just between 'us' and 'them', but also between themselves, showing how they depend on one another's support to survive, memorialising one another when they don't. They resist closure: they are often immediate, broken texts, but are also poetic, poignant, political. Above all, they problematise the 'distance' around which humanitarian stories revolve, showing that it is not the starting point of the problem, but the aim of the system.

But I don't want to stop in celebration of these stories. Because I think we have to be careful not to simply swap poles in the dichotomy, demanding that asylum seekers and refugees become articulate, creative, powerful artists before we will respond to them. Because not everyone can be articulate. Structures of violence do render people voiceless, and even speechless. Not all experience can be easily spoken. The non-verbal actions taken by asylum seekers in Australia's immigration prisons bear witness to this – silence, lip-stitching, setting fire to yourself, drinking detergent and burning out your larynx. These actions cannot be called voice, but they testify, nonetheless – if we listen to them.

So ultimately, what I wish for is that we learn to respond to one another even without the perfect story. To do this, we need to try to educate each other in not expecting to be seduced and enticed into caring. To understand that representation is not the cause of ethical relations: the ethical relations are always there, we are always already in them. And the fact that people are held off-shore, forced into distance, literally denied any possibility of life other than serving as a 'message' to future asylum seekers and citizen-voters, does not remove that ethical implication, it deepens it. If – and here again I speak, always ambivalently, as an 'Australian' – if 'our' security is dependent on the camp, then we are a community defined by the camp: that much is inescapable and hence so is the ethical entanglement it implies.

So this is, I think, the only ethical way to listen to refugee stories – not as missives from those who are distant and other and have to be remade in our own image before they count, but as stories from amongst us, from amongst those who once hoped to live among us, in a world in which we are all vulnerable to one another's actions, and in which we all need conditions of sustenance and support in order for our lives to be liveable.

1 Tanja Dreher, 'Listening in: Improving Recognition of Community Media to Support Democratic Participation and Wellbeing,' *Listening in Project*, 2020. <https://www.listeninginproject.org/about>.

2 Liisa H Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization,' *Cultural Anthropology* 11, no. 3 (1996): 377–404.

3 Hannah Arendt, *On Revolution* (New York: Viking Press, 1963); Luc Boltanski, *Distant Suffering: Morality, Media and Politics*, Cambridge Cultural Social Studies (Cambridge: Cambridge University Press, 1999).

4 Judith Butler, *The Human Condition: Vulnerability, Survivability*, The Barcelona Debate. Lecture given at Centre de Cultura Contemporània de Barcelona on February 12, 2008, 1:02:59. <https://libguides.murdoch.edu.au/Chicago/all>.

5 Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004); Judith Butler, *Frames of War: When Is Life Grievable?* (New York: Verso, 2009); Judith Butler, *Notes toward a Performative Theory of Assembly* (Cambridge: Harvard University Press, 2015).

6 Behrouz Boochani, *No Friend but the Mountains: The True Story of an Illegally Imprisoned Refugee*, trans. Omid Tofighian. (London: Picador, 2019); *Eaten Fish*. 'Eaten Fish.' <https://eatenfish.com/>; Rosie Scott and Thomas Keneally, eds. *Southerly (Another Country)* 6, no.1 (2004); Mohsen Soltany Zand, *Inside Out* (Sydney: Stickylabel, 2005); *Writing Through Fences*. 'About Us.' *Writing Through Fences*. <https://www.writingthroughfences.org/>; Behind the Wire. 'Stories.' *Behind the Wire*. <https://behindthewire.org.au/stories/>.

## Against Erasure<sup>1</sup>

*Claire Loughnan, Una McLivenna,  
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and Sam Taylor*

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How can we learn from a site of historical harm if our access to it is denied? How do we uncover the traces of what happened when that place wasn't only hidden to begin with, but has now disappeared?

Between 2001 and 2008, and again between 2013 and 2017, hundreds of asylum seekers were effectively imprisoned under Australian law, in an offshore processing centre on Manus Island, Papua New Guinea (PNG).<sup>2</sup>

Journalists were denied entry so the evidence of what was happening there had to be smuggled out on hidden mobile phones, often under cover of night.<sup>3</sup>

Those working there were threatened by the Australian Government with two-year prison sentences for speaking out about what they witnessed, under controversial 'gag' orders.<sup>4</sup>

In 2016, the PNG Supreme Court ordered the detention centre to be closed as its existence breached human rights provisions in the PNG constitution. It was dismantled in 2017.<sup>5</sup>

Today, the site is overgrown with forest and jungle. Yet several men died there, due to homicide, self-harm, suicide or untreated medical concerns.<sup>6</sup> Many hundreds of others experienced pain and torture during their imprisonment.

In an effort to preserve the memory of what was done at Manus in our name, we have come together as an interdisciplinary and international research team to build a 3D digital representation of the now dismantled site – *Against Erasure*.<sup>7</sup>

In the absence of most of the buildings and any available plans of the site, we had to reconstruct the detention centre by drawing on archival materials – interviews with Kurdish writer and former detainee Behrouz Boochani, Google Maps, images from the film *Chauka Please Tell Us The Time* and recordings from the Messenger Project by Michael Green and Abdul Aziz Muhamat.<sup>8</sup>

When Boochani re-visited Manus in 2018 with former migration worker Nicole Judge and refugee activist Ian Rintoul, it was as if the centre had never existed.<sup>9</sup>

As Boochani said:

The prison had been completely destroyed and was now a jungle with a whole range of plants and other vegetation. I saw the only tree that had existed in Fox prison. I also saw a tree that was in Delta prison, which we called "the suicide tree". I saw the location of Chauka, the Green Zone, and Bravo, all solitary confinement cells... all these places were now gone; there was not one sign of them left.<sup>10</sup>

From a technical perspective, the project was unusual. Instead of designing from the ground up, we were piecing together the digital fragments that remained.

We used a 2014 Google Earth satellite image combined with a rudimentary layout diagram from a parliamentary report. Then we reviewed two documentaries for any shots with buildings, fences and doors to infer the height and distances of buildings.

The real breakthrough came when Boochani guided us, building by building, through the entire compound that he knew so well, making sense of the structures and elements, like gates, trees and a soccer field.

Seeing through his eyes how people survived there, how they were separated and controlled – we realised that capturing the human experience within this digital reconstruction was of utmost importance.

The reconstruction of the site is based on a 2014 iteration of the detention centre. We had agreed that the 2014 image, when the prison was crammed with container structures, was the most illustrative of harsh conditions there. But Boochani emphasised that it was always in flux and never permanent.

The site underwent many transformations during its operation. At its peak, it was incredibly crowded, with more than 1,000 men, many camps within a camp and a long perimeter fence through which the men were forced to walk to get to the medical centre.

The 3D model was imported into an interactive video emulating a drone-style 'fly-through'. To add the human stories, we added interactive hotspots, profiling the geography of Manus Island, some detainees who died there and some who survived.

Other hotspots provide context through references to activists, media and key Australian political figures who were authors of inhumane laws and policies which make up this country's border protection regime.

In some ways, the 'erasure' of the site is a blessing.

Rather than comprising decaying buildings, the site has been returned to its earlier form, regenerated by jungle – this isn't a reconstruction of historical 'ruins'.

But the stories of pain and suffering endured in these 'erased' sites continue to reverberate in the present. Honouring the experiences of those who were imprisoned there, has driven this project.

This is the first known 3D model of the detention centre, making a significant contribution to collective knowledge of the facility and the island on which it was based.

In the face of the Australian government's refusal to acknowledge the harms of its border protection regime, this model is an historical reminder of, and testament to, the lives and suffering of those imprisoned there – a violent effect of Australian laws and policies.

'Against Erasure' was led by criminologist Dr Claire Loughnan and historian Dr Una McLivenna, with team members Jordy Silverstein, Mahnaz Alimardanian, and Uma Kothari, and the expertise of Sam Taylor, Mitch Buzza and Meredith Hinze from the University of Melbourne Faculty of Arts eLearning/eTeaching Team.

Against Erasure was launched on 25 November, 2021 with guest speakers Behrouz Boochani, Arash Kamali Sarvestani, Shaminda Kanapathi and Ben Doherty.<sup>11</sup>

- 1 Originally published in *Pursuit* (Claire Loughnan, Una McLivenna, Mitch Buzza, Meredith Hinze and Sam Taylor, 'Against Erasure,' *Pursuit*, November 24, 2021. <https://pursuit.unimelb.edu.au/articles/against-erasure>).
- 2 Refugee Council of Australia, 'Australia's Asylum Policies,' March 1, 2021. <https://www.refugeecouncil.org.au/asylum-policies/5/>.
- 3 Paul Karp, 'Keeping Journalists out of Detention Centres Helps Stop Boats, Says Cormann,' *The Guardian*, June 14, 2016. <https://www.theguardian.com/australia-news/2016/jun/14/keeping-journalists-out-of-detention-centres-helps-stop-asylum-boats-mathias-cormann-bill-shorten-election>.
- 4 Ben Doherty, 'Immigration Detention Doctors Challenge Border Force Act's Secrecy Clause in Court,' *The Guardian*, July 27, 2016. <https://www.theguardian.com/australia-news/2016/jul/27/immigration-detention-doctors-challenge-border-force-acts-secrecy-clause-in-court>.
- 5 Maria Giannacopoulos and Claire Loughnan, 'Closure' at Manus Island and Carceral Expansion in the Open Air Prison,' *Globalizations* 17, no. 7 (2020): 1118-1135.
- 6 Ben Doherty, Nick Evershed and Andy Ball, 'Deaths in Offshore Detention: The Faces of the People Who Have Died in Australia's Care,' *The Guardian*, June 20, 2018. <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.
- 7 University of Melbourne, 'Against Erasure – Manus Island.' *Against Erasure*, 2021. [https://omeka.cloud.unimelb.edu.au/against\\_erasure-manus\\_island/](https://omeka.cloud.unimelb.edu.au/against_erasure-manus_island/).
- 8 Behrouz Boochani and Arash Kamali Sarvestani. 2017. *Chauka, Please Tell Us the Time*. Netherlands: Sarvin Productions; Muhamat, Abdul Aziz. 2019. *The Messenger*. Wheeler Centre. <https://www.wheelercentre.com/wlr-articles/the-messenger/>.
- 9 Ben Doherty, 'Detention Centre Staff Say Careers and Lives Were Damaged by Speaking out,' *The Guardian*, April 27, 2016. <https://www.theguardian.com/australia-news/2016/apr/27/detention-centre-staff-say-careers-and-lives-were-damaged-by-speaking-out>.
- 10 Behrouz Boochani, 'I Returned to My Prison on Manus Island and was Stunned by What I Saw,' *The Guardian*, October 29, 2018. <https://www.theguardian.com/commentisfree/2018/oct/29/i-returned-to-my-prison-on-manus-island-and-was-stunned-by-what-i-saw>.
- 11 Shaminda Kanapathi, 'Six Years of My Life Lost on Manus Island: Refugee Writes on Anniversary of "PNG Solution",' *The Sydney Morning Herald*, July 19, 2019, <https://www.smh.com.au/national/six-years-of-my-life-lost-on-manus-island-refugee-writes-on-anniversary-of-png-solution-20190719-p528t5.html>.

## Privatisation, Offshore Processing and Externalisation: Who Benefits?

Mark Yin

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We know that Australia's offshore detention regime is fraught with human rights abuse. Since offshore processing centres reopened in 2012, examples of human rights violations have never been far from the headlines.<sup>1</sup>

However, the role of private corporations in sustaining this regime and the externalisation of refugee policies is less well understood—even as the cost per asylum seeker of offshore processing continues to grow.<sup>2</sup>

The detail of how offshore detention centres operate, including the activities of private contractors, tend to be highly secretive in a manner that facilitates human rights abuse. In this context, the 2019 Paladin Scandal sheds some light on how the conduct of contractors and subcontractors and their symbiotic relationship with government may also contribute to systemic human rights abuse in offshore detention.<sup>3</sup>

The scandal uncovered hundreds of documents detailing the Australian Department of Home Affairs' day-to-day relationship with private security firm Paladin, who were contracted to administer Manus Island Detention Centre in 2017. An analysis of these documents revealed a compromised understanding of accountability within the contractual relationship, and a lack of momentum for change.<sup>4</sup>

### “Performance management”

The Australian government regulated Paladin through a ‘Performance Management Framework’ (PMF), which outlined indicators Paladin needed to meet each month; if Paladin failed to meet these indicators, they were fined through monthly ‘abatements’ for each unmet indicator. In September 2019, the *Australian Financial Review* reported that Paladin were fined in this manner more than 3,700 times in a year.<sup>5</sup>

However, although this figure appears significant, the PMF system was hampered by two notable shortcomings. Firstly, inbuilt into their contract was a right for Paladin to negotiate their payable abatements. The government did appear to regulate Paladin through the PMF, but also provided them recourse by allowing them to submit ‘Excusable Performance Failures’ (EPFs) each month, which could save Paladin thousands of dollars.

Secondly, the PMF system also failed to recognise patterns in these failures, treating them as discrete incidents despite

evidence that they were systemic in nature. A key example was the hundreds of cleaning services which Paladin failed to provide.<sup>6</sup> Although inadequate cleaning services in offshore detention are routine, systematic failures which fundamentally dehumanise detainees.<sup>7</sup> Although a failure to clean seems a mundane, unremarkable failure, Kurdish writer Behrouz Boochani reflects in his book on the impact of unhygienic conditions at Manus Island Prison (offshore processing):

The floor is always in the same state: piss up to the table. These toilets are so filthy that the toilet has extended along the ground for a few metres. The toxic water has seeped into the surrounding area, penetrating the space where various species of plants are growing.<sup>8</sup>

There was simply no frame for the Australian government to apprehend this as wrongdoing. As such, it appeared that the PMF system was not designed to recognise systemic, underlying flaws as wrongdoing.

### No impetus for change

It may seem reasonable that a contractor like Paladin would want to follow the directions of government, and of course, this is to be expected that they comply with these directions. But there was a financial incentive to pass the required performance metrics, and as long as they did this, there was no reason for them to push for change.

The question remains why the Australian government would have wanted to stay the course, even in cases that led to harm to refugees. The political appeal of appearing ‘tough on borders’ may shed some light on this, but it does not explain the nature of the PMF system nor the thousands of fines administered through it.<sup>9</sup>

To understand this, we must contextualise the government's correspondence with Paladin. A key clue can be found in a letter dated December 2018, where officials wrote, “the Department appreciates Paladin's efforts to work with the Department...congratulates Paladin on the increased ‘Passed’ performance metrics and reduction in abatements, and looks forward to future months seeing 100% metrics achieving a ‘Passed’ metric”.

Less abatements means a financial loss for government. However, their desire to keep abatements limited is, perhaps unsurprisingly, political. When questioned about Paladin's performance failures in 2019, then-Senate spokesperson for Home Affairs Michaelia Cash said, “Paladin demonstrated continuous improvement in meeting service standards during the course of the contract”.

In this context, it becomes clear that the *appearance* of effective function was a political tool for maintaining the state-corporate relationship. The more performance

indicators were met, the more money Paladin would save, but also the more legitimate government would appear. That there were still some fines allowed government to maintain the image of holding Paladin accountable, but deeper accountability would have also deepened scrutiny of government, and of the policy of offshore detention itself. Paladin and government thus shared an interest in maintaining the status quo—at the expense of asylum seekers, not to mention Paladin workers as well.

### *Human rights and standards of care*

The Paladin documents paint a picture of the ‘normal’ operation of an offshore detention contract. In particular, they suggest that in the course of administering such contracts, the government’s regulatory capacity or desire is limited. Even as Paladin were fined thousands of times for the same few service lapses, there continued to be a ‘normal’ level of unhygienic, inhumane, corrupt and otherwise harmful conditions under their administration.

How best to address these conditions is not a novel question. Abolition remains a clear answer, not just for offshore processing but all forms of detention, immigration or otherwise.<sup>10</sup> It must be noted that Australian prisons are also by and large privately-run: in fact, more Australians are kept in for-profit prisons than in any other country proportionally speaking.<sup>11</sup>

To be able to imagine a decarceral future in this context is both challenging and vitally important.

At the same time, the case of Paladin revealed that although contracts are the salient measure of performance which mediates accountability outcomes, they can operate in a compromised manner, unable to apprehend human rights harm. As such, they too present an opportunity for change.

Human rights enforcement may seem peripheral to government contracts, but their absence at present is precisely what sustains the punitive nature of incarceration. Without ‘teeth’, without the threat of substantive consequence, the capacity for human rights harm remains embedded in carceral spaces, and the contracts which enact them. Meanwhile, the maintenance of the relationship between government and private contractors in the Australian setting appears crucial to maintaining also the system of externalisation of responsibility for refugee protection.

- 1 United Nations, ‘Re-Opening of Offshore Detention Camps in Australia Could Lead to Rights Violations – UN,’ *United Nations News*, August 17, 2012. <https://news.un.org/en/story/2012/08/417762-re-opening-offshore-detention-camps-australia-could-lead-rights-violations-un>.
- 2 Ben Doherty and Ben Butler, ‘Nauru Detention Centre Operator Makes \$101m Profit – At Least \$500,000 for Each Detainee,’ *The Guardian*, February 12, 2022. <https://www.theguardian.com/world/2022/feb/12/nauru-detention-centre-operator-makes-101m-profit-at-least-500000-for-each-detainee>.
- 3 Bernard Keane, ‘Home Affairs Thrashes about in the Quicksand of Paladin,’ *Crikey*, February 19, 2019. <https://www.crikey.com.au/2019/02/19/home-affairs-paladin-scandal-questions/>.
- 4 Parliament of Australia, Senate, *Senate Orders for Production of Documents—Immigration—Department of Home Affairs—Paladin contracts—Order of 4 July 2019—Letter to the President of the Senate from the Minister for Employment, Skills, Small and Family Business (Senator Cash) Responding to the Order, and Attachments*. [https://dl.aph.gov.au/senate/tables/documents/OPD\\_Paladin\\_Combined.pdf](https://dl.aph.gov.au/senate/tables/documents/OPD_Paladin_Combined.pdf).
- 5 Angus Grigg, Lisa Murray, Jonathan Shapiro and Edmund Tadros, ‘Paladin Fined More Than 3700 Times in a Year,’ *Australian Financial Review*, September 17, 2019. <https://www.afr.com/policy/foreign-affairs/paladin-fined-more-than-3700-times-in-a-year-20190917-p52s4q>.
- 6 Angus Grigg, Lisa Murray, Jonathan Shapiro and Edmund Tadros, ‘Revealed: Paladin Fined over 1000 Times,’ *Australian Financial Times*, August 30, 2019. <https://www.afr.com/policy/foreign-affairs/revealed-paladin-fined-over-1000-times-20190829-p52lhx>.
- 7 Sev Ozdowski, ‘A Last Resort? National Inquiry into Children in Immigration Detention,’ *Australian Human Rights Commission*, 2004. <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/last-resort-national-inquiry-children-immigration>.
- 8 Behrouz Boochani, *No Friend but the Mountains: The True Story of an Illegally Imprisoned Refugee*, trans. Omid Tofighian, (London: Picador, 2019).
- 9 Ben Doherty and Helen Davidson, ‘Australia’s Offshore Detention Regime Is a Brutal and Obscene Piece of Self-Delusion,’ *The Guardian*, November 30, 2017. <https://www.theguardian.com/australia-news/2017/nov/30/australias-offshore-detention-regime-is-a-brutal-and-obscene-piece-of-self-delusion>.
- 10 Sharry Aiken and Stephanie J. Silverman, ‘Decarceral Futures: Bridging Immigration and Prison Justice towards an Abolitionist Future,’ *Citizenship Studies* 25, no. 2 (2021): 141-161.
- 11 Dan Butler, ‘Prisons for Profit: The Business of Incarceration,’ *SBS News*, August 27, 2021. <https://www.sbs.com.au/nitv/article/2021/08/27/prisons-profit-business-incarceration>.

## The Trump Wall: From the Spectacularisation to the Instrumentalisation of Borders

Ludovica Da Lozzo

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Since his presidential election in November 2020, Joe Biden pledged to reform the immigration system in the United States. He promised to take urgent action to counter the draconian regulations implemented during the Trump presidency and, by doing so, he promised a more humane immigration policy and the implementation of lawful pathways to citizenship.<sup>1</sup> That's how, on the first day of his administration, President Biden ordered to stop any wall construction initiated by his predecessor. Taking as a starting point this renewed scenario, this post aims at pointing out how narratives and aesthetics of border changed during and after the Trump-Era. As a matter of fact, the policy implemented by Trump reframed the imagery associated with the immigration crisis in the United States, the consequences of which will not be so easily wiped out.

### A “big, beautiful wall”

The construction of a physical barrier on the southern border with Mexico was a keystone of the Trump's presidency. He pledged to build a “big, beautiful wall” to halt the flow of illegal immigrants and drugs over the border.<sup>2</sup> He therefore put the securitarian discourse at the core of his programme, claiming that more strict regulations would have benefitted native-born workers as well as the economy of the nation as a whole.<sup>3</sup> Still, this border policy went much more beyond its declared aims, fuelling a perilous patriotism that eventually intensified already existing racial divisions within the country. At the same time, the whole situation was directly connected with the larger phenomenon of “spectacularisation of borders”.<sup>4</sup> In this framework, migrants crossing the border rapidly gained hyper-visibility through widespread media coverage. Still, the migration flow at the southern border was not new in itself: what was new was the imagery associated with it, as well as its instrumentalisation for political purposes. As a matter of fact, images of people suffering in their attempt to reach the U.S. were not only shared worldwide but, most importantly, were leveraged by the political power. This was made possible due to a combination of factors.

First, the Trump Wall contributed to making tangible an alleged American identity, the construction of which was ignited by the mainstream far-right ideology that ruled during the Trump-Era. The very definition of this cultural identity thus laid its foundation on an imagery of power

and exclusion. By constructing a fence at the US-Mexico borderline, a setting which had already witnessed various enforcements in the past, this rhetoric found a tangible dimension. Indeed, since the beginning of its construction, the Trump Wall seemed to legitimize the exclusion of any “anti-Americanism” trace, directly labelled as “unwanted” or “undesirable”.<sup>5</sup> Through this mystification of the American identity, the public opinion was therefore induced to believe that migrants and asylum-seekers were in any case not entitled to enter the nation.

Second, the symbolic dimension of borders must be considered as well. As we said, the construction of a border fence was part of a complex rhetoric of power that steered during the Trump presidency. In this context, the border construction involved a full-fledged cultural re-landscaping that encompassed a wide range of complex dynamics.<sup>6</sup> Considered as the only way to bring back an alleged American “faded grandeur”, the Trump Wall thus played a performative function, convincing the population that the construction of a barrier at the southern border was the only way to protect the nation.<sup>7</sup>

Third, we cannot ignore the role that mass media played in this context. By all accounts, the construction of this border fence received worldwide media coverage, which eventually contributed to further Trump's racist demagoguery.<sup>8</sup> In this way, the law intended to sanction people crossing the border remained largely invisible, blurring the distinction between legal and illegal migration. At the same time, stereotyped representations of the newcomers became hyper-visible, instilling a feeling of perpetual danger in the population. Mass media hence reinforced a consolidated pattern in which the border was depicted as vulnerable, while people crossing it were perceived as a potential threat.

### Future challenges

By going much more beyond any simplistic securitarian discourse, the Trump's border wall project far outstripped its former scopes to become the disruptive expression of long-standing xenophobic attitudes deeply rooted in the social fabric. Two important aspects stand out in this framework: the spectacularisation of borders and its consequent political instrumentalisation. Considered by many experts as a stand-in for larger promises of racial exclusion, it's no surprise that the Trump Wall was renamed the “Wall of Shame”.<sup>9</sup> With the renewed agenda pledged by President Biden, such tendencies now seem to withdraw. However, it must be stressed that these forces could easily heighten again in the future if fuelled by similar narratives and that the cultural war encouraged during the Trump presidency may have long-lasting effects that cannot be overlooked.

- 1 British Broadcasting Corporation, 'What Are President Biden's Challenges at the Border?' *BBC News*, November 17, 2021. <https://www.bbc.com/news/world-us-canada-56255613>.
- 2 Lucy Rodgers and Dominic Bailey, 'Trump Wall: How Much Has He Actually Built?' *BBC News*, October 31, 2020. <https://www.bbc.com/news/world-us-canada-46824649>.
- 3 Isabel Soto and Whitney Appel, 'Comparing Trump and Biden on Immigration,' *American Action Forum*, September 8, 2020. <https://www.americanactionforum.org/insight/comparing-trump-and-biden-on-immigration/>.
- 4 Nicholas De Genova, 'The Border Spectacle of Migrant "Victimisation";' *Open Democracy*, May 20, 2015. <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/border-spectacle-of-migrant-victimisation/>.
- 5 Ibid.
- 6 Mimi Yang, 'The Trump Wall: A Cultural Wall and a Cultural War,' *Lateral* 6, no.2 (Winter 2017): 1-12.
- 7 Áshild Kolås and Lacin Idil Oztig, 'From Towers to Walls: Trump's Border Wall as Entrepreneurial Performance,' *Environment and Planning C: Politics and Space* 40, no. 1 (February 2022): 124-42.
- 8 Sam Fulwood III, 'The Media Is Overlooking the Purpose of Trump's Border Wall,' *ThinkProgress*, January 11, 2019. <https://archive.thinkprogress.org/media-have-trumps-wall-all-wrong-d90d2665070a/>.
- 9 Guillermo Arias, 'Trump's Wall of Sham,' *The New York Times*, January 24, 2019. <https://www.nytimes.com/2019/01/24/opinion/trump-wall-shutdown.html>.

## Parallels of Cruelty to Refugees: Normalising the Unacceptable in Australia and the UK<sup>1</sup>

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On 14 April 2022, UK Prime Minister Boris Johnson unveiled the Memorandum of Understanding (MoU) that the government signed with Rwanda.<sup>2</sup> This MoU marks an important step in implementing the government's new Nationality and Borders Act, regarded as the 'the most radical changes to the broken asylum system in decades' by punishing individuals who try to enter the UK without prior authorisation.<sup>3</sup> A key component of this Act is the ability to send asylum-seekers who arrive in a manner that is dubbed 'illegal' (particularly targeting those who seek to arrive in UK via boat across the Channel) to be processed offshore. This MoU is the first such agreement that the UK government has signed with a third country to facilitate the offshore detention and processing of asylum claims. It also effectively prevents these asylum-seekers from being able to settle in the UK, should their claim be successfully processed.

This policy is framed for a domestic audience, linked to the rhetoric of the UK taking back control of its borders and determining who has the right to enter, or be excluded. Yet, this focus on control and deterrence will undermine the UK's standing and responsibility as a member of the community of states that are signatories to the Refugee Convention.

The Nationality and Borders Act and the recent MoU further align the UK with the harmful and cruel practices that successive Australian governments have adopted since the 1990s, pursuing a harsh policy of deterrence and detention towards asylum-seekers arriving by boat. Australia's approach comprises five pillars: mandatory and indefinite detention; offshore processing; maritime interdiction and push-backs; temporary protection visas (TPVs); and a no resettlement in Australia policy.<sup>4</sup> Offshore detention and processing of asylum-seekers represents the 'hallmark' of Australia's refugee policy, where the processing of asylum claims takes place beyond state territorial borders.<sup>5</sup>

In 2001, the Australian government concluded bilateral agreements with the governments of Nauru and Papua New Guinea (PNG) to facilitate the transfer of asylum-seekers to mandatory detention and processing centres in these countries as part of its Pacific Solution to deter what it labelled 'unauthorised maritime arrivals.' Legitimising this policy has been a narrative of protecting state sovereignty, where refugees are framed as threats to the integrity of state borders and societal cohesion. This policy has continued under successive governments, on

both sides of the political spectrum, even in the face of extensive evidence of the harm caused to those asylum-seekers who have been transferred to offshore detention centres and of the violation of international refugee, human rights and maritime law.<sup>6</sup> Despite this proven cruelty, Australia has increasingly been regarded - and even admired - as a model or template for governments around the world, and in particular for the UK government, as it also seeks to 'take back control' of its border.

The agreement with Rwanda paves the way for the UK to relocate asylum-seekers who arrive 'illegally' in the UK to Rwanda for processing. Under the scheme, individuals who are granted asylum will be encouraged to remain in Rwanda for at least five years. However, much of the scheme remains unclear.

Firstly, although the government had hoped that the first flights would commence by end May, the agreement is currently subject to a number of legal challenges which may either delay the implementation of the plan or scuttle the plan altogether.

Secondly, many practical aspects of the plan remain unclear. For example, there are short-term plans to convert a former hostel into a detention centre but no details on long-term plans to house transferred asylum-seekers.

Thirdly, there is no clarification as to what would happen to those individuals whose claims are rejected.<sup>7</sup>

Fourthly, the agreement requires the consent of both the UK and Rwanda for the relocation of individuals to these detention centres.<sup>8</sup> The UK is therefore reliant on the consent of Rwanda before it can transport an asylum seeker to Rwanda. In response to criticisms from the African Union and individual African states following an agreement that Rwanda signed with Denmark, the Rwandan government had stated 'it will not accept relocation of citizens of neighbouring countries or those with criminal records'.<sup>9</sup>

### ***Australia is no template – borrower beware!***

Although the UK government's attempt to model Australia and introduce a system of offshore processing could be potentially short-lived, it unfortunately confirms that there is a growing cruelty in its approach. With the growing global movement of asylum-seekers and refugees, both Australia and the UK have decided to engage in harsh practices and the adoption of harmful models for refugee protection.

Given the widespread documented physical, mental and sexual abuse against men, women and children under Australia's system of offshore processing and detention,<sup>10</sup> it is imperative that the UK government reconsider its plans to offshore its responsibilities, especially in light of its recognition that some refugees could face persecution under the Rwanda deal.

This approach by governments in the UK and Australia to externalisation risks eroding the international refugee system. Offshore processing policies challenge core principles of international refugee and human rights law, prevent people from exercising their right to seek asylum, and confine refugees in countries where their human rights are systematically violated.<sup>11</sup>

If the UK continues to follow the current Australian approach, it is feasible that this externalisation approach could become even more entrenched in other states, as a growing number of politicians in Europe already admire and promote the Australian case as an exemplar - and some have indicated their support for the UK's MoU with Rwanda.<sup>12</sup>

These policies remain damaging, with substantial human and political costs. They undermine international efforts and collaboration to bring about an enduring solution to refugee protection. It is imperative to hold reluctant states to account as they offload responsibility to states that are not in a position to protect the rights of asylum-seekers.

Both Australia and the UK engage in inhumane and cruel policies. These agreements are not, as Prime Minister Johnson presented, 'the prototype of a solution to the problems of global migration that is likely to be adopted by other countries'.<sup>13</sup> There are viable alternatives. Rather than a race to the bottom, both of these states could take it upon themselves to become leaders for a new approach, one that recognises a common humanity and a common claim to protection.

1 Originally published in *Asylum Insight* (Philomena Murray, Margherita Matera and Tamara Tubakovic, 2022. 'Parallels of Cruelty to Refugees: Normalising the Unacceptable in Australia and the UK.' *Asylum Insight*, May, 2022. <https://www.asyluminsight.com/murray-matera-tubakovic>).

2 United Kingdom of Great Britain and Northern Ireland, Home Office, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, 2022. <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r>.

3 *Nationality and Borders Bill 2022* (United Kingdom of Great Britain and Northern Ireland), 58/2. <https://bills.parliament.uk/publications/46276/documents/1756>; Lisa O'Carroll, 'Priti Patel to Reveal Proposals for Offshore Centres for Asylum Seekers,' *The Guardian*, July 6, 2021. <https://www.theguardian.com/uk-news/2021/jul/05/priti-patel-to-reveal-proposals-for-offshore-centres-for-asylum-seekers>.

4 Hessom Rezavi, 'The Split State: Australia's Binary Myth about People Seeking Asylum,' *Australian Book Review*, June, 2021. <https://www.australianbookreview.com.au/abr-online/current-issue/964-june-2021-no-432/7846-the-split-state-australia-binary-myth-about-people-seeking-asylum-by-hessom-razavi>.

5 Madeleine Gleeson and Natasha Yacou, *Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia*, Kaldor Centre for International Refugee Law Policy Brief 11, August 2021. [https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy\\_Brief\\_11\\_Offshore\\_Processing.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf).

6 Violeta Moreno-Lax, *The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia*, Kaldor Centre for International Refugee Law, Policy Brief 4, May 2017. [https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy\\_Brief\\_4\\_Interdiction\\_of\\_asylum\\_seekers\\_at\\_sea.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_4_Interdiction_of_asylum_seekers_at_sea.pdf); Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum Is Legal and Australia's Policies Are Not*, (Sydney: New South Publishing, 2014).

7 Parvati Nair, 'How the UK's Plan to Send Asylum Seekers to Rwanda Is 21st-Century Imperialism Writ Large,' *The Conversation*, April 22, 2022. <https://theconversation.com/how-the-uks-plan-to-send-asylum-seekers-to-rwanda-is-21st-century-imperialism-writ-large-181501>.

8 United Kingdom of Great Britain and Northern Ireland, Home Office, *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, 2022. <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r>.

9 Hanne Beirens and Samuel Davidoff-Gore, 'The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum,' *Migration Policy Institute*, April 2022. <https://www.migrationpolicy.org/news/uk-rwanda-asylum-agreement>.

10 Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island*, Papua New Guinea, December 11, 2013. <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>; Amnesty International 2014, *This is Still Breaking People: Update on Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island*, Papua New Guinea, May 12, 2014. <https://www.kaldorcentre.unsw.edu.au/key-reports-offshore-processing>; Amnesty International, *Island of Despair, Australia's "Processing" of Refugees on Nauru*, October 17, 2016. <https://www.amnesty.org/en/documents/asa12/4934/2016/en/>; Commonwealth of Australia, *Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Final Report*, 2015. [https://www.aph.gov.au/parliamentary\\_business/committees/senate/regional\\_processing\\_auru/regional\\_processing\\_auru/final\\_report](https://www.aph.gov.au/parliamentary_business/committees/senate/regional_processing_auru/regional_processing_auru/final_report); Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention,' *The Guardian*, August 10, 2016. <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>; UNHCR, *UNHCR Mission to the Republic of Nauru: 3-5 December 2012*, December 14, 2012. <https://www.refworld.org/docid/50cb24912.html>; UNHCR, UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 23 to 25 October 2013, November 26, 2016. <https://www.refworld.org/docid/5294aa8b0.html>.

11 Paul McDonough and Tamara Tubakovic, 'International Refugee Law and EU Asylum: Accordance and Influence,' in eds. L Tsourdi and P De Bruycker *Research Handbook on EU Migration and Asylum Law*, (Edward Elgar Publishing, forthcoming).

12 Aubrey Allegretti and Jennifer Rankin, 'Sending UK Asylum Seekers to Rwanda Will Save Money, Claims Minister,' *The Guardian*, April 15, 2022. <https://www.theguardian.com/uk-news/2022/apr/15/sending-uk-asylum-seekers-to-rwanda-will-save-money-says-minister>.

13 Andrew Sparrow, 'UK Plans to Send Thousands of Asylum Seekers to Rwanda, Says Boris Johnson - As It Happened,' *The Guardian*, April 15, 2022. <https://www.theguardian.com/politics/live/2022/apr/14/uk-politics-live-boris-johnson-asylum-seekers-rwanda-plan-provokes-fury-priti-patel-latest-updates>

## Carceral Intersections: Violence in Immigration and Youth Detention<sup>1</sup>

Samantha O'Donnell

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Australia is well-known for its racialised practices of incarceration. In 2020, Indigenous young people represented 48% of the overall youth detention population despite only representing 6% of the total population of young people in Australia.<sup>2</sup> This incarceration rate becomes even more stark when the focus is solely on the Northern Territory, a jurisdiction in Australia, where Indigenous young people consistently represent well above 90% of the total number of young people in detention.<sup>3</sup>

The Australian state engages in similarly violent carceral practices to incarcerate refugees. The Migration Act (1958) establishes the mandatory detention of non-citizens without a valid visa. This period of detention need not be determined and can be indefinite.<sup>4</sup> Immigration detention is not *officially* imprisonment, but it is clear that immigration detention centres are inherently carceral spaces that rely on punitive forms of control.<sup>5</sup> Australia also externalises responsibility for refugee protection through “offshore” detention centres in Papua New Guinea and Nauru. Loughnan highlights how Australia’s entry into agreements with these states, that are not signatory to the Refugee Convention, attempts to block asylum seekers from arriving in Australia and so limit its obligations under international law.<sup>6</sup> These collective policies have led to Australia’s detention regime being regarded as one of the harshest in the world.

This propensity towards incarceration is also connected to past and continuing colonial structures. As Rule Brown and Ironfield suggest, incarceration operates as a ‘colonial function... to further the erasure of First Nations people.’<sup>7</sup> Giannacopoulos and Loughnan similarly establish carcerality as a form of control over refugees that is firmly embedded within Australia’s settler-colonial logic, where the carceral expansion of the Australian state is justified through the imagination of terra nullius.<sup>8</sup>

In an article just published in *Critical Criminology*, I further develop the violent connections between these practices of incarceration.<sup>9</sup> I explore how the harms experienced by young Indigenous people in prison in the Northern Territory are insidiously similar to the harms experienced by refugees imprisoned in immigration detention both onshore and offshore. Drawing on qualitative analysis of publicly accessible first-hand accounts, I examine these experiences of harm as, in Achille Mbembe’s terms, a living death.<sup>10</sup> I also suggest that if we are to understand the harms experienced

by young Indigenous people and refugees when they are incarcerated, then their experiences must be situated as part of the racist practices that characterise the Australian settler-colonial state.<sup>11</sup>

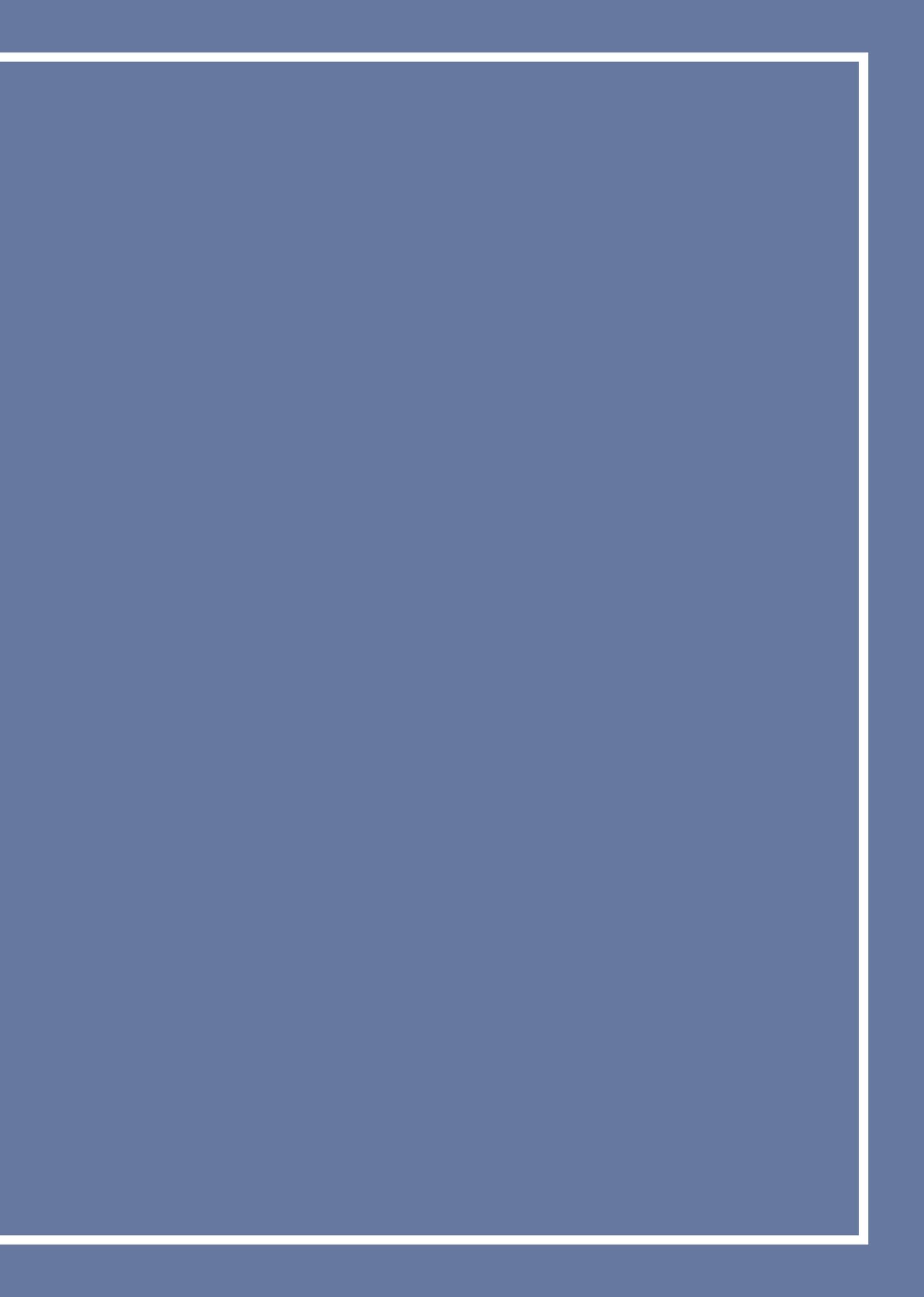
In my findings, I merge aspects of Mbembe’s necropower and Foucault’s disciplinary power to illustrate how racism and carcerality intersect to subject incarcerated Indigenous young people and refugees to four overlapping expressions of violence: structural violence, epistemic violence, physical violence and brutality, and disciplinary violence.<sup>12</sup> I suggest that it is the complex overlapping of these multiple forms of harm that creates an experience of living death. All four mechanisms, exist as part of the ongoing structural violence of settler-colonialism, operate epistemically to erase identities, oftentimes operate in physical ways, and, work disciplinarily to control and regulate. As I discuss in the article, by engaging existing theoretical perspectives to reconceptualise the experiences of these two groups as a living death, I build on existing critical scholarship to develop a critique of carceral systems.

It is also important to acknowledge that I am a white settler who has been advantaged by the Australian settler-colonial state. Although this article cannot be separated from my position of privilege, I recognise Indigenous sovereignty and adopt a decolonising perspective that works to move beyond what Gomeri poet and researcher Alison Whittaker terms, a ‘racist silence’ that we practice in Australia on a national scale.<sup>13</sup>

What is clear is that challenges to this racist silence are urgently needed. During the COVID-19 pandemic refugees have continued to be detained in hotels and immigration detention centres without appropriate health measures.<sup>14</sup> There has also been a recent reversal of legal reforms that arose out of the *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Royal Commission).<sup>15</sup> Such a reversal points to the limited ability of law reform to lead to substantive change, and directs our attention to the salience of colonial structures and practices that continue to underwrite violence at, and within the border.

In this article, I importantly shift the focus away from law and regulation. Instead, I broaden the theoretical tools available to criminologists and other critical scholars, and encourage structurally located challenges to this state-sanctioned violence.

- 1 Based on Samantha O'Donnell, 'Living Death at the Intersection of Necropower and Disciplinary Power: A Qualitative Exploration of Racialised and Detained Groups in Australia.' *Critical Criminology* (Forthcoming 2022): 1-20.
- 2 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2020, 2021* <https://www.aihw.gov.au/getmedia/37646dc9-dc6f-4259-812d-1b2fc5ad4314/aihw-juv-135.pdf.aspx?inline=true>.
- 3 Australian Institute of Health and Welfare, 'Youth detention population in Australia 2020.' *AIHW*, 2021. <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2020/contents/data-visualisation/trends-in-the-youth-detention>.
- 4 *Migration Act 1958* (Commonwealth of Australia). Compilation no. 142. <https://www.legislation.gov.au/Details/C2019C00046>.
- 5 Joseph Pugliese, 'Penal Asylum: Refugees, Ethics, Hospitality,' *Borderlands eJournal* 1, no. 1 (2002): 1-8.
- 6 Claire Loughnan, 'Active Neglect and the Externalisation of Responsibility for Refugee Protection,' in *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*, eds. Azadeh Dastyari, Amy Nethery and Asher Hirsch (London: Routledge, 2023).
- 7 Latoya Aroha Rule, Lilly Brown and Natalie Ironfield, 'Incarceration Nation exposes the racist foundations of policing and imprisonment in Australia, but at what cost?' *The Conversation*, August 30, 2021. <https://theconversation.com/incarceration-nation-exposes-the-racist-foundations-of-policing-and-imprisonment-in-australia-but-at-what-cost-165951>.
- 8 Maria Giannacopoulos and Claire Loughnan, 'Closure' at Manus Island and Carceral Expansion in the Open Air Prison, *Globalizations* 17, no. 7 (2020): 1118-1135.
- 9 Samantha O'Donnell, 'Living Death at the Intersection of Necropower and Disciplinary Power: A Qualitative Exploration of Racialised and Detained Groups in Australia.' *Critical Criminology* (Forthcoming, 2022): 1-20.
- 10 Achille Mbembe, *Necropolitics*, (Durham: Duke University Press, 2019).
- 11 Suvedrini Perera and Joseph Pugliese, 'Sexual Violence and the Border: Colonial Genealogies of US and Australian Immigration Detention Regimes' *Social & Legal Studies* 30, no. 1 (February 2021): 66-79.
- 12 Mbembe, *Necropolitics*; Michel Foucault, *Discipline and Punish: The Birth of the Prison*. 3rd ed. (London: Penguin, 2020).
- 13 Alison Whittaker, 'Despite 432 Indigenous Deaths in Custody since 1991, No One Has Ever Been Convicted. Racist Silence and Complicity Are to Blame,' *The Conversation*, June 3, 2020. <https://theconversation.com/despite-432-indigenous-deaths-in-custody-since-1991-no-one-has-ever-been-convicted-racist-silence-and-complicity-are-to-blame-139873>.
- 14 Anthea Vogl, Caroline Fleay, Claire Loughnan, Philomena Murray, and Sara Dehm, 'COVID-19 and the Relentless Harms of Australia's Punitive Immigration Detention Regime,' *Crime, Media, Culture* 17, no. 1 (March 2021): 43-51.
- 15 Nicholas Fancourt and Olga Havnen, 'The NT's Tough-on-Crime Approach Won't Reduce Youth Offending. This Is What We Know Works,' *The Conversation*, May 11, 2021. <https://theconversation.com/the-nts-tough-on-crime-approach-wont-reduce-youth-offending-this-is-what-we-know-works-160361>.





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