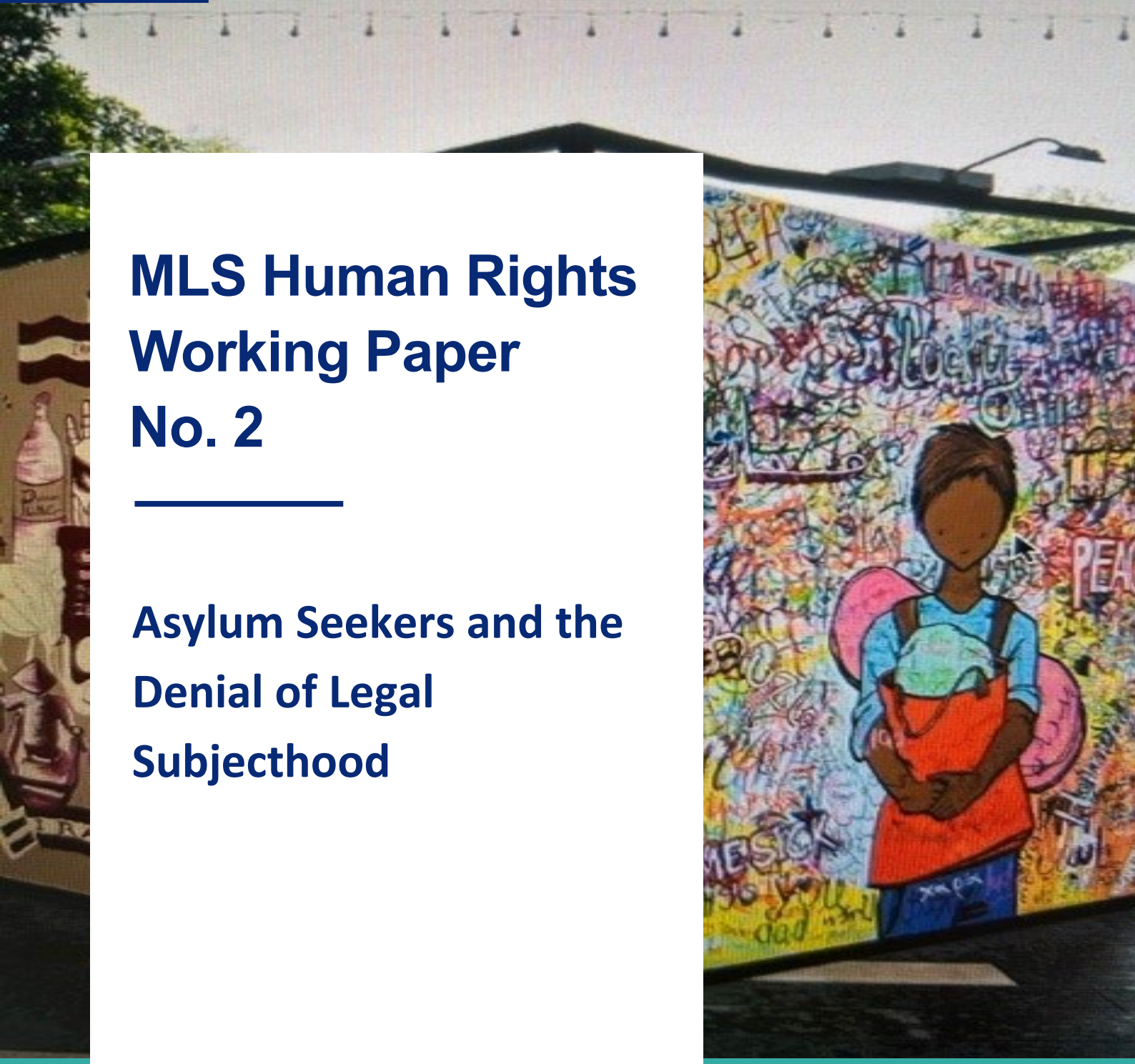

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Asylum Seekers and the Denial of Legal Subjecthood

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I INTRODUCTION

'*Whereas human beings count as persons in the space of inclusion, in the space of exclusion they seem to count only as bodies*.'[1]

Loghman Sawari was merely seventeen years of age when he fled Iran in 2013, escaping persecution of his family and community by the Iranian administration.[2] He and his family belong to the Ahwazi Arab, an ethnic minority in Iran who are consistently ill-treated by the government.[3] His brothers were tortured for years in detention and his cousin was publicly hanged in 2007.[4] Loghman initially escaped to Malaysia, then to Indonesia, and subsequently embarked a boat heaving with people for Australia.[5] It was also in 2013 that Australia introduced Operation Sovereign Borders, a group of militant policies geared towards border protection, which reinstated 'rigorous offshore processing' for all asylum seekers arriving by boat at the facilities in Manus Island for adult men and Nauru for families, women, and unaccompanied children.[6] The boat carrying Loghman and about seventy others arrived at Christmas Island, an Australian territory in the Indian Ocean, after the change in Australia's migration law.[7] Loghman was wrongly categorised as an adult by the Australian authorities, despite being a minor, and was sent to Manus Island.[8] Since then, his life has become a horrifying account of indefinite incarceration, spanning over nearly a decade and across different detention centres. He did not commit a crime, and none is alleged against him. All he ever wanted was to be free.[9] Loghman's story is only one of a countless number of asylum seekers.

Hannah Arendt, in *The Origins of Totalitarianism*, claims that asylum seekers are rendered stateless in their search for haven and have only their *inalienable* rights to depend on as circumstances beyond their control force them to forego political membership within the state of their nationality.[10] The right to belong to an 'organized community' becomes crucial in a

[1] Niklas Luhmann, *Theory of Society, Volume 2* (Stanford University Press, 2013) 26.
[2] Ben Doherty, 'Three countries, eight years: one refugee's nightmare odyssey through Australia's detention system', *The Guardian* (online, 17 July 2021) <https://www.theguardian.com/australia-news/2021/jul/17/three-countries-eight-years-one-refugees-nightmare-odyssey-through-australias-detention-system>.
[3] Ibid; see generally 'Iran: Hundreds arrested in vicious crackdown on Ahwazi Arabs', *Amnesty International* (Press Release, 2 November 2018) < https://www.amnesty.org/en/latest/press-release/2018/11/iran-hundreds-arrested-in-vicious-crackdown-on-ahwazi-arabs/>.
[4] Doherty (n 2).
[5] Ibid.
[6] 'The Coalition's Operation Sovereign Borders policy', *Parliament of Australia* (Political Party Documents, July 2013) 2 <https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/partypol/2616180%22> ('*Operation Sovereign Borders pamphlet*'); Doherty (n 2).
[7] Doherty (n 2).
[8] Ibid.
[9] Ibid.
[10] Hannah Arendt, *The Origins of Totalitarianism* (William S. Hein & Company, 2020) 292; Emma Larking, *Refugees and the Myth of Human Rights* (Ashgate Publishing, 2014) 24.

world which is arranged as an 'organized humanity', so much so that the loss of political status results in an expulsion from humanity.[11] Losing this right, Arendt offers, signifies the loss of the very features that infuse life with meaning. Refugees and asylum seekers are dispossessed of what she refers to as the 'right to have rights' as they can neither claim rights nor appear before the law to argue the abuse of those rights.[12] They are embraced by the expanse of international human rights law, by virtue of being human, at least in principle, and yet are particularly susceptible to human rights' violations.[13] She provides that the framework of human rights breaks down when such rights of asylum seekers, those who have lost 'all other qualities and specific relationships' that make them belong to humankind except the very fact of being human, are violated.[14]

The failure of the promise of universal protection under human rights law is laid bare as the very law that 'divides inside from outside' is sought to offer limited protection against its own creations.[15] Law engages in a fanciful determination of the categories of persons that lie within its scope of protection and to what extent. The elaborate creation of legal rules and categories end up excluding rather than empowering asylum seekers and contravenes the essence, if not the letter of human rights law. It is in such exclusions that the lives of asylum seekers are imperilled. This essay aims to emphasise the (non)status of asylum seekers as rights-bearing subjects of international human rights law and attempts to unravel the varied layers of exclusion that conspire to produce their disenfranchisement. I argue that asylum seekers are denied legal subjecthood in so far as their rights are inadequately recognised and protected by the global legal order. They are treated rather as legal *objects*, dispossessed of substantial rights, to be dealt away with.

Part II of this essay provides a brief overview of a right to asylum[16] under international human rights law. The initial half focuses on two facets of such a right, namely a state's right to grant or refuse asylum vis-à-vis an individual's right to receive or be granted asylum. The latter half indicates two features from an ancillary regime of protection for asylum seekers. The prohibitions against *refoulement*[17] and arbitrary detention[18] are considered herein. Part III explores the Australian response to asylum seekers. I argue that settler colonial vestiges are traceable in the existing immigration law and that it is heavily influenced by a racialized political rhetoric towards refugees and asylum seekers. I subsequently analyse how the policies of mandatory detention and offshore processing in Australia's immigration regime violate its obligations under international human rights law, including but not limited to the

[11] Arendt (n 10) 296-297.
[12] Ibid 296; Larking (n 10) 24.
[13] See generally *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*').
[14] Arendt (n 10) 299.
[15] Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000) 358.
[16] *UDHR* (n 13) art 14(1).
[17] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 241; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 ('*CAT*').
[18] *UDHR* (n 13) art 9; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1) ('*ICCPR*').

features underlined from the ancillary regime of protection under part I. Part IV offers reflections on the evolving notions of sovereignty and belonging in a transnational world. While it does not provide durable solutions for the problems confronted by asylum seekers covered within this essay, it urges a reconceptualization of the notion of sovereignty and urges its conscientious exercise by states, especially concerning asylum seekers. Finally, the status of asylum seekers as legal subjects is promoted, followed by the conclusion in part V.

II (NON)STATUS OF ASYLUM SEEKERS IN INTERNATIONAL HUMAN RIGHTS LAW

Michael Meszaros's copper sculpture titled *Refugee* is currently displayed in the St. Paul's Anglican Cathedral in Melbourne, Australia and is in the shape of a hollow individual encased by spears springing out of the left and a ridged barrier on the right. The sculpture signifies that a refugee is threatened by the 'spikes' of persecution on one end and is prevented from escaping it by the 'barrier' of state sovereignty on the other. Its description states that the figure is a 'void' to reflect the 'non-person' status of such an individual.[19] The 'void' also reminds me of the perpetual indeterminacy asylum seekers find themselves in in their search for refuge, for whom there is neither protection from the persecuting state nor relief from other states. The lives of asylum seekers are deeply impacted by their need for refuge, a haven, asylum. The following discussion considers the right to asylum under international law to qualify the status of asylum seekers as subjects of human rights law.

A *An empty right to asylum?*

The institution of asylum is historically established through state practice and is a recognised principle of international law. The proliferation of states and the development of notions of territorial jurisdiction and supremacy resulted in the principle of asylum as not only denoting a place of refuge, but also the *right* of a state to grant protection to foreign nationals as an exercise of its sovereignty, against the exercise of jurisdiction by another state.[20] A 'right to asylum' is considered here as comprising two facets: a state's right to grant or refuse asylum and an individual's right to be granted or to receive asylum.

A state's right of asylum flows out of its sovereign exercise of exclusive control over individuals in its territory and jurisdiction, without it being perceived as antagonistic towards other states.[21] It is entrenched under international law as the discretionary right of every

[19] 'Refugee by Michael Meszaros OAM', *Association of Sculptors of Victoria* (Web Page) <https://sculptorsvictoria.asn.au/sculptors/view_sculpture/refugee>.
The description accompanying the sculpture at the Cathedral reads as follows,
"A refugee is pushed from one side by dangerous forces, represented by spikes threatening the figure, whilst being prevented from escaping the spikes by a barrier (the vertical corrugations). The figure is a void to suggest that the refugee is often considered a kind of 'non-person', who has lost human characteristics and is instead reduced to a number or a statistic, to be dealt with accordingly."
[20] Goodwin-Gill and McAdam (n 17) 400.
[21] Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke Journal of Comparative & International Law* 1, 3; María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 (1) *International Journal of Refugee Law* 3, 10.

sovereign state, as opposed to being a right of an individual.[22] Article 14 of the *Universal Declaration of Human Rights* ('*UDHR*') envisages the 'right to seek and to enjoy' asylum from persecution.[23] However, it does not specify an individual's right to be granted or to receive asylum. It is this silence that disproportionately affects asylum seekers as states cannot be compelled to grant asylum to those who need it.

The refusal of States to undertake an obligation to grant asylum is evidenced by the history of international conventions and other instruments. The drafting history of *UDHR* reveals a tension between States that perceived the grant of asylum as a sovereign exercise of their right versus those that supported an individual's right to be granted asylum.[24] The original text of Article 14 (1) proposed by the Commission on Human Rights stated that 'everyone has the right to seek and *be granted*, in other countries, asylum from persecution.'[25] But it was altered in favour of the existing phrase, 'the right to seek and to enjoy' asylum, as the British, Australian, and Saudi Arabian representatives resisted obligating states to grant asylum.[26] By substituting 'be granted' with 'to enjoy' in Article 14 (1), the drafters implied their desire against requiring states to grant asylum to individuals. The *UDHR* thus does not give rise to an individual right to asylum.[27] The language and inclusion of Article 14 (1) in the same has been eminently criticised by Lauterpacht as 'artificial to the point of flippancy' since it does not specify the correlative duty on states to give effect to a right of asylum.[28]

It is astonishing that the principal instruments concerning the protection of refugees under international law, namely the *1951 Convention Relating to the Status of Refugees* ('*Refugee Convention*') and its *1967 Protocol relating to the Status of Refugees*, do not provide a right to be granted asylum[29] when being able to receive and enjoy asylum is a prerequisite to accessing refugee status under the *Refugee Convention*.[30] Similarly, prominent instruments of human rights law such as the *International Covenant on Civil and Political Rights* ('*ICCPR*') are also silent on the question of asylum. The Yugoslavian representative, during discussions on the draft *ICCPR* at the Seventh Session of the United Nations ('UN') Commission on Human Rights, had raised a concern regarding a missing individual right to asylum and proposed an additional article providing for the same.[31] However, the said proposal failed as representatives widely diverged on whether an individual was owed a right to asylum under

[22] Boed (n 21) 4.
[23] *UDHR* (n 13) art 14 (1).
[24] Goodwin-Gill and McAdam (n 17) 404; Guy S. Goodwin-Gill, 'Declaration on Territorial Asylum', *UN Audio-Visual Library* (Web Page) <https://legal.un.org/avl/ha/dta/dta.html>.
[25] *Draft International Declaration of Human Rights: Recapitulation of amendments to article 12 of the draft Declaration (E/800)*, UN Doc A/C.3/285/Rev.1 (30 October 1948) [1].
[26] Boed (n 21) 9.
[27] Ibid 10.
[28] Hersch Lauterpacht, *International law and human rights* (Stevens, 1950) 421; Goodwin-Gill and McAdam (n 17) 406.
[29] Boed (n 21) 11.
[30] María-Teresa Gil-Bazo and Elspeth Guild, 'The Right to Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 872.
[31] P Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 92, 120.

international law. There was also disagreement as to the class of persons to whom asylum should be granted.[32]

The *Declaration on Territorial Asylum* was produced owing to this lack of consensus between states on the inclusion of a right to asylum in the *ICCPR*. However, similar disagreements cropped up amongst representatives on the nature of an individual right to asylum during negotiations[33] which resulted in a document that stresses that asylum granted by a state is an exercise of its sovereignty[34] and endorses each State as the sole judge of the grounds upon which it will grant asylum.[35] The subsequent 1977 UN Conference on Territorial Asylum, convened with the goal of adopting a Convention on Territorial Asylum, likewise remained unsuccessful as there existed considerable disagreement amongst state representatives on the duty of a state to grant asylum to individuals.[36]

International human rights law recognises state sovereignty as the 'organising principle of modern international law' and presupposes the autonomy of states in matters of immigration and the determination of the claims of asylum seekers.[37] The universal application of human rights law to 'all human beings'[38] is eclipsed by the notion of sovereignty when a state's right to grant asylum comes into conflict with an individual's right to receive asylum. The latter is recognised by scholars of international law merely based on moral and humanitarian grounds.[39] Though a right to asylum arising from the *UDHR* has assumed the status of customary international law, state practice to date does not support a concomitant duty to grant asylum.[40] An appeal to humanity in these instances then only binds states 'in conscience than in fact'.[41]

This discussion reflects that asylum seekers are a vulnerable category under human rights law as states remain unwilling to accept a right to asylum as a right possessed by the individual. Such a right to asylum then is an *empty* right and is emblematic of the unfulfilled promise of protection of human rights law. It fails to provide a right to receive or be granted asylum to individuals. It is what makes the refugee in Meszaros's sculpture *hollow*. Parallelly, human rights advances are continually made in the development of ancillary forms of protection for asylum seekers.[42] The following discussion focuses on two rights within the same. These include the principle of *non-refoulement* and the prohibition against arbitrary detention under human rights law.

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[32] Ibid; Boed (n 21) 10.
[33] Weis (n 31); Gil-Bazo (n 21) 12.
[34] *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN Doc A/RES/2312 (XXII) (14 December 1967) art 1 (1).
[35] Ibid art 1 (3); Goodwin-Gill and McAdam (n 17) 408.
[36] Boed (n 21) 13-14.
[37] Larking (n 10) 138.
[38] *UDHR* (n 13) art 1.
[39] Boed (n 21) 8; Matthew J. Gibney, 'The ethics of refugees' (2018) 13 (10) *Philosophy Compass* 1, 3-4.
[40] Goodwin-Gill and McAdam (n 17) 417-418.
[41] Larking (n 10) 137-138.
[42] Colin Harvey, 'Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law' (2015) 34 *Refugee Survey Quarterly* 43, 49.

B *Ancillary regime of protection for asylum seekers*

Asylum seekers, at least in principle, are eligible for protection through a wide array of rights enshrined within the core instruments of human rights law. However, the prohibitions against *refoulement* and arbitrary detention are specially elaborated upon here as particularly salient for asylum seekers. The routine infringements of these prohibitions by states intensifies the marginalisation of asylum seekers and leads to their disenfranchisement as subjects of human rights law. This is illustrated in the Australian context and is explored in the succeeding portion of this essay.

1 *Prohibition of* refoulement

Non-refoulement under international law signifies that no person must be returned to any country where they are likely to suffer persecution of any kind. This is distinguishable from other processes of requiring a person to leave a state such as expulsion or deportation.[43] The provision of *non-refoulement* is deeply ingrained in human rights law through several instruments, in so far as it protects people from return to circumstances where they face a real risk of being subjected to torture, or cruel, inhuman, or degrading treatment, or punishment, among other forms of harm.[44] It is also imperative to note that *non-refoulement* under international law requires not only the non-return to a risk of harm but also stable, long-lasting solutions.[45]

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Convention against Torture*') is the only international instrument that explicitly provides for *non-refoulement* under Article 3.[46] It prohibits States from removing an individual where there are substantial grounds for believing that doing so would expose them to a risk of being subjected to torture.[47] Such a prohibition is absolute[48] and the Committee against Torture ('CAT') has stated that it must be applied by state parties without any form of discrimination and irrespective of 'the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.'[49]

Other instruments of human rights likewise prohibit the subjection of any person 'to torture or cruel, inhuman or degrading treatment or punishment.'[50] Although the *ICCPR* does not explicitly mention *refoulement*, the UN Human Rights Committee ('CCPR') has clarified that

[43] Goodwin-Gill and McAdam (n 17) 241.
[44] Ibid 362.
[45] Goodwin-Gill and McAdam (n 17) 392.
[46] *CAT* (n 17) art 3; Goodwin-Gill and McAdam (n 17) 365.
[47] Goodwin-Gill and McAdam (n 17) 351.
[48] Ibid; Committee against Torture, *Communication No. 475/2011*, 52nd sess, UN Doc CAT/C/52/D/475/2011 (24 June 2014) 11 [11.6] ('*Nasirov v. Kazakhstan*').
[49] Committee against Torture, *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, UN Doc CAT/C/GC/4 (4 September 2018) 2 [10].
[50] *UDHR* (n 13) art 5; *ICCPR* (n 18) art 7.

the principle of *non-refoulement* inheres within Article 7 of the same[51] and has upheld the absolute nature of the provision.[52] Article 7 also does not permit derogation by states even during times of emergency or under extenuating circumstances.[53] Similar right of prohibition against torture of children is enumerated in the *Convention on the Rights of the Child*.[54] The Committee on the Rights of Child has observed that states must respect *non-refoulement* obligations arising out of international human rights, humanitarian, and refugee law in the treatment of unaccompanied or separated children. It has further stated that states shall not return a child where there are substantial grounds for believing that there is a real risk of irreparable harm to them.[55]

2 *Prohibition of arbitrary detention*

The prohibition of arbitrary detention is supported by the 'right to life, liberty and security of person'[56] in the *UDHR* and finds expression in Articles 9 and 9 (1) of the *UDHR* and the *ICCPR* respectively.[57] The latter requires that all detention must be 'in accordance with' and 'established by' law.[58] Detention, however, may be authorized by law and still be arbitrary. Accordingly, the CCPR has clarified the scope of arbitrariness and prescribed that the determination of the arbitrariness of detention must include elements of 'inappropriateness, injustice, lack of predictability and due process of law'.[59] The detention, in any given case, must be reasonable, necessary and proportional to the aim desired to be achieved.[60] Unauthorized extension of detention or a lack of periodic re-evaluation of the basis for detention can further make it arbitrary under this provision.[61] Detention is also arbitrary if the domestic law mandating it does not provide an effective review procedure.[62] Article 9 (4) of the *ICCPR* embeds the principle of effective review in human rights law and involves the right of any person deprived of their liberty to bring proceedings before a court to determine its lawfulness.[63] The CCPR has found the failure to provide effective review by state parties as violative of Article 9 (4).[64] The conditions of detention also affect a state's compliance

[51] Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess (10 March 1992) [9] ('*General Comment No 20*').
[52] Human Rights Committee, *Views: Communication No. 2471/2014*, 121st sess, UN Doc CCPR/C/121/D/2471/2014 (12 December 2017) 7 [9.5] ('*Jamshidian v Belarus*').
[53] *ICCPR* (n 18) art 4(2); *General Comment No 20* (n 51) [3].
[54] *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA Res 44/25 (entered into force 2 September 1990) art 37 (a).
[55] Committee on the Rights of Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005) 10 [26-27]; Goodwin-Gill and McAdam (n 17) 351.
[56] *UDHR* (n 13) art 3.
[57] *UDHR* (n 13) art 9, *ICCPR* (n 18) art 9(1).
[58] *ICCPR* (n 18) art 9(1); Goodwin-Gill and McAdam (n 17) 468.
[59] Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) 3 [12] ('*General Comment No 35*').
[60] Ibid.
[61] *General Comment No 35* (n 59) [11, 13].
[62] Goodwin-Gill and McAdam (n 17) 469.
[63] Ibid; *ICCPR* (n 18) art 9(4); *General Comment No 35* (n 59) [39].
[64] Human Rights Committee, *Views: Communication No. 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (28 October 2013) 19 [9.6] ('*F.K.A.G. et al. v Australia*').

with internationally accepted standards of treatment for detention, including the prohibition on cruel, inhuman, or degrading treatment, and other recognised procedural rights and guarantees.[65]

The preceding discussion revealed the absence of a right to receive or be granted asylum for individuals under human rights law. Though there exists an ancillary regime of protection for asylum seekers as outlined above in the form of prohibitions against *non-refoulement* and arbitrary detention, they remain woefully inadequate. The disparity between the sovereign right of states to exercise control over their territory and jurisdiction versus the conscientious exercise of such a right, in observance with international human rights obligations, is blatant in the Australian context. The following discussion will reveal a gaping hole in the armour of protection of human rights law as it sheds light upon the struggles confronted by asylum seekers in their search for refuge.

III Dispossessed of the 'Right to have Rights': Asylum Seekers in Australia

Asylum seekers are incapacitated from securing their rights and suffer from human rights' violations. The absence of a right to asylum results in their exclusion from legal subjecthood as they are dispossessed of the very 'right to have rights.'[66] Arendt uses this phrase to underscore that 'the right of every individual to belong to humanity', where humanity includes political membership of a community and the possession of rights, should be guaranteed by humanity itself.'[67] Her concern is not that the 'rightless' are unequal before the law, but that no law exists for them.[68] Citing slavery as an example, she explains that its offense against human rights was not that it took away freedom, but that it deprived certain people of the chance of fighting for that freedom.[69]

This is glaringly apparent in the Australian instance as asylum seekers arriving by boat are excluded from legal protection through a range of discretionary measures discussed herein. This portion attempts to unravel such layers of exclusion in the Australian context to highlight the marginalisation of asylum seekers. The debate on asylum in Australia is heavily informed by relevant moral and political considerations, some of which are highlighted herein. I first delineate an overview of the development of two salient features of Australian immigration policy, namely mandatory detention, and offshore processing. I then explain how these violate the prohibitions against arbitrary detention and *refoulement* discussed in part I.

A *Of 'boat people' and 'queue jumpers': Australia's response to asylum seekers*

[65] Goodwin-Gill and McAdam (n 17) 469-470.
[66] Arendt (n 10) 296.
[67] Ibid 298; quoted in Seyla Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights' (2020) 2 *Jus Cogens* 75, 80.
[68] Arendt (n 10) 295-296.
[69] Ibid 297.

Australia was taken through coercion by the first British settlers against the will of the Indigenous inhabitants of the land. It is in this foundational act of violence that the origins of the settler legal system lie.[70] These origins firmly entrenched the notion of incarceration within the Australian colonial imaginary.[71] Incarceration is essential to the creation and character of settler colonial societies. Nethery specifies how the Australian colonial state used administrative detention to establish order and hierarchy by classifying people into racial sub-groups, a practice which has since persisted. Such classification, in her view, necessitated incarceration on an 'automatic, unreviewable, and indefinite' basis and involved 'unmitigated executive control over the management of 'outsiders', assuaging concerns of national identity and maintaining the Anglo-Saxon composition of their population.[72] This context is instrumental to the development of Australian immigration policy as vestiges of settler colonialism in the form of incarceration are traceable in it.

Anxieties over irregular migration have activated legal responses in Australia throughout modern history.[73] The first time a sizeable number of Asians arrived in Australia was in 1848 when the Chinese arrived in the continent as indentured labour. The growing influx of Chinese immigrants prompted feelings of cultural and economic insecurity among the British and their Australian-born descendants.[74] The collective national desire to remain *British* birthed the *Immigration Restriction Act 1901*.[75] Commonly referred to as the White Australia policy, this legislation was initially aimed at restraining Chinese immigration, but eventually expanded to limit non-white (particularly Asian) immigration to Australia.[76] It was dismantled over time, however, certain of its features, such as the registration of non-British migrants as 'aliens'[77], continued well into the early 1970s.[78] The White Australia policy was finally abolished with the introduction of the *Racial Discrimination Act 1975*[79] which made it illegal to discriminate against migrants based on race.[80]

Detention has featured in Australia's immigration law since its very inception in 1901.[81] The *Migration Act 1958* ('*Migration Act*') is the principal federal legislation enacted by the Commonwealth to 'regulate the migration and presence of non-citizens' in Australia.[82]

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[70] Brian T. Trainor, 'Asylum Seekers, Colonialism & the De-Legitimisation of the Australian State' (2003) 75 (5) *Australian Quarterly* 18, 18.
[71] Amy Nethery, 'Incarceration, classification and control: Administrative detention in settler colonial Australia' (2021) 89 (102457) *Political Geography* 1, 1.
[72] Ibid 2.
[73] Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17 (1) *Human Rights Law Review* 33, 36.
[74] Don McMaster, 'Asylum-seekers and the insecurity of a nation' (2002) 56 (2) *Australian Journal of International Affairs* 281.
[75] *Immigration Restriction Act 1901* (Cth).
[76] 'The Immigration Restriction Act 1901', *National Archives of Australia* (Web Page) <https://www.naa.gov.au/explore-collection/immigration-and-citizenship/immigration-restriction-act-1901> ('Immigration Restriction Act 1901, *National Archives of Australia*').
[77] *Nationality and Citizenship Act 1948* (Cth) s 5(1) (definition of 'alien').
[78] Immigration Restriction Act 1901, *National Archives of Australia* (n 76).
[79] See generally *Racial Discrimination Act 1975* (Cth).
[80] Immigration Restriction Act 1901, *National Archives of Australia* (n 76).
[81] McMaster (n 74) 283.
[82] *Migration Act 1958* (Cth) s 4(1) ('*Migration Act*').

Legislative changes to this document progressively have led to the creation of a discretionary and procedurally restrictive regime for the determination of the claims of asylum seekers. The first wave of Asian asylum seekers, mostly from Vietnam, arrived in 1976 and were relatively less in number.[83] They were warmly received by the Australian administration, but their arrival sparked a negative public reaction to such 'irregular maritime arrivals' or 'boat people', as they came to be labelled.[84] The second wave of asylum seekers, mostly Cambodian, arrived in Australia in 1989 but were not so fortunate and were subjected to incarceration within the detention centres established across Sydney, Melbourne, and Perth.[85] They were placed in isolation in these centres, obscured from the public, and removed from community support and legal advice.[86] Their influx also led to the enactment of the *Migration Legislation Amendment Act 1989*,[87] which sanctioned officers to arrest and detain anyone suspected of being an 'illegal entrant'[88] under the Act.[89] This event sowed the seed for mandatory detention in Australian immigration policy as it was not long before the practice was introduced for *all* asylum seekers arriving to Australia without a valid visa or entry permit through the *Migration Reform Act 1992*.[90]

The increasing number of asylum seekers also fuelled the insecurity of the Australian state and its people, brought about by a fear of the 'other'.[91] It led to the creation of a racialized political rhetoric towards them as pejoratives such as 'Asian hordes', 'queue-jumpers', 'illegal migrants', and 'boat people' gained currency.[92] Trainor suggests that the use of such terms conveyed a qualitative fear of the arrival of countless 'others' in Australia who would compromise the liberal character of Australian society.[93] He further states that this encouraged a 'complacent racism'[94] in the Australian state which was furthered by the Howard government's response to what is colloquially referred to as the *Tampa* affair.

In August of 2001, a Norwegian vessel, *MV Tampa*, rescued 438 mainly Afghan asylum seekers from a sinking boat between Indonesia and Christmas Island. The Australian government deployed military force to prevent it from approaching Christmas Island, irrespective of the dire situation of the people on board and the captain's pleas to be allowed

[83] McMaster (n 74) 285.
[84] Ibid; Jaffa McKenzie and Reza Hasmath, 'Deterring the 'boat people': Explaining the Australian government's People Swap response to asylum seekers' (2013) 48 (4) *Australian Journal of Political Science* 417, 418.
[85] Janet Phillips and Harriet Spinks, 'Immigration detention in Australia', *Parliament of Australia* (Background Note, 20 March 2013) <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/detention#_Toc351535439>.
[86] McMaster (n 74) 285.
[87] *Migration Legislation Amendment Act 1989* (Cth) ('*Migration Legislation Amendment 1989*').
[88] Ibid s 6(1).
[89] *Migration Legislation Amendment 1989* (n 87) s 19(1); Phillips and Sprinks (n 85).
[90] *Migration Reform Act 1992* (Cth); Phillips and Sprinks (n 85); Beke Freyer and Fiona H. McKay, 'An investigation of incident reports from the detention center Nauru: Has Australia breached the Universal Declaration of Human Rights?' (2021) 20 (4) *Journal of Human Rights* 449, 450.
[91] McMaster (n 74) 279.
[92] Ibid 285; McKenzie and Hasmath (n 84) 418.
[93] Trainor (n 70) 20.
[94] Ibid 21.

to land.[95] It justified its decision in the name of defending Australia's sovereignty and territorial integrity by invoking fears of invasion.[96] However, the government's response was unjustifiably disproportionate to the small number of *Tampa* asylum seekers.[97] In September, their case for habeas corpus was decided by the Federal Court of Australia in *Ruddock v Vadarlis*,[98] wherein a 2:1 majority held that powers conferred upon the executive under section 61 of the *Australian Constitution*[99] includes the power to exclude or prevent the entry of non-citizens to the state.[100] Australia's sovereign status was held to be echoed in its power to determine who may come into its territory and who may not, and who shall be admitted into the Australian community and who shall not.[101]

October of 2001 witnessed the 'Children Overboard' episode, a ploy involving the production of false photographs by the Australian administration of asylums seekers throwing their children into the water in the lead-up to the federal election. The government claimed that this was a deliberate attempt by the asylum seekers to activate Australia's protection obligations under international law.[102] The 9/11 attacks in the United States in the following month further galvanised increased support for border protection.[103] This series of unfortunate events led to the introduction of the Pacific Solution. The Pacific Solution involved the excision of certain territories from Australia's migration zone (making it legally impossible for asylum seekers landing there to apply for refugee status); interception of asylum seekers entering Australia by boat; and offshore processing or the transfer of irregular migrants to remote island locations in Papua New Guinea (Manus Island) and Nauru.[104] It relied heavily on deterrence rationales and punitive detention and was embedded in a wider discussion on the protection and securitization of the nation state.[105] Notably, certain features of the Pacific Solution were borrowed from US policy and practice carried out at Guantanamo Bay during the early 1990s.[106]

The Pacific Solution was dismantled in 2008 but replaced by an even more militarised policy, Operation Sovereign Borders, in 2013. First disseminated as a pamphlet by the Liberal-Coalition government, it described the program as 'a military-led response to combat people

[95] Court of Conscience Editorial Team, 'Timeline of Australia's Refugee Policies' (2019) 13 *Court of Conscience* 1, 14; Linda Briskman and Victoria Mason, 'Abrogating Human Rights Responsibilities: Australia's Asylum-seeker Policy at Home and Abroad' in Juliet Pietsch and Marshall Clark (eds), *Migration and Integration in Europe, Southeast Asia and Australia: A Comparative Perspective* (Amsterdam University Press, 2015) 139.
[96] McMaster (n 74) 288.
[97] Ibid 280.
[98] *Ruddock v Vadarlis* (2001) FCA 1329 ('*Ruddock*').
[99] *Australian Constitution* s 61.
[100] *Ruddock* (n 98) 149 [193]; Greg Martin, 'Stop the boats! Moral panic in Australia over asylum seekers' (2015) 29 (3) *Continuum* 304, 314.
[101] *Ruddock* (n 98) 149 [193].
[102] Martin (n 100) 314.
[103] Briskman and Mason (n 95) 140.
[104] McKenzie and Hasmath (n 84) 418; van Berlo (n 73), 35.
[105] van Berlo (n 73) 36-37.
[106] Susanna Dechent, 'Operation Sovereign Borders: The Very Real Risk of *Refoulement* of Refugees' (2014) 39 (2) *Alternative Law Journal* 110.

smuggling.'[107] It described border protection as a 'crisis' and a 'national emergency', and assured that if elected, a Coalition government would 'tackle it with the focus and energy that an emergency demands.'[108] It included policies such as establishing '*genuine* and *rigorous* offshore processing' and the interception of boats by the Australian Defence Force, among other questionable measures.[109] These elements effectively reinstated the Pacific Solution.

B *Unravelling the layers of exclusion*

McMaster believes that a historical continuity links the enactment of the White Australia policy at the beginning of Federation to the obdurate and draconian approach to Australian asylum seekers at the centenary of Federation.[110] He suggests that it is the Australian insecurity brought about by a fear of the other that manifests itself in the current Australian immigration regime.[111] Age-old practices of incarceration, classification, and unregulated executive control continue to determine the fate of asylum seekers and remain firmly embedded within the character of Australian society and politics.[112] The *Migration Act* has been modified numerous times to make mandatory detention and offshore processing legal within Australian domestic law. However, Australia's treatment of asylum seekers is in breach of its international human rights obligations. This segment will unravel the layers of exclusion produced by these policies which exacerbate the plight of asylum seekers and disempower them as legal subjects.

Territorial excision is a foundational feature of Australian immigration policy. It sanctions certain parts of the Australian territory to be excised from its 'migration zone.'[113] In 2013, Australia controversially excised itself in entirety from its legislatively defined migration zone. This resulted in any non-citizen not holding a valid visa ('unlawful non-citizen'[114]) entering Australia being designated an 'unauthorised maritime arrival.'[115] Unauthorised maritime arrivals lie outside Australia's migration zone and are thus excluded from applying for asylum or an Australian visa of any kind.[116] This considerably limits irregular migrants' access to Australia's legal system when seeking asylum.[117] The detention of 'unlawful non-citizens' in an 'excised offshore place'[118] is prescribed under section 189 (3) of the *Migration*

[107] Operation Sovereign Borders pamphlet (n 6) 2.
[108] Ibid.
[109] Operation Sovereign Borders pamphlet (n 6) 5.
[110] McMaster (n 74) 279.
[111] Ibid.
[112] Nethery (n 71) 2.
[113] *Migration Act* (n 82) s 5(1) (definition of 'migration zone'); Anthea Vogl, 'Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border' (2015) 38 (1) *UNSW Law Journal* 114.
[114] *Migration Act* (n 82) s 14(1).
[115] Ibid s 5AA(1); Vogl (n 113) 114.
[116] Vogl (n 113) 114.
[117] Ibid 115.
[118] *Migration Act* (n 82) s 5(1) (definition of 'excised offshore place').

Act.[119] Since the 'excised offshore place' effectively includes the whole of the Australian continent, detention under the *Migration Act* becomes mandatory and automatic for all persons entering Australia irregularly and without relevant travel permits.

Australian migration law lays down indefinite and unreviewable detention for offshore asylum seekers in penal facilities which lack regulation, transparency, and accountability over the daily lives of detainees, often resulting in general abuse and violence.[120] Detention of this kind is akin to Giorgio Agamben's theorization of 'camps'.[121] He describes such spaces as political structures that arise out of a state of exception or a 'temporary suspension of the rule of law' based on a 'factual state of danger.'[122] For him, camps are 'a hybrid of law and fact in which the two terms have become indistinguishable'[123] as the state of exception increasingly becomes the norm.[124] Agamben suggests that the detention of foreigners awaiting the determination of their claims for asylum also classify as 'camps' where 'the normal order is de facto suspended' and the commission of atrocities depends 'not on law but on the civility and ethical sense of the police who temporarily act as sovereign.'[125]

Arendt, in her analysis of extermination and concentration camps, described them as 'laboratories in the experiment of total domination.'[126] She states that camps result in the 'destruction' and 'disintegration' of the human personality in three stages: the first involves the arbitrary arrest of the judicial person (arbitrary since it occurs irrespective of the actions or opinions of the person concerned);[127] the second is through the 'complete isolation' of these camps from the rest of the world, 'as if they and their inmates were no longer part of the world of the living';[128] the final stage involves the 'destruction of individuality itself' and is brought about through the institutionalisation of torture.[129] Mandatory detention under Australian immigration law resembles Arendt's description of 'camps' as it contemplates detention for *all* unauthorised arrivals to Australia until the determination process is completed, irrespective of one's circumstances or actions.[130] Restricted visitor access is also characteristic of detention facilities set up by the Australian administration and are 'much harder to access than ordinary prisons.'[131] Journalists are generally prevented from entering them and its staff are barred from publicly sharing details of what transpires within these

[119] *Migration Act* (n 82) s 189(3); Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 (2) *Melbourne Journal of International Law* 1, 6-7.
[120] Nethery (n 71) 3.
[121] Ibid.
[122] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr Daniel Heller-Roazen (Stanford University Press, 1998) 181-182.
[123] Ibid 183.
[124] Ibid.
[125] Agamben (n 122) 187; quoted in Nethery (n 71) 3.
[126] Hannah Arendt, 'Social Science Techniques and the Study of Concentration Camps' (1950) 12 (1) Jewish *Social Studies* 49*,* 60.
[127] Ibid 59-61.
[128] Arendt (n 126) 59.
[129] Ibid 61.
[130] McMaster (n 74) 284.
[131] Ibid 286.

centres. Such restrictions serve as a barrier between the Australian public and the reality of the experience of detention.[132] The legality of mandatory detention is upheld by the *Migration Act* as well as the Australian High Court,[133] leading to its institutionalisation.

Mandatory detention is declared by the Australian government as deterrent but may be better understood as a reaction to a *perceived* security threat and as an act of discrimination.[134] Detention and offshore processing violate Australia's international human rights obligations. These infringe the right to 'liberty and the security of person'[135] and the prohibition against arbitrary detention[136] enshrined under the *UDHR* and the *ICCPR*, as discussed in part I of this essay. Arbitrary detention, coupled with the indefinite nature of detention, and the lack of information and adequate procedural safeguards has also been held to violate the right against subjection to 'torture or to cruel, inhuman or degrading treatment or punishment' under Article 7 of the *ICCPR*.[137]

The Committee on Economic, Social and Cultural Rights ('CESCR'), in the first cycle of Australia's Universal Periodic Review ('UPR') in 2011, suggested remedying the provision of health services, including mental health, for detainees. It further noted that detainees in Christmas Island's immigration detention facilities were placed in isolation without appropriate safeguards, especially for women and children.[138] The Committee on the Elimination of Racial Discrimination ('CERD') recommended that Australia review its mandatory detention regime with an alternative to detention, and employ detention as a measure of last resort, limited by statute to the shortest time reasonably necessary. It also endorsed standardized asylum assessment and review procedures and equal entitlement to public services for all asylum seekers.[139] The Australian government accepted majority of the recommendations. However, the second UPR cycle in 2015 revealed that only ten percent of the recommendations had been implemented.[140] Overcrowding in places of detention was identified as a problem in the second cycle and the Committee against Torture ('CAT') urged Australia to ensure that the conditions of detention are compliant with international norms and standards.[141] It also recommended that Australia must repeal mandatory detention and not detain children and families with children as well as persons in need of international protection.[142] The UN High Commissioner for Human Rights expressed that the lack of a case-by-case assessment of detention can make it arbitrary. She also reported that the policy

[132] Freyer and McKay (n 90) 449-450.
[133] See generally *Al-Kateb v Godwin* [2004] HCA 37.
[134] McMaster (n 74), 284.
[135] *UDHR* (n 13) art 3; *ICCPR* (n 18) art 9(1).
[136] *UDHR* (n 13) art 9; *ICCPR* (n 18) art 9(1).
[137] *F.K.A.G. et al. v Australia* (n 64) 19-20 [9.8].
[138] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 10th sess, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) 9 [37] ('*UPR Report: Australia 1*').
[139] Ibid 11-12 [49].
[140] Freyer and McKay (n 90) 453.
[141] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 23rd sess, UN Doc A/HRC/WG.6/23/AUS/2 (31 August 2015) 7 [19] ('*UPR Report: Australia 2*').
[142] Ibid 13 [67].

of mandatory detention led to self-harm practices and suicides among detainees.[143] She also referred to Australia's political refrain of 'boat people' and 'queue jumpers' as having resulted in the stigmatization of an entire class of people. In view of this, she urged all Australian political parties to adopt a principled approach against such denigration of asylum seekers.[144] The CCPR, in the third cycle of the UPR, recommended that the application of force or physical restraints against asylum seekers be discontinued. Likewise, the Special Rapporteur on the human rights of migrants recommended independent and systematic monitoring of all detention centres and ensuring access to justice for all detainees.[145]

Offshore processing of the claims of asylum seekers in Australia and their detention in punitive, prison-like conditions also violates the principle of *non-refoulement*. CERD, in the first UPR cycle, specified that Australia must respect the principle of *non-refoulement* within its domestic law when returning asylum seekers to third countries.[146] The CCPR, in the third UPR cycle, recommended that *non-refoulement* be adhered to, and that all asylum seekers, regardless of their mode of arrival, have access to efficient refugee status and *non-refoulement* determinations.[147] The CESCR likewise expressed concern at the regional processing of asylum seekers' claims, despite the inhumane conditions at such facilities, including but not limited to allegations of sexual abuse by the officials. It reiterated the responsibility of Australia to the asylum seekers at these offshore detention facilities and urged it to cease the policy, shut down the regional processing centres, repatriate all concerned persons to Australia for the determination of their asylum claims with procedural safeguards.[148] The CAT has stated that state parties must not adopt measures that compel persons in need of protection to return to their country, despite the risk of torture or other cruel, inhuman, or degrading treatment or punishment.[149] Serious violations of human rights violate the principle of *non-refoulement* when they amount to cruel, inhuman or degrading treatment.[150]

Australia's unilateral non-entrée policies, including 'visa requirements, carrier sanctions, airline liaison officers, surveillance technologies, interception at sea, and the excising of Australian territory', also violate the principle of *non-refoulement*.[151] The goal of these policies is to prevent refugees from even reaching the point of being able to present their case

[143] *UPR Report: Australia 2* (n 141) 13 [66].
[144] Ibid.
[145] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 37th sess, UN Doc A/HRC/WG.6/37/AUS/2 (13 November 2020) 11 [96] ('*UPR Report: Australia 3*').
[146] *UPR Report: Australia 1* (n 138) 11-12 [49].
[147] *UPR Report: Australia 3* (n 145) 10 [90].
[148] Ibid 10 [92].
[149] Committee against Torture, *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, UN Doc CAT/C/GC/4 (4 September 2018) 3 [14].
[150] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford Academic, 2014) 35.
[151] Asher Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 *Refugee Survey Quarterly* 48, 49.

for protection to asylum state authorities.[152] They limit potential asylum-seekers and force those fleeing persecution to resort to irregular and often dangerous journeys to seek protection.[153] Australia also enters into agreements with its regional neighbours, most of whom are not bound by similar obligations to refugees under international law, to shift the responsibility of border control, resulting in the detention and deportation of those who would otherwise claim protection in Australian territory.[154]

The Australian response to refugees denies them the avenue to demand their rights. The human rights' issues at stake have motivated the stakeholders in the Australian civil society to advocate against the Australian government's policies on asylum seekers. Critics have morally objected to the injustice of mandatory detention and offshore processing and their terrible consequences for asylum seekers. From a legal standpoint, Australia's immigration regime has been widely criticized in so far as it violates the state's international human rights obligations as underscored above.

IV Sovereignty in a Transnational world

Douzinas, drawing from Freud and the discipline of psychoanalysis, suggests that the self is split, and the subject comes into existence by being separated from what becomes the 'other'. This introduces it to a 'lack' which causes deep *constitutive* trauma in the creation of the subject.[155] Likewise, he provides that the nation-state comes into being by excluding other peoples and nations. Such an exclusion characterises the nation-state as a split, constituted by itself and the other (here, the excluded peoples and nations). This exclusion also introduces a lack at the heart of the polity, which cannot be rejected or managed, and continually manifests in practices such as racism, xenophobia, or similar others.[156] Addressing this lack involves conceiving myths celebrating a fictitious united polity. But Douzinas states that law and other state institutions remain captive to such recurring trauma associated with the lack. This trauma is reflected most clearly in asylum seekers and refugees as their arrival is perceived as a symptom of the trauma, an echo of the lack in the heart of the nation. Douzinas thus claims that in seeking recognition, asylum seekers bring to the fore the constitutive exclusion that lies at the foundation of law and the nation-state and forces the state to not just live with the other (here, asylum seekers), but also to live with the other within it and to live as an other.[157] His suggestion that asylum seekers are the state's 'others' who inhere within it but are incessantly rejected by it offers a philosophical explanation for the historical unwillingness of states to recognize and uphold the rights of refugees.

[152] James C. Hathaway, 'The Rights of Refugees under International Law' (Cambridge University Press, 2010) 291.
[153] Hirsch (n 151) 49
[154] Ibid.
[155] Douzinas (n 15) 357.
[156] Ibid.
[157] Douzinas (n 15) 357.

Sovereignty is deeply entrenched under international human rights law and the global legal order. The conflict between the notion of state sovereignty and the promise of universal protection of human rights is far from resolved. I do not aspire to provide durable solutions to the problems confronted by asylum seekers highlighted in this essay but offer certain reflections on the evolving notions of state sovereignty and transnational belonging in the contemporary world. The drafting history of relevant international instruments such as the *UDHR* demonstrate that the inadequacies in law's response to asylum seekers are not only grounded in a failure of political will, but also in disagreement over the sources of obligation to refugees, what is owed to them, and how responsibility for them should be distributed between states.[158] This constitutes a chief reason against the recognition of an individual's right to asylum under international law. Another reason may be that unregulated migration challenges a state's sovereignty and its power to decide who is included and who is not in the constitution of the nation-state.[159]

The sovereign status of states is uncontested and well-established under international law. The concern, however, relates to the ethical and conscientious exercise of the liberty conferred by this status.[160] Trainor suggests that the notion of sovereignty is 'legitimately employed by those who acknowledge their membership of, and responsibility towards, the international community.'[161] Referring to the example of the Howard administration in Australia, he urges that those who use it as an 'instrument of separation' from the rest of the world abuse such a power.[162] Lester advocates re-evaluating the conception of 'absolute sovereignty' as irrefutable and urges attention to how law and power govern the relationship between asylum seekers and the sovereign. She argues that states rely upon inhumane institutional practices, made legitimate by the 'ostensible neutrality and restraint of law and legal process', to obscure the dehumanising effects of legal violence that is perpetrated upon asylum seekers.[163]

A steep disparity also exists on a practical level between what asylum seekers and states consider important. In this regard, McMaster claims that for asylum seekers fleeing dire situations, sovereignty does not figure as a consideration at least until they arrive at entry points, while states like Australia are preoccupied with modernist notions of sovereignty and border security.[164] He also highlights that the immigration policy in Australia places the onus on the asylum seekers to prove that they are genuine refugees. This reveals the government's interest in upholding its sovereignty over treating asylum-seekers with sympathy.[165] Loghman's experience, narrated at the beginning of this essay, also displays the state's utter disregard for the special needs of certain classes of people, such as children who are separated from their families. McMaster argues that sovereignty is becoming increasingly

[158] Gibney (n 39) 2.
[159] Hirsch (n 151) 50.
[160] Trainor (n)70 21.
[161] Ibid 24.
[162] Ibid.
[163] Eve Lester, 'Making Migration Law: Courting our conscience' (2019) 13 *Court of Conscience* 1, 34.
[164] McMaster (n 74) 288.
[165] Ibid 280.

illusory and identity increasingly transnational in the twenty-first century. This necessitates a reimagination of the 'old dichotomy between national sovereignty and transnational values, especially universal human rights.'[166]

Finally, it is also imperative to emphasise the status of asylum seekers as subjects of human rights law to recognise their agency and to avoid depoliticizing them as victims. Richard Bailey, who was involved in the campaign against mandatory detention in Australia, provides insights into disrupting Australian immigration policy through a 'strategic' engagement with law. This involved moral appeals to human rights in protests both inside and outside detention centres as well as exploiting legal loopholes.[167] The campaign also employed human rights law as a 'propaganda tool', not to reform domestic policy, but to expose the irony of an administration that violates its international legal obligations under relevant instruments despite being a signatory to them. Such a tactic, Bailey claims, generated 'resistant participation' by shifting public opinion and arguing for mass action.[168]

V Conclusion

This essay argued that asylum seekers are alienated from the global legal order and revealed their (non)status under human rights law owing to their disenfranchisement as rights-bearing subjects. Their denial of legal subjecthood ensues from the absence of a right to receive or be granted asylum under international law. The right of asylum has traditionally been perceived as belonging to the states, flowing from the exercise of its sovereignty and exclusive control over its territory and jurisdiction. The drafting history of core documents of human rights law illustrates the unwillingness of states to acknowledge an individual right to asylum. Developments in human rights law are made in what I have referred to as the ancillary regime of protection concerning asylum seekers. While a wide array of rights applies to them within the human rights corpus, two of them, namely the right against *refoulement* and the right to liberty and protection against arbitrary detention, were highlighted in this essay as particularly salient for asylum seekers. Violations of these rights were subsequently explored in the Australian context.

An overview of the development of mandatory detention and offshore processing under the Australian immigration regime was attempted to highlight the marginalization of asylum seekers in a domestic context. I argued that traces of settler colonialism in the form of incarceration can be traced in Australian migration law. I also argued that it is heavily influenced by a racialized political rhetoric towards asylum seekers. Layers of exclusion in the form of relevant legal, moral, and political obstacles facing asylum seekers aimed to be unraveled in the Australian context. To this end, I underlined how the current immigration regime violates Australia's obligations under human rights law.

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[166] Ibid.
[167] Richard Bailey, 'Strategy, Rupture, Rights: Reflections on Law and Resistance in Immigration Detention' (2009) 31 (1) *Australian Feminist Law Journal* 33.
[168] Ibid 49.

Finally, the failure of political will to recognize and uphold the rights of asylum seekers, the disagreement of states over the specific contours of an individual right to asylum, and the privileging of the notions of 'state sovereignty' and 'national identity' over the protection of asylum seekers were emphasized as some of the chief reasons for the exclusion of asylum seekers from the global legal order. The traditional conceptualization of sovereignty was urged to be revaluated in the era of transnational belonging. Asylum seekers were imagined as legal subjects of human rights law to promote their agency and political subjectivity through the example of the movement against immigration policies in Australia.

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