

## NOTE

A LOOK AT AUSTRALIA'S ASYLUM POLICY THROUGH THE LENS OF  
THE UNITED STATES' MPP

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## INTRODUCTION

In 2019, after an Australian offshore detention facility denied a thirty one-year-old Indian refugee medical care, he locked himself in his room and set it on fire.<sup>1</sup> Fellow refugees and security guards broke down the door and rescued him.<sup>2</sup> In addition to burning himself, the man attempted to slash his stomach multiple times.<sup>3</sup> It took an attempt on his own life for the man to finally get the medical treatment he sought.<sup>4</sup> Unfortunately, there are dozens of tragic incidents similar to this in Australian offshore detention facilities.<sup>5</sup> There were ninety-five other suicide attempts in the summer of 2019.<sup>6</sup> Moreover, from 2013 to 2018, at least twelve refugees and asylum seekers have died at Australian offshore facilities.<sup>7</sup> The asylum seekers Australia returns to the asylum seekers' country of persecution are not included in these statistics.<sup>8</sup> When returned, asylum seekers face further persecution and punishment for attempting to flee.<sup>9</sup>

For years, Australia has taken extreme measures to make sure asylum seekers are not settled within its borders.<sup>10</sup> In 2013, the Australian government implemented a controversial, offshore processing policy, which is still in effect today.<sup>11</sup> This policy mandates that detained asylum seekers who arrive by boat must be transferred to small island nations in the Pacific to await

1. Yan Zhuang, *Man sets himself on fire on Manus Island after being 'denied medical treatment,'* THE SYDNEY MORNING HERALD, (June 21, 2019, 6:41 PM), <https://www.smh.com.au/national/man-sets-himself-on-fire-on-manus-island-after-being-denied-medical-treatment-20190621-p5204i.html>.

2. *Id.*

3. *Id.*

4. *See generally* Yan Zhuang, *supra* note 1 (discussing a man that self-harmed after a clinic refused to provide him with medical treatment).

5. *Id.*

6. *Id.*

7. *Australia Events of 2018*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/australia> (Last visited May 8, 2020) [hereinafter *Australia Events*].

8. *See infra* Part IV; *See Turning Back Boats*, ANDREW & RENATA KALDOR CTR. FOR INT'L REFUGEE LAW, <https://www.kaldorcentre.unsw.edu.au/publication/'turning-back-boats'> (last visited on May 8, 2020) [hereinafter Kaldor Center, *Turning Back Boats*] (explaining that Australian authorities do not track the outcome for people whose boats are returned).

9. *See* Shira Sebban, *Saving the World, One Life at a Time*, NEWMATILDA.COM (Oct. 15, 2016), <https://newmatilda.com/2016/10/15/saving-the-world-one-life-at-a-time/> (discussing specific instances of persecution faced by Vietnamese individuals who sought asylum in Australia but were returned to their home country).

10. *See* Patrick van Berlo, *The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality*, 17 HUM. RTS. L. REV. 33, 36 (2017) (discussing Australia's current border policy).

11. *Id.*

processing.<sup>12</sup> The offshore processing policy, coupled with the conditions asylum seekers face, has exposed Australia to allegations which claim Australia does not live up to their obligations to refugees under international law.<sup>13</sup> The difference between an asylum seeker and a refugee will be discussed later in this article.

Since 2012, an asylum seeker who attempts to reach Australia by boat without a valid visa faces the possibility of detention at an offshore processing facility or being sent back to the nation they fled from.<sup>14</sup> In 2013, the Australian government introduced Operation Sovereign Borders to address the influx of asylum seekers arriving in Australia by boat.<sup>15</sup> Under Operation Sovereign Borders, Australia's military intercepts boats that sail toward Australia.<sup>16</sup> The boats are usually turned away and brought right outside the territorial waters of the boat's original departure country.<sup>17</sup>

In 2019, similar to Australia's policies, the United States implemented the "Remain in Mexico Policy," or the Migration Protection Protocol ("MPP").<sup>18</sup> Under MPP, asylum seekers who arrive at the U.S.-Mexico border are returned to Mexico to await asylum proceedings in the United States.<sup>19</sup> Often, the asylum seekers are targets of violent attacks, sex crimes, and human trafficking.<sup>20</sup>

MPP has been widely criticized and is the subject of a lawsuit brought on behalf of asylum seekers at the U.S.-Mexico Border who were subjected to MPP.<sup>21</sup> The lawsuit alleges MPP violates the international law principle of *non-refoulement*, amongst other human obligations the United States owes asylum seekers.<sup>22</sup> The international law principle of *non-refoulement* prevents

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12. *Id.*

13. Susanna Dechent, Sharmin Tania & Ajckie Mapulanga-Hulston, *Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities*, 31 INT'L J. REFUGEE L., 83, 84 (2019).

14. *Australia's Refugee Policy: An Overview*, ANDREW & RENATA KALDOR CENTER FOR INT'L. REFUGEE LAW, <https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview> (Last visited on May 8, 2020) [hereinafter *Refugee Policy*].

15. *Id.*

16. *Id.*

17. Kaldor Center, *Turning Back Boats*, *supra* note 8.

18. *See generally* U.S. Dep't of Homeland Sec., *Migrant Protection Protocols* (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter MPP].

19. *Id.*

20. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1078 (9th Cir. 2020).

21. *Id.* at 1078-79.

22. *Id.* at 1081.

countries from returning asylum seekers and refugees to countries where they have a well-founded fear of persecution.<sup>23</sup>

The controversial immigration policies of the United States and Australia are similar because both governments are legislating and implementing policies to close their borders to asylum seekers. As a result, both policies have been criticized for subjecting asylum seekers to persecution in other nations. This Note argues Australia's immigration policy violates *non-refoulement*. Specifically, this Note will apply the international law arguments raised in opposition to MPP to criticize Australia's immigration policy as violating international law.

Part I of this Note will discuss the sources of international law that give rights to asylum seekers and entitle asylum seekers to certain rights. Part II will outline how the United States and Australia have implemented *non-refoulement* principles into each nation's domestic law. Additionally, Part II highlights the U.S. asylum policy at the U.S.-Mexico border as well as Australia's asylum policy regarding irregular maritime arrivals. Part III examines the legal challenges made against MPP on behalf of asylum seekers. Part IV will examine the current Australian asylum policies portrayed by the arguments made against MPP and discuss how Australia falls short of its international obligations to asylum seekers. Part V will offer suggestions of how Australia could reform their asylum policy as it applies to irregular maritime arrivals.

## I. SOURCE OF LAW

### A. *The History of Refugee Protection*

The principle of *non-refoulement* has long been incorporated in international refugee law and is essential to the protection of asylum seekers. World War I triggered people around the world to flee from the persecution in their home nations and seek refuge in other countries.<sup>24</sup> However, there were no guidelines on how nations, in which refugees sought refuge, should treat refugees. In 1920, the League of Nations was formed to resolve international disputes, which included addressing refugee needs.<sup>25</sup> The League of Nations provided guidance on how refugees and asylum seekers

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23. U.N. High Comm'r for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, U.N. Doc. DIP 1951 Conv./ Q&A A.8/ENG1, at 4 (Sept. 2011), <https://www.unhcr.org/en-us/4ec262df9.pdf> [hereinafter UNHCR].

24. *Id.* at 1.

25. DAVID MARTIN ET AL., *FORCED MIGRATION LAW AND POLICY*, 49 (2d ed. 2013) (The League of Nations appointed the first High Commissioner for Refugees in 1921. The High Commissioner's Office focused its efforts to finding refugees resettlement opportunities and providing the refugees with identifying documents).

should be treated when seeking refuge in other nations.<sup>26</sup> However, the guidance was not binding; nations were free to create their own policies.<sup>27</sup>

The October 28, 1933 Convention Relating to the International Status of Refugees ("1933 Convention") was the first binding instrument that protected refugees and asylum seekers.<sup>28</sup> The 1933 Convention included a *non-refoulement* provision that prohibited nations from rejecting refugees at their borders.<sup>29</sup> However, the 1933 Convention was ratified by only eight nations<sup>30</sup> and the *non-refoulement* provision only applied to the Russian, Armenian, Assyrian, Assyro-Chaldean, and Turkish refugees.<sup>31</sup>

The efforts of the 1933 Convention proved to be futile in providing sufficient protections to refugees because of the presence of fascist regimes.<sup>32</sup> Furthermore, the commencement of World War II created a sharp increase in the number of people seeking refuge outside of their homelands.<sup>33</sup> In response, the United Nations formed the Office of the United Nations High Commissioner for Refugees ("UNHCR") on December 14, 1950, to address the worldwide displacement of people from their home countries.<sup>34</sup> The goal of the UNHCR was similar to that of the 1933 Convention, to protect refugees who fled their home countries seeking safety from persecution.<sup>35</sup> The UNHCR sought to create a body of law to ensure the refugees had adequate protections.<sup>36</sup>

#### *B. The 1951 Convention Relating to the Status of Refugees and 1967 Protocol*

In 1951, the United Nations adopted the Convention Relating to the Status of Refugees ("the 1951 Convention").<sup>37</sup> Subsequent conflicts around the

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26. *Id.* at 50.

27. *Id.*

28. Robert J. Beck, *Britain and the 1933 Refugee Convention: National or State Sovereignty?*, 11 INT'L J. REFUGEE L. 597, 603 (1999) [hereinafter *1933 Convention*].

29. MARTIN ET AL., *supra* note 25, at 50.

30. *1933 Convention*, *supra* note 28, at 600.

31. *Id.* at 603.

32. MARTIN ET AL., *supra* note 25, at 50.

33. UNHCR, *supra* note 23 at 1.

34. DREE K. COLLOPY, *AILA'S ASYLUM PRIMER*, 3 (Am. Immigr. Laws. Ass'n, 8th ed. 2019).

35. *Id.*

36. UNHCR, *supra* note 23, at 1.

37. *Id.*

world displaced more refugees who needed protection.<sup>38</sup> This led to the creation of the 1967 Protocol by the United Nations.<sup>39</sup>

The 1951 Convention and the 1967 Protocol are treaties which outline the rights and protections of asylum seekers.<sup>40</sup> The 1951 Convention has 145 signatories and the 1967 Protocol has 146 signatories.<sup>41</sup> There are 148 nations that are parties to one of these instruments, and there are 142 nations that are party to both.<sup>42</sup> Notably, the United States is only a party to the 1967 Protocol, while Australia is a party to both instruments.<sup>43</sup> As defined by the 1951 Convention and later amended by the 1967 Protocol, a refugee is a person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>44</sup>

To qualify as a refugee, a person must meet the criteria set forth by the 1951 Convention.<sup>45</sup> An asylum seeker is someone who has moved across international borders in search of international protection.<sup>46</sup> Countries with established asylum procedures, consider an asylum seeker to be someone who

38. See generally U.N. High Comm'r for Refugees, *History of UNHCR*, <https://www.unhcr.org/en-us/history-of-unhcr.html> (last visited on June 30, 2020) (noting UNHCR's involvement in assisting refugees during the 1960s decolonization of Africa, resettlement of Hungarians during the Hungarian Revolution, and the displacement of refugees from the Middle East, Africa, and Asia).

39. UNHCR, *supra* note 23, at 1.

40. U.N. High Comm'r for Refugees, *Convention and Protocol Relating to the Status of Refugees*, 2, <https://www.unhcr.org/en-us/3b66c2aa10> (last visited May 8, 2020).

41. U.N. High Comm'r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR 1, (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (hereinafter 1951 Convention State Parties)

42. *Id.*

43. *Id.*

44. Convention Relating to the Status of Refugees, art. I, ¶ 2, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

45. U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 28, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), <https://www.unhcr.org/4d93528a9.pdf> [hereinafter UNHCR Handbook].

46. MARTIN ET AL., *supra* note 25, at 50.

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has submitted an asylum claim that has yet to be resolved by the admitting country.<sup>47</sup> In order to provide effective protection, *non-refoulement* applies to asylum seekers, who are presumed to be refugees until their status has been determined.<sup>48</sup>

### C. The International Law Principle of *non-refoulement*

The principle of *non-refoulement* is vital to the protection of refugees and asylum seekers. In fact, it is the principle underlying both the 1951 Convention and the 1967 Protocol. Another United Nations treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also provides asylum seekers protection from *refoulement*.<sup>49</sup>

#### 1. The 1951 Convention

The 1951 Convention defines and outlines the principle of *non-refoulement* as follows:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>50</sup>

Article 33 of the 1951 Convention does not extend *non-refoulement* obligations to individuals who are reasonably believed to be a security threat

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47. Amnesty International, *What's the Difference Between a Refugee and Asylum Seeker?*, <https://www.amnesty.org.au/refugee-and-an-asylum-seeker-difference> (last visited May 8, 2020).

48. Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Appellees' Answering Brief at 14, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (2019) (No. 19-15716) [hereinafter UNHCR Amicus Brief]; Note on International Protection, Rep. of the Exec. Comm. of the High Comm'r's Programme on the Work of Its Forty-Fourth Session, ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31, 1993).

49. See 1951 Convention, *supra* note 44, at art. 33 (defining *refoulement*); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 117 [hereinafter CAT].

50. 1951 Convention, *supra* note 44, at art. 33.

to the nation in which they seek entry.<sup>51</sup> Moreover, the 1951 Convention and the 1967 Protocol do not require signatories to admit refugees, they only prohibit *refoulement*.<sup>52</sup>

## 2. *The Convention Against Torture*

The prohibition against *refoulement* is also expressly stated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). Article three of CAT states:

1. No State Party shall expel, return (“refoule”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State Concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>53</sup>

The 1951 Convention, the 1967 Protocol, and CAT provide signatories with the framework to create legislation and policies that incorporate the protection of refugees and asylum seekers. The United States and Australia created legislation that adheres to the duties imposed on them by these treaties.

### *D. United States Refugee Law*

Both Australia and the United States, as parties to treaties that seek to protect asylum seekers and refugees, have incorporated the principles from these treaties into their domestic law.

The United States ratified the 1967 Protocol into domestic law when Congress passed the Refugee Act of 1980. Though the United States is not a party to the 1951 Convention, the 1967 protocol binds the United States to comply with the substantive provisions of the 1951 Convention which obligate the United States to follow the policy of *non-refoulement*.<sup>54</sup>

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51. 1951 Convention, *supra* note 44, at art. 33.

52. Tara Manger, *A Less than ‘Pacific’ Solution for Asylum Seekers in Australia*, 16 INT’L J. REFUGEE L. 53, 59 (2004).

53. CAT, *supra* note 49.

54. 1951 Convention, *supra* note 44, at art. 33.



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The 1951 Convention's definition of a "refugee"<sup>55</sup> was incorporated into United States domestic law through the Immigration and Nationality Act ("INA").<sup>56</sup>

### *E. Australian Refugee Law*

Australia is a signatory to both the 1951 Convention and the 1967 Protocol.<sup>57</sup> Australia's Migration Act of 1958 ("Migration Act 1958") states Australia's *non-refoulement* obligations arise from its status as a signatory to both the 1951 Convention and CAT.<sup>58</sup> Additionally, Australia has recognized the 1951 Convention and CAT both outline the rights guaranteed to migrants.<sup>59</sup> However, the Migration and Maritime Legislation Amendment Bill 2014 amended the Migration Act 1958, removing most references to the 1951 Convention, discussed below.<sup>60</sup>

## II. CURRENT POLICIES

This section of the note will outline the current asylum policies in the United States and Australia. Specifically, it will focus on each country's treatment of individuals seeking asylum with the hope of escaping persecution in their home nations. First, this section will outline the current policy employed at the U.S.-Mexico border. Then, this section will provide a brief overview of the recent history of Australia's border policy and how it has shaped Australia's current policy.

### *A. The United States*

In January of 2019, the United States announced the implementation of the Migrant Protection Protocols ("MPP"), also known as the "Remain in

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55. 1951 Convention, *supra* note 44, at art. 1.

56. 8 USC § 1011 (a)(42) (2020) (defining refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."); 1951 Convention, *supra* note 44.

57. 1951 Convention State Parties, *supra* note 41; Jessica Howard, *To Deter and Deny*, 21 REFUGE 33, 36 (2003).

58. *Migration Act 1958* (Cth) s 5 (Austl.); 1951 Convention State Parties, *supra* note 41.

59. *Id.* at s 198AA.

60. Khalid Koser, *Australia and the 1951 Refugee Convention*, (Apr. 30, 2015), <https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention>.

Mexico” policy.<sup>61</sup> Under the MPP, migrants seeking admission into the United States are returned to Mexico during their pending immigration proceedings.<sup>62</sup> The Department of Homeland Security (“DHS”) claims this policy was enacted to restore a safe immigration process and reduce threats to national security.<sup>63</sup> Since its inception, the MPP applies to asylum seekers from Spanish speaking<sup>64</sup> countries at the U.S.-Mexico border.<sup>65</sup> Customs and Border Protection (“CBP”) previously stated people from non-Spanish speaking countries who are seeking asylum were not subject to MPP. However, on January 29, 2020, DHS announced Brazilian migrants who seek asylum at the Mexican border are now subject to MPP.<sup>66</sup> Brazilian migrants are now the first group of migrants from non-Spanish speaking nations to be subject to MPP.<sup>67</sup>

Section 235 of the INA applies to both the inspection<sup>68</sup> and the expedited removal<sup>69</sup> of migrants at the U.S.-Mexico border, including those who are not clearly entitled to admission.<sup>70</sup> This includes people who apply for asylum.<sup>71</sup> Under the INA, DHS may return an asylum seeker who arrives by land at the Mexican border back to Mexico, during the pendency of removal proceeding.<sup>72</sup> Section 235 (b)(2)(c) of the INA states,

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory

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61. MPP, *supra* note 18.

62. Dale Kim, *Remain in Mexico: How the U.S. is Flouting its Obligation to Protect Asylum Seekers*, COLUM. J. OF TRANSNAT’L L. (2019)

63. MPP, *supra* note 18.

64. The named plaintiffs challenging the MPP are from Guatemala, Honduras, and El Salvador.

65. Am. Immigr. Council, *Policies Affecting Asylum Seekers at the Border*, 2-3 (Jan. 29, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/policies\\_affecting\\_asylum\\_seekers\\_at\\_the\\_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf).

66. Press Release, Dep’t of Homeland Sec., *DHS Expands MPP To Brazilian Nationals*, (Jan. 29, 2020), <https://www.dhs.gov/news/2020/01/29/dhs-expands-mpp-brazilian-nationals>.

67. Camilo Montoya-Galvez, *U.S. to Require Brazilian Asylum Seekers to Wait in Mexico for Court Hearings*, CBS News (Jan. 29, 2020, 6:33 PM), <https://www.cbsnews.com/news/remain-in-mexico-expansion-us-to-require-brazilian-asylum-seekers-to-wait-in-mexico-for-hearings/>.

68. 8 USC § 1225(b)(1)(A) (2020).

69. 8 USC § 1225(b)(1)(B)) (2020).

70. 8 USC § 1225(b)(1)(A) (2020).

71. MPP, *supra* note 18.

72. 8 USC § 1225(b)(2)(C) (2020).

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contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229(a)<sup>73</sup> of this title.<sup>74</sup>

Under MPP, a U.S. asylum officer will interview the asylum seeker and assess the risk of persecution if returned to Mexico (“*nonrefoulement* interview”).<sup>75</sup> The asylum officer is not required to ask an asylum seeker if they fear returning to Mexico.<sup>76</sup> The only time an asylum officer will determine whether it is more likely than not that the asylum seeker would face persecution if returned to Mexico, is if the asylum seeker states they fear persecution.<sup>77</sup> If the asylum officer finds that the applicant is more likely than not<sup>78</sup> to face persecution and torture in Mexico, MPP does not apply and the asylum seeker is permitted to enter the United States to litigate their asylum claim.<sup>79</sup> However, if the asylum officer determines the asylum seeker’s fear does not meet the “more likely than not” standard as it pertains to persecution in Mexico, the asylum seeker will be returned to Mexico while they await further proceedings.<sup>80</sup>

### B. Australia

Australia’s immigration policy is widely criticized for failing to uphold international law. Similar to the United States’ exclusive application of the MPP only at the U.S.-Mexico border, Australia implements different procedures for asylum seekers arriving by boat. Over the past twenty years, a series of events and legislative acts shaped and led to the creation of Operation Sovereign Borders, Australia’s current immigration policy for illegal maritime arrivals.

On August 26, 2001, a Norwegian ship, the *M/V Tampa*, rescued over 400 asylum seekers at sea near Australia and sought to dock in the nearest

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73. 8 USC § 1229(a) as stated above refers to administrative proceedings where an immigration judge decides the admissibility or deportability of person seeking admission into the United States.

74. 8 USC § 1225(b)(2)(C) (2020). In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

75. 8 USC § 1225 (b)(1)(A)(ii) (2020).

76. Innovation Law Lab v. Wolf, *supra* note 20, at 1079.

77. *Id.* at 1078.

78. *Id.*

79. *See, e.g.*, Innovation Law Lab v. McAleenan, 924 F.3d 503, 506 (9th Cir. 2019).

80. *Id.*; Innovation Law Lab v. Wolf, *supra* note 20, at 1078.

Australian port.<sup>81</sup> Facing an increased number of irregular boat arrivals,<sup>82</sup> Australia refused to allow the boat to dock.<sup>83</sup> While the boat was still at sea and trying to dock in Australia, Australia struck a deal with New Zealand and Nauru to divide processing the refugees.<sup>84</sup> Nauru, a small island nation in the South Pacific, agreed to take two-thirds of the asylum seekers while New Zealand accepted 150.<sup>85</sup>

In response to the *M/V Tampa* incident, Australia announced a new policy called the Pacific Solution.<sup>86</sup> The Pacific Solution sought to prevent asylum seekers from entering Australian territorial waters in an attempt to deny asylum seekers access to Australian asylum procedures.<sup>87</sup> Under the Pacific Solution, Australia aimed to redirect asylum seekers sent to other nations or to Australia's offshore processing sites in Nauru and Papua New Guinea.<sup>88</sup> The policy also established border protection policies based on deterrence, punishing asylum seekers who arrive by boat by placing them in detention facilities.<sup>89</sup> The Pacific Solution ended in 2007 when Australia elected a new government.<sup>90</sup>

In 2012, the number of asylum seekers significantly increased, and in turn, Australia passed legislation reestablishing the use of offshore processing centers to detain asylum seekers.<sup>91</sup> The new policy created a "no advantage principle," so that asylum seekers arriving by boat would not have their status determined faster than asylum seekers who arrive by plane.<sup>92</sup> The Prime Minister of Australia further secured Australia's borders by announcing any asylum seeker without a valid visa who arrives by boat after July 19, 2013, will not be resettled in Australia.<sup>93</sup> This policy accompanied an agreement with Nauru in which Nauru agreed to settle asylum seekers, processed and declared refugees in Nauru.<sup>94</sup>

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81. van Berlo, *supra* note 10, at 3.

82. Howard, *supra* note 57.

83. van Berlo, *supra* note 10, at 3.

84. *Id.*

85. United States Committee for Refugees and Immigrants, *Paying the Price: Australia, Indonesia try to Stop Asylum Seekers*, 22 REFUGEE REP. no. 8, September 2001, <https://www.refworld.org/docid/3c58099a1.html> (last visited 14 November 2020)

86. Manger, *supra* note 52.

87. *Id.*

88. *Id.*

89. van Berlo, *supra* note 10.

90. *Id.* at 4.

91. Dechent et al., *supra* note 13, at 5.

92. *Id.*

93. *Id.*

94. *Id.* at 5-6.

Australia has not sent any new asylum seekers sent to Papua New Guinea or Nauru since 2014;<sup>95</sup> however, hundreds of asylum seekers remain detained on these islands.<sup>96</sup> A detained asylum seeker can be brought to Australia for medical treatment, but is deemed a “transitory person” and is returned to the offshore facility as soon as possible.<sup>97</sup>

### 1. Current Legislation

Australia currently polices its borders through Operation Sovereign Borders, a militarized coalition designed to combat irregular migration.<sup>98</sup> According to the Operation Sovereign Borders' website, “Australia's borders are closed to illegal maritime migration. . . Anyone who attempts an unauthorized[sic] boat voyage to Australia will be turned back to their point of departure, returned to their home country, or transferred to another country.”<sup>99</sup> Under Operation Sovereign Borders, the only way to gain entry to Australia is with an Australian visa.<sup>100</sup> The Australian Government does not generally release information about on-water operations, such as those associated with Operation Sovereign Borders, so the information available to the public is limited.<sup>101</sup>

In 2014, Australia overwrote the international obligations it once had through legislative acts and judicial proceedings. Section 72(4) of Australia's Maritime Powers Act (2013) authorizes Australian maritime officers to detain migrants who enter Australian waters and return them outside Australian territorial waters.<sup>102</sup> In *CPCF v. Minister for Immigration and Border Protection & Anor*, plaintiffs detained at sea challenged this provision. Just before Australia's High Court rendered its opinion in *CPCF*, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 was rushed through Australia's legislative process.<sup>103</sup>

95. *Refugee Policy*, *supra* note 14.

96. Damien Cave, *A Timeline of Despair in Australia's Offshore Detention Centers*, N.Y. TIMES, (June 26, 2019) <https://www.nytimes.com/2019/06/26/world/australia/australia-manus-suicide.html>.

97. *Migration Act 1958* (Cth) s 198 (Austl.).

98. Dechent et al., *supra* note 13.

99. *Australia's borders are closed to illegal migrants*, AUSTRALIAN GOVERNMENT, <https://osb.homeaffairs.gov.au/outside-australia> (last visited July 23, 2020).

100. *Id.*

101. *Refugee Policy*, *supra* note 14.

102. *Maritime Powers Act 2013* (Cth) (Austl.).

103. Marinella Marmo & Maria Giannocopoulos, *Cycles of judicial and executive power in irregular migration*, 5 COMPARATIVE MIGRATION STUDIES at 12, 16 (2017), <https://doi.org/10.1186/s40878-017-0059-x>.

The Maritime Powers Act, through the 2014 amendment, explicitly prioritizes border policing over the rights of asylum seekers as stated in the 1951 Convention and 1967 Protocol. For example, Section 75A of the Migration Act is titled *Failure to consider international obligations etc. does not invalidate exercise of powers*.<sup>104</sup> Section 75A states:

- (1) The exercise of a power under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H is not invalid:
  - (a) because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or
  - (b) because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or
  - (c) because the exercise of the power is inconsistent with Australia's international obligations.
- (2) Subsection (1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraph (1)(a), (b) or (c).<sup>105</sup>

In the *CPCF* opinion, the court held the Maritime Powers Act did not violate Australia's obligation of *non-refoulement* by upholding section 74 of the Migration Act.<sup>106</sup> The court reasoned section 74<sup>107</sup> of the Maritime Powers Act "embraces risks of the kind to which the *non-refoulement* obligations under the Refugee Convention and the Convention against torture are directed."<sup>108</sup> Section 74 of the Maritime Powers Act requires that a maritime officer "be satisfied that it is safe to place a person in the place to which the person is taken."<sup>109</sup>

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104. *Id.*; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (Austl).

105. *Maritime Powers Act*, *supra* note 102.

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

107. "A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place." *Maritime Powers Act*, *supra* note 102.

108. *CPCF*, *supra* note 106, at ¶ 12.

109. *Id.* at ¶ 126; The High Court stated there was no violation of *non-refoulement* because there were no facts the migrants would not be safe in the country the migrants were brought.

## 2. *Procedures of Operation Sovereign Borders*

Operation Sovereign Borders is Australia's current border protection policy.<sup>110</sup> Under Operation Sovereign Borders, migrants intercepted by the Australian Government in Australian waters can be "turned back."<sup>111</sup> A "turnback" occurs when the Australian Government removes the intercepted vessel from Australian waters and brings the vessel outside of the country it departed.<sup>112</sup> It is unclear whether people on these vessels have the opportunity to raise an asylum claim.<sup>113</sup>

A "takeback" is where Australia works with the vessel's country of departure to return the passengers and crew to that country.<sup>114</sup> In takeback situations, Australia uses "an enhanced screening process at sea" to determine if the asylum seekers are at risk of persecution.<sup>115</sup> Returned asylum seekers have stated the enhanced screening process does not afford asylum seekers a sufficient opportunity to state a fear of persecution.<sup>116</sup>

Despite the goals of the 1951 Convention and the 1967 Protocol to protect asylum seekers, the United States and Australia's immigration policies have failed to comply with them.

### III. CHALLENGES TO MPP

MPP has drawn heavy opposition including a lawsuit brought by Innovation Law Lab.<sup>117</sup> Innovation Law Lab, along with other immigration advocates, sued the United States Government<sup>118</sup> on behalf of mostly Central American asylum seekers who were forced to return to Mexico while they awaited legal proceedings to determine their asylum status.<sup>119</sup>

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110. Kaldor Center, *Turning Back Boats*, *supra* note 8.

111. Australia distinguishes between "turnbacks" and "takebacks." "Turnbacks" are vessels found in territorial waters. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; *See also* Sebban, *supra* note 9.

117. Kim, *supra* note 62.

118. The suits name the current Acting Secretary of Homeland Security. The suits are *Innovation Law Lab v. Nielsen*, *Innovation Law Lab v. McAleenan*, and *Innovation Law Lab v. Wolf* are part of the same litigation, the named defendant is the Secretary of Homeland Security.

119. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019).

### A. *Innovation Law Lab takes on MPP*

One of the main legal arguments Innovation Law Lab raised against the MPP is that the MPP violates the United States' *non-refoulement* obligation by returning asylum seekers to a country where they face persecution.<sup>120</sup>

#### 1. *The United States is Bound by International Law*

Congress enacted section 1231(b)(3), or the withholding of removal statute, as part of the Refugee Act of 1980.<sup>121</sup> The Supreme Court has acknowledged this statute “parallels” Article 33 of the 1951 Convention.<sup>122</sup> Furthermore, Innovation Law Lab argued Article 3 of CAT was implemented into the INA.<sup>123</sup> The INA states “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.”<sup>124</sup>

Innovation Law Lab argued the forced return policy of MPP violates the withholding of removal statute.<sup>125</sup> The withholding of removal statute forbids the return of an alien to a country where their “life or freedom is threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”<sup>126</sup> Because the Refugee Act of 1980 incorporates Article 33 of the 1951 Convention, the violation of the withholding of removal statute violates the international principle of *non-refoulement*.

#### 2. *The Named Plaintiffs Face Persecution in Mexico*

The principle of *non-refoulement* classifies asylum seekers as a protected class, safeguarding them from persecution.<sup>127</sup> The named plaintiffs in Innovation Law Lab’s action provided declarations demonstrating how their

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120. Appellee’s Answering Brief at 24, *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019) (No. 19-15716) (hereinafter Appellee’s Answering Brief).

121. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999).

122. *Id.* at 427.

123. Appellee’s Answering Brief, *supra* note 120, at 24-25.

124. *Id.* at 25 [citing Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-207, Stat. 2681 (codified at 8 USC § 1231 (2020) note)].

125. *Id.* at 30.

126. 8 USC § 1231 (b)(3) (2020). The withholding statute is consistent with the 1951 Convention. *See also* 1951 Convention, *supra* note 44, at art. 33.

127. 1951 Convention, *supra* note 44, at art. 33. The protected classes are race, religion, nationality, membership of a particular social group or political opinion.



lives and freedom are threatened due to their nationality.<sup>128</sup> Howard Doe, a named plaintiff and asylum seeker, stated:

I was afraid to leave the house [where I was staying] because I had seen in the news that migrants like myself had been targeted. While I was in Tijuana, two young Honduran men were abducted, tortured and killed. . . . On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger[.]<sup>129</sup>

Another Central American asylum seeker, Christopher Doe, wrote about his experience in Mexico:

The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around five or six times, just for being a Honduran migrant. During my most recent stop, the police threatened to arrest me if they saw me on the street again . . . I have also been robbed and assaulted by Mexican citizens. On two occasions, a group of Mexicans yelled insults, threw stones, and tried to attack me and a group of other Caravan members.<sup>130</sup>

Normal removal proceedings allow an asylum seeker to go before an immigration judge, who determines whether an individual faces persecution.<sup>131</sup> However, under the MPP, the United States returns asylum seekers to Mexico without any chance to express their fear of persecution.<sup>132</sup> Furthermore, the MPP's failure to notify asylum seekers they must affirmatively raise fear of persecution does not adequately protect against the risk of *refoulement*.<sup>133</sup> The evaluation procedure used as part of the MPP is insufficient and violates the United States' obligation of *non-refoulement*, and thus, is unlawful.<sup>134</sup>

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128. Innovation Law Lab v. Wolf, 951 F.3d 1073, 1090 (9th Cir. 2020).

129. *Id.* at 1091.

130. *Id.*

131. Complaint at 34, Innovation Law Lab v. McAleenan, 924 F.3d 503, 507 (9th Cir. 2019), [https://innovationlawlab.org/media/Innovation-Law-Lab-compl.\\_for\\_decl.\\_and\\_inj.\\_relief.pdf](https://innovationlawlab.org/media/Innovation-Law-Lab-compl._for_decl._and_inj._relief.pdf).

132. Innovation Law Lab v. McAleenan, 924 F.3d 503, 508 (9th Cir. 2019).

133. *Id.* at 511.

134. *Id.*

### B. UNHCR Amicus Curiae Brief

UNHCR filed an *amicus curiae* brief in support of Innovation Law Lab's challenge to MPP (MPP *Amicus* Brief).<sup>135</sup> The UNHCR provides nations with interpretive guidance pertaining to the provisions of the 1951 Convention and 1967 Protocol.<sup>136</sup> Historically, the United States has relied on the UNHCR's guidelines regarding refugee law.<sup>137</sup>

#### 1. The Scope of Refoulement

The UNHCR's brief addresses *non-refoulement* and its scope. The UNHCR argues *refoulement* protection applies to any territory where there is a threat of persecution.<sup>138</sup> A nation that transfers an asylum seeker to a third-party nation must ensure the asylum seeker is not *refouled*.<sup>139</sup> In addition, if the receiving nation does refole an asylum seeker, the transferring nation still maintains its responsibility.<sup>140</sup>

#### 2. International Law Requires Procedural Protections for Asylum Seekers

In addition to *refoulement*, the UNHCR's brief focused on the procedure for assessing whether an asylum seeker is likely to face persecution if transferred to another country.<sup>141</sup> A country must first determine if an asylum seeker will be subject to persecution in the transferring country. If so, they will be protected from *refoulement*.<sup>142</sup> The UNHCR's safeguards include:

[A]n individualized assessment of the facts and circumstances of each case, and should be carried out with certain minimum standards of due process. These include allowing the individual to present her or his views on elements, such as specific needs, heightened risk, and other factors which may preclude the proposed transfer, and to appeal the decision to transfer while remaining in [the] country.<sup>143</sup>

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135. UNHCR Amicus Brief, *supra* note 48, at 1.

136. *Id.* at 9.

137. *See also* Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005).

138. UNHCR Amicus Brief, *supra* note 48, at 13.

139. *Id.* at 13-14.

140. *Id.* at 13.

141. *Id.* at 17.

142. *Id.* at 18.

143. *Id.*

These guidelines require the United States to enforce adequate safeguards to assess the risk of persecution asylum seekers face in Mexico.<sup>144</sup> Importantly, the UHCR guidelines suggest the United States does not have these procedures in place because asylum seekers are targets of violence in Mexico when they are categorized as migrants.<sup>145</sup>

Both Innovation Law Lab and the UNHCR make compelling arguments alleging MPP does not meet the requirements of the 1951 Convention. The MPP's *non-refoulement* interview does not provide notice to asylum seekers that they must affirmatively state they fear persecution in Mexico.<sup>146</sup> This process has led to a number of Central American asylum seekers in Mexico being targeted with violence because of their nationality.<sup>147</sup> As a result, the asylum seekers are *refouled* in violation of international law.

#### IV. CHALLENGING "OPERATION SOVEREIGN BORDERS"

Australia's Operation Sovereign Borders has been criticized<sup>148</sup> for not complying with the 1951 Convention and 1967 Protocol by violating the principles of *non-refoulement*. Viewing Operation Sovereign Borders through the challenges raised against the MPP, Australia arguably falls short of providing adequate protections for asylum seeker against *refoulement* because its procedures do not adequately protect asylum seekers from the risk of being *refouled*.

##### A. Asylum Seekers in Offshore Processing Detention Centers Face Persecution

Forcing asylum seekers to return to Mexico while their refugee status is determined exposes them to dangerous persecution.<sup>149</sup> Similarly, asylum seekers and refugees forced to other nations by Australia have faced a similar fate. Like the MPP, it can be argued Australian asylum seekers face persecution because they are members of the protected classes enumerated in the 1951 Convention. Specifically, their persecution is arguably based on race, nationality, and membership in a particular social group.<sup>150</sup>

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144. *See id.*

145. *See id.*

146. Innovation Law Lab v. Wolf, 951 F.3d 1073, 1078 (9th Cir. 2020).

147. *Id.* at 1090-91.

148. See Kaldor Center, *Turning Back Boats*, *supra* note 8.

149. *Id.* at 1093.

150. *See* 1951 Convention, *supra* note 44.

The UNHCR definition of race includes membership in a particular social groups of common descent forming a minority within a larger social group.<sup>151</sup> The term “nationality” in the context of the 1951 Convention includes acts directed towards ethnic minorities and membership in an ethnic group.<sup>152</sup> Protections of a particular social group includes people who have the same social status.<sup>153</sup>

Moreover, local populations have committed serious discriminatory acts when the authorities do not provide effective protection.<sup>154</sup> For example, in Papua New Guinea, reports surfaced that local citizens attacked and robbed Sudanese, Iranian, and Afghani refugees on multiple occasions because of tensions between the communities.<sup>155</sup> The asylum seekers who were attacked in Papua New Guinea<sup>156</sup> are minorities within a larger social group.<sup>157</sup> The refugees were attacked by the local people, who are the ethnic majority because the refugees were from other nations.<sup>158</sup> It is arguable asylum seekers share the same social status because of the fact they were rejected from Australia.<sup>159</sup> The asylum seekers were attacked by the members of local population after the government forced the asylum seekers out of the facility where they were protected.<sup>160</sup> These attacks would likely be considered incidents of persecution on the basis of one of the protected grounds enumerated in the 1951 Convention.

As a signatory to both the 1951 Convention and the 1967 Protocol, Australia is obligated to adhere to the principle of *non-refoulement*.<sup>161</sup> Australia’s obligations under the 1951 Convention and 1967 Protocol ensures

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151. UNHCR Handbook, *supra* note 45, at 13.

152. *Id.*

153. *Id.*

154. *Id.* at 14.

155. Ben Doherty, *Manus Island Refugees seriously injured in machete attacks*, THE GUARDIAN, (July 30, 2017), <https://www.theguardian.com/australia-news/2017/jul/31/manus-island-refugees-seriously-injured-in-machete-attacks>.

156. *Id.*

157. The UN Human Rights Office of the High Commissioner says the following about minorities: “There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).” *Minorities Under International Law*, OHCHR, <https://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx> (last visited April 3, 2020).

158. Doherty, *supra* note 152.

159. *See id.*

160. *Id.*

161. 1951 Convention State Parties, *supra* note 41; UNHCR Handbook, *supra* note 45, at 31.

that a third-party nation does not *refoules* the asylum seeker.<sup>162</sup> Because Australia sent asylum seekers to other countries, Australia is still liable if the asylum seekers are *refouled*.<sup>163</sup> Though Australia may have no intention of admitting an asylum seeker who arrives by boat,<sup>164</sup> Australia's obligation to ensure an asylum seeker is not *refouled* or persecuted still applies after transferring the asylum seeker to an offshore processing center.<sup>165</sup>

*B. Australia's Procedures for Turnbacks and Takebacks  
Risks non-refoulement*

Australia provides little public information about its "turnback" operations; thus, little is known about the extent of the risk assessment procedures offered to asylum seekers who are turned back.<sup>166</sup> In "takeback" scenarios, Australia uses an enhanced screening process at sea to assess the asylum seeker's need for protection.<sup>167</sup> The takeback screening process is similar to that of the MPP; both procedures raise a risk of *refoulement* by failing to inform asylum seekers they must affirmatively articulate a need for protection.<sup>168</sup>

Australia claims that it conducts interviews in person with asylum seeker interviews while at sea and with translators available.<sup>169</sup> However, asylum seekers claim interviews are done over noisy video conferences and without translators.<sup>170</sup>

Similar to the United States deviating from required screening procedures in the MPP, Operation Sovereign Borders also employs an enhanced screening procedure for asylum seekers.<sup>171</sup> This procedure departs from normal procedures to evaluate the likelihood of an asylum seeker would face persecution "turned back."<sup>172</sup> Further, the screening process used in the Operation Sovereign Borders still does not give asylum seekers a meaningful

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162. UNHCR Amicus Brief, *supra* note 48, at 4.

163. *See id.*

164. *See* COMMONWEALTH OF AUSTRALIA, *Operation Sovereign Borders*, <https://osb.homeaffairs.gov.au/> (last visited Nov. 29, 2020).

165. *See* UNHCR Amicus Brief, *supra* note 48, at 13-14.

166. Kaldor Center, *Turning Back Boats*, *supra* note 8.

167. *Id.*

168. *Id.*

169. Press Release, Scott Morrison Minister for Immigration and Border Protection, *People smuggling venture returned to Sri Lanka*, (Nov. 29, 2014) (on file with author).

170. Kaldor Center, *Turning Back Boats*, *supra* note 8.

171. *Id.*

172. *Id.*

opportunity to express their fear of persecution.<sup>173</sup> Both the MPP and Operation Sovereign Border depart from the UNHCR requirement that asylum seekers be afforded minimum standards of due process.<sup>174</sup> This includes the ability to articulate any specific risks they may face if returned to the nation they fled.<sup>175</sup>

In its MPP *Amicus* Brief, the UNHCR stated it exercises its supervisory responsibility by providing interpretative guidance on the 1951 Convention and 1967 Protocol.<sup>176</sup> As it pertains to screening asylum seekers at sea, initial screening may be done at sea to identify people with protection needs.<sup>177</sup> However, if there is any doubt as to whether an individual needs protection, a full screening is then required.<sup>178</sup> Additionally, full screening procedures are only carried out for asylum seekers whose cases can “be decided quickly [based on] manifestly founded or unfounded cases.”<sup>179</sup>

Unfortunately, Australia’s current screening procedure under Operation Sovereign Borders has caused asylum seekers to be *refouled*.<sup>180</sup> To illustrate, two parents and their three children fled Vietnam after the state seized their land and because of institutionalized discrimination against Catholics.<sup>181</sup> The family fled from Vietnam to Australia seeking asylum, only for Australian officials to determine the family did not face a threat of persecution if they returned to Vietnam.<sup>182</sup> Australian officials did not provide the family with a translator even though no one in the family spoke English.<sup>183</sup> The family only realized they were being returned when they reached port in Vietnam.<sup>184</sup> Upon their return, the Vietnam government sentenced the parents to a 30-month prison terms for organizing an illegal departure to Australia.<sup>185</sup>

In this case, there was doubt as to whether the family required protection since they were never given a translator and they were unable to effectively communicate their fear of persecution. Additionally, the family’s case was not

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173. *Id.*

174. UNHCR *Amicus* Brief, *supra* note 48, at 13.

175. *Id.*

176. *Id.*

177. U.N. High Comm’r for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: Legal standards and policy considerations with respect to extraterritorial processing*, 5 (Nov. 2010) (hereinafter UNHCR *Protection Policy Paper*).

178. *Id.* at 15.

179. *Id.*

180. Sebban, *supra* note 9.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 15.

185. *Id.*

manifestly unfounded; the Vietnam government had seized their land prior to them fleeing and imprisoned them once they returned to Vietnam.<sup>186</sup> To comply with the UNHCR's interpretation<sup>187</sup> of asylum law, Australia should have referred the family to regular in-country Refugee Status Determination procedures.<sup>188</sup>

Australia's offshore detention of asylum seekers led to the persecution of asylum seekers.<sup>189</sup> Like the MPP, Australia's asylum policy caused asylum seekers to be persecuted based on their race, nationality, and membership of a social group, all of which are protected groups of the 1951 Convention.<sup>190</sup> Moreover, Operation Sovereign Borders' procedures for determining an asylum seeker's risk of persecution are deficient. Like the MPP, Australia's enhanced screening procedures failed to identify the risk of *refoulement* for an asylum seeker which led to their persecution.<sup>191</sup> Using the legal challenges made against the MPP, Australia's asylum procedures do not comply with the policy of *non-refoulement*.

#### V. SUGGESTED REFORM IN AUSTRALIAN LAW

Australia's legislative body and its High Court, through its opinion in *CPCF v. Minister for Immigration and Border Protection*, failed to prioritize its international obligation of *non-refoulement*.<sup>192</sup> Australia upheld its Maritime Act and its amendments despite its inconsistency with Australia's international obligations.<sup>193</sup> The Maritime Act also explicitly states the 1951 Convention and CAT do not limit its powers.<sup>194</sup>

To effectively protect asylum seekers, Australia should eliminate holding *non-refoulement* interviews at sea for asylum seekers intercepted by the Australian military. Rather, Australia should only conduct regular in-country proceedings in front of a neutral member of Australia's judiciary for all asylum seekers. This would reduce the chance of pressure from high-ranking officials within the Minister of Home Affairs' office to keep asylum seekers out of Australia. This reform would limit the number of instances of asylum

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186. *Id.*

187. UNHCR Amicus Brief, *supra* note 48, at 13.

188. UNHCR *Protection Policy Paper*, *supra* note 174, at 15.

189. *See* Doherty, *supra* note 153.

190. *Cf. id.*

191. *See id.*

192. *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (Austl.).

193. Marmo & Giannocopoulos, *supra* note 103, at 6, 12.

194. *See* *Maritime Powers Act 2013* (Cth) s 75(A) (Austl.). Section 75 A of the Maritime Powers Act states the Powers under certain sections of the Maritime Powers act is are not limited by Australia's international obligations.

seekers traveling to Australia who face similar fates as asylum seekers at the U.S.-Mexico border. Such a policy would reduce the likelihood of the *non-refoulement* obligation being violated.

Moreover, at its next opportunity, Australia's High Court should interpret the Maritime Powers Act to comply with international law. As a signatory to the 1951 Convention, the 1967 Protocol, and CAT, Australia committed to refrain from acts that would undermine the treaty's purpose.<sup>195</sup> However, the Maritime Powers Act states international obligations do not limit its power. Australia's policy of taking asylum seekers back to countries where they face persecution violates *non-refoulement*, a core principle of the treaties Australia agreed to uphold. By allowing Operation Sovereign Borders to act outside of the limits of Australia's international obligations, Australia stifles the treaties' objective and purpose.

#### CONCLUSION

There are numerous parallels between Operation Sovereign Borders and the MPP, but the most striking similarity is both nation's attempts to circumvent the international law protection of *non-refoulement*. The 1951 Convention and the 1967 Protocol collectively have guaranteed asylum seekers the protection of *non-refoulement* and both treaties are binding on Australia and the United States. Innovation Law Lab filed a suit for injunctive relief against the United States for its failure to provide asylum seekers protection under international law. As a signatory to the 1967 Protocol, the challenges made against the MPP are useful in assessing whether Operation Sovereign Borders complies with the principles of *non-refoulement*.

The UNHCR states the scope of *non-refoulement* requires the transferring nation to ensure the third-party nation does not persecute or *refoule* asylum seekers. The asylum seekers Australia sends to other nations through its offshore detention program are likely to be persecuted based on being a part of a protected category under Article 33 of the 1951 Convention. Like the United States, Australia sending people to another nation where they are persecuted while they await asylum proceedings violates the principle of *non-refoulement*.

Similar to the procedure followed by the United States, the procedure for determining whether an asylum seeker may face danger if sent to another nation does not adequately protect asylum seekers. Innovation Law Lab argued the procedures the MPP has in place do not give asylum seekers a meaningful opportunity to raise their fears during their *non-refoulement*

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195. 1951 Convention State Parties, *supra* note 41; Renee Dopplick, *Legal Obligations of Signatories and Parties to Treaties*, INSIDE JUSTICE (Mar. 17, 2010), [http://www.insidejustice.com/intl/2010/03/17/signatory\\_party\\_treaty/](http://www.insidejustice.com/intl/2010/03/17/signatory_party_treaty/).



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interview. Similarly, under Operation Sovereign Borders, Australia's procedure is held without translators—limiting the ability of asylum seekers to effectively communicate their fears of persecution to the interviewer.

Moreover, Australia's High Court should interpret Australia's Maritime Power Act to be limited by the 1951 Convention, 1967 Protocol, and CAT. As a signatory of all three, Australia is obligated to comply with the treaties' objectives. Continuing to secure its borders in this manner defeats the protections available to asylum seekers under international law.

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