

**THE CRIMINALISATION OF UNAUTHORISED
IMMIGRANTS: HOW DOES IMMIGRATION
DETENTION BECOME PUNISHMENT?**

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I, Tracy Albin, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

Abstract

International Law — Refugees — Asylum Seekers — State Practice — Immigration Detention — Criminal Justice — Deterrence — Retribution — Punishment

Asylum seekers and refugees are some of the most vulnerable people in the world. The sad reality is, they invite differing opinion towards them and are often considered as a burden to society. Despite having a structured and comprehensive international legal framework for the protection of these vulnerable people, many modern state practices fall short of the prescribed standards. On that backdrop, this paper focuses on the increasing convergence of criminal justice and immigration law, which has been colloquially named 'crimmigration', and is a recent topic of study for many scholars. It is argued by some writers that the practice of immigration detention is fundamentally modelled, and indeed operated, on the three fundamental principles of criminal justice: deterrence, retribution and punishment. This paper will demonstrate how different aspects of immigration detention reflect these principles, resulting in the criminalisation — and ultimately the punishment — of unauthorised immigrants in Australia, the United States and the United Kingdom.

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LIST OF ABBREVIATIONS

ACEM	Australian College of Emergency Medicine
APPGs	All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants (UK)
CRC	<i>Convention on the Rights of the Child</i> , opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
EU	European Union
HRC	United Nations Human Rights Committee
ICCPR	<i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
IIRIRA	<i>Illegal Immigration Reform and Immigrant Responsibility Act 1996</i> (US)
IMMA	<i>Immigration Act 1990</i> (US)
PNG	Papua New Guinea
Protocol	<i>Protocol Relating to the Status of Refugees</i> , opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)
Refugee Convention	<i>Convention Relating to the Status of Refugees</i> , opened for signature 14 December 1950, 189 UNTS 137

(entered into force 22 April 1954)

***Torture
Convention*** *Convention Against Torture and Other Cruel,
Inhumane or Degrading Treatment or Punishment,*
opened for signature 10 December 1984, 1465 UNTS
85 (entered into force 26 June 1987)

UN United Nations

UNHCHR United Nations High Commissioner for Human Rights

UNHCR United Nations High Commissioner for Refugees

I INTRODUCTION

A An Introduction to Crimmigration

A historical analysis of international immigration policy reveals a telling story of the interaction between immigration law and criminal justice.¹ This interaction has been termed ‘crimmigration’.² The phenomenon found its footings toward the end of the 20th century, based on developments in immigration policy worldwide as a response to the September 11 terrorist attacks in the United States (‘US’).³ Many writers argue that from that time, states have exploited public fear to create a state-induced culture of control.⁴ As a result, this era saw a growth in detention practices, as states became wearier of unauthorised immigrants⁵ and less concerned with their international human rights obligations.⁶ By attributing culpability to all asylum seekers for the prevalence of terrorism and pressure on states’ resources,⁷ governments around the globe have facilitated the criminalisation of unauthorised immigrants.

Today, crimmigration is an area of interest for both legal academics and criminologists.⁸ Many scholars argue that the adoption of the criminal enforcement

¹ See generally Stephen Legomsky, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’ (2007) 64 *Washington and Lee Law Review* 469; Michael Welch, ‘The Sonics of Crimmigration in Australia’ (2012) 52 *British Journal of Criminology* 324; Sharon A Healy, ‘The Trend Toward the Criminalisation and Detention of Asylum Seekers’ (2004) 12(1) *Human Rights Brief* 14; Alice Bloomfield, ‘Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?’ (2016) 35 *Refugee Survey Quarterly* 29.

² Ibid.

³ See, eg, Welch, above n 1, 327–30; Michael Welch, ‘Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control’ (2005) 5(4) *Criminal Justice* 331, 332, 335–8; Paresh Kathrani, ‘Asylum Law or Criminal Law: Blame, Deterrence and the Criminalisation of the Asylum Seeker’ (2011) 18(4) *Jurisprudence* 1543, 1549–50; Healy, above n 1, 14–5.

⁴ Welch, above n 1, 329; James Banks, ‘The Criminalisation of Asylum Seekers and Asylum Policy’ (2008) 175 *Prison Service Journal* 43, 43–6; Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime and Sovereign Power’ (2006) 56(2) *American University Law Review* 367, 409–13.

⁵ ‘Unauthorised immigrants’ refers throughout to those people who arrive in a state by air or boat without appropriate documentation for entry into a state. This definition therefore includes both refugees and asylum seekers; these terms are used interchangeably throughout.

⁶ Welch, above n 3, 335–9.

⁷ Stumpf, above n 4, 385–6; Teresa A Miller, ‘Blurring the Boundaries Between Immigration and Crime Control After September 11th’ (2005) 25(1) *Boston College Third World Law Journal* 81, 85; Kathrani, above n 3, 1549–50; See generally Miranda Lewis, ‘Asylum: Understanding Public Attitudes’ (2011) 35(3) *London Institute for Public Policy Research* 7.

⁸ See generally Mary Bosworth and Sarah Turnbull, ‘Immigration Detention and the Expansion of Penal Power in the United Kingdom’ in Karamet Reiter and Alexa Koenig (eds), *Extreme*

model into immigration laws, and the concurrent rejection of criminal law safeguards, leads to an imbalance between the transgressions of unauthorised immigrants and the punishment that they inevitably face.⁹ Through the use of deterrence, retribution and punishment, modern day immigration policies disproportionately affect bona fide unauthorised immigrants who are truly in need of human rights protection and humanitarian aid.¹⁰ This paper will explore the concept of crimmigration, illustrating how immigration policies in the 21st century encourage public perceptions that ‘asylum seekers occupy the same societal role of [criminals], therefore legitimising ... popular hostility toward them’.¹¹ Specifically, this paper will demonstrate how the use of criminal justice rationales to detain unauthorised immigrants results in the criminalisation, and therefore the punishment, of detainees.

B Methodology and Structure

The analysis undertaken in this dissertation is primarily doctrinal and critical research. The purpose of adopting these two methodologies is to adequately synthesise the literature in the area, identify the gaps, and critique the existing international law framework to propose new suggestions for reform. The paper is divided into six chapters. Chapter I establishes the conceptual framework, methodology, research question, objectives, and significance of the research. Chapter II provides a brief overview of the international law governing the treatment of

Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement (Palgrave Macmillan, 2015); Cesar Hernandez, ‘Immigration Detention as Punishment’ (2014) 61 *University of California Los Angeles Law Review* 1346; Leanne Weber, ‘The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care’ (2002) 14(1) *Current Issues in Criminal Justice* 9; Catherine Skulan, ‘Australia’s Mandatory Detention of “Unauthorized” Asylum Seekers: History, Politics and Analysis Under International Law’ (2007) 21 *Georgetown Immigration Law Journal* 61.

⁹ Legomsky, above n 1, 469, 542; Peter Billings, ‘Wither Indefinite Immigration Detention in Australia? Rethinking Legal Constraints on the Detention of Non-citizens’ (2015) 38(4) *University of New South Wales Law Journal* 1386, 1410; Phillippe De Bruycker et al, ‘Alternatives to Immigration and Asylum Detention in the EU’ (Report, Odyssees Network, January 2015) 53; see generally Michael J Wishnie, ‘Immigration Law and the Proportionality Requirement’ (2011) 2(1) *University of California Irvine Law Review* 415.

¹⁰ Kathrani, above n 3, 1545; Alfred De Zayas, ‘Human Rights and Refugees’ (1992-1993) 61(2) *Nordic Journal of International Law* 253, 255; see generally Izabella Majcher, ‘Crimmigration in the European Union Through the Lens of Immigration Detention’ (Working Paper No 6, Global Detention Project, 30 September 2013); Jennifer Bond, ‘Excluding Justice: The Dangerous Intersection Between Refugee Claims, Criminal Law, and “Guilty” Asylum Seekers’ (2012) 24(1) *International Journal of Refugee Law* 37.

¹¹ Brett Story, ‘Politics as Usual: The Criminalisation of Asylum Seekers in the United States’ (Working Paper No 26, Oxford University Refugee Studies Centre, September 2005) 3.

asylum seekers and refugees to determine the framework that all member states are obliged to, but often do not, work within. Chapter III explores the use of deterrence in immigration law, as the first criminal justice principle in the matrix. This chapter will focus on immigration detention laws in Australia and the US, highlighting how the use of deterrence-based legislation and the rhetoric of policymakers contribute to the criminalisation of unauthorised immigrants. This chapter suggests that governments are exploiting the threat of terror to create a legislative culture of control, aimed specifically at excluding perceived ‘threats’ to national security, using deterrence as their means of achieving such ends.

Chapter IV focuses on the conditions of immigration detention; specifically, the absence of temporal limits on detention in Australia and the United Kingdom (‘UK’), and the undeniable link this has to increased mental health issues amongst detainees. This chapter also analyses the lack of healthcare services available in detention facilities as contributing to mental health issues. The paper argues that these conditions form part of the adoption of the criminal justice principle of retribution by states, where the detention of unauthorised immigrants is accepted and indeed encouraged by policymakers, as being commensurate to the ‘illegality’ of their arrival.

In Chapter V, the author’s own suggestions for reform come to light. It underlines the need for an immigration regime aimed at reversing the crimmigration crisis. To that end, two suggestions for policy reform will be made: (1) the establishment of an international framework governing state immigration detention regimes; and (2) the introduction of a universal temporal limit on detention. In doing so, the objectives of the research, discussed below, will be put forward as policy-based solutions for this ever-growing problem. Chapter VI provides concluding remarks, whilst reaffirming the need for renewed debate and reform of immigration detention policy.

C Research Question and Objectives

1 Research Question

The primary objective of the research is to illustrate how the importation of criminal justice methods into immigration detention practices, specifically through reliance on the principles of deterrence, retribution and punishment, results in the criminalisation of unauthorised immigrants. The research question can therefore be framed as: the criminalisation of unauthorised immigrants: how does immigration detention become punishment?

2 Research Objectives

The research has three main objectives: (1) to suggest an international framework for governing national immigration detention, (2) to suggest a universally applicable temporal limit for detention, and (3) to stimulate renewed debate on the efficacy of immigration detention and the need to impose a temporal limit. To achieve those objectives, the paper will demonstrate how current detention policy in Australia, the US and the UK continues to adopt the principles of deterrence, retribution and punishment, which results in immigration detention that inherently criminalises unauthorised immigrants. In doing so, the need for a new and more effective regulatory framework that prescribes the minimum standards of detention, and the need for a universal temporal limit, will be highlighted.

3 Significance and Originality

The significance and originality of this research predominantly stem from the first and second research objectives. While some writers have attempted to trace the beginning of crimmigration and pinpoint the areas of importation of criminal justice into immigration law,¹² there is little literature focusing explicitly on the criminalisation of unauthorised immigrants through the specific use of detention, and the punishment of immigrants that results therefrom. The suggestion of a new

¹² See generally Legomsky, above n 1; Stumpf, above n 4; Bosworth and Turnbull, above n 8; Welch, above n 3; Healey, above n 1.

international regulatory framework in Chapter V is therefore an advancement on previous research. In proposing such a framework, the paper aims to provide an innovative solution to the crimmigration crisis focused on state responsibility, enforcement capabilities and the promotion of international laws and values.

Furthermore, the suggestion of a universal temporal limit seeks to address a marked gap in the literature. While several states do in fact implement a temporal limit on detention in their domestic laws, there are a resounding number of states which do not. Hence, no specific time limit has been put forward in the existing literature; this paper aims to fill that gap by providing a suggestion for a universally applicable temporal limit aimed at addressing the issues of immigration detention worldwide. The author believes that a universal temporal limit will improve uniformity, transparency, predictability and reliability of detention practices. The paper also suggests that this will lead to a decrease in the prevalence of human rights breaches in immigration detention, which have been widely traversed in the past. While it is not expected that the temporal limit put forward in this paper will be readily adopted, the suggestion will stimulate discussion and generate the potential for a universal temporal limit to be adopted in the future.

An additional source of significance of the research is the considerable infancy of the area of study. Although not a primary focus of the paper, this lends itself to the author's ability to suggest innovative reform and facilitates the identification of limitations in previous literature. The overall purpose of this research is to highlight the ongoing importance of the protection of unauthorised immigrants from the harsh consequences of the 'crimmigration crisis' and to stimulate a change in the way unauthorised immigrants are viewed by society, and hence, how laws around the world respond to them.

D Limitations of the Research

Given the broad nature of this area, the author has adopted several limitations to sufficiently focus the content of the paper as well as deepen the value of the analysis. These are detailed below.

1 *Spatial Limit*

Although there are a number of states that contribute to the crimmigration crisis globally, the research focuses on Australia, the US and the UK. There are two reasons for this: (1) the availability of information relating to detention practices in these states, and (2) the considerable geopolitical power of these states, who are well placed to become leaders for reform.

2 *Temporal Limit*

The infancy of the literature in this area suggests that the crimmigration phenomenon began in the late 1980s and early 1990s. Therefore, the discussion of state legislation on immigration detention will be limited to legislation introduced around that time as well as more modern legislative initiatives from the 21st century.

3 *Limitation on the Subject Matter*

This paper focuses on the criminalisation of unauthorised immigrants only. While this limitation in subject scope exists, it is put forward by the author that this situation occurs with regard to all immigration detainees. Unauthorised immigrants for the purpose of this paper refers to those immigrants that arrive by air or sea without proper documentation.

4 *The Definition of Detention*

Detention for the purposes of the paper refers to a situation of deprivation of liberty of unauthorised immigrants, which is mandated by the laws of a state.¹³ Based on this definition, the types of detention considered include offshore detention facilities, closed onshore detention facilities and holding centres in airports and other points of entry. It does not, however, include detention imposed on immigrants for human trafficking or carrying illegal items. It also excludes alternatives to detention, such as

¹³ For a detailed discussion on the definition of detention, see Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669, 677–82.

the use of ankle-monitored home detention, where the immigrant is free to enter the community.

II APPLICABLE INTERNATIONAL LAW

A The International Right to Seek Asylum

The tension between state sovereignty and international law, particularly in the area of asylum seekers and refugees, continues to grow.¹ This tension often leads to states derogating from their international law obligations, in favour of a policy that prioritises those states' national security. This section will explore the international law regulating asylum seekers and refugees, to the extent necessary for a deeper understanding of the discussion to follow.

B The 1951 Refugee Convention

When examining the international framework governing refugees, the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*') is the most appropriate starting point. Described as the 'centrepiece of international refugee protection today',² the *Refugee Convention* defines the term 'refugee' and prescribes the rights of displaced people as well as the legal obligations of states to protect them.³ The pivotal aspect of the *Refugee Convention* is the definition of 'refugee'. Article 1(a)(2) defines a refugee as someone who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside their country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country.⁴

Furthermore, according to art 1(c), the *Refugee Convention* will cease to apply if a person voluntarily waives their right to protection by a state, re-acquires their nationality or re-establishes themselves in the country which they left or another

¹ See generally Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007).

² United Nations General Assembly, *Draft Convention Relating to the Status of Refugees*, GA Res 429, UN GAOR, 3rd Comm, 5th sess, 325th plen mtg, UN Doc No A/RES/429 (14 December 1950).

³ United Nations High Commissioner on Human Rights, *The 1951 Refugee Convention*, The UN Refugee Agency <<http://www.unhcr.org/en-au/1951-refugee-convention.html>>.

⁴ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(A)(2).

country in which they do not fear persecution. This is also the case if the circumstances on which a person's status as a refugee was granted no longer exist, or where the person is able to return to their home country because the fear of persecution no longer exists.

The endorsement of a single definition of 'refugee' in the *Refugee Convention*, and the introduction of the 1967 *Protocol Relating to the Status of Refugees* ('*Protocol*'),⁵ has resulted in a wide reaching and universally applicable instrument for the treatment and protection of refugees and asylum seekers. Underpinned by the fundamental principles of non-discrimination, non-penalisation and non-refoulement, the *Refugee Convention* seeks to provide the basic rights of access to courts, primary education, work and the provision for documentation without the prejudice of religion, gender, age, nationality or any other recognised protected difference.⁶ The *Refugee Convention* currently has 145 state signatories, all of which have ratified or acceded to the Convention.⁷

C *The 1967 Protocol Relating to the Status of Refugees*

The *Protocol* is independent of, but largely related to, the *Refugee Convention* and was introduced to lift the temporal and geographical limitations inherent in the latter.⁸ The *Refugee Convention*, upon its inception, applied to refugees whose 'circumstances had come about as a result of events occurring before 1 January 1951'.⁹ Additionally, states were given the option to interpret this as 'events occurring in Europe or elsewhere' prior to this date.¹⁰ The *Protocol* relieves the

⁵ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁶ *Convention Relating to the Status of Refugees* (21 May 2014) Information Platform <<https://www.humanrights.ch/en/standards/un-treaties/further-conventions/refugee-convention/>>.

⁷ *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR <<http://www.unhcr.org/en-au/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>>.

⁸ Lucy Mayblin, *Historically European, Morally Universal? The 1951 Geneva Convention on the Status of Refugees* (Essay, 2010).

⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(A)(2).

¹⁰ *Ibid* art 1(B)(1)(b).

Refugee Convention of these restrictions and broadens its application, enabling it to reach every displaced person globally.¹¹

D *The 1948 Universal Declaration of Human Rights*

Many of the fundamental human rights of asylum seekers and refugees are laid down in the *Universal Declaration of Human Rights*.¹² These include, inter alia, the right to seek and enjoy asylum,¹³ the freedom from torture or cruel, inhumane or degrading treatment,¹⁴ and the freedom from arbitrary arrest and detention.¹⁵ The protection of these rights is supported by the introduction of national laws and policies. One of the significant areas for national law relates to the procedures for determining refugee status, an area of which the *Refugee Convention* is predominantly silent. These rights are also aided by prevailing community standards which influence the development of laws in a state, as well as customary international law.

E *Other International Law*

While other international laws have a limited application to refugee protection, it is nevertheless an important aspect of the legal framework. For example, the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*¹⁶ deals directly with displaced persons in situations of armed conflict. In addition, three notable human rights treaties directly affect refugees; the *International Covenant on Civil and Political Rights* ('ICCPR'),¹⁷ the *Convention Against Torture*

¹¹ See generally *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Both refugees and asylum seekers are entitled to the rights afforded under the *Refugee Convention* and the *Protocol*.

¹² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹³ *Ibid* art 14.

¹⁴ *Ibid* art 5.

¹⁵ *Ibid* art 9.

¹⁶ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Article 2(1) of the *ICCPR* gives that instrument extra-terrestrial jurisdiction, meaning states are obliged to comply with its provisions even where it exercises control outside of its territory: see Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN GAOR, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

and Other Cruel, Inhumane or Degrading Treatment or Punishment ('*Torture Convention*')¹⁸ and the *Convention on the Rights of the Child* ('*CRC*').¹⁹ Together, these treaties compliment the protections afforded by the *Refugee Convention*.

For instance, art 16 of the *CRC* provides that:

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Further, art 9 of the *ICCPR* states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Case law in relation to arbitrary detention under art 9 of the *ICCPR* has further clarified the obligations of states under these international treaty provisions. For example, in *F J v Commonwealth of Australia (No 2)*,²⁰ the Human Rights Committee observed that 'arbitrariness' is not equal to 'illegal', rather it involves a level of inappropriateness, injustice or a lack of predictability and due process of law.²¹ As a necessary implication, detention of unauthorised immigrants must be reasonable, necessary and proportionate in all of the circumstances.²²

Further, in *FKAG v Australia*,²³ the Human Rights Committee recognised that extended periods of detention must be assessed and justified on a case-by-case basis. Hence, where a person is detained for a long period, it must be due to circumstances

(*Advisory Opinion*) [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJRep 168, 242–3 [216].

¹⁸ *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁰ *F J v Commonwealth of Australia (No 2)* [2017] VSCA 99; UN Human Rights Committee, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2233/2013*, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016).

²¹ *Ibid* [10.3].

²² *Ibid*.

²³ *FKAG v Australia*, Human Rights Committee, *Views Adopted by the Committee at its 108th Session*, UN GAOR, Communication No 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013).

such as an ‘individualised likelihood of absconding, danger of crimes against others, or risk of acts against national security’.²⁴

F UN Guidelines on Detention

The UN Guidelines on Detention provide several safeguards against the denial of basic rights to unauthorised immigrants. Guideline 6 clearly states that ‘indefinite detention for immigration purposes is arbitrary as a matter of international human rights law’ ... ‘maximum periods of detention should be set in national legislation’.²⁵ Further, Guideline 8(vi) provides that ‘appropriate medical treatment must be provided where needed, including psychological counselling’,²⁶ whilst Guideline 9.1 declares that factors relating to a detainee’s mental health must be taken into account when deciding whether or not to detain that person.²⁷ Guideline 9.1 also provides that periodic assessments of detainee’s mental and physical health should be conducted to ensure the health and protection of immigrants.²⁸ With these in mind, the paper will demonstrate how Australia, the US and the UK continue to violate international human rights and humanitarian law, as well as UN safeguards for refugees and asylum seekers.

These treaties are not an exhaustive summary of all international laws applicable to asylum seekers and refugees; they aim to provide an overview of the international law perspective on the issue, to inform the discussion to follow. The next three chapters will analyse the nature and objectives of immigration detention in establishing the main argument of the paper: the detention of asylum seekers in accordance with the principles of criminal justice amounts to punishment. This will be established by analysing the legislative intent of states and the absence of temporal limits as well as the conditions of detention.

²⁴ Ibid [9.3].

²⁵ UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) r 6.

²⁶ Ibid r 8(vi).

²⁷ Ibid r 9.1.

²⁸ Ibid.

III THE CULTURE OF CONTROL: A LEGISLATIVE CREATION

In response to ‘deep seated anxieties over dangerousness, pollution and social defence’,¹ governments often rely on their sovereign power to select the membership of their society and to exclude unauthorised immigrants.² In some cases, such action is warranted; there is no doubt that in a modern world of rapid globalisation, seamlessly easy transnational movement of people and increased ability of speedy information sharing, there is a justification for strong border protection and strengthened security measures.³ However, it is the proportionality of these responses to the necessity to obviate security threats that is now in question.

Recent changes to immigrations laws in the 21st century have increasingly focused on detaining people that are deemed to be a threat to national security.⁴ Following the September 11 attacks in the US, a number of harsh and disproportionate laws were enacted across the globe to increasingly deter and exclude immigrant arrivals, particularly those who arrive undocumented.⁵ Many of these policies continue to operate today, and ‘the association between immigration and criminal law has become so strong that immigration law has usurped the traditional role of criminal law’.⁶

This chapter will demonstrate how states rely on deterrence in formulating and implementing their immigration policies. To do this, the chapter will undertake an analysis of political discourse and legislative measures taken in Australia and the US

¹ Michael Welch, ‘The Sonics of Crimmigration in Australia’ (2012) 52 *British Journal of Criminology* 324, 329.

² Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime and Sovereign Power’ (2006) 56(2) *American University Law Review* 367, 413.

³ Paresh Kathrani, ‘Asylum Law or Criminal Law: Blame, Deterrence and the Criminalisation of the Asylum Seeker’ (2011) 18(4) *Jurisprudence* 1543, 1549; Leanne Weber, ‘The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care’ (2002) 14(1) *Current Issues in Criminal Justice* 9, 11; see generally Dinah Shelton, ‘Protecting Human Rights in a Globalised World’ (2002) 25(2) *Boston College Industrial and Commercial Law Review* 273.

⁴ Stumpf, above n 2, 382.

⁵ See generally Cesar Hernandez, ‘Immigration Detention as Punishment’ (2014) 61 *University of California Los Angeles Law Review* 1346; Mary Bosworth and Sarah Turnbull, ‘Immigration Detention and the Expansion of Penal Power in the United Kingdom’ in Karamet Reiter and Alexa Koenig (eds), *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement* (Palgrave Macmillan, 2015); Michael Welch, ‘Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control’ (2005) 5(4) *Criminal Justice* 331; Kathrani, above n 3.

⁶ Stumpf, above n 2, 385.

since the 1990s. Deterrence is the first of the three criminal justice principles in the matrix laid out in Chapter I. The following two chapters will demonstrate the use of the remaining principles, retribution and punishment. Cumulatively, these three chapters establish the overall thesis of the paper; that modern state immigration detention practices are criminalising unauthorised immigrants resulting in their unjustified and disproportionate punishment.

A Crimmigration and the Use of Deterrence

The principle of deterrence is specifically designed to induce fear of the penalties for crime, to discourage the public from engaging in criminal behaviour.⁷ Deterrence is therefore a well established principle of criminal justice.⁸ However, deterrence is also a central consideration in the development of immigration policy, particularly that relating to unauthorised immigrants. The United Nations has explicitly concluded that people arriving in a state without prior authorisation should not be detained for the sole reason that they are seeking asylum.⁹ Further, it is recognised by international law that detention must not be used as a punitive measure for irregular arrival in a state, nor does such arrival give rise to an automatic right to detain such a person.¹⁰ Despite this, it remains common practice in many states to detain unauthorised immigrants upon arrival, some for indefinite periods of time. The rationale behind such operations is often described as the ability to deter future unauthorised immigrants who are stereotyped as contributing to increased crime rates and decreased economic conditions.¹¹

As one of the key characteristics of criminal justice, it is posited that the adoption of deterrence objectives in immigration detention policy is one of the leading

⁷ Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Paper, Sentencing Advisory Council, April 2011) 7.

⁸ Valerie Wright, 'Deterrence in Criminal Justice: Evaluating Certainty v Severity of Punishment' (Report, The Sentencing Project, November 2010) 1; Sharon Pickering and Caroline Lambert, 'Deterrence: Australia's Refugee Policy' (2002) 14(1) *Current Issues in Criminal Justice* 65, 67.

⁹ UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) r 4.1.4.

¹⁰ *Ibid.*

¹¹ Stumpf, above n 2, 385–6; Teresa A Miller, 'Blurring the Boundaries Between Immigration and Crime Control After September 11th' (2005) 25(1) *Boston College Third World Law Journal* 81, 81, 85.

contributors to crimmigration.¹² The following part will demonstrate how government rhetoric supporting the culture of control enables them to generate public support for immigration detention policies that are principally founded on the rationales of criminal justice. It is then predicated that these policies mandate the punishment of unauthorised immigrants, despite their bona fide status.

1 *Australia*

Australia has consistently maintained the rhetoric that they ‘must deter [unauthorised immigrants] to protect the Australian community [and] to guarantee the integrity of Australia’s borders’.¹³ Australia has long favoured an immigration framework of exclusionary and deterrence based initiatives; this is exemplified by their offshore processing and mandatory detention regimes.¹⁴ It is from these policies that Australia has placed itself at the forefront of international focus of the United Nations and other human rights organisations¹⁵ for their use of ‘questionable means [of detention] ... with no end in sight’.¹⁶

(a) *Offshore Processing*

Offshore processing refers to the process of intercepting immigrants arriving by boat and redirecting them to an offshore processing facility where their application for asylum can be determined.¹⁷ Offshore processing is one of the key elements of Australia’s deterrent detention regime.¹⁸ In 2001, Australia became the first and only country to implement offshore processing.¹⁹ In that year, a ship dubbed “Suspected Illegal Entry Vessel 4” (‘SIEV 4’) was intercepted by HMAS Adelaide

¹² Pickering and Lambert, above n 8, 65.

¹³ Ibid.

¹⁴ Michael Grewcock, *Crimes of Exclusion: The Australian State’s Responses to Unauthorised Migrants* (PhD Thesis, The University of New South Wales, 2007) 198, 273, 299.

¹⁵ Ibid 196–7.

¹⁶ Pickering and Lambert, above n 8, 65.

¹⁷ *Australia’s Offshore Processing Regime* (24 June 2016) Refugee Council of Australia <<https://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/offshore-processing/briefing/>>.

¹⁸ Azadeh Dastyari, ‘Detention of Australia’s Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?’ (2015) 38 *University of New South Wales Law Journal* 669, 669–70.

¹⁹ Ibid.

approximately 120 nautical miles north of Christmas Island.²⁰ In the immediate aftermath of the September 11 attacks in the US, and whilst also advocating their own people smuggling challenge,²¹ the Australian government ordered that the boat, carrying 223 passengers, be towed to Indonesian waters and turned away from Australia.²²

At the time, the Howard government claimed that the passengers were throwing children overboard to secure safe passage onto Australian soil.²³ A Senate Inquiry later declared this untrue, thereby uncovering a deceptive plan devised by certain government ministers.²⁴ The Report found that the Howard government had sought to make an example out of SIEV 4, demonising the passengers to generate support for their tough stance on ‘illegal’ arrivals.²⁵ This incident formed the basis of the ‘Pacific Solution’, introduced by Prime Minister Howard in 2001, which incorporated s 198A into the *Migration Act 1958* (Cth), legitimising offshore processing for the first time in Australia.²⁶

Although this regime was dismantled in 2008 under the Rudd government, it was re-introduced by Prime Minister Gillard in 2012, in response to a significant increase of unauthorised boat arrivals.²⁷ The policy continues today under section 198AD of the Act which states that:

²⁰ Ronald D Francis, *Brithplace, Migration and Crime: The Australian Experience* (Palgrave Milligan, 2014) 36–40.

²¹ *Ibid*; Grewcock, above n 14, 179.

²² *Ibid*.

²³ Alison Dellit, *How the ‘Children Overboard’ Lie Developed* (6 March 2002) Green Left Weekly <<https://www.greenleft.org.au/content/how-children-overboard-lie-developed>>.

²⁴ Senate Select Committee, Parliament of Australia, *Report on a Certain Maritime Incident* (2002) 31–148.

²⁵ *Ibid* xxv.

²⁶ Grewcock, above n 14, 198–206; Janet Phillips, ‘The ‘Pacific Solution’ Revisited: A Statistical Guide to the Asylum Seeker Caseload on Nauru and Manus Island’ (Background Note, Parliamentary Library, Parliament of Australia, 2012) 2–4; see also Susan Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’ (2006) 18 *International Journal of Refugee Law* 696; Penelope Mathew, ‘Australian Refugee Protection in the Wake of the *Tampa*’ (2002) 96 *American Journal of International Law* 661; Tania Penovic and Azadeh Dastyari, ‘Boatloads of Incongruity: The Evolution of Australia’s Offshore Processing Regime’ (2007) 13 *Australian Journal of Human Rights* 33.

²⁷ Elibritt Karlsen, ‘Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources’ (Research Paper, Parliamentary Library, Parliament of Australia, 2016) 2; Republic of Nauru and Commonwealth of Australia, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* (Intergovernmental

An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.²⁸

The period following the introduction of offshore processing was plagued with deterrent-fuelled rhetoric by the Australian government. For instance, in 2001, when speaking of the new measures introduced under the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), the then Defence Minister Peter Reith stated:

[We]’ve got to be able to control it otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.²⁹

Following these developments, Australia’s refugee policy continued to exist ‘along a continuum of deterrence and its associated criminal law overtones’.³⁰ Government Ministers continued to advance this position to legitimise the Australian model of offshore processing, and the detention of unauthorised immigrants who were seen as ‘queue-jumpers’.³¹ These depictions of unauthorised immigrants as a threat to security lent itself to the use of ‘punitive measures of crimmigration control’.³² The threat of offshore processing is therefore a direct act of deterrence toward unauthorised immigrants and aims to send a ‘clear message ... that they cannot buy their way into Australia’.³³

The draconian policy of offshore processing is an inherent breach of international human rights law and results in the unjustified punishment of unauthorised immigrants.³⁴ This point has been reinforced by the Papua New Guinea (‘PNG’) Supreme Court. In 2016, a five-man bench of that Court held that the transfer of unauthorised immigrants from Australia to offshore detention centres on Manus

Agreement, 29 August 2012); The Hon Julia Gillard MP, ‘Moving Australia Forward’ (Speech delivered at Lowy Institute, Sydney, 6 July 2010).

²⁸ *Migration Act 1958* (Cth) s 198AD.

²⁹ Catholic Commission for Justice Development and Peace Melbourne, Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into Migration Zone Excision*, July 2002, 28.

³⁰ Pickering and Lambert, above n 8, 71.

³¹ Janet Phillips, ‘Asylum Seekers and Refugees: What are the Facts?’ (Research Paper, Parliamentary Library, Parliament of Australia, 2015) 5–6.

³² Welch, above n 1, 329.

³³ See generally The Hon Julia Gillard MP, above n 27.

³⁴ Dastyari, above n 18, 672.

Island constituted a breach of those immigrants' human rights both in international law and in the respective states' constitutions.³⁵ The Court further held that the act of detaining immigrants on PNG constituted treating the immigrants as prisoners and was therefore illegal.³⁶

(b) Mandatory Detention

The *Migration Amendment Act 1992* (Cth), introduced by the Keating government, implemented mandatory detention for designated persons in Australia.³⁷ At this time, the amendments imposed a 273-day temporal limit on detention.³⁸ However, a short time after in 1994, the regime was expanded to cover all people residing in Australia without a valid visa and the temporal limit was abandoned.³⁹ This is the current situation in Australia today; unauthorised immigrants are detained immediately and for indefinite periods of time, typically in offshore facilities on either Manus Island or Nauru.⁴⁰

The most common rationale for mandatory detention is 'deterrence and border control'.⁴¹ While speaking of the introduction of the mandatory detention regime, the then Immigration Minister Gerry Hand stated:

I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may

³⁵ See generally *Namah v Pato* [2016] PJSC 13 (April 26, 2016); Eric Tiozec and Stephanie Anderson, *PNG's Supreme Court Rules Detention of Asylum Seekers on Manus Island is Illegal* (27 April 2016) ABC News <<http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>>.

³⁶ Ibid.

³⁷ Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights – Snapshot Report* <<https://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report/1-introduction#fnB3>>.

³⁸ *Migration Amendment Act 1992* (Cth) s 54Q.

³⁹ Nathan Hancock, *Migration Amendment (Duration of Detention) Bill 2003, Bills Digest*, No 182 of 2002–03, 23 June 2003, 2.

⁴⁰ Noting that the Manus Island Detention Centre was decommissioned in July 2017 and detainees are now being re-located.

⁴¹ Adele Garnier and Lloyd Cox, 'Twenty Years of Mandatory Detention: The Anatomy of a Failed Policy' (Working Paper, Macquarie University, 2012) 12 <http://www.auspsa.org.au/sites/default/files/twenty_years_of_mandatory_detention_adele_garnier_and_lloyd_cox.pdf>.

not be achieved by simply arriving in that country and expecting to be allowed into the community.⁴²

The genesis of Australia's immigration framework in such deep rooted deterrent policies as this has laid the foundation for the politically driven and socially destructive regime that operates in the present day. By removing temporal limits on detention and relying heavily on mandatory, offshore processing, the Australian government has created a framework 'rooted in an idea of deterrence which is based on the incessant background hum of discourses of asylum seeker deviance'.⁴³ In relying on this rhetoric, the government has 'reinforced the legality and necessity of state responses',⁴⁴ which continue to promote the convergence of criminal justice and immigration policy, thereby rendering the two indistinguishable, leading to the criminalisation — and punishment — of unauthorised immigrants.

The next section will explore the use of deterrence in immigration detention policies in the US, to demonstrate how successive American governments have contributed to the crimmigration crisis.

2 *The United States*

The US is one of the many states that has been heavily criticised for 'embracing the rhetorical frames of dangerousness and criminality whilst pursuing immigration detention policies and practices'.⁴⁵ The US signed the *Refugee Convention* in 1968 and began incorporating its principles into domestic legislation from 1980.⁴⁶ However, internationally, the 1980s and 1990s saw scales of mass conflict, leading to greater amounts of displaced people around the globe.⁴⁷ This, coupled with the rapid development of technology and the increasing ease of transnational transport, resulted in the enactment of zero-tolerance immigration laws, increased border

⁴² Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia' (Background Note, Parliamentary Library, Parliament of Australia, 2013) 6.

⁴³ Pickering and Lambert, above n 8, 65.

⁴⁴ Ibid 77.

⁴⁵ Sarah Turnbull, 'Immigration Detention and Punishment' in *Oxford Research Encyclopaedia: Criminology and Criminal Justice* (Oxford University Press, 2017) 1, 7.

⁴⁶ Brett Story, 'Politics as Usual: The Criminalisation of Asylum Seekers in the United States' (Working Paper No 26, Oxford University Refugee Studies Centre, September 2005) 11.

⁴⁷ Kathrani, above n 3, 1549.

policing and tactical collaboration between the US immigration department and the police force.⁴⁸ This is believed to have contributed to the gradual — and ongoing — criminalisation of unauthorised immigrants.⁴⁹ As a result, US immigration laws since the late 20th century have been plagued with the fundamental principles underpinning criminal justice systems.⁵⁰

(a) *The Defining Decades: The 1980s and 1990s*

Between the 1980s and 1990s, the US first began developing laws that can be said to contribute to the crimmigration crisis today. The US government's 'war on drugs' fuelled the need for immigration policies which effectively targeted those populations thought to be most harmful to society.⁵¹ For example, the introduction of the *Immigration Act 1990* Pub L No 101–649, 104 Stat 4978 ('*IMMA*') by President George W Bush was the first major categorisation of unauthorised immigrants as criminals. When introducing the Bill for the *IMMA*, the President stated:

[The *IMMA*] meets several objectives of my Administration's war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country.⁵²

During this time, President Bush also expanded the mandate of the Immigration and Naturalization Service ('INS') to include enforcing contraband and narcotics as well as their usual role of policing immigration.⁵³ Moves such as this effectively contributed to the construction of unauthorised immigrants as criminals in the public mind. As a result, the US experienced a growth in the number of detention facilities and consequently, the number of detained immigrants.⁵⁴

⁴⁸ Story, above n 46, 3; *An Overview of US Refugee Law and Policy* (18 November 2015) American Immigration Council <<https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>>.

⁴⁹ Story, above n 46, 3.

⁵⁰ Ibid; Kathrani, above n 3, 1548.

⁵¹ See, eg, *Anti-Drug Abuse Act 1986* Pub L No 99–570, 100 Stat 3207; *Anti-Drug Abuse Act 1988* Pub L No 100–690, 102 Stat 4181; *Immigration Reform and Control Act 1986* Pub L No 99–603, 100 Stat 3445; *Immigration Act 1990* Pub L No 101–649, 104 Stat 4978; *Violent Crime Control and Law Enforcement Act 1994* Pub L No 103–322, 108 Stat 1796; Hernandez, above n 5, 1360–1.

⁵² George W Bush, 'Statement on Signing the Immigration Act of 1990' (Speech delivered at The White House, Washington DC, USA, 29 November 1990).

⁵³ Story, above n 46, 14.

⁵⁴ The number of detained immigrants rose 70% between 1996 and 1999 alone; Story, above n 46, 16.

The *Illegal Immigration Reform and Immigrant Responsibility Act 1996* Pub L No 104-208; 110 Stat 3009–546 (*IIRIRA*)⁵⁵ was also introduced during this time, under the Clinton administration, and implemented stronger penalties for those arriving at US borders illegally and for those assisting them.⁵⁶ It also placed greater restrictions on the rights of unauthorised immigrants in terms of what they could and could not do or access whilst on American soil.⁵⁷ The proliferation of negative views surrounding this Act is demonstrated by the following statement by Senator Simpson at the time:

I say to my colleagues, it is in the national interest to achieve control over our borders, to achieve control over illegal immigration and the misuse of our most generous public support and welfare programs that so burden the taxpayers of this country.⁵⁸

This period also saw an increase in the use of deterrence-based policy. For example, Operation Global Reach, introduced by the INS in 1997, was an immigration strategy with an ‘emphasis on overseas deterrence’.⁵⁹ Similarly, in 2005, Operation Streamline was launched with a view to criminally prosecuting unauthorised immigrants at US borders.⁶⁰ The ultimate goal of this initiative was to ‘deter unauthorised entry’ and ‘reduce recidivism’.⁶¹

(b) Deterrence and the Increase in Detention

The legislative framework ‘protecting’ asylum seekers in the US quickly became a source of uncertainty and punishment in the 21st century. In 2003, the US government introduced ‘Operation Liberty Shield’ which brought a wave of strict and never seen before controls over unauthorised immigrants. Under the George W Bush administration, this initiative placed a blanket ban on arrivals from 33

⁵⁵ *Illegal Immigration Reform and Immigrant Responsibility Act 1996* Pub L No 104-208; 110 Stat 3009–546.

⁵⁶ Ibid § § 202, 203; Stephen Legomsky, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’ (2007) 64 *Washington and Lee Law Review* 469, 478.

⁵⁷ Legomsky, above n 56, 478–80.

⁵⁸ Sarah Harmon, *US Immigration Policy and Rhetoric: The Construction of the Identity of Immigrants* (Honours Thesis, University of Oregon, 2009) 63.

⁵⁹ Global Detention Project, *United States Immigration Detention* (May 2016) Global Detention Network <https://www.globaldetentionproject.org/countries/americas/united-states#_ftnref112>.

⁶⁰ Ibid.

⁶¹ Ibid.

prescribed countries where the terrorist group Al-Qaeda was known to operate.⁶² This ban introduced a presumption of a connection to terrorist groups against all persons fleeing those 33 countries, without individual assessment; the result of that presumption was immediate detention.⁶³ These laws necessarily operated unjustifiably harshly against bona fide unauthorised immigrants.⁶⁴

As a result of these deterrent objectives, and the consequential increase in dependence on immigration detention in the US, the number of detained immigrants has increased significantly. The introduction of the *IIRIRA* almost doubled the number of detainees in US immigration detention in less than two years; rising from 8 500 in 1996 to 16 000 in 1998.⁶⁵ Further, the Centre of Migration Studies New York calculated an average of 85 000 people being detained in US immigration detention annually in 1995;⁶⁶ that number inflated to over 477 000 in 2012.⁶⁷

These numbers demonstrate the undeniable link between the use of deterrence and the rate of immigration detention. By creating a legislative culture of control and exploiting public fear of the perceived risk posed by unauthorised immigrants, the US has shaped a system of immigration detention that inherently criminalises and punishes those immigrants, through the adoption of criminal justice principles such as deterrence.

B Summary

This chapter has demonstrated how the focus on the supposed deviance of unauthorised immigrants enables states to introduce draconian immigration policies that rely inherently on the principle of deterrence. By exploiting public fear of terrorism and economic hardship, which have been disproportionately linked to irregular arrivals at borders,⁶⁸ states are depicting unauthorised immigrants in a

⁶² Story, above n 46, 4.

⁶³ Ibid 4.

⁶⁴ Kathrani, above n 3, 1545.

⁶⁵ CIVIC, *US Immigration Detention* <<http://www.endisolation.org/resources/immigration-detention/>>.

⁶⁶ Global Detention Project, above n 59.

⁶⁷ Ibid.

⁶⁸ See generally Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism* (Springer Heidelberg Dordrecht, 2010).

criminal light, highlighting them as ‘people we do not want’.⁶⁹ These tactics have contributed to regimes of mandatory detention and offshore processing in Australia and the use of blanket bans and immediate arrest at borders in the US. As a result, the lines between criminal justice and immigration policy are sufficiently blurred, with unauthorised immigrants being treated in much the same way as criminals. Further to this, the distinction between criminals, who make a conscious choice to break the law, and unauthorised immigrants, who are often fleeing persecution and travelling without documentation as a last resort, is arguably obsolete in such deterrence policies.

The next chapter of this paper will explore the conditions of detention in Australia and the UK, highlighting how the absence of a temporal limit on detention and the shortfalls of healthcare systems in detention facilities constitute a breach of international law. It is posited that the indefinite nature of detention serves a retributive function; the length of detention and the absence of any legislative restraint on state power to detain is a result of the public’s perception that detention is commensurate to the ‘illegality’ of unauthorised arrival at state borders.

⁶⁹ Pickering and Lambert, above n 8, 65.

IV FROM PERSECUTION TO PUNISHMENT: THE ABSENCE OF TEMPORAL LIMITS AND THE EFFECT ON MENTAL HEALTH IN IMMIGRATION DETENTION

A Overview

The journey made by immigrants from their homes to a new state in the pursuit of humanitarian protection can be treacherous and chaotic. Many immigrants leave their homes to save their lives; to leave a war zone where they lived in constant fear.¹ However, for many, the reality of their ‘new life’ lay in an enclosed detention centre, with significant restrictions on their movement and personal liberty. For some, their detention continues for weeks, months or even years, with no visible conclusion.

This section focuses on the link between indefinite detention and retribution. Retribution, in criminal justice, aims to impose a punishment that is commensurate to the crime committed.² The length and condition of detention is arguably a response of governments to the ‘illegality’ of arriving in a state without prior authorisation, and the supposed burden this places on social structure, state resources and the economy.

In this respect, Hernandez has commented:

The traditional justification that immigration detention most promotes is retribution — that is, the goal of “reprimand[ing] the wrongdoer” to ensure that “the punishment should fit the crime ... retributive sanctions symbolize society’s collective determination of the proper stigmatizing response to conduct that flouts the group’s mores. Applied to immigration detention, confinement signals to detainees that they have committed a social wrong, criminal activity that violates immigration law, and must now suffer the consequence meted out — a deprivation of liberty.”³

¹ Alfred De Zayas, ‘Human Rights and Refugees’ (1992-1993) 61(2) *Nordic Journal of International Law* 253, 253.

² Arjen Leerkes and Dennis Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’ (2010) 50 *British Journal of Criminology* 830, 833; Kermit Hall and David Clark, *The Oxford Companion to American Law* (Oxford University Press, 2002) 197.

³ Cesar Hernandez, ‘Immigration Detention as Punishment’ (2014) 61 *University of California Los Angeles Law Review* 1346, 1402.

This position will be explored with reference to immigration detention in Australia and the UK, two of the world's most geopolitically important countries that do not currently impose a temporal limit on immigration detention. This section will also explore, briefly, how inadequate access to healthcare facilities contributes to mental health problems for detainees and exacerbates their suffering, contributing to their overall punishment.

B Australia

1 Indefinite Detention in Australia

Australia's immigration detention regime is perhaps one of the most widely publicised in the world. In February 2017, a class action by a group of immigration detainees successfully argued that the conditions of detention in Manus Island, and the act of detaining immigrants in the first place, are a breach of international law.⁴ On this basis, the Manus Island detention centre was decommissioned in July 2017, following a settlement agreement by the Australian government, worth over AUD\$70 million.⁵ Apart from this, Australia's detention regime has also attracted close media scrutiny since the Howard government's 'children overboard' saga in 2001,⁶ with breaches of human rights being consistently brought to light. So, what is Australia getting wrong with its immigration policy?

Australia's immigration detention regime has not included a temporal limit on the length of detention for a considerable period. In 1994, the Keating government removed the 273-day limit that once appeared in the *Migration Act 1958* (Cth) and in doing so, the Australian government moved away from providing truly humanitarian

⁴ *Kamasae v Commonwealth of Australia and Ors*, S CI 2014 6770.

⁵ See generally Majid Karami Kamasae, 'Notice of Proposed Settlement', *Submission in Kamasae v Commonwealth of Australia and Ors*, S CI 2014 6770, 17 July 2017; Stefan Ambruster, *Refugees Afraid, Confused as Manus Island Detention Centre Shutdown Begins* (9 July 2017) SBS <<http://www.sbs.com.au/news/article/2017/07/06/refugees-afraid-confused-manus-detention-centre-shutdown-begins>>; Ben Doherty, *Power and Water Cut Off for Refugees on Manus as Dutton Confirms Closure* (20 July 2017) The Guardian <<https://www.theguardian.com/australia-news/2017/jul/20/power-and-water-cut-off-for-refugees-on-manus-as-dutton-confirms-closure>>.

⁶ Alison Dellit, *How the 'Children Overboard' Lie Developed* (6 March 2002) Green Left Weekly <<https://www.greenleft.org.au/content/how-children-overboard-lie-developed>>.

aid and began arbitrarily excluding, and indeed criminalising, unauthorised immigrants.

Intriguingly, Australia's policy of indefinite detention has been upheld by the High Court of Australia on numerous occasions. In *Al-Kateb v Godwin*⁷ the majority of the Justices held that there was a power to detain as long as the Minister 'continues to have the intention of removing the [detainee] from the country',⁸ whether or not there is any likelihood of the removal occurring.⁹ The majority further stated that:

As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court.¹⁰

However, the majority of the High Court acknowledged some form of limit on immigration detention in *Plaintiff M76/2013 v Minister for Immigration and Citizenship and Ors*:¹¹

The Act does not authorise detention of an offshore entry person for whatever number of successive periods in detention would be necessary for the Minister to obtain information and advice about a series of disconnected inquiries said to relate to questions of public interest governing the exercise of the power under section 46A(2). To read the Act as permitting that to occur would be to read the Act as permitting detention at the will of Executive. That construction should be rejected.¹²

Despite this, indefinite detention continues in Australia today, and the mental health concerns associated with this continue to grow. In addition to the use of indefinite detention, Australia has privatised offshore immigration detention for almost two decades, which has led to a proliferation of unsound practices and the demise of any humanitarian basis that Australia's detention policy ever operated upon. The privatisation in combination with the use of offshore processing and mandatory, indefinite detention, has raised Australia's detention regime to a catastrophic level.

⁷ (2004) 219 CLR 562.

⁸ Joyce Chia, 'Back to the Constitution: The Implications of *Plaintiff S4/2014* For Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628, 643.

⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562, 662 [299] (Callinan J).

¹⁰ *Ibid* 595 [73] (McHugh J), 651 [259] (Hayne J).

¹¹ (2013) 251 CLR 322.

¹² *Ibid* 360 [103] (Hayne J).

2 *Mental Health in Australian Detention*

Widespread mental health concerns are common in Australian detention centres.¹³ From its visit to Nauru in 2016, Amnesty International found that almost every detainee interviewed reported having a mental health issue of some kind, that transpired following their transfer to Nauru.¹⁴ This finding is also supported by the UNHCR.¹⁵ There have been a number of reports of self-harm, such as people ‘pouring petrol over themselves, drinking insect repellent, swallowing screws ... hanging and cutting themselves’.¹⁶

The link between mental health issues and indefinite detention was strengthened in the 2017 Senate Inquiry into the allegations of abuse and self-harm in Australian detention centres.¹⁷ The Australian College of Emergency Medicine (‘ACEM’) submitted that indefinite detention places additional stress on the mental and physical health of detainees, and significantly erodes their resilience.¹⁸

When visiting Manus Island in April 2016, the UNHCR stated that:

The rates of ... depressive or anxiety disorders and/or PTSD in the asylum-seeker and refugee population in the Manus Island RPC or ELTC are amongst the highest recorded rates of any surveyed population. They are many-fold higher than in

¹³ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre* (2017) 23 [2.36].

¹⁴ Amnesty International, Submission No 6 to Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre*, April 2017, 23 [2.37].

¹⁵ UNHCR, Submission No 43 to Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre*, April 2017, 70 [3.54].

¹⁶ Senate Legal and Constitutional Affairs References Committee, above n 13, 24 [2.41].

¹⁷ See generally Senate Legal and Constitutional Affairs Reference Committee, above n 13.

¹⁸ Australian College of Emergency Medicine, Submission No 13 to Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre*, April 2017, 68 [3.49]; UN Special Rapporteur on the Human Rights of Migrants, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centers in Nauru*, UN GAOR, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 5.

mainstream Australian populations and higher than that recorded in asylum-seeker populations living in the Australian community.¹⁹

The UNHCR also found that detainees who had sought medical treatment for their mental health issues had found the services to be unhelpful and not engaging.²⁰ It also submitted that current medical services are not adequately treating detainees.²¹ Further to this, the Australian Medical Association believes that detainees in Nauru and Manus Island do not have access to the same level of healthcare that a person living in Australia would receive.²² This leaves most detainees untreated, with their situation worsening over time.

In addition, the UN Special Rapporteur, after his official visit to Australian detention centres in November 2016, observed that:

The Australian authorities have put in place a very punitive approach to unauthorised maritime arrivals, with the explicit intention to deter other potential candidates ... The average time in immigration detention is 454 days and the majority of people held in detention have been there for more than 730 days. Administrative detention for prolonged and indefinite periods has a profound effect on migrants' mental wellbeing, with many cases reported of self-harm, PTSD, anxiety and depression: it is not the right environment for often already traumatised people ... I join the voices of other UN human rights mechanisms in saying that such conditions amount to cruel, inhuman and degrading treatment. I urge the Government to introduce a statutory time limit on immigration detention and offer a meaningful judicial review process.²³

¹⁹ UNHCR, above n 15, 41 [2.86].

²⁰ Ibid 44 [2.97].

²¹ Ibid.

²² Australian Medical Association, Submission No 1, to Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre*, April 2017, 27–8 [2.50].

²³ UN Special Rapporteur on the Human Rights of Migrants, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centers in Nauru*, UN GAOR, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 2–3.

The Special Rapporteur explicitly attributes the involuntary geographical and psychological confinement of Australia's detention regime to their deliberate engineering, and continued control over the operation of such facilities.²⁴

C The United Kingdom

1 Indefinite Detention in the UK

In 2008, the European Union introduced the EU Returns Directive 2008/115/EC.²⁵ This Directive implements a six-month time limit on detention, which the UK declined to adopt. The UK remains the only EU country failing to adopt a temporal limit of any kind.²⁶ In light of that failure, the UN Special Rapporteur on the Human Rights of Migrants in June 2009 suggested that the UK 'take all necessary steps to prevent cases of de facto indefinite detention'.²⁷ Further, a Report by the All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants ('APPGs') in 2015 strongly recommends that the UK abandon indefinite detention and impose a time limit of 28-days.²⁸

The APPG Report of the Inquiry into the Use of Immigration Detention in the UK ('the APPG Report')²⁹ broadly concludes that 'the [immigration] system ... is seriously detrimental to the individuals detained in terms of their mental and physical wellbeing'.³⁰ It is now widely accepted that the use of indefinite detention is a leading cause of mental health issues for vulnerable immigrants.³¹ So why does the UK refuse to impose a temporal limit?

²⁴ Ibid 5.

²⁵ European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 On Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC.

²⁶ All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants, *The Report of the Inquiry into the Use of Immigration Detention in the UK* (2015) 16.

²⁷ United Nations Commission on Human Rights, *Report of the Special Rapporteur on the Human Rights of Migrants: Mission to the United Kingdom of Great Britain and Northern Ireland*, UN GAOR, 14th sess, Agenda Item 3, UN Doc A/HRC/14/30/Add.3 (16 March 2010) 19.

²⁸ All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants, above n 26, 9.

²⁹ Ibid.

³⁰ Ibid 72.

³¹ Secretary of State for Home Department, *Review into the Welfare in Detention of Vulnerable Persons*, Report No CM9186 (2016) 22.

As seen in the previous chapter, most states do not want to be seen as taking a soft stance on immigration control, in light of the growing threat of terror and global security concerns. Unfortunately, this necessity for governments to appear tough on what they call ‘queue jumpers’ and ‘threats to society’ results in the ongoing punishment and degrading treatment of truly bona fide unauthorised immigrants in need of humanitarian protection.³² With this tough stance, comes depleting conditions of detention, increased mental health issues and an urgent need for reform.

The UK, and other governments, who continuously fail to effectively limit immigration detention, are using indefinite detention as a means of seeking retribution. States are relying on the illegality of their arrival as the justification for prolonged detention. It is argued that the time spent by unauthorised immigrants in detention is rationalised by states as a response to the perceived threat to the sanctity of their sovereignty and border protection. This is also a result of the need for governments to seek approval from their citizens in one of the most politically fuelled and controversial areas: immigration control.

2 Mental Health in UK Detention

The Shaw Report on the Welfare in Detention of Vulnerable Persons (‘Shaw Report’), is one of the most important reviews of immigration detention in the UK’s history.³³ The Shaw Report makes two key conclusions: (1) there is a consistent finding that immigration detention has a negative impact upon detainee’s mental health, and (2) the impact on mental health increases the longer detention continues.³⁴ The Shaw Report found that:

Detention worsened mental health because it diminished the sense of safety and freedom from harm, it was a painful reminder of past traumatic experiences, it aggravated fear of imminent return, it separated people from their support networks and it disrupted their treatment and care.³⁵

³² Zayas, above n 1, 255.

³³ Global Detention Project, *United Kingdom Immigration Detention* (October 2016) Global Detention Project <<https://www.globaldetentionproject.org/countries/europe/united-kingdom>>.

³⁴ Secretary of State for Home Department, above n 31, 176.

³⁵ *Ibid* 29.

There is now a resounding understanding across the globe that indefinite detention of unauthorised immigrants contributes to the overwhelming mental health issues found among detainees. Many organisations, both governmental and non-governmental, have conducted empirical studies to demonstrate this point. For example, a UK based organisation, Bail for Immigration Detainees, notes a significant increase in the rate of suicides in UK immigration detention: between 1989 and 2003 there were four reported suicides in immigration custody, between 2003 and 2005 there were seven, and in 2015 there were 393 suicide attempts in UK detention.³⁶

Linked to this is the severe lack of access to healthcare in detention facilities. On that point, the Shaw Report found that ‘people with mental illness could not be satisfactorily managed in detention’.³⁷ To address the mental health concerns of detainees, a reporting mechanism is incorporated in Rule 35 of the *Detention Centre Rules 2001* (UK). Rule 35 requires a medical practitioner to furnish a report for any detained person whose health is likely to be adversely affected by continuous detention, who is suspected of being suicidal or who may have been a victim of torture.³⁸

However, this rule has been very highly criticised and several organisations, including the United Nations Committee against Torture,³⁹ the UK Border Agency,⁴⁰ and the UK Home Office⁴¹ have released research demonstrating the consistent and significant failure of the rule in achieving its objectives. For instance, statistics released by the UK Home Office reveal that in the second quarter of 2014, 452 detainees were the subject of at least one report pursuant to Rule 35 and of those,

³⁶ Bail for Immigration Detainees, *Self-Inflicted Deaths of Immigration Detainees* (Briefing Paper, October 2005) <<http://www.biduk.org/148/briefing-papers/briefing-papers.html>>; No Deportations, *IRCs ‘Self Harm (Attempted Suicide) and Those on ‘Self-Harm Watch’ (At Risk of Suicide) 2015* (24 March 2016) <<http://www.no-deportations.org.uk/Media-2014/Self-Harm2015.html>>.

³⁷ Secretary of State for Home Department, above n 31, 28.

³⁸ *Detention Centre Rules 2001* (UK) r 35.

³⁹ United Nations Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of the United Kingdom*, 50th sess, 1160th and 1161th mtg, UN Doc CAT/C/GBR/5 (6–31 May 2013) 10–1.

⁴⁰ See generally, Home Office UK Border Agency, Parliament of the United Kingdom, *Detention Centre Rule 35 Audit* (2011).

⁴¹ See generally All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants, above n 26.

only 45 were released.⁴² One of the leading reasons for this is the lack of staff training on the operation and implementation of Rule 35.⁴³

One ex-employee of the UK's Yarl Wood facility, Mr Noel Finn, also reported to the APPGs that:

Home Office officers did not recognise symptoms of mental illness such as depression, schizophrenia, PTSD, personality disorder or at risk patients, self-harming behaviour, suicidal ideation, general anxiety etc. [and] patients often went without full and proper assessments and treatment plans.⁴⁴

It is therefore evident that the conditions of detention and the impact this has on the mental health of detainees continues to worsen under the current regime being adopted in the UK.

D Summary

Based on the above, it is argued that states' reluctance to adhere to restrictions on their power illustrates the link between the use of detention and retribution. In derogating from the guidelines, and other international instruments outlined in Chapter II, states continue to use detention as a method of punishing immigrants for their irregular migration patterns. This advances states' tough stance on unauthorised immigrants, which is one of the most politically-sensitive areas of policy. It is argued that, to maximise the positive political effects of this stance, states increase or decrease the punitive nature of detention — and consequently the length of detention — depending on the political and economic climate and more importantly, the level of 'illegality' of an unauthorised immigrant's arrival.

So, what can be done? It is well known that the United Nations High Commissioner for Refugees is unable to impose any sort of fine or other penalty to ensure states adhere to their international obligations under the *Refugee Convention* and other

⁴² Ibid 62.

⁴³ Ibid.

⁴⁴ Ibid 57.

international instruments.⁴⁵ In light of this, the following chapter will suggest a new international framework designed to specifically reverse the crimmigration crisis. It will also suggest the introduction of a universal temporal limit for detention, to be adopted by all states.

⁴⁵ The UNHCR's role with respect to the Refugee Convention and the 1967 Protocol is merely supervisory: UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions*, UN GAOR, UN Doc EC/1992/SC.2/CRP.10 (15 June 1992).

A Crimmigration Equals Punishment

The previous chapters have demonstrated how modern immigration detention practices are increasingly becoming ingrained with the criminal justice system by adopting its three key principles: deterrence, retribution and punishment. The thesis of the paper states that the use of deterrent and retributive-fuelled state immigration detention results in the criminalisation of unauthorised immigrants, and hence their punishment according to criminal justice standards. Punishment refers to:

Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.¹

According to the UNHCR, illegal entry does not give a state the automatic right to detain² and further, detention is not permitted as a punitive measure or as a disciplinary action for irregular arrival.³ Many academics and interest groups in this area have proposed suggestions for reform aimed at decriminalising unauthorised immigrants and returning immigration detention to its administrative roots.⁴ However, no current proposal aims to address the issue on a global scale. In order for real change to occur, reform must be demanded from the entire international community.

To this end, the following section will put forward two options for reform. The first is the establishment of an internationally applicable framework that may be used to determine whether a certain policy falls within the ambit of its administrative purpose, or extends beyond its limits into the crimmigration sphere. The second is the introduction of a universal temporal limit on detention, to effectively minimise the time spent in detention and the psychological and physical effects this causes to

¹ *Blacks Law Dictionary* (West Publishing, 2nd ed, 1910).

² UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) r 4.1.1

³ *Ibid.*

⁴ See, eg, Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56(2) *American University Law Review* 367; Stephen Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Washington and Lee Law Review* 469.

detainees. Although the proposed reforms contained herein may be considered too ambitious for practical use, they aim to reinvigorate the discussion on reform in this area and provide a starting point for renewed debate on the efficacy of detention practices globally. All proposals contained below are the original ideas of the author, drawing on discussions in previous literature cited throughout where appropriate.

B A New International Framework

One of the key issues that the author has identified from the critical analysis of the existing literature is the lack of an internationally applicable and enforceable framework for regulating the operation of immigration detention. Although there is an international framework of treaties and guidelines, as described in Chapter II, that govern the treatment of refugees and asylum seekers, their enforceability against states seems almost non-existent. Therefore, it is a pivotal suggestion of this paper that an international regulatory framework with increased enforceability be implemented for the supervision and review of state detention regimes. A proposed structure of that framework is described below.

1 The Form of the Framework

The most appropriate form for such a regulatory framework is an international treaty, voluntarily entered into by member states. This is the best option for allowing multi-state membership and effective implementation, when compared to other non-enforceable mechanisms such as guidelines or model laws. It is expected that most states who are signatory to other conventions such as the *ICCPR* and the *Refugee Convention* would enter into such a treaty. The aim of the proposed framework is twofold: (1) to ‘reverse’ the effects of the crimmigration crisis through mandatory review and (2) to maintain the administrative purpose of immigration detention through the use of enforceability measures.

2 Initial Mandatory Review of National Detention Regimes

For the new framework to represent an improvement on previous instruments, a mandatory review mechanism is required. This is essential for national laws to be

adequately scrutinised and for governments to be held accountable to their international obligations. This mechanism will require the Human Rights Committee ('HRC') to mandatorily review the immigration detention regimes of all member states following the appropriate notification being given. This allows the HRC to consider a states' immigration detention regimes and its conformity with international law, as well as to highlight areas for necessary reform; this includes identifying the specific policies that amount to punishment. The overall aim of the mandatory review mechanism is to restore consistency between national and international laws over time, effectively reversing the crimmigration crisis.

Of course, with any mandatory requirement, there is a need to implement a penalty for non-compliance. This may arise where a state refuses or neglects to divulge information or documents to the HRC during the review process and following an appropriate request. The author suggests that the establishment of a penalty regime for non-compliance is essential to the integrity and enforceability of such a proposed framework. One such penalty may include, as a preliminary thought, making a donation to the UNHCR that is commensurate to the level of non-compliance by a state. This potential financial burden may entice states to ensure utmost compliance with the framework, whilst also benefiting the international community.

3 Enforceability

As stated above, the most important aspect of a new framework is ensuring its enforceability against member states. One of the drawbacks of the current international system is the inability for the United Nations or other regulatory bodies to enforce the provisions of the treaty when violations occur.⁵ This leaves the door open for some states to implement policies that are inconsistent with international laws and values; this is one of the major factors contributing to the crimmigration crisis. Therefore, for a new framework to be successful, it needs to have sufficient enforceability.

⁵ Harold Hongju Koh, 'How is International Human Rights Law Enforced?' (1999) 74(4) *Indiana Law Journal* 1397, 1398.

For this purpose, a new regime may be established for monitoring state compliance with the minimum standards outlined in the new framework (discussed below). The regime gives signatory member states and the HRC the power to refer another member states' national detention regime to the Good Offices of the United Nations Secretary General ('Good Offices') for review, who may suggest avenues for reform or the imposition of penalties for serious violations. The Good Offices provide third party assistance where there is a conflict between two or more states in a matter concerning international law and diplomacy.⁶ Their role may include, but is not limited to, facilitating negotiation between the parties, mediating disputes and advising parties generally.⁷

To ensure accountability of this system, and to further solidify the enforceability of the proposed framework, it is suggested that the recommendations of the Good Offices be passed to the HRC, who may then decide the matter for themselves. In governing and promoting the values of the international community, the HRC may take into account the Good Offices findings, and adjudicate the matter further. The HRC will have the power to impose financial penalties for serious violations — breaches identified *after* the first mandatory review detailed above which have not been rectified — and to make formal recommendations for reform of a states' detention regime. Failure to adhere to such recommendations may result in further referral by the HRC or another member state to the Good Offices, which may attract additional financial penalties until compliance with the framework is achieved. Additionally, these violations may become evident during the mandatory periodic review, detailed below.

A potential limitation of this framework may be that member states will choose not to make such referrals in order to avoid jeopardising their relationship with other states; the proposal to give such referral power to the HRC aims to address this issue.

⁶ See generally Alys Brehio, 'Good Offices of the Secretary General as Preventative Measures' (1998) 30 *New York University Journal of International Law and Politics* 589; Thomas M Franck, 'The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture' (1995) 6 *European Journal of International Law* 360.

⁷ Tamarat Samuel, "Good Offices" Means Taking Risks (19 November 2015) Global Peace Operations Review <<http://peaceoperationsreview.org/interviews/good-offices-means-taking-risks/>>.

4 Minimum Standards of Detention Regimes

While it is not possible to explore all of the standards that should, or could, be imposed by an effective regulatory framework in one paper, this section will outline two of the key provisions that are absolutely necessary for an effective regime, based on the discussion in previous chapters. It is intended that the review mechanism detailed above, the ability for the Good Offices to make suggestions on reform and monetary sanctions, and the HRC's power to impose financial penalties for non-compliance, will aid the enforcement of these minimum standards and thereby contribute to the overall reversal of the crimmigration crisis.

(a) Reversing Crimmigration: Abandoning Deterrence and Retribution

The primary purpose of the proposed framework is the reversal of the crimmigration crisis. This necessarily involves limiting the detention process to administrative purposes, rather than using it as a source of punishment for unauthorised immigrants. The key task of the framework is therefore to ensure that the detention regimes of member states are not used for the purpose of deterrence or retribution. This necessitates a range of considerations. For example, the legislative intent behind a regime may reveal an underlying deterrent or retributive purpose. Further, the language giving effect to the provisions of detention legislation and policies may operate in a way that results in the criminalisation of unauthorised immigrants, such as referring to them as 'illegals' or 'aliens'. The provisions of a regime may also be constructed in a way that characterises the act of arriving without prior authorisation as illegal, thereby attributing criminality to such immigrants.

These factors may individually or collectively contribute to the crimmigration crisis and hence need to be considered during the review of a state's detention policies. To this aim, the dissertation suggests that the framework allow the Good Offices and the HRC to consider a broad range of factors including, but not limited to, the discourse of a parliament when enacting a new policy, the practical effects of that policy on detainees and the consistency of those policies with international law. A possible limitation of this mechanism is the ability for states to structure their legislation in a way that avoids an adverse finding, whilst maintaining deterrence and retributive

purposes in the practical operation of detention. By allowing the Good Offices and the HRC to consider all information relevant to a detention regime, including the power to request evidence and summon witnesses, these tactics may be avoided.

(b) Bona Fide Arrival: Abandonment of Mandatory Detention

As noted in Chapter III, mandatory detention for unauthorised immigrants is readily used in some states such as Australia. This means that unauthorised immigrants are mandatorily placed in closed detention without a prior assessment of the merits of their claim. This removes any ability for immigration departments to exercise discretion which may be detrimental to immigrants that have suffered torture, sexual abuse or other inhumane treatment in the past.⁸ For these vulnerable people, detention may act as a trigger for past traumas and can lead to a decrease in their mental health, placing them at a higher risk of self-harm and suicide.⁹

To combat this issue, the second minimum standard of the proposed framework is the removal of mandatory detention and by necessity, the introduction of a discretionary based assessment upon an immigrant's arrival to a state. For example, where an immigrant presents with health concerns, such as vulnerability due to prior victimisation, an immigration officer will be required to refer that person to a medical practitioner for assessment, who will furnish a report on the immigrant's suitability for closed detention. If the report recommends that the person not be detained, alternatives to detention such as release into the community with the imposition of bail conditions or the use of mandatory reporting may be considered.

The fundamental function of this process is to recognise the bona fide status of some unauthorised immigrants. This aims to make state policies and legislation consistent with international law; unauthorised arrival at a border alone is not sufficient to justify immediate detention of a person and hence detention practices in all states

⁸ John Kinzie, 'PTSD Among Traumatized Refugees' in Laurence Kirmayer, Robert Lemelson and Mark Barad (eds), *Understanding Trauma: Biological, Psychological and Cultural Perspectives* (Cambridge University Press, 2007) 194–206; Heather Gridley et al, Submission to the Joint Committee on Australia's Immigration Detention Network, August 2011, 6–7; Katy Robjant et al, 'Psychological Distress Amongst Immigration Detainees: A Cross-sectional Questionnaire Study' (2009) *British Journal of Clinical Psychology* 48, 309.

⁹ Ibid.

should provide a system for merits-based assessment upon arrival.¹⁰ When implemented in conjunction with the first objective of the framework — the elimination of deterrence and retributive purposes of detention — this will avoid innocent and extremely vulnerable immigrants who are fleeing genuine persecution from being criminalised and detained for the criminal acts of others.¹¹ This aspect of the framework specifically aims to restore the correct status of unauthorised immigrants as people in need of humanitarian aid, rather than those who are ‘unknown’ and don’t belong.

5 Consistent Supervision: The Role of the Human Rights Commission

The primary focus of Chapter IV is the absence of temporal limits and the mental health issues of detainees that flow from this. This is a result of the criminalisation of unauthorised immigrants which has led to them receiving a lower standard of medical care.¹² This is also largely attributable to the lack of sufficient and effective monitoring systems, particularly where detention facility management is privately contracted.¹³ On this backdrop, it is clear that a stronger system for monitoring states’ compliance to international laws in relation to immigration detention is needed.

One of the key enforcement characteristics of the proposed framework is the ability of the HRC or a member state to refer matters of concern arising from other member states’ detention regimes to the Good Offices. The dissertation suggests that the same mechanism apply to a monitoring system for detention; that the HRC have the power to inspect a member states’ detention facilities every three years, to monitor compliance with the framework and hence with international laws. As a result of these regular inspections, the HRC will furnish a report to the UNHCR regarding the

¹⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) r 8(vi) and 9.1.

¹¹ For example, the act of people smuggling, which is how most unauthorised arrivals end up at a states’ borders. People smuggling is illegal in international law and in most member states.

¹² Australian Medical Association, Submission No 1 to Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre*, April 2017, 27–8 [2.50].

¹³ See generally Caroline Fleay, ‘The Limitations of Monitoring Immigration Detention in Australia’ (2015) 21(1) *Australian Journal of Human Rights* 21.

states' compliance, and where necessary, refer matters to the Good Offices for consideration.

Further, by imposing sanctions for non-compliance, in addition to the reputational damage that a state would suffer as a result of a negative report, the rate of compliance is likely to substantially increase. As a general note, this surveillance mechanism is separate and distinctive from the enforceability mechanism described above whereby member states must submit to a detailed analysis of their national detention regime by the HRC. This requirement for periodic review will continue as long as a state is a member of the framework.

6 Possible Limitations

One of the most obvious limitations of the proposed framework is its financial viability. As with all new projects of reform, adequate funding is required for the implementation and effectiveness of the proposed mechanism. However, given that the framework above is not proposing the establishment of any new statutory or international bodies, and is instead making use of institutions already in place such as the Good Offices and the HRC, it is envisaged that any financial difficulties arising from the framework may be limited.

A further potential barrier is the voluntary nature of the framework. International law is notorious for being a 'toothless tiger' when it comes to enforcement because all member states adopt international laws on their own volition and can just as easily remove themselves from such obligations by withdrawing from an instrument.¹⁴ Hence, one major concern is the unwillingness of states to adopt and implement the framework, given its strong enforcement and enhanced surveillance mechanisms. However, it is hoped that the reputational damage that states would suffer as a result of not adopting such a framework, aimed at protecting the most vulnerable people in the world, would be sufficient to make at least the leading states (for example Australia, the US and the UK) take the leap. It is then hoped that smaller states will follow suit as a result. All in all, the framework takes a very proactive and intentional

¹⁴ Jonathan Crowe and Kylie Western-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing, 2013) 158–61.

approach to reversing the crimmigration crisis and restoring immigration detention to its administrative roots, thus advancing international law and holding member states publicly liable for violation.

C An Effective Universal Temporal Limit

1 The Purpose of a Universal Temporal Limit

Chapter IV of this paper focuses on the absence of temporal limits on detention and the critical psychological effects this has on detainees. Given its seriousness, this is considered by the author as the most important issues requiring redress. Chapter IV examines various temporal limits placed on detention by different states. However, the important takeaway from that discussion is the inconsistency of temporal limits from state to state and, in particular, the absence of any temporal limit on detention by certain states. This is a major source of concern. It follows, then, that the best way to rectify this issue is to introduce a universally applicable temporal limit on detention.

A universal temporal limit has the ability to improve not only the transparency and consistency of detention regimes around the globe but to decrease the mental harm caused to detainees, increase the efficacy of immigration programs and potentially speed up the application process for asylum or refugee status. Implementing a mandatory limit on the length of detention may also benefit the efficiency of current state systems by placing pressure on states to determine an application before the expiry time, to avoid the situation where detainees are released from detention into the community — with certain conditions — only to have their application later refused. This may cause a person to hide from the state to avoid refolement or further detention.

2 Finding an Appropriate Limit

Various temporal limits are currently in use in some states. For instance, France utilises a 45-day limit whilst Belgium adheres to 60-days. This is in contrast to the states discussed in this paper — Australia, the US and the UK — all of whom do not

implement any temporal limit. As one of the most commonly traversed areas of concern in relation to immigration detention, several government enquiries have suggested various temporal limits.

For example, the Shaw Report suggests the introduction of a 28-day limit in the UK.¹⁵ This is echoed by the APPG Report.¹⁶ In Australia, the Australian Parliamentary Joint Standing Committee on Migration recommends a 90-day limit¹⁷ which is supported by the Parliamentary Joint Select Committee on Australia's Immigration Detention Network.¹⁸ Researchers in the area have also contributed to this discussion. Gridley, for example, talking from a psychological perspective, recognises that detention for longer than two years significantly increases the chance of detainees developing long lasting and severe mental health problems.¹⁹ The European Union has also implemented a Directive supporting a six month limit on detention.²⁰

Based on the available literature, and the present understanding of the effects of detention on the mental health of detainees, a six-month temporal limit is suggested by the author. This limits detention to well within two years; the point in time in which the effects of detention on mental health increase and are more likely to continue after release. It also allows governments enough time to receive and consider applications for asylum, whilst at the same time limiting the potential for prolonged and arbitrary detention. It is the opinion of the author that a 28-day limit, which has also previously been suggested by the UNHCR,²¹ is not adequate for an

¹⁵ Secretary of State for Home Department, *Review into the Welfare in Detention of Vulnerable Persons*, Report No CM9186 (2016) 22.

¹⁶ All-Party Parliamentary Group on Refugees and All-Party Parliamentary Group on Migrants, *The Report of the Inquiry into the Use of Immigration Detention in the UK* (2015) 9, 18.

¹⁷ Fleay, above n 12, 29; Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: A New Beginning — Criteria for Release from Detention* December (31 March 2013) ix, xx.

¹⁸ Fleay, above n 13, 29.

¹⁹ Gridley above n 8, 10; see generally Derrick Silove et al, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44(3) *Transcultural Psychiatry* 359.

²⁰ European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 On Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals*, 16 December 2008, OJ L 348/98-348/107; 16.12.2008, 2008/115/EC.

²¹ United Nations High Commissioner for Refugees, *Immigration Bill 2015-16: Briefing on Amendments 57, 84 and 166A* (April 2016) s 84(1).

assessment of asylum applications. Nor is this length sufficient in allowing states to properly screen immigrants and determine an appropriate placement for them in the host state. While there is clear international recognition that a temporal limit must be imposed for immigration detention, the temporal limit imposed must not be too restrictive, otherwise states may choose not to adhere to the limit, which relies solely on voluntary adoption.

3 Time's Up: Where to Next?

Where an application for asylum is not finalised within the six-month period, and hence the detainee is required to be released, alternatives to detention may be used. These include, but are not limited to, home detention, the imposition of parole conditions, bail, or reporting obligations, or a combination of appropriate measures. This allows the detainee to be released into the public on a limited and conditional basis, whilst maintaining the states' ability to exert a level of control over their movements within the state. Further, it significantly decreases the repercussions of detention on mental health. Whilst it is the hope of the author that applications under the proposed regime will be processed and determined within the six-month period, it is noted that in the event that this cannot be achieved, the use of alternatives to detention is a suitable solution.

It is well established that alternatives to detention are always less harmful than detention itself.²² Alternatives to detention are therefore considered an 'opportunity to promote a more humane and efficient approach to migrants'.²³ Some other accepted benefits include a much lower risk to mental health, lower administrative costs to the state, increased cooperation by migrants, easier access to legal assistance, faster and more efficient processing of applications, higher rates of compliance and willingness to return, and fewer incidents in immigration detention facilities.²⁴ These findings further support the viability of a universal temporal limit, where there are

²² Alice Bloomfield, 'Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?' (2016) 35 *Refugee Survey Quarterly* 29, 37.

²³ *Ibid* 38.

²⁴ Australian Human Rights Commission, *Immigration Detention at Curtin: Observations from Visit to Curtin Immigration Detention Centre and Key Concerns Across the Detention Network*, Report (2011) 55.

identifiable and efficient alternatives available for use when the temporal limit has expired.

VI CONCLUSION

This paper has explored the phenomenon of crimmigration with a specific focus on the criminalisation of unauthorised immigrants through the use of detention in Australia, the US and the UK. In doing so, the paper has demonstrated how current immigration detention policies in these states substantially operate under the three primary principles of criminal justice; deterrence, retribution and punishment. Through the implementation of deterrence and retributive purposes in the design and enforcement of detention policies, unauthorised immigrants are being characterised as criminals and are punished accordingly. This trend toward crimmigration stems largely from the increasing threat to national security, and the unjustified link between terror and irregular migration, which has resulted in a prejudicial perception of unauthorised immigrants as criminals.

Based on the analysis undertaken in the preceding chapters, it can be seen that modern detention practices are riddled with reflections of criminal justice. The merging of the two areas of law has resulted in a shift in immigration detention policy from its administrative roots to a greater focus on punishment and criminality. As demonstrated throughout, this result is inconsistent with international law. The practice of mandatory and indefinite detention has been consistently condemned by the United Nations High Commissioner for Human Rights, the High Commissioner for Refugees and many other Non-Government Organisations and interest groups.

In the past, literature has traced the history of the relationship between the two areas, outlining the criticisms of current detention regimes around the world.¹ However, no research to date has provided a clear and powerful suggestion for reversing this trend and returning immigration detention to its administrative origins. This paper has filled this gap in making two suggestions for reform. First, the development of an internationally applicable framework governing state detention policy, that mandates cooperation between the Good Offices, the HRC, and all member states. The

¹ See, eg, Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56(2) *American University Law Review* 367; Stephen Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Washington and Lee Law Review* 469; Leanne Weber, 'The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care' (2002) 14(1) *Current Issues in Criminal Justice* 9.

framework also provides for mandatory review of state legislation, appropriate enforcement mechanisms and the imposition of sanctions for states that derogate from their obligations under the proposed framework.

Second, the paper calls for the implementation of a universally applicable temporal limit on detention to improve transparency, efficacy and confidence in state detention regimes, as well as to reduce the risk of mental health issues for detainees during, and following release from, detention. These suggestions for reform are intentionally ambitious; they aim to reinvigorate the discussion in this area and provide some fresh ideas for the international community when tackling this issue. While the ideas themselves are unlikely to be implemented by the United Nations or member states, they do identify potential avenues for innovative reform.

In summary, crimmigration is a very real concern. As the number of displaced people around the world continues to rapidly increase, the need for an internationally recognised and fair detention system, with a renewed focus on providing humanitarian aid is emphasised. Refugees and asylum seekers are some of the most vulnerable people in society and their lives are very much in the hands of the states in which they arrive. While an international regime regulating the treatment of these people currently exists, it arguably lacks sufficient force.

This paper aims to refresh calls for a stronger and more stringent international framework. With states increasingly relying on detention to uphold national security and sovereignty, it is recognised that the complete abolition of immigration detention is unlikely. Hence, for significant change in this space to be achieved, it is prudent to focus on improving the operation of current detention regimes. It is hoped that this paper will open the door for renewed debate and will stimulate the minds of interest groups, IGOs, NGOs and most importantly states, to reconsider their international obligations and to improve their detention regimes, in line with the values and objectives of the international community.

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