STEMMING THE TIDE OR KEEPING THE BALANCE – THE ROLE OF THE JUDICIARY

ENDIGUER OU REGULER LES FLUX MIGRATOIRES – LE RÔLE DU JUGE

INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES

L'ASSOCIATION INTERNATIONALE DES JUGES DU DROIT DES REFUGIES

5th CONFERENCE / 5ème CONFERENCE

Wellington, New Zealand

International Association of Refugee Law Judges
L'association internationale des juges du droit des réfugiés

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PREFACE

The New Zealand members of the International Association of Refugee Law Judges were proud to host the Fifth World Conference in Wellington, New Zealand between 22 October 2002 and 25 October 2002. The theme of the Conference was "Stemming the Tide or Keeping the Balance – The Role of the Judiciary".

The IARLJ was fortunate in attracting academics and international judges who spoke on a range of challenging issues including the Global Movement of People, Interception, Detention, and Judicial Independence. Coinciding with UNHCR's Global Consultations on International Protection, the Conference included commentary from UNHCR and others on its recent initiatives. We are grateful to all those speakers, panellists and chairs who contributed to the Conference and to those who have consented to the publication of their papers. We hope that this publication will give those interested more insight into these very complex issues, which continue to challenge those involved in the field of refugee law.

We gratefully acknowledge the following contributions to this Conference:

- The New Zealand Refugee Status Appeals Authority for organising and managing the Conference on behalf of the IARLJ
- UNHCR for supporting and contributing to the funding of the Conference
- The New Zealand Government's Department of Labour and Department for Courts for their financial contributions
- The New Zealand Law Foundation for sponsoring the visit to New Zealand of Dr Radhika Coomaraswamy.

Finally, I would like to thank the editors of the New Zealand Association for Comparative Law and of the Revue Juridique Polynesienne for their collaborative efforts and assistance with this publication.

Ema Aitken
October 2002 Conference Chairperson
Wellington, New Zealand

ADDRESS OF WELCOME

K J Keith*

Your Excellencies, your Honours, Minister, distinguished guests, ladies and gentlemen.

It is my great pleasure to welcome you again to this Conference of the International Association of Refugee Law Judges. I had the privilege of being invited to speak at your conference in Berne two years ago when my New Zealand colleagues took the initiative, gladly accepted by the members of the Association, to go to the antipodes.

If I may elaborate on my mihi in the formal welcome, I greeted nga rangatira – the chiefs – o te ao whanui – of the world – o nga hau e wha – from the four winds – from nearly thirty countries on my count with 100 or more visitors coming to this favoured land.

The major attention of this Conference is on the law and on courts, tribunals and judges. I thought that I might step back a little and look at the bigger picture and finally say a word or two about New Zealand, picking up on the reference I have just made to this favoured land.

One striking figure is the estimated number of persons of concern who at 1 January 2002 fell under the mandate of the UNHCR – 19,783,100 or roughly Australia's population and five times New Zealand's. The UNHCR website also highlights at the moment three stories among many that do not get into our media.

First, the Great Lakes. In the few days before 15 October, 9,000 Congolese refugees had arrived in Burundi, fleeing the fighting in the Democratic Republic of the Congo, and Rwanda was fearing an influx as well. At the same time an increasing number of Burundis were fleeing their own war-torn country for Tanzania which this year has received over 17,400 refugees from that country.

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* Sir Kenneth Keith, Justice of the Court of Appeal, New Zealand.

Next, to Colombia where the numbers of refugees and internally displaced persons are increasing very rapidly. It is believed as many as 2,000,000 people have been forced from their homes since 1995. Colombia is home to various irregular armed groups that have a tendency to target anyone suspected of collaborating or sympathising with an opposing group, without taking into account if this collaboration is real, voluntary or forced. These armed groups also forcibly recruit young people, including minors, and resort to kidnapping and extortion both as a form of persecution and intimidation, as well as to finance their activities.

Some of those issues are also being addressed by the ICRC and by a Dutch colleague of mine who spoke here just a week or two back, Frits Kalshoven, to see in his case whether an inquiry into some of the alleged breaches of international humanitarian law might be launched.

The third story is also from Africa. (I don't mention Asia or Europe since those stories which involve two-thirds of the 20,000,000 people do tend to get covered here.) It is from the Ivory Coast. Hundreds of thousands of people – Ivorians, immigrants and refugees – have been displaced in the wake of the attempted coup on September 19. Some have crossed the borders, including nationals of neighbouring countries like Mali, Burkina Faso and Guinea who have been returning home amid rising xenophobia in Côte d'Ivoire.

Within the country, thousands of people continue to be displaced daily. More than 200,000 have been driven out of their homes in the central city of Bouaké, along with several thousand more in the southern commercial centre of Abidjan. People are leaving en masse out of a combination of fear, hunger and poverty.

Those numbers, like the current 20 million and the 50 million the UNHCR has helped over the 50 years of its existence, help put the situation in this country into perspective. The number of applicants here in recent years has grown a great deal, for instance from 27 in the whole of 1987, but it is at most 2,000 per year – a per capita figure similar to Australia's and, thinking of last year's conference, only about a tenth of the Swiss per capita figure. The number we take under the UNHCR resettlement scheme is 750 a year, a figure which ranks us with Canada at the top of that scheme on a per capita basis. I return to the value of those people to New Zealand at the end.

Before I do that I wish to make just two other points about the very large international scene.

The first is to mention the actions last December by the Parties to the 1951 Convention and this month by the Executive Committee (including New Zealand) to renew their commitment to the Convention and to adopt a Programme of Action and an Agenda for Protection. Given the great concern that was being expressed in various parts of the world about the Convention, particularly since 11 September, and about the need to scale back its obligations, that worldwide support is most encouraging.

The final international matter I wish to mention is the related role of the ICRC. I do that principally because of the complementary role of the two bodies based on their commitment, going back in the case of the ICRC to 1863, to humanity. The outstanding UNHCR publication *The State of the World's Refugees* marking the 50 years of the High Commissioner's office and a recent issue of the *International Review of the Red Cross* with the same purpose elaborate the connections at length. A number of the authors of those publications are here today. Let me mention some of the connections.

It was the ICRC which in 1921 appealed to the League of Nations to assist over one million Russian refugees displaced during the Russian civil war. The League responded by appointing Fridtjof Nansen, the famous polar explorer, as High Commissioner on behalf of the League for those refugees, later extended to others including Greeks, Bulgarians and Armenians. His budget was £4,000! With the then newly established International Labour Organisation he helped around 60,000 refugees to find work.

I move forward thirty years to the formation in 1951 of the UNHCR, again urged by the ICRC. The ICRC message of May 1950 to governments began with this stark reminder

> Of all victims of the recent war, none, since the Armistice, have endured greater hardships than the refugees and none have been more hardly dealt with. Up to the present they have had, like civilians in general, the protection of no International Convention.

To quote the present President of the ICRC, Jacob Kellenberger, that body was calling both for the development of legal norms and the formation of a body able to act on behalf of persons in need. As he says, the essential purpose was humanitarianism; one essential means was international law.

The Soviet Union and its satellites boycotted the negotiations and the United States wanted a strictly defined temporary agency. The new body shared important characteristics with the ICRC – its work was to be of an entirely non-

political character; it was to be humanitarian and social; and, as a rule, it was to relate to groups and categories of refugees. There followed in July 1951 the Convention, now binding on 144 states, which is to be seen in the context of the Universal Declaration of Human Rights of 1948, the Genocide Convention of 1948 and the four Geneva Conventions of 1949, now accepted by 190 states.

To come to the present day, both Mr Kellenberger and Mr Lubbers stress their profound obligation to maximise the impact of their organisation's limited resources through cooperation and contemporary action. The sad fact is that wars – the ICRC's raison d'être – cause involuntary population movement, beyond the country and within it. The two bodies have to work together and suffer real losses in their increasingly dangerous humanitarian work. Mr Lubbers makes the point in a concrete way:

> Over the past few years, we have seen dear friends and colleagues brutally murdered in remote locations such as Mugina, Novye Atagi, Atambua, Macenta, Kimpese and Bunia. It is too easy to say that these committed humanitarians gave their lives to lessen the suffering of others. The lives of our colleagues were not given willingly, rather they were cruelly and unfairly taken, leaving their families and loved ones devastated and wounded in ways that never heal. I would like to dedicate this volume to their memory and, in doing so, call for a redoubling of our collective efforts to enhance security and respect for the lives of all humanitarian workers. We cannot protect refugees and the victims of war if we lose our own lives in the effort..

To conclude, I come back to my earlier reference to this being a favoured land. It is favoured in so many ways. We who live here are so fortunate. The particular favour I wish to emphasise is that provided by the refugees who have made their homes here. There is an excellent book by Anne Beaglehole *A Small Price to Pay* which tells some of the stories of the 1930s Jewish refugees. The *Small Price* was of course being in New Zealand in the 1930s and 40s but without access to the opera each night compared with being dead. Daniel Snowman has just published a similar book for the United Kingdom, *The Hitler Emigres*. Its thesis is that far from eliminating the cosmopolitan culture he abhorred, Hitler was instrumental in spreading it worldwide. Snowman tells the story of refugees who made their mark on Britain's postwar intellectual and cultural life.

I think of just two of the New Zealand refugees one of whom I was privileged to know. His stepfather was a great Viennese architect who returned to practice there in the 1950s but not before he had designed at least one major commercial building, just along Lambton Quay, and designed private houses of style and

utility well suited to Wellington's topography and climate. The son was one of our great public servants and supporter of the arts. He became Secretary to the Treasury. He was a professor of public policy at the University and he made real contributions to sculpture in the streets and parks of Wellington. That contribution is marked by a splendid sculpture, the Navigator, behind this building and the Beehive and facing the Treasury Building where he worked so well for the country which gave him refuge. That is a particular and spectacular manifestation of the great value to countries which meet their basic humanitarian and legal obligations to protect fellow humans from persecution. Meeting those obligations favours everybody.

It is now my happy duty to declare the conference open and to wish you every success, not just here in the conference discussions, but beyond, in meeting your fellows, making new friends and seeing something of this favoured land.

OPENING ADDRESS

Erika Feller*

This is the 3rd of your biennial Conferences I have the privilege to address. It gives me great pleasure to do so. My experience of these meetings in the past - and indeed my contacts with the International Association of Refugee Law Judges - confirms me in the view that the judiciary is one of the more important partners of UNHCR in its central mission of protecting refugees.

It was this belief that led, in August 1999, to the signature by your Association and UNHCR of our joint Memorandum of Understanding. This Memorandum took as its starting point that judges, together with quasi-judicial decision makers in all regions of the world, have a special role to ensure that persons seeking and in need of protection outside their country of origin are effectively able to access it, in accordance with their rights and in full respect for the applicable principles of international law. The MoU recognises that the IARLJ and UNHCR have a mutual interest in seeing the basic principles of legal protection applied without discrimination, fairly, consistently, humanely and subject to the Rule of Law. This mutual interest is heightening day by day as refugee protection, as a concept and as a reality, is today being challenged on a number of different fronts.

The tradition of granting asylum liberally to those fleeing persecution and conflict is on the wane. Asylum countries are worried about receiving refugees without the prospect of their early repatriation; large-scale arrivals, seen as a threat to political, economic or social stability, tend increasingly to provoke hostility and violence. Refugees are returning to countries emerging from long, drawn out war, where peace is fragile, infrastructure weak, the human rights situation not yet stabilised and the basic necessities of life in uncertain supply. Return may as much follow inhospitable, even hostile, conditions in host countries as any durable changes at home.

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* Director of International Protection, UNHCR.

With asylum space shrinking, preserving access to and the quality of asylum is a continuing challenge, worldwide. So too is the dilemma of how to address the distinctive needs of refugees in the context of modern migration policies of many States. Concerns about costs, about the clarity of the refugee concept in today's migratory flows and the newer dimension of human smuggling, trafficking and terrorism - have led to a major re-shaping of asylum systems in countries with a long tradition of active political support for refugee protection. Increased detention, reduced welfare benefits and restricted family-reunion rights are only a part of a slow but steady growth in processes and laws whose compatibility with the protection framework is rather tenuous.

This is the "bigger picture" reality confronting refugee protection. At its heart is, for a range of different reasons, the waning quality of asylum. We see this manifest at a number of levels - at this global level of international trends or regional developments; at the country level in our camps, but also at the level of the individual case. This last is, perhaps, where you as adjudicators are most likely to confront asylum dilemmas - not in the settlements, or at the closed borders, but rather in the individual experiences which create refugees out of normal people and their families.

Let me share with you just one from the list of many examples recently brought to UNHCR's attention. I do so for what it shows about the quality of available asylum. A woman - a writer with several children - outspoken in her criticism towards the dictatorial regime of her own country, was arrested and brutally abused before she managed to escape, but without her family. Her only way out of the country was the illegal path, through resort to smugglers. After a perilous journey, she reached a country of asylum. Because of her mode of entry, she was automatically detained for a long period without legal assistance. She was in fact recognised as a refugee – her fears were held well founded -, but she was only granted temporary stay, with no right to reunion with her young children, or to travel rights. As a result, at this moment, she is cut off from her family, with no prospect of return, much less of earning a living or establishing a new life in the asylum country. Her physical and mental health is naturally seriously deteriorating.

It seems that the woman in question, whose claim, I repeat, was positively adjudicated, has been doubly victimised. Circumstances in her home country turned her into a refugee. In her asylum country a combination of laws and the concerns that generated them - concerns about rising tides, the taint of association

with criminality, the need to deter - has meant that she is now denied the full benefits of her new status.

Mode of travel, legality of entry, or even the situation and status of other groups of migrants that may have arrived alongside an asylum seeker should not limit the right to present a claim and have it properly processed, nor should these facts be allowed to substitute for the refugee definition itself. Our joint MoU calls upon the IARLJ and UNHCR to promote a common understanding of asylum principles and to encourage fair practices as regards enjoyment of refugee status. In this individual case, it is certainly, in our assessment, a moot question as to whether the asylum principles have been given full sway, as to whether the practice has been fair, indeed whether "effective protection" is what has been accessed. One can - regrettably - multiply the individual cases of this sort many times, in many countries. It is here that you have a correcting and balancing role to play.

Lest there be any doubt, either, about the significance of the responsibility to judge accurately, fairly and expeditiously the protection needs and to provide thereby for "effective protection", let me mention, also as an illustration, another individual case which has recently attracted a lot of media attention in this part of the world. It is the case of Mr Alvaro Morales, a Colombian asylum seeker in Australia, whose claim was rejected. As we understand it, one of the bases for rejection was the assumed availability of protection in another country, Argentina. Mr Morales returned to Argentina, where his efforts to access this protection proved fruitless. His claim to asylum was rejected and he was deported to Colombia where, reportedly he was killed by para militaries near his parent's rural home.

Mr Chairman, this Conference has a two-fold title "Stemming the tide - Keeping the balance". The developments I have very generally described deserve analysis against this aptly chosen focus for today's Conference. Flood imagery, alarmist and defensive at the same time, is very much part of the atmospherics within which asylum systems now operate, particularly but not exclusively in the developed world. A sense on the part of governments of not being in sufficient control of borders, their growing frustration about so-called "asylum migration", about abuse of asylum systems by "queue jumpers", "abusers" and criminals, has fuelled restrictive laws and practices designed to keep arrivals, costs, people smuggling and domestic backlash to the minimum. There is, though, a growing concern that these various barriers, while contributing to some decline in arrival rates, is now encouraging the rise of ever more innovative smuggling networks - a

phenomenon which represents a threat both to the interests of States and to the welfare of asylum seekers.

To return to the flood analogy which the Conference organisers have asked us to reflect upon, do the facts support it? We doubt it, based not least on the 2001 survey of recent statistical trends released recently by UNHCR.

Fact number 1: The global refugee population, which stands at an estimated 12 million people, has remained virtually unchanged between 1997 and 2001;

Fact number 2: When compared to the early 1990's, refugee arrivals during these later years have actually declined some 24%;

Fact number 3: Some half of the world's refugees originates from just seven (7) States, principal among them Afghanistan, from which close to 4 million people had been displaced. This refugee producing country is now the main receiver back of its own citizens.

Fact number 4: The largest number of asylum applications in industrialised countries in 2001 were received by the United Kingdom (92,000), Germany (88,000) and the United States of America (83,000). These figures are notably lower than comparable figures for the early 1990's when, for example, Germany received in one year more than 450,000 applications.

In parenthesis, and taking this also as one basis for comparison, Australia is recorded by as having received 12,366 asylum applications in 2001, and New Zealand 1,601.

Numbers of course are far from the full story. I have though put some selectively on the table to suggest that, with actual numbers declining, the "flood" notion is unnecessarily alarmist. I want now to turn to the issue of balance.

The refugee problem is, very centrally, an issue of rights – of rights which have been violated and of resulting rights, set out in international law, which are to be respected. A refugee, classically defined, is a persecuted person, denied security of person, unable to exercise the right to freedom of expression, to freedom of association, to freedom of belief, to pursue political convictions, or just even to be who she is born to be. A refugee is also someone unable to continue to live in safety where she is, due to the discriminate, or even indiscriminate, dangers of war or serious civil disturbance. Flight and seeking asylum is the only realistic option for her and her family, to protect their right to life, security or freedom of person.

The foundation rights of the international protection regime are set out in the 1951 Convention and its 1967 Protocol. They are, certainly for us, as relevant to the protection of refugees in this contemporary context as they were in 1951. They include:

- The right not to be returned to persecution or the threat of persecution (the principle of non-refoulement);
- The right not to be discriminated against in the grant of protection;
- The right not to be penalised for having entered into or being illegally in the country where asylum is sought, given that persons escaping persecution cannot be expected to always leave their country and enter another country in a regular manner;
- The right not to be expelled, except in specified, exceptional circumstances to protect national security or public order;
- The right to minimum, acceptable conditions of stay.

On December 13th 2001, in the Convention's 50th anniversary year, the first ever meeting of States Parties was held at Ministerial level in Geneva. That meeting adopted a Declaration which stands as a strong statement of political commitment to upholding the values and principles of the Convention, and to implementing its provisions fully. It is, therefore, all the more strange that UNHCR increasingly hears from certain States that the protection regime of which we have been made the guardian no longer fits the problem, that its essential tenets are increasingly marginalised. These States have become disillusioned about their capacity to manage contemporary population movements using existing tools, particularly the 1951 Convention, and increasingly view refugee protection as a burden, not a shared responsibility. UNHCR's response has been clear and unqualified. Rather than holding the 1951 Convention accountable for limits in relation to problems it was never envisaged to deal with, the challenge is to clarify its place in the modern world, in particular as regards the asylum-migration nexus. It does have a place within the larger body of principles affecting the treatment of migrants, broadly defined, but as a rights protection instrument, to safeguard the security of a particularly vulnerable group of non-citizens. It is not, and was never intended to be, a migration control tool. This fact does not lessen the importance of the 1951 Convention, or render it peripheral. To the contrary, given the mixed population movements of today, without the Convention the likelihood is that the needs of asylum-seekers and

refugees will become ever more marginal, perhaps totally subsumed to overriding local interests, with disastrous consequences for the persons concerned.

This being said, we have also agreed that the Convention does not hold all the answers. If the Convention is clear in terms of rights, it is close to silent about whose responsibility it actually is to protect them in the context of modern displacement situations and population movements. A State is clearly in violation of its Convention obligations if, by its own actions, a situation is created whereby protection, where needed, is not available. But there is a rights versus responsibilities dilemma, particularly in mass-influx situations. The key to ensuring protection for those who genuinely need it lies, urgently, in the development of approaches which will achieve that balance, which will better apportion responsibilities, share burdens and, ultimately, which will allow States to identify to whom they owe protection responsibilities, with what content, and to whom they do not.

Participants were clear at the Ministerial meeting in this regard that the protection principles cannot be viewed in isolation of the broader framework in which they will be applied. There are costs - financial, social, political or security - that the grant of asylum may entail for States. In fact UNHCR has long acknowledged the importance of seeking accommodation between the legitimate interests of States and their international humanitarian responsibilities to protect refugees. This is not impossible. Far from it, UNHCR's experience is that respect for refugee rights is fully compatible with upholding the interests and concerns of domestic populations, even in a post September 11 environment.

In this regard, though, the Convention does not hold all the necessary answers. When is a state party to the Convention required to provide for the rights to which an asylum-seeker or refugee is entitled; when is another state the more appropriate provider; what are the criteria for determining when responsibilities are engaged and when they can be refused? The answers to these questions are only partially to be found in the instruments which we have. It was, also recognised in the Ministers' Declaration that protection today demands a complement to the Convention, in the form not least of progressive development of the law, and additional strategies and tools.

I THE GLOBAL CONSULTATIONS AND THE AGENDA FOR PROTECTION

UNHCR's process of Global Consultations on the International Protection has recently been completed. This process was in part a response to criticism of the

Convention, but perhaps more importantly to the bigger challenges confronting refugee protection - how to protect refugees better in mass influx situations, how to make asylum systems work better, how to find solutions particularly in the protracted situations, how to share the responsibilities more equitably, how to address the waning quality of asylum. The goals of the process included, to shore up support for the existing international framework for protection, as well as to explore the scope for enhancing protection through new approaches which respect both the rights at stake and the concerns and constraints of States and other actors.

The First Track of the process was designed to reaffirm the centrality of the 1951 Convention as the basic rights protection instrument. It culminated in the Ministerial Declaration which, at least on paper, did just that. The Third Track allowed States to consolidate understanding of "extra Convention" problems and explore areas where new approaches are required. This, essentially, generated the Agenda for Protection. The Second Track, which is perhaps of most interest in the present context, had as its purpose, clarifying the scope of application and the interpretation of aspects of the 1951 Convention, particularly the definition Article, in its modern context. Our purpose in seeking this clarification was to promote greater consistency in decision making among refugee adjudicators and more harmonisation of State practices as regards the Convention. We are in the process of reproducing the results of Second Track discussions in the form of a book containing the background papers and the round table conclusions. We are also now issuing new or revised guidelines on exclusion, cessation, gender-persecution, the ground of membership of a particular social group, the internal flight alternative concept and interpretation of Article 31 (non-penalisation for illegal entry). These guidelines will be offered to adjudicators as a complement to UNHCR's Handbook.

Among other positions, they will reinforce the understanding:

- That the exclusion clauses are not static but have to be interpreted in a more "evolutionary way", drawing on developments over recent years in international criminal law, extradiction law and human rights law;
- That *non-refoulement* is incontestably a principle of customary international law and that it is breached by measures that have (or even could have) the effect of returning a refugee to the frontiers of where life or freedom would be threatened; such measures including rejection at the frontier, interception or indirect "chain" return;

- That the refugee definition, properly interpreted, can encompass gender-related claims without the need for an additional Convention ground; also that a gender-sensitive interpretation of the Convention is required;
- That a social group is constituted both by the "inherent, inalienable characteristics test" and, on occasion, by the social perception test;
- That internal flight possibilities have a relevance to assessing the validity of the claim, but that the mere absence of risk of persecution is not enough, in itself, to establish the existence of an internal protection option;
- That the Art 31 protections are not precluded in the case of individuals who have genuinely only transited countries en route from their country of origin or threat;
- And, that there is an obligation on States not only to refrain from decisions that result in family separation but also positively to take measures which respect and promote the right to family unity.

The foregoing is a selective and rather unsophisticated rendition of some outcomes of Track 2, for which I apologise. I have taken the liberty of presenting them so on the basis that you will be going into much greater detail on these issues in the course of the deliberations of this Conference. There will be a more elaborate contribution from UNHCR at the appropriate point. For my purposes now, I wanted only to flag to you a process which we hope, over time, will indeed find its reflection in your own deliberations in the individual case.

Let me now, though, return to the more strategic aspect of the Global Consultations process, crystallised in the Agenda for Protection, which has just been endorsed by UNHCR's Executive Committee. It sets as the central goals for refugee policies for UNHCR and, more important, for States:

- Strengthened implementation of the 1951 Convention and the 1967 Protocol
- Protecting refugees within broader migration movements
- Sharing of burdens and responsibilities more equitably and building of capacities to receive and protect refugees
- Addressing security-related concerns more effectively
- Re-doubling the search for durable solutions

- Meeting the protection needs of refugee women and refugee children.

Although not a legally binding document, the Agenda does represent a broad consensus on areas for action. Realising many of its objectives hinges on resolute follow-up by protection partners, including the judiciary.

As lawyers, you might have a particular interest in one area for follow-up, which the High Commissioner, Mr Lubbers, has termed "Convention Plus".

The Global Consultations had, as I mentioned, a particular focus on the "tools" of protection, those presently available (notably the Convention) and those in need of development for better global management of refugee problems. In this context, the High Commissioner has foreshadowed, in effect, a new drafting process to generate issue specific "special agreements," to build on the Convention regime in very particular areas. Paragraph 8(b) of UNHCR's Statute in fact envisages such special agreements "calculated to improve the situation of refugees and reduce the numbers requiring protection". They would not be new treaties as such, but rather executive commitments of a contractual nature. Whether at all, and if so to what extent, these agreements will be justiciable will be one question we will have to address early in the process.

The so-called "irregular movement" problems - or the problem of asylum seekers moving on from countries where they have or could have accessed effective protection is one of the protection challenges which might lend itself to a special agreement of some sort. UNHCR is examining how to strengthen the hosting capacity of first asylum countries, while creating incentives for the so-called "secondary movers" to return to them, or even not to leave in the first place. Such incentives might, among others, include, joint refugee status screening arrangements in first asylum countries, contributed to by, and with the political and financial backing of "destination" countries in Western Europe and elsewhere. We are also examining how UNHCR can play a more substantive role, both in countries of first asylum and in destination countries which would not exclude a more elaborate role in the refugee status determination processes, for example at points of entry. UNHCR's participation in the RSD manifestly unfounded airport procedures in Switzerland and Austria are two positive models we are now exploring further to see how they could apply in other countries. Another possible option might be an agreement on burden and responsibility sharing in relation to the processing of asylum applications for a particular region, or even for a particular caseload. At some point there may be important implications for the work of national asylum adjudicators.

II CONCLUSION

In conclusion, let me briefly recap my key message.

Keeping the balance to me means, above all, keeping the balance between refugee rights and states' interests and responsibilities. The imbalance or the disconnection between rights and responsibilities in a globalised world of large-scale migration of various sorts, is perhaps, the challenge confronting the viability of asylum today. In mixed migration movements there will be people who are refugees, with the right to have their situations properly adjudicated and protection made available. There are now some quite complicating factors in this regard, revolving around notions of secondary movement, "safe country," internal flight alternative, even now "external flight alternative," as well as the imperative of combating smuggling and trafficking which can well lead to an asylum seeker with a well founded claim not being able to access any protection mechanism, absent a system for designating the responsible parties. UNHCR's role here is clearly and unequivocally to uphold the principles of protection for those who fall within the "protection gap" between international refugee law and state practice. I hope that, consistent with letter and the spirit of the MoU we have with the IARLJ, we can count on the membership of this Association to support and assist us in this endeavour.

FISHING IN THE STREAM OF MIGRATION: MODERN FORMS OF TRAFFICKING AND WOMEN'S FREEDOM OF MOVEMENT

*Radhika Coomaraswamy**

I am greatly honoured to be with you today and to give one of the introductory speeches for your very important conference. It is also heartening to note that this meeting of important people associated with immigration and asylum has decided to focus on trafficking of women and its implications for migration policy. This is a critical area for many women in today's world and it is truly creditable that the IARLJ Conference this year has decided to spend some time addressing these difficult issues.

I OVERVIEW

A few decades ago the term trafficking had a very different connotation. As reflected in the reference "White Slavery", trafficking was closely linked to the kidnapping and abduction of women and their sale to men for sexual slavery. The image conjured was one of women in shackles being herded together against their will to provide sexual services for men in countries other than their own. Let us not make any mistake. This type of trafficking still continues and is still a major problem in many parts of the world. I can only remember Chamoli, a girl I interviewed in Nepal.

The case of Chamoli presents the nightmare of classical trafficking, the horrible reality that requires immediate attention and vigorous enforcement.

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* United Nations Special Rapporteur on Violence Against Women.

Chamoli[1] fell in love with a young man when she was sixteen. He promised to marry her so she ran away with him to India. After they crossed the border, he took her to Poona where there was an older Nepali lady who ran a home with many young girls. She watched the old lady pay her boyfriend and then he disappeared. She was told that she had been sold into prostitution. She refused to accept her new trade. She was beaten into submission and subject to torture. Knives were held to her neck and her genitalia. She was not given any food for days. Finally, hungry and exhausted she agreed to provide sexual services. After a few weeks she was sold again to a woman from Bombay. In Bombay, she was given a cubicle that was the size of a narrow bed surrounded by a curtain. She served ten to twenty clients a night even when she was menstruating and there was no day of rest. She was not allowed to leave the brothel without the male bouncer and was given some pocket money for clothes and other expenses. Finally, with the aid of a Nepali NGO Maiti Nepal, her brothel was raided and Chamoli was rescued. She was kept in an Indian government home for seven months before being deported. She said the home was really a jail and the conditions were sometimes worse than the brothel. She had nothing to do from morning till evening. After seven months she was flown to Nepal and reunited with her family. By this time she began to have dizzy spells, diarrhoea and vomiting. The Maiti Nepal doctors diagnosed her as having HIV AIDS. She was in an advanced condition and had only a few more months to live. The United Nations estimates that four million people were trafficked in the year 1998. It also estimated that seven billion dollars worth of profit off trafficking went to criminal groups.[2] The numbers continue to increase with each year.

And yet, Chamoli's case only heightens the modern dilemma. Modern day trafficking is more nuanced and complicated than earlier classical forms. It is complicated by the fact that today trafficking is closely linked to the question of migration. Saskia Sassen in a recent paper points to the growing presence of women in the fringes of the international global market. She argues, "the employment and/or use of foreign born women covers an increasingly broad range of economic sectors, some illegal and illicit and some in highly regulated industries. The key actors giving shape to these processes are the women

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1 Based on an interview, November 2000. The name has been changed to protect the victim.

2 <http://www.hrlawgroup.org/site/programs/traffic.html>.

themselves in search of work, but also, and increasingly so, illegal traffickers and contractors as well as governments of home countries".[3]

Traditionally women have provided certain type of services in the family and in the community. In the home, the ties of intimacy makes them provide these services for free whether they be sexual service for their spouses, or domestic service for the household or unskilled labour in family farms or family owned enterprises. At the same time, they have also provided these same services to the greater community as low paid, low skilled workers. They provide sexual services in the form of prostitution which is probably the most marginalised profession in the world. They provide domestic labour as badly paid domestic workers or house maids. They also work in agricultural communities as low paid unskilled workers in fields owned by richer landlords or in urban areas or free trade zones where foreign investment is welcomed.

This provision of these traditionally female services is not a new phenomenon. What is new, as described by many women scholars, is that in the modern world there is an international market for what used to be provided for the family, the local community or the nation-state. There is now an international market for prostitution where the service providers are of all nationalities and communities. There is now an international market for housemaids and low paid unskilled workers. In this international demand for female services, supply follows closely behind and women often migrate to provide their services to an international clientele. They cross borders in the transnational flow of labour. Many in the third world have argued that the push for transnational flow of capital from richer to poorer countries should also be accompanied by a more lenient attitude to the transnational flow of labour from the poorer to the richer countries. Women are caught up in these currents of migration and the problem of trafficking is complicated by the process of globalisation and the transnational movement of capital, labour and goods.

The essentially novel feature of modern forms of trafficking is that women desire to migrate for many reasons and for this reason they become increasingly vulnerable to traffickers. This desire to migrate is often ignored in the traditional analysis of trafficking. Professor Saskia Sassen in her article sees the phenomenon of trafficking through the prism of our political economy. She argues that the macro-development policies followed by governments in pursuit of globalisation

3 Saskia Sassen, "Counter Geographies of Globalisation: The Feminisation of Survival" in a paper presented at Columbia University, February 2001.

may have led to unemployment and debt on the part of third world women. This in turn has led to women migrating in large numbers in search of survival. This search for survival is sometimes a nightmare as their vulnerability is exploited and abused by those who wish to profit off their bodies or their labour. Ironically this search for survival often empowers some women. Households and communities become dependent on their earnings and even governments come to rely on their foreign currency remittances.

Women's desire to migrate, to make a better world for themselves and their families cannot be ignored in our struggle to fight trafficking and traffickers. For this reason, conceptual clarity is absolutely essential before we discuss legislation and procedures for preventing trafficking. Trafficking must be seen in the context of migration and migration patterns. As one leader of an NGO said, "traffickers fish in the sea of migration".[4] In this context any effort to combat trafficking must not violate women's freedom of movement.

Women leave their countries for many reasons. I have interviewed many women and they leave because of a variety of concerns. They want to escape poverty or discrimination at home. Many of them leave because they are in a desperate situation. In countries where there is polygamy, women leave their countries when their husbands take another wife. Often women who migrate come from communities and castes that suffer disabilities in their home country. They migrate to escape discrimination and oppression at home. In addition women seek to migrate from countries where there is armed conflict, where their physical safety and the safety of their children are not assured. For a wide variety of reasons, the modern woman is ready to migrate, ready to cross borders in an attempt to survive and better her life.[5]

While women muster up courage to venture forth in the modern world, despite their cultural upbringing in very conservative societies, there is no doubt that they often end up in situations of violence and abuse. What is needed is a principled and pragmatic way in which we can separate legitimate forms of migration from those that are violent or abuse the vulnerability of the women concerned. Trafficking is the concept that has been entrusted with this formidable task.

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4 Communication to special rapporteur by an NGO representative during the rapporteur's visit to Bangladesh, November 2000.

5 These reasons for migration are based on interviews conducted with women victims of trafficking in Nepal, India and Bangladesh in November 2000.

Though it is theoretically easy to construct, in practice and in the real world, it poses enormous problems.

For example, in some sending countries, desperate to stem the tide of women who are taken abroad into slavery-like conditions, immigration authorities are responding to the crisis of trafficking by insisting that women get the permission of their husbands or fathers before they get passports or leave the country. This is a very dangerous trend precisely because many women whom I interviewed left their countries because they wanted to escape from an abusive husband or father or seek refuge from family violence. By entrapping these women in situations of domestic violence and abuse, these well-intentioned immigration policies are actually having a very negative impact on the lives of ordinary women. Any attempt to deal with trafficking must therefore not result in the denial of other basic rights. Prohibitions, preventing women from travelling or requiring that women get their husband's or father's permission to travel, fundamentally violate women's rights under the pretext of protecting women from violence and abuse.[6]

Another conceptual issue that deserves clarification is that we must separate the regimes that protect children from those that vindicate women's rights. Trafficking in children requires a more draconian approach that places the state in the role of guardian and protector. Children who have been trafficked require the state to protect them and take care of them until they return home to their families. However, the provision of such services should respect the rights of the child. They should not become shunted children kept for long years in government homes without any future. Reconciliation with the family should also be done with caution since many of these children fled their homes because of domestic abuse. Unless such abuse is recognised as a factor and there is a guarantee that it will cease, children should not be unconditionally returned to their parents.

The situation of women is sometimes very different. Women as adults often make important decisions with regard to their lives. While reconciliation with the family must be the primary strategy of any trafficking involving children, the case of women has to be dealt with differently. Many of the women who have been trafficked do not want to be rescued, do not want to stay in state homes and do not want to return to their families.[7] In my interviews with women I discovered that

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6 Bangladesh and Nepal prevent women from going to the Middle East for employment. Bangladesh requires a husband or a father to give permission before a woman receives her passport.

7 Based on interviews in Nepal and Bangladesh, November 2000.

many of the women did not want to return home, some of them did not want to be named or rescued. In some countries they had formed independent trade unions to protect their rights. In this context, it may be necessary for the state to respect their wishes and protect their rights without imposing solutions that will only make life more miserable for them. For this reason, the regime that protects children with its emphasis on family reconciliation and rehabilitation should be different from a regime that emphasises the human rights of women and their autonomy to make decisions about their own lives.

The third and perhaps most controversial conceptual issue is that legislation on trafficking should be delinked from regimes regulating prostitution. One reason for this delinking is that women, children and boys are being trafficked for a wide variety of purposes other than prostitution. They are being trafficked for forced labour, forced marriage, camel jockeying, begging, etc. Nevertheless prostitution remains the primary purpose of trafficking and therefore poses important dilemmas. One is often asked whether prostitution is sex work or violence against women. In surveying different realities around the world, the answer appears to be, it depends; it depends on context and it depends on the person.

One major reason why an international approach to trafficking should not make prostitution a central concern is the pragmatic realization that there is currently no international consensus on the correct approach to take with regard to the regulation of prostitution. There remain countries throughout the world that criminalise prostitutes and criminalise prostitution. This moralistic approach to prostitution exists in most Islamic and Catholic states as well as in many states in the United States of America. There are other countries that take their lead from the 1949 Convention on the Suppression of Trafficking. Most countries in South Asia for example take this approach. The Convention, based on the perspective of the Abolitionist Movement, criminalises those who exploit prostitution but treats the prostitute herself as a victim without any criminal liability. Other countries follow the regulationist model that legalizes prostitution through a system of licensing and allows prostitutes to see themselves as sex workers who should have economic and social rights protected by law. The Netherlands and many countries in Europe follow this approach. Some women's groups and NGOs reject all these frameworks, arguing for laws and strategies that respect the rights of sex workers focusing on issues of violence and abuse and the prevention of AIDS. The United Nations itself is divided, depending on which agency is taking the lead. The Convention on the Elimination of Discrimination Against Women and the CEDAW Committee in Recommendation 19 seem to take the abolitionist

approach. However the UN Declaration on the Elimination of Violence Against Women with its language of "forced prostitution" and the ILO in some of its reports seem to take the view that there is the possibility of legitimate sex work.

These divisions among different schools and different approaches are deep and acrimonious. They depend on radically different attitudes toward the human personality and human sexuality. The abolitionist approach is premised on the deep ambivalence that early feminists had toward human sexuality. Seeing sexuality as a site of exploitation and abuse, feminists like Catherine McKinnon were always suspicious of sexual expression outside the realm of intimate partners. They fought campaigns against prostitution, against pornography and sexual harassment in the workplace. They demanded a legal, criminal approach that required accountability and punishment of all the individuals involved with the sex trade. They demanded an environment where women would be free from fear and abuse. The feminist legacy of laws that today create an environment where women are accorded more respect and dignity are in great part due to the tireless efforts of these women.

Younger feminists, who have benefited from the environment created by the older women activists, see things a little differently. In the postcolonial era of "human agency", they are interested in taking a second look at the so-called female victim. They write about sexual agency, female desire and the female body. For many it is time to move beyond the moral puritanism of the early feminism to a more nuanced understanding of human sexuality. This requires looking at sexuality as a site for women's empowerment and agency.[8] In this discourse, the prostitute becomes the sex worker, an individual endowed with agency and rights. In this worldview, the prostitute does not exist to be rescued by the outside world but demands her rights as a worker and a human being. She defines the terms of her salvation, forming trade unions and agitating for human rights.

In Bombay, I came across a group of older women prostitutes or sex workers who reflected this world view. They were initially Devadasis, women from the South of India who were given to temples for prostitution. They had moved on to the slums of Bombay where they earned a living as sex workers. They explained that they belonged to a caste that traditionally gave their younger daughters into

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8 For a good analysis see Duncan Kennedy, "Sexual Abuse, Sexy Dressing and the Eroticization of Domination" in D Kennedy *Sexy Dressing etc Essays on the Power and Politics of Cultural Identity* (Harvard University Press, 1993) 126.

temple prostitution.[9] They had left the temple and migrated to Bombay in search of a better life. Here, they explained, they earn enough to spend on their children and were in a position to save enough money to send some home to their parents who were taking care of their children. Their main concerns were health protection, HIV AIDS and schooling and amenities for their children. They said they were reasonably happy. They work at night, play cards during the day and had few complaints. They became extremely offended when it was suggested that a rehabilitation centre be set up and that they be trained in another occupation. They made it very clear that they did not want another occupation and they did not want the state or the police in their lives. They only wanted protection from HIV AIDS and some provision for their children. They were considering forming a trade union like the sex workers trade union in Calcutta.

In this context, therefore, we are faced with a reality which earlier groups of feminists refused to confront because the numbers of women who were content with sex work were so small to warrant attention. However, with regard to international migration, it is true that many women do migrate, knowing they are going into sex work. When they get to their destination they are deceived by the conditions and find themselves in slavery-like conditions.

Let me tell you the story of a Polish doctor whom I met during my visit to Poland. She was a victim of trafficking. She qualified in Poland as a doctor but during the state socialist era, doctors earned a paltry sum of money. When Eastern Europe opened up, some of her clients had gone for sex work in Germany. They painted a rosy picture of the life of the sex worker and they claimed to have made an enormous amount of money as call girls. The doctor who had to take care of a large family made inquiries and then agreed to go to Germany to do sex work. She was smuggled across the border by a group of traffickers, many of them of the same community as the doctor. When she got to the brothel it turned out to be a nightmare. There were constant beatings, not enough food, her documents were taken, she was not allowed to leave the house and she had to service an inordinate number of clients. When she complained, they assaulted her mercilessly. Since she did not have documentation and was smuggled into the country, she was terrified to go to the police. Finally, she escaped and went to the Polish consulate where she was initially refused any special treatment until she begged and pleaded and managed to get in touch with a friend who sent her money for her air travel back to Poland. She had not told her parents and family that she had gone for sex

9 Based on an interview, November 2000.

work and therefore her return was quite a traumatic one. Whatever questions we may have about the doctor's capacity for moral judgment, we cannot ignore the fact that many women go ready for sex work as respectable call girls and are terribly deceived about the conditions of work.

Though some women are drugged and abducted across the borders, the vast majority of women are deceived. Though they wish to migrate to better their lives and are promised lucrative jobs, when they accept and cross the border willingly, they find out too late that they have been sold into prostitution. Those who know they are going into sex work, find out that they must be in a brothel, living the life of a sexual slave being subject to terrible violence and abuse. Perhaps the worst case of brothel conditions was the case in Thailand where dozens of sex workers were killed when a building (housing a brothel) was burnt down. Chained to the bed they had no chance of escape.

Ironically, however, despite all this abuse and violence, the situation is very complex when you actually interview the women. The majority of the women and girls interviewed by a government survey in India did not want to be rescued. Only 43% wanted to leave their brothels. The majority wanted to stay in the brothel but wanted the conditions to improve. This is an indication of the type of violence and oppression from which they were escaping when they decided to migrate or cross borders. In addition they felt they had nowhere to go since most of them did not want to return home or face their families. For everyone concerned with immigration and refugee law, the truth is that many trafficked women are escaping conditions that are even worse than the reality they face as sex workers in a brothel. The nature of persecution and suffering they had to undergo before they voluntarily leave a country is often ignored in the literature on trafficking.

II RESPONSE OF STATES

States around the world have begun to respond to the crisis posed by increasing trafficking in women and children across their borders. However, their efforts raise disturbing dilemmas for law-making and law enforcement at the international level and within national borders.

During the last few months of 2001, the United Nations Convention against Transnational Organised Crime added a Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children. The document was a consensus document after many hours of deliberation. The Protocol defines trafficking as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Though the definition is a mouthful, it is a major development in the law of trafficking. The earlier international document on trafficking, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, defines trafficking very differently. The Convention states in Article 1:

> The Parties to the present Convention agree to punish any person who to gratify the passions of another
>
> (1) Procures entices or leads away, for purposes of prostitution another person, even with the consent of that person;
>
> (2) Exploits the prostitution of another person, even with the consent of that person ...

In contrast to the earlier approach to trafficking, the Protocol of the year 2001 makes significant changes. Firstly, The Protocol distinguishes between women and children. For women there must be transfer or transportation across borders but it must involve some form of coercion or abuse of vulnerability. With regard to children, fraud, deception coercion or abuse is not necessary. Mere recruitment, transportation or transfer is enough[10] to incur criminal liability.

In another very important change, the Protocol appears to imply that the transport and transfer with free and full consent of an adult victim for purposes such as prostitution is not trafficking. Transportation and transfer without violence or abuse will not be interfered with. The burden of proving lack of consent will not be on the victim since the Convention states that if abusive means are used, the consent of the person shall be irrelevant.[11]

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10 Article 3(c) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

11 Article 3(c) of the Protocol.

The Protocol has a complex approach to the definition of trafficking being linked to prostitution. The interpretive notes make it clear that the term sexual exploitation may be interpreted by each country according to its own experiences thus allowing for the differences in approach to prostitution and sexual services. In addition, the Convention links trafficking to a wide variety of purposes and the definition is not only connected to the exploitation of prostitution. It includes among other end purposes such practices as forced labour, removal of organs or other slavery like practices. The language of the Protocol itself is a compromise, reflecting the various positions of diverse groups and interests. While the earlier approaches to trafficking linked in clearly and only to prostitution and sexual exploitation, the modern approach to trafficking is to recognise diverse ends with regard to the slavery like conditions that are manifest in the world.

Besides uniting on international definitions of trafficking, countries around the world are taking national measures to combat trafficking. Cynics argue that these radical measures may be prompted by recent United States legislation that requires countries to take efforts against trafficking to qualify for certain aid requirements. However, all these laws have serious human rights implications. Though one lauds the effort and the intention behind these pieces of legislation, the consequences of such action may actually make life more unbearable for the women and girl victims. An example of the type of legislation being considered is the current Nepalese draft prepared by the Ministry of Women and Social Welfare.[12] The draft, prepared by the police department, criminalises the prostitute for the first time in Nepalese history. This will ensure that the woman victim will become the target of police action and not the trafficker since she is the visible product and the easier person to target. The draft also gives the police draconian powers to arrest, detain, search and seize material. Most of the provisions violate the International Covenant on Civil and Political Rights. It also shifts the burden of proof so that the accused has to prove that he is innocent. The vesting of enormous powers in a police force usually results in acts of impunity that target women victims. In India under the Prevention of Immoral Traffic Act, though the law is structured to deal with traffickers, 80% of the cases filed are under soliciting, resulting in the reality that the woman victim is the person who is arrested most of the time. Being the most visible symbol of the sex industry, giving draconian powers to the police usually implies that the woman victim will be the one to be harassed, detained and questioned.

12 Provided by the Ministry of Women and Social Welfare, November 2000.

In many countries, the state has always taken on the historical role of being the protector of the female victim. The worst manifestation of this protection ideology is the protection homes set up in South Asia for women victims of trafficking. In India, women and girls rescued from trafficking are kept in these homes "for their own protection". The conditions are jail-like, and the women and girls cannot leave the premises. They have very little to do, the sanitary conditions are often appalling and they languish for years on end until the authorities decide what to do with them.[13] They await case dates and repatriation dates but since they cannot leave the premises none of this is done with their consultation. They are the forgotten women and in interviews often plead with outsiders to let them out. Meanwhile, the traffickers are usually given lesser sentences and are allowed out into the community at a much earlier date. As a result, very few of the women working in brothels and guest houses want to be rescued since they feel life in the government home is sometimes worse than in the brothel.

Though new, strong laws are being adopted throughout the world, the criminal justice systems in the different countries do not seem ready to deal with the problem of trafficking. Even though trafficking is an international phenomenon, except for the European Union, there is no co-operation among police in the different countries. Each operates in its own sphere with a few isolated meetings throughout the year. The arrest and conviction rates also reveal a major problem with regard to criminal justice. The police in many parts of the world do not have any special training manuals or procedures with regard to trafficking. In some countries there are now special units to deal with trafficking within the police department. However, the major problem in this sphere remains allegations of police corruption.[14] Women and girls interviewed in many parts of the world, especially in Asia and Africa spoke of police complicity in trafficking. They often spoke of money changing hands in front of them, of brothel owners being warned of raids. One girl spoke of how she ran away to the police station in Thailand but the brothel owner came to the station and paid the police and took her away. She was beaten senseless after the event.[15] Corruption was seen as endemic in this trade and unless serious efforts are made from the top to punish this type of behaviour, sending a message that such behaviour will not be tolerated, it is unlikely that much will change. However, pressure and vigilance by local level

13 Based on a visit to the Liluah home in Calcutta, November 2000.

14 Based on interviews November 2000.

15 Based on interviews November 2000.

NGOs working on trafficking has helped to curtail police corruption in many states.

The legacy of the judiciary in many societies is also mixed with regard to the prosecution of traffickers. The conviction rate throughout the world is abysmally low. The police argue that the reason for this is that the judiciary is patriarchal and insensitive to the issues. The members of the judiciary, on the other hand, present the point of view that the evidence has not been gathered properly and since the punishments are now draconian demanding long sentences, it is unconscionable to convict someone without the proper evidence. The draconian laws may therefore have the opposite effect of not resulting in convictions.

Given the strong link between trafficking and migration in the modern world, the problem of trafficking poses major challenges for refugee and immigration agencies. Unless there is what I may call "trafficking awareness" on the part of the immigration officials around the world, the problems may be compounded. The reality is that much of the activism around the world on trafficking has been prompted by immigration officials and police taking the lead trying to prevent illegal immigration first and the abuse and violation of women second.

In fact nightmare realities may result from this quest to fight trafficking through control of immigration. Let me give you a case. As UN Special Rapporteur on Violence Against Women, during the summer I have interns from all over the world working on my report in Sri Lanka. One such intern in the year 2001 was from the New York University Law School and was an American citizen of Pakistani descent. When she was leaving the country to fly to England, the British immigration official advising the Sri Lankan authorities looked at her passport. He stared at her and her passport and then became convinced that she was a trafficking victim. He claimed that the US passport was forged. She pulled out her Ohio driver's license, her NYU student card etc... but he was still convinced that she was a trafficking victim. She was pulled out of the queue and put into a detention cell at the airport. Since it was the middle of the night she had to wait six hours till the morning in the cell. Thereafter she was allowed to make phone calls and managed to contact friends and the US embassy. About 12 hours later, a US Embassy came to the airport and she was cleared.

In fighting trafficking an enormous amount of discretion is vested in those who monitor cross-border movements of people. In actual fact, the ordeal women suffer pending immigration formalities merely compound their problems. International anti-trafficking norms establish mechanisms by which victims of trafficking can return to their countries of origin without punishment by either

government. But summary deportation is the rule and the process in many parts of the world is corrupt, abusive and a terrible ordeal. In Thailand, the women are treated like illegal immigrants, they have to pay their transportation expenses to the border. Burmese women are taken straight to the border and handed over to Burmese officials or left on their own to cross the border. Many of the women are from minority ethnic groups and do not want to be anywhere near the authorities of the governing SLORC. While waiting to be deported, women are held in jail or detention cells from seven days (Thailand) to seven months (India). In many of these jails, corrupt officials have coveted sexual services from the victims for special favours. In cases studied at the Burmese border, through such corruption many women return to Thailand and continue life at another brothel. Some women on their arrival in the country of origin are arrested on charges of illegal departure and charged with prostitution.

When one deals with issues of trafficking, it is important to realise that the woman who is trafficked, according to the modern definition, is a victim not a perpetrator. In many systems of justice, she is treated as a perpetrator, subject to harshness, cruelty and insensitivity. If we are to truly fight trafficking in a meaningful way, we must learn to focus on the victim and her needs and concerns as well as the concerns of the state in preventing the crime of trafficking. For example, even though she is a victim of trafficking, we cannot presume that she wants to go home. It is important that immigration and refugee judges have procedures that allow them to ascertain why the women left in the first place, what was the nature of the abuse, violence or oppression she faced at home that made her become a victim of trafficking. Summary deportation cannot be the answer given the complicated nature of the individual histories. There must be more meaningful and humane ways with which to deal with the trafficked victim.

In some countries regimes have been put in place that have become international models to deal with this current problem. Belgium and The Netherlands are spearheading this new approach to fighting trafficking with humane treatment for the victim. The hallmarks of this approach are the following:

(1) Special government departments and units in the police and immigration authorities are set up to fight trafficking and they have international linkages. These units work together, co-ordinate information and activity in the country and in the region.

(2) Laws are being drafted in keeping with modern definitions of trafficking. In addition there are strong procedures to ensure the safety and protection

of the victims. This may involve strong witness protection schemes and anonymous witness provisions in some difficult cases.

(3) Training programmes for the police, immigration officials, prosecutors and the judiciary on trafficking and other related crimes especially in areas such as how to handle the female victim of trafficking abuse.

(4) Women victims of trafficking are not summarily deported. They are given three months breathing space to decide whether they will testify against the trafficker. If the victim agrees to testify, she will be given a visa for the length and duration of her case and thereafter be eligible for consideration to remain on humanitarian grounds.

(5) The police and immigration authorities work closely with women's NGOs set up to work with women victims of trafficking. The moment a woman is "rescued" at a brothel or an immigration counter, she is handed over to these NGOs. These NGOs run shelters and have legal and psychological counselling for these women. They will also assist the women in their dealings with the police, the prosecutors and the judiciary. The partnership between NGOs and the police is an essential element in the success story with regard to successful convictions of traffickers and the humane treatment of victims.

Sending countries are also responsible for fighting trafficking with a humane face.

Again, the partnership with NGOs is essential, and women should be handed to relevant NGOs when they are seen to be victims of trafficking victims. In addition when women are deported or when they return to the country there must be special programmes for them, ascertaining their medical position and whether they wish to return to their families or live a life on their own. The foreign consulates should have officers who are skilled in dealing with issues of trafficking and abuse. Finally measures should be taken to fight the long term problems that cause women to leave home countries in the first place. Abuse and violence in the home, unemployment, discrimination and oppression are matters that require effective action on the part of the sending countries if we are to deal with trafficking in terms of long-term solutions.

III CONCLUSION

In many of our attempts to fight trafficking, we must not forget our first concern – the woman victim. All these measures are made meaningful only

because they allow women to live a life of respect and dignity. In promoting these measures we must keep this in mind. We must validate the lives of these women and give them the respect they deserve. The women involved may be victims but they are also human beings with aspirations and experiences. Any measure to be successful must learn to understand their needs and desires. In their suffering they have insights and ideas from which we can benefit. Too often they become pawns in someone else's game. Their voices and interests are compromised as states uphold sovereignty and stem the tide of migration. Whatever measures are taken should give centreplace to the rights of the woman victim. Immigration laws, refugee procedures, and asylum practices must surely ensure and protect their right to live in dignity.

THE HOWS AND WHYS OF INTERCEPTION: A STATE PERSPECTIVE

Jenny Bedlington[*]

I INTRODUCTION

There is increasing recognition in the developed world that there are substantial economic, demographic and social benefits to be gained from facilitating the orderly movement of people around the world. People are moving in increasing numbers for tourism, family reasons, education, business or employment. Migration reinforces links with the global economy and society, enhancing both productive and cultural diversity.

Drawing on the positive experiences of traditional overtly migration countries such as the United States, Canada, Australia and New Zealand, countries in Europe are exploring legal migration as the way to balance ageing populations and to fill labour market imbalances.

In addition to migration opportunities, a small number of countries make a contribution to refugee protection by offering third country resettlement to refugees in countries of first asylum.

The other, unfortunately much larger part of global people movement is made up of:

- forced migration of those who flee conflict, persecution or natural disasters; and
- illegal movement of those who seek to circumvent migration and border controls, often in order to improve their economic circumstances.

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* Senior Adviser, Department of Immigration and Multicultural and Indigenous Affairs, Australia.

Community support for immigration and resettlement, whether in traditional or emerging migration countries, is dependent on community confidence. The community expects that intakes do not exceed the community's capacity to integrate new arrivals, that migration and resettlement programmes are managed with fairness and integrity and that appropriate public health and security issues are being rigorously addressed.

It is no accident that communities that are diverse, tolerant and welcoming of migrants and resettled refugees are at the same time strongly supportive of measures to combat irregular migration and to fight people smuggling.

Many of those who are being smuggled or trafficked are migrants in search of a better life, hoping to find employment opportunities and economic prosperity abroad, while others are asylum-seekers and refugees.[1]

For many of those fleeing directly from a country of persecution, countries of asylum have clear obligations under the Refugees Convention not to *refoule*.[2] For those who have no need of protection, swift return to their country of origin is the most effective anti-smuggling approach.

But many of the people using people smugglers have mixed motives: they are refugees making secondary and even tertiary movements, from a country of first or subsequent asylum where they had or could have sought and been provided with effective protection, to a preferred country of protection where they seek improved living standards and/or a durable solution.

In all cases, criminal traffickers or smugglers make large illicit profit from offering their services.[3]

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1 UNHCR draft paper on 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations' (EC/50/SC/CRP.17), 18th Meeting of the Standing Committee, 9 June 2000 at: http://www.unhcr.ch/refworld/refworld/unhcr/excom/standcom/2000/menu.htm.

2 Under Article 33(1), States undertake not to return or expel a refugee to the frontiers of a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.

3 Ibid, p 1. The paper also points out the distinction made by the Vienna ad hoc Committee on the Elaboration of a Convention against Transnational Organised Crime (CTOC) (created by the UN General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two protocols supplementing CTOC, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour,

The costs of dealing with irregular migration are large and impact on the effectiveness and sustainability of the international protection system: In 2001 the IGC Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia estimated that refugee status processing costs alone, exclusive of asylum-seeker accommodation and support, litigation or removal of rejected asylum-seekers cost IGC countries[4] in excess of US$10 billion.

Transparent links between a State's capacity and willingness to provide contributions to countries of first asylum and UNHCR and to resettlement are made in only a few countries. There is however clearly an impact where finite resources are used to deal with large numbers of asylum-seekers.[5]

In recent years, States have renewed efforts to prevent irregular migration and to combat the smuggling and trafficking of persons, in particular when undertaken by organised criminal groups.

This focus is reflected in the Convention against Transnational Organized Crime (CTOC) and its supplementary Protocols on trafficking and smuggling of migrants.[6] The General Assembly, in adopting the Convention and its Protocols, noted that it was:[7]

> Deeply concerned by the negative economic and social implications related to organized criminal activities, and convinced of the urgent need to strengthen

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and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country.

4 IGC countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, The Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and United States.

5 For example, Switzerland is a UNHCR resettlement country; however, it suspended its resettlement quota in early 1999, citing special circumstances related to the increase in asylum seekers and the need for increased in-country resources.

6 The United Nations Convention against Transnational Organized Crime (CTOC), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, were adopted by the General Assembly in its Resolution 55/25 at its 62nd plenary meeting on 15 November 2000.

7 Resolution adopted by the General Assembly 55/25. United Nations Convention against Transnational Organized Crime, 15 November 2000.

cooperation to prevent and combat such activities more effectively at the national, regional and international levels.

Destination States have increasingly resorted to interception measures within the broader context of migratory control measures. Although interception frequently occurs in the context of large-scale smuggling or trafficking of persons, it is also applied to those who travel on their own, without the assistance of criminal smugglers and traffickers.

Because some intercepted persons may be asylum-seekers and refugees, but others may not, interception is a key example of the migration/asylum nexus. Interception is one of the processes within which State border control and entry laws and policies intersect with protection polices and obligations.

This paper examines the international legal and policy framework in which interception is used as one of the measures to combat irregular migration and people smuggling, and the impact of interception on asylum-seekers and refugees.

II MANAGEMENT OF PEOPLE MOVEMENT – THE WHY

Australia has consistently argued that irregular migration and people smuggling are best addressed using a comprehensive and integrated approach, drawing on international cooperation. The approach necessarily involves a solid commitment to the twin objectives of:

- continuing to meet protection obligations and working to ensure the viability of the international protection system;
- while at the same time, doing everything possible to fight irregular migration and people smuggling.[8]

Some argue that people smuggling is necessary to enable refugees to flee persecution in their country of origin to a place of safety.

While there is evidence to suggest that some refugees use people smugglers to reach an asylum country, in 2001 only 15% of those applying for asylum in IGC countries were adjudged to be refugees.[9] In addition, an analysis of decisions in 2001 demonstrates that in most cases asylum seekers would have had to transit

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8 'Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime – Australia's Commitment', September 2001 (A Paper distributed at UNHCR Global Consultations).

9 *Overview on First Instance Decision Data 2001* – IGC.

countries where they could have availed themselves of protection but instead chose to obtain both a protection and migration outcome at their final destination.

A The Comprehensive and Integrated Approach

Australia continues to vigorously promote and pursue a comprehensive and integrated approach to managing irregular migration. This approach is comprised of three main elements:

- addressing the so-called push factors through preventive strategies;
- disruption of the mechanism used to effect illegal entry – people smuggling and trafficking and the use of fraudulent documents; and
- addressing the attractiveness of the product sold by the smugglers – the so-called pull or demand factors – through adjustments to reception, return and readmission arrangements.

1 Prevention

Preventive strategies are relevant to both countries of origin and countries of first asylum. They seek to remove or ameliorate the factors that motivate people to leave through:

- support for the resolution of conflict and the development of human rights in countries of origin;
- aid and development assistance to developing countries to reduce poverty and address humanitarian and emergency relief situations;[10]

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10 General Assembly resolution 54/212 of 22 December 1999 urges 'Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development'. Incorporated in the Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air. Also, Art 15 (3) of the Protocol against the Smuggling of Migrants states 'Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment'.

- resources to support countries of first asylum
  - in continued provision of effective protection while durable solutions are found; and
  - in provision of local integration as appropriate; and/or
- resources to support UNHCR in registration, refugee status determination and repatriation, and the referral of refugees in countries of first asylum for third-country resettlement.

Australia's capacity building and assistance measures are constantly reprioritised to take account of the needs of specific caseloads and situations. While Australia continues to fund and support States in the areas of migration management and border control, funding has also been directed to support rebuilding infrastructure and providing for people being returned or repatriated to assist with improving their standard of living. For example, since September 2001, the Australian Government has committed AU$40.3 million to assist with humanitarian aid and reconstruction of Afghanistan.

2 Disruption

The operations of people smugglers are generally highly profitable and low risk, encouraging the proliferation of this form of transnational organised crime. A key strategy is therefore to increase the risks and costs for the people smuggler.

Substantial work is being done by the Centre for International Crime Prevention (CICP)[11] and through regional bodies and initiatives to encourage States to criminalise people smuggling and ensure penalties are at a level commensurate with the gravity of the offence. States are urged to cooperate through exchange of information and joint law enforcement operations to identify, apprehend and successfully prosecute people smugglers and traffickers.

The Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime[12] generated considerable impetus and high level support for efforts to intensify regional cooperation including through

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11 The Centre for International Crime Prevention (CICP) is the United Nations office responsible for crime prevention, criminal justice and criminal law reform. It pays special attention to combating transnational organised crime, corruption and illicit trafficking in human beings. See at: http://www.undcp.org/odccp/crime_cicp.html

12 26-28 February, 2002 www.dfat.gov.au/illegal_immigration/cochair.html

information-sharing for law enforcement purposes and cooperation in verifying the identity and nationality of illegal migrants. Work is proceeding in the region on developing legislation to criminalise people smuggling and trafficking.[13]

Information campaigns that advise the lower level operatives, for example crews of boats, of the risks and penalties relating to involvement in people smuggling are important.[14]

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13 For example, new NZ legislation makes people smuggling an offence punishable by 20 years in jail or up to $500,000 in fines (previously the maximum penalty had been three months jail and a $5,000 fine). Fines for businesses that 'knowingly' hire illegal immigrants will jump from $5,000 to $50,000. The New Zealand Herald, 'Closing door on forlorn line of asylum-seekers', 28 May 2002, at http://www.nzherald.co.nz/storyprint.cfm?storyID=2043613

14 A Media Statement by Hon Phil Goff, Minister of Foreign Affairs, 'NZ sends stark warning to people-smugglers and boatpeople', Friday 28 June 2002 at www.refugee.org.nz/news.htm provides details of New Zealand's information campaign. 'The Minister has claimed that pamphlets warning of likely death or heavy penalties is hitting its mark with people-smugglers and potential illegal migrants. Three thousand pamphlets have been distributed in towns and ports in Indonesia directly to potential illegal migrants warning them of the perils of undertaking a journey to New Zealand. He claims that reports from Jakarta reveal that the pamphlet is making potential illegal immigrants doubtful about travelling to New Zealand as they see the journey as too dangerous and people-smugglers see the pamphlet campaign as an obstacle to attracting business. A further 25,000 pamphlets will be distributed in Indonesia and in other nations such as Iran, Pakistan, Sri Lanka, Thailand, Malaysia and Vietnam. The pamphlets also highlight the new laws passed recently which provide for severe penalties including fines of up to half a million dollars and twenty years imprisonment for those responsible for smuggling people.'

The Australian Government is collaborating with the International Organisation for Migration (IOM) on the development of an international information campaign to combat people smuggling from the Middle East and South-West Asia. As the international people smuggling rackets feed on rumour and misinformation, a key preventative strategy is to improve the level of information available to potential users about smugglers and outcomes. Australia's international information campaigns have been conducted in source, first asylum and transit countries. The campaigns concentrated on disseminating messages about the penalties for people smuggling and the dangers of illegal travel to Australia. For example, an Indonesian-language scrapbook of newspaper stories about Indonesian fishermen gaoled in Australia was compiled and distributed in those parts of Indonesia where people smuggling is active. Information about legal avenues of migration to Australia was also included in the campaigns.

Another way of increasing the costs of smugglers' operations is through concerted efforts to disrupt the flow of people. Interception, wherever possible, as early as possible along the route, is the key disruption strategy and is widely used by States.[15]

Australia's approach involves criminalisation of people smuggling with minimum sentencing to underline the gravity of the offence,[16] investment in the apprehension, prosecution and where necessary and possible the extradition of smugglers,[17] enhanced surveillance and detection capacity[18] and board, search and vessel seizure and destruction powers.[19]

3 Reception, readmission and return

Most irregular migrants seek permanent residence status, usually by applying for asylum. However, even if that quest were unsuccessful, extended stay, achieved through long processing times and/or delays in removal, of itself provides benefit. Time in the country of destination provides an opportunity to

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15 At a meeting organised in May 2001 by UNHCR as part of the Global Consultations process, involving 21 participants (including representatives of the Government of Canada and the United States, NGOs, academics and others) it was 'recognised that interception is here to stay, as States consider it an effective means of controlling irregular migration and combating smuggling or trafficking of persons'; 'Global Consultations Update' in Prima Facie, the Newsletter of UNHCR's Department of International Protection, August 2001, p 4. An overview of the meeting's conclusions and recommendations on incorporating refugee protection safeguards into interception measures can be found in the document: 'Regional Workshops in Ottawa, Ontario (Canada) and Macau', Global Consultations on International Protection, 2nd Meeting, EC/GC/01/13, 31 May 2001.

16 DIMIA Fact Sheet 70, Border Control, 19 November 2001. Australian courts must now sentence those convicted of people smuggling action which have occurred since 26 September 2001 (including crews of boats) to a minimum of 5 years in prison, with a maximum sentence of 20 years in prison possible for a first conviction, and at least 8 years and up to 20 years for a second conviction for bringing people to Australia illegally where both offences occurred after the 26 September 2001.

17 DIMIA Fact Sheet 70, Border Control, 19 November 2001.

18 DIMIA Fact Sheet 73, People Smuggling. Measures include improved Coastwatch, Customs and Navy capabilities to detect, pursue, intercept and search boats carrying unauthorised arrivals.

19 DIMIA Fact Sheet 70, Border Control, 19 November 2001.

work (whether permitted or not), which can generate funds sufficient to at the least defray the costs of smuggled entry and for remittances.

Thus the key to reduction in value of what is sold by the smuggler is to process quickly, remove as soon as practicable and return to the country of origin, or to the country of first asylum providing effective protection if the person is a refugee.

In the absence of readmission, reduction of the benefits achieved though smuggling down to the level of core entitlements (for example through removal of immediate access to local integration) can encourage refugees to stay in the country of first asylum in order to access the full benefits of the orderly delivery of durable solutions.

These strategies, while they no doubt impact on the choices made by smugglers and the users of smugglers as to which destination country to target, are not enough in and of themselves to prevent people smuggling. It is only through truly global cooperation and investment in preventive strategies and cooperation on return and readmission – the comprehensive and integrated approach – that true inroads in reducing the incidence of people smuggling will be made.

4 Comprehensive approach by other destination countries

Policies in other countries reflect this comprehensive approach.

An example of a comprehensive approach is provided by the country-specific action plans of the European Union's High Level Working Group on Asylum and Migration (HLWG). These plans address the phenomenon of composite flows and comprise a number of elements relating to the root causes of migratory and refugee movements. They also contain control measures to combat irregular migration, such as increasing the number and effectiveness of airline liaison officers and immigration officials posted abroad.[20]

The European Union (EU) has recently proposed a number of measures to combat illegal migration, including measures to prevent illegal migrants reaching EU borders. The Commission of the European Communities in a communication to the European Council and the European Parliament stated that:[21]

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20 UNHCR Standing Committee paper on interception, op cit, p 2.

21 Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM (2001), Brussels, 15.11.2001, at http://www.ue2002.es/principal.asp?idioma=ingles

> The prevention of and fight against illegal immigration are essential parts of the common and comprehensive asylum and immigration policy of the European Union.

The problem of illegal immigration within the broader context of the common policy on asylum and immigration was considered recently by the European Council in Seville. The Council concluded (Conclusion 28) that:[22]

> Measures taken in the short and medium term for joint management of migration flows must strike a fair balance between, on the one hand, an integration policy for lawfully resident immigrants and an asylum policy complying with international conventions, principally the 1951 Geneva Convention, and, on the other, resolute action to combat illegal immigration and trafficking in human beings.

The Council endorsed the EU plan to fight illegal immigration and called on the Council and the European Commission to attach top priority to certain measures contained in the plan.[23] The European Council considered that combating illegal migration required a greater effort by the EU and a targeted approach to the problem with the use of all appropriate instruments in the context of the EU's external relations.[24] The Council considered it necessary to carry out a systematic assessment of relations with third countries which did not cooperate in combating illegal immigration. Inadequate cooperation by a country could

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22 Seville European Council, Presidency Conclusions at http://.ue2002.es/principal.asp?idioma=ingles

23 Seville European Council, op cit, Conclusion 30 – in particular 'review, before the end of the year, the list of third countries whose nationals require visas or are exempt from that requirement; introduce... a common identification system for visa data [as soon as possible]; speeding up of the conclusion of readmission agreements currently being negotiated and approval of new briefs for the negotiation of readmission agreements with countries already identified by the Council...'.

24 Seville European Council, ibid, Conclusion 33 – the Council concluded that an integrated, comprehensive and balanced approach to tackle the root causes of illegal immigration must remain the European Union's constant long-term objective. The Council urged that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal migration. The Council highlighted the importance of ensuring the cooperation of countries of origin and transit in joint management and border control as well as on readmission.

hamper the establishment of closer relations between that country and the Union.[25]

EU members are faced with uneven and unreliable cooperation of source countries with respect to facilitating return of nationals. As a result, EU States are increasingly adopting an approach of expecting readmission to the point of embarkation to Europe, thus increasing the incentive for these transit countries to intercept and in turn return to prior transit countries or the country of origin.

The United States has Integrated Border Enforcement Teams (IBET) in place. These are multi-agency groups of law enforcement officials dedicated to securing the integrity of the border. In December 2001 the United States and Canada began working together at key international locations to enhance interception capacity.[26]

On 8 October 2001, the President of the United States George W Bush announced the creation of the Department of Homeland Security in order to secure borders and transportation systems which straddle 350 official ports of entry.[27]

The issue of combating smuggling and trafficking of persons has also featured prominently on the agenda of several international organisations, including the Council of Europe; the Organisation for Security and Cooperation in Europe (OSCE); the International Organisation for Migration (IOM); the Inter-

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25 Seville European Council, ibid, Conclusion 35.

26 www.sgc.gc.ca/Releases/e20011203_2.htm

27 www.whitehouse.gov/deptofhomeland/sect3.html. It is planned that the Department will work towards the creation of a state-of-the-art visa system, which will include biometric information gathered during the visa application process. It would ensure that information is shared between databases of border management, law enforcement, and intelligence community agencies so that individuals who pose a threat to America are denied entry to the United States. It would also lead efforts to deploy an automated entry-exit system that would verify compliance with entry conditions, student status such as work limitations and duration of stay, for all categories of visas. The Department will incorporate the United States Customs Service (currently part of the Department of Treasury), the Immigration and Naturalization Service and Border Patrol (Department of Justice), the Animal and Plant Health Inspection Service (Department of Agriculture), and the Transportation Security Administration (Department of Transportation).

Parliamentary Union; and several United Nations agencies, such as the International Labour Organisation (ILO).[28]

III INTERNATIONAL TRAVEL AND INTERNATIONAL LAW

A Do States have a Sovereign Right to Control their Borders?

States have a legitimate interest in controlling irregular migration and have the sovereign right to control their borders and to determine who will enter their territory. As the High Court of Australia said in the case of *Lim*:[29]

> The power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a Judicial Committee of the Privy Council, said in *Attorney-General for Canada v Cain* ([1906] AC 542 at p 546): 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests'.

B What is the Impact of the Refugees Convention?

The Refugees Convention contains no explicit or implicit prohibition on interception. A State's primary obligation under the Refugees Convention is not to *refoule* or return a person, either directly or indirectly to a country where the person's life or freedom would be threatened on account of a Convention ground. The prohibition on *refoulement* in Article 33 of the Refugees Convention may qualify, but does not remove the prerogative of States to intercept,[30] exclude,[31]

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28 UNHCR Standing Committee paper on interception, ibid, p 2.

29 Brennan, Deane and Dawson JJ, in *Lim v MILGEA* (1992) 176 CLR 1 FC 92/051 at 27. More recently, in *Ruddock v Vadarlis* [2001] FCA 1329 at 193, http:/www.austlii.edu.au, French J (in the majority), stated: 'The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering'.

30 Qualified interception on the high seas has been incorporated into the UN 'Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime', United Nations, 2000, see

expel or deport illegal entrants, even if they are refugees.[32] In the context of interception measures, it is accepted that there need to be effective safeguards put in place to ensure that *refoulement* does not take place in the transit country of interception or the countries of disembarkation.

This *non-refoulement* obligation does not require entry to the territory of the intended State of destination, nor to its refugee status determination procedure.[33]

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especially Articles 8 ('Measures against the smuggling of migrants by sea') and 9 ('Safeguard clauses').

31 In considering the case of the MV *Tampa*, Beaumont J of the Full Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329 at 125-126, http:/www.austlii.edu.au said: '[T]here is nothing in any of the authorities to contradict the principle that an alien has no common law right to enter Australia. This aspect is beyond argument ... [W]hilst customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state's territory. This accords with the principles of the Refugee Convention. By Article 33, a person who has established refugee status may not be expelled to a territory where his life or freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory'. The case involved the Australian Government's ability to prevent the entry into Australia's migration zone, and arranging for their departure from Australian territorial waters, of unauthorised arrivals rescued from a sinking vessel by a Norwegian ship, the MV *Tampa*, on 26 August 2001. The unauthorised arrivals were removed to Nauru, where a refugee status determination procedure was implemented.

32 For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, pp123-173 at www.immi.gov.au

33 The Convention is silent on what procedure might be appropriate to determine refugee status, where it might take place, and who might undertake it. These are matters which the Convention's drafters left to each State to determine. As noted in UNHCR's 'Handbook on Procedures and Criteria for Determining Refugee Status', Geneva 1979, para 189: '[T]he determination of refugee status, although mentioned in the 1951 Convention (cf Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedure is to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure'. For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, pp123-173 at www.immi.gov.au

It may be met anywhere in the world by other States which permit entry and which honour the *non-refoulement* obligation and other core human rights obligations.

Asylum is for States to provide rather than a right of the individual. The right to 'seek and enjoy asylum' in the Universal Declaration of Human Rights (UDHR) must be understood as purely permissive. As noted by Gummow J of the High Court in *Ibrahim*:[34]

> [The] right 'to seek' asylum [in the UDHR] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals ... Nor was the matter taken any further by the International Covenant on Civil and Political Rights ... Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate'.

The return of illegal entrants to a safe country of first asylum in the case of those making secondary movement, or transfer to another safe country where any protection claims may be considered by UNHCR, officials of the receiving State, or officials of the intercepting State are both valid actions under international law.

Interception of refugees beyond the territorial boundaries of the intercepting or destination State does not engage the protection obligations of either State under the Refugees Convention. While there is some support for the view that the *non-refoulement* obligation has assumed the status of customary international

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34 *MIMA v Ibrahim* [2000] HCA 55 at 137-138. He adds, '[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national ... Over the last 50 years, other provisions of the Declaration have [citing Brownlie] come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation'. See also comments by Gummow J et al in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225.

law,[35] there is no obligation on the intended State of destination to admit to its territory a refugee seeking to enter illegally.

It has been suggested by UNHCR,[36] that the physical act of interception by a State engages that State's protection obligations in respect of those intercepted, irrespective of the location of that interception.

However, an examination of the *travaux preparatoires* provides firm ground for the conclusion that Article 33(1) of the Refugees Convention was not intended by the original drafters to apply extraterritorially. In particular the President of the Conference ruled that to avoid ambiguity the interpretation given by the Netherlands be placed on the record. That interpretation reflected a consensus among a number of major receiving States that Article 33 was limited in its application to those who had already been admitted or were already within the territory.[37] In agreement with Robinson, Grahl-Madsen notes that Article 33 'may

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35 There is no settled view on whether the obligation applies extra-territorially, though some commentators take the view that it does. According to Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) 143, 'The principle of *non-refoulement* has crystallised into a rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action wherever it takes place, whether internally, at the border or through its agents outside territorial jurisdiction'. See also 'The Scope and Content of the Principle of *Non-Refoulement*', by Sir Elihu Lauterpacht and Daniel Bethlehem, UNHCR, 20 June 2001 (a background paper prepared for the Expert Roundtable series organised by UNHCR as part of the Global Consultations process for the 50th anniversary of the Convention).

The proposition that the principle of *non-refoulement* – but not necessarily agreement on its scope as proposed by Goodwin-Gill – is now embedded in customary international law was acknowledged in the Declaration adopted by Contracting States to the Convention on 12-13 December 2001 in Geneva.

36 In the UNHCR Standing Committee paper, 'Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', EC/50/SC/CRP.17, 9 June 2000, p 4, UNHCR adopts a purposive approach to give effect to the objective of international protection. It is argued that to restrict the Convention's application to the territories of the Contracting States would render the Convention ineffective. It is also argued that international human rights law recognises an obligation of *non-refoulement* in certain circumstances and has extra-territorial effect where a person is 'subject to the jurisdiction' of the State.

37 Weis P, *The Refugee Convention, 1951 The Travaux Preparatoires Analysed with a Commentary*, (Cambridge University Press, UK, 1995) 334-335.

only be invoked in respect of persons who are already present – lawfully or unlawfully – in the territory of a Contracting State.[38]

An act of interception outside the territory does not create an Article 33 obligation on the part of a destination country or the flag state of a rescuing ship, whoever does it, or wherever it is done, if the asylum-seeker is not within the State's territorial boundary. This general principle is not changed in the context of interception on the high seas or in rescue at sea.[39]

C Obligations of Carriers

Carriers have a responsibility to abide by the immigration laws and regulations of States. These obligations are set out in the Chicago Convention for international air carriers,[40] but as a matter of domestic law, this responsibility applies in any event to air carriers, as it does to shipping, rail and road carriers.

Australia's migration legislation imposes a liability on carriers to ensure that non-citizens brought to Australia are properly documented. The master of a vessel [which includes an aircraft][41] which brings an unauthorised passenger or inadequately documented passenger to Australia is deemed guilty of an offence[42] and may be liable to pay any costs of detention, removal and deportation.[43]

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38 Grahl-Madsen, *The Status of Refugees in International Law*, (Vol 2, AW Sijthoff-Leyden) 94.

39 For further discussion of this point, see section 5.3 of this paper.

40 For example Article 13 of the 1944 Convention on International Civil Aviation [known as the Chicago Convention] states: 'The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.'

41 Section 5(1) of the Migration Act.

42 Section 232(1) of the Migration Act states:

Where:

(a) a non-citizen:

(i) enters Australia on a vessel; and

(ii) because he or she is not the holder of a visa that is in effect or because of section 173, becomes upon entry an unlawful non-citizen; and

(iii) is a person to whom subsection 42(1) applies; or

(b) a removee or deportee who has been placed on board a vessel for removal or deportation leaves the vessel in Australia otherwise than in immigration detention under this Act;

the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding 100 penalty units.

Section 229 of the Migration Act states *inter alia*:

The master, owner, agent, charterer and operator of a vessel of which a non-citizen, is brought in to Australia on or after 1 November 1979 are each guilty of an offence against this section unless the non-citizen, when entering Australia:

is in the possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia; or

holds a special purpose visa; or

is non-citizen who is eligible for a special category visa; or

holds an enforcement visa; or

is a non-citizen who is covered by subsection 42(2) or (2A) or by regulations made under subsection 42(3)

A person who is guilty of an offence against this section is liable, upon conviction, to a fine not exceeding $10,000.

An offence against subsection (1) is an offence of absolute liability.

43 Section 213(1) of the Migration Act:

If a non-citizen who enters Australia:

(a) is required to comply with section 166 (immigration clearance); and

(b) either:

(i) does not comply; or

(ii) on complying, is detained under section 189 as an unlawful non-citizen;

then, as soon as practicable after the Secretary becomes aware that paragraphs (a) and (b) apply to the non-citizen, the Secretary may give a carrier of the non-citizen a written notice requiring the carriers of the non-citizen to pay:

(c) if the non-citizen is detained - the costs of the non-citizen's detention; and

(d) if the non-citizen is removed or deported from Australia, the costs of the non-citizen's removal or deportation.

In the EU, carriers are responsible for returning aliens who are refused entry.[44] In addition, carriers are obliged to take all necessary measures to ensure that an alien is in possession of valid travel documents.[45]

In Canada, interception measures used include obliging carriers to screen passengers for proper documents.[46] In the United Kingdom, a £2000 civil penalty is imposed on the driver or operator of any UK-bound road vehicle concealing illegal immigrants (the penalty was later applied to rail freight).[47]

D Obligations of Passengers

Passengers are bound under relevant domestic law to abide by entry and stay conditions, including obtaining visas where required to enter lawfully. Attempted

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Section 217 states:

(1) If a person covered by subsection 193(1) is to be removed, the Secretary may give the controller of the vessel on which the person travelled to and entered Australia written notice requiring the controller to transport the person from Australia.

(2) Subject to section 219, the controller must comply with the notice within 72 hours of the giving of the notice or such further time as the Secretary allows.

Penalty: 100 penalty units.

(3) An offence against subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

See also sections 207-221.

44 Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, op cit, para 4.7.5. Carriers are responsible for returning those clients who are refused entry on the basis of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

45 Ibid.

46 Summary Record of Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection, Ottawa, May 14-15, 2001.

47 The UK government introduced the civil penalty in April 2000, and in the first year issued 852 notices in respect of 4798 clandestine entrants; the penalty was applied to rail freight in March 2001.

P&O Stena Line introduced routine lorry checks at Calais in December 2000, and in four months found nearly 1,700 potential illegal entrants: http://194.203.40.90/default.asp?PageId=1205.

entry without valid documentation may be subject to penalty, subject to the provisions of Article 31 of the Refugees Convention.[48]

IV WHAT IS INTERCEPTION?

A formally internationally accepted definition of interception does not exist. UNHCR have put forward a working definition, which defines interception as:[49]

> Encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.

Its dictionary meaning is to seize, catch or stop (a thing) going from one place to another, or to check or stop (motion etc).[50]

A Interception and International and Domestic Law

International law provides important parameters for States undertaking interception as a means to combat irregular migration and people smuggling. Reference to these parameters is to be found within a complex framework of existing and emerging international legal principles deriving from international maritime law, criminal law, the emerging legal regime for combating transnational crime, the law of State responsibility[51] and human rights and refugee law.

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48 For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, p123 at www.immi.gov.au. For further information on legislative provision see Press release of *Legislative Provisions Restore Integrity to Refugees Convention* MPS 117/2001 (13 August 2001) <http://www.minister.immi.gov.au/media_releases/media01/r01117.htm>

49 UNHCR paper on interception, op cit, p 2.

50 *Australian Concise Oxford Dictionary* (Oxford University Press, Melbourne, 1995) 588.

51 It should be noted that Australia does not accept the view put forward by some international bodies that the law of state responsibility imposes an obligation on intercepting countries, when a government official is involved in interception, to provide access to their territory and to provide fair and effective asylum procedures within that territory. No question of an international wrongful act arises when the interception has taken place outside the borders of the intercepting state. Consequently

The right to leave a country, including one's own,[52] is not explicitly dependent on whether the person has the right to enter another country. However, the right to leave a country is subject to such restrictions as are provided by law and are 'necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[53] It is recognised, for example, that States have a limited right to prevent persons accused of a crime from leaving their territory.[54]

It was proposed by the British delegation participating in the drafting of the ICCPR that States might be permitted to control emigration in order to assist neighbouring States to control illegal immigration.[55]

The French term '*ordre public*' was inserted together with the English 'public order' to indicate that the full sense of the term was meant to cover not only the absence of public disorder, but also:[56]

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the doctrine of state responsibility has no bearing on the issue. Access to fair and effective procedures may be met by return to a safe country of first asylum and/or transfer to another safe country for processing by UNHCR, by officials of the intercepting state or receiving state.

52 Article 13.2 of the Universal Declaration of Human Rights (UDHR) states 'Everyone has the right to leave any country, including his own, and to return to his country' and Art 12.2 of the ICCPR states 'Everyone shall be free to leave any country, including his own'.

53 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) provides that: '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.'

54 Nowak, M, 1993, UN Covenant on Civil and Political Rights: ICCPR Commentary (NP Engel, Kehl) 213.

55 Ibid, p 214.

56 Ibid, p 212.

> ...in addition to public safety and the prevention of crime, all those "universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based" [footnotes removed].

Presence in a country of those engaged in people smuggling and trafficking imports a substantive threat to public safety and the State's capacity to prevent crime. There is clear evidence that corruption of local officials and subversion of law enforcement are necessary for people smuggling to operate, thus threatening the core of the State's governance. People smuggling is often associated with other forms of smuggling and breaches of customs and quarantine regulations.

Restrictions on the right to leave in order to combat people smuggling and trafficking can thus clearly be seen to be in accordance with Article 12(3) of the International Convention on Civil and Political Rights (ICCPR).

Of further relevance, interception is clearly envisaged in the Chicago Convention[57] and in the People Smuggling and Trafficking Protocols of the Convention against Transnational Organized Crime.[58] The general individual right expressed in Article 12(2) of ICCPR must be read in the light of these specific provisions.

In any event, interception by transit countries, whether or not it is done in cooperation with destination countries, can be viewed in the context of breach of their own domestic immigration and other laws, thereby falling within the provisions of Article 12(3).

Nor is interception – the prevention of exit to a country where there is no right of entry – a blanket prevention of exit. The person would still be able to leave to a country of origin or other country into which the person had permission to enter, or indeed to the proposed country of destination should entry subsequently be authorised.

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57 Article 13 obliges international air carriers to ensure that passengers are properly documented for entry to the destination State. So carriers in a practical sense, by preventing boarding by undocumented passengers, undertake interception.

58 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime (Article 15) and Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime (Article 8).

States are not able to intercept within the territory of another State, without their express agreement.[59]

Interception measures must not breach domestic laws, for example criminal laws with respect to destruction or damage of property or crimes against the person such as assault.

There was general agreement at the regional workshop organised in May 2001 by UNHCR as part of the Global Consultations process which considered ways of incorporating refugee protection safeguards into interception measures, that intercepted persons, including asylum seekers and refugees, are entitled to be treated in a safe and humane manner.[60]

V INTERCEPTION MEASURES – THE HOW

In the context of managed people flows, the prevention of unauthorised movement takes place whenever there is refusal of a visa or permission to enter.

It appears that all countries operate some form of visa regime, some with visas considered at the border, some with visa-free entry for nationals of low risk countries.[61]

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59 Article 4 of the United Nations Convention Against Transnational Organised Crime states "1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law".

60 'Regional Workshops in Ottawa, Ontario (Canada) and Macau', Global Consultations on International Protection, 2nd meeting, EC/GC/01/13, 31 May 2001. The workshop concluded that international law standards, in particular the UN Convention against Transnational Organised Crime and its relevant Protocols as well as international refugee and human rights law, provide a useful framework for elaborating applicable standards and procedures of treatment.

61 It was pointed out at the Workshop on Incorporating Refugee Protection Standards into Interception Measures, (UNHCR Global Consultations on International Protection), Ottawa, in 2001 that the INS continues to rely on visa requirements as the primary method for screening and intercepting persons not entitled to travel to the US. Australia has a universal visa system delivered through overseas posts at diplomatic missions, travel agents and e:visas, to encourage travellers to obtain authority before departing to

When a person who has not applied for a visa or who has been refused a visa nevertheless attempts to circumvent the orderly lawful entry system, with or without the use of a people smuggler, purposeful interception by State authorities is an important part of its border management system.

Interception takes place:

- in countries of departure at immigration control points where exit permits are required and at boarding points by international air, land and sea carriers;
- in transit countries, where the person is illegal, or is attempting to depart to a destination where they have no right to enter;
- at sea; and
- at the borders of transit or destination countries in the process of attempting illegal entry.

A Interception in Countries of Departure at Immigration Control Points and at Boarding Points for International Air, Land and Sea Carriers

Interception at the point of embarkation can be particularly effective as it:

- increases the likelihood of identification of recruiters and people smugglers and therefore also interruption of other planned smuggling attempts;
- minimises the risk, both financial and physical, to the users of smugglers; and
- sends a strong deterrence message to those with a potential to pay a smuggler in the future.

Interception of smuggled migrants at boarding points by international carriers is clearly envisaged by the Protocol against the Smuggling of Migrants,[62] as is the

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Australia. See Fact Sheet 53, Australia's Entry System for Visitors at http://www.immi.gov.au/facts/53entry_system.htm

62 Article 11 of the Protocol against the Smuggling of Migrants states: '... 2. Each State Party shall adopt legislative or other appropriate measures to prevent to the extent possible, means of transport operated by commercial carriers from being used in [smuggling migrants]... 3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of

imposition of sanctions against carriers who violate their obligations to ensure that passengers have the necessary authority to enter the destination State.[63]

The IATA/Control Authorities Working Group (IATA/CAWG) brings together airlines and immigration control authorities from nineteen countries[64] to 'develop and pursue a cooperative programme for the facilitation and processing of a growing number of passengers, while ensuring effective action against illegitimate traffic...'.[65]

To this end, Immigration Liaison Officers (ILOs) are placed with airlines to assist with the identification of fraudulent documents and to provide airlines with training and advice on entry requirements and so assist them to comply with Chicago Convention obligations and avoid carrier sanctions.[66]

In accordance with the IATA/CAWG Code of Conduct, Liaison Officers are to refer inadmissible passengers who raise refugee issues to seek assistance from the relevant diplomatic mission or the UNHCR.

Many countries utilise these administrative measures with the aim of intercepting inadmissible passengers. At key locations abroad, such as the main

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commercial carriers... to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State'.

63 Article 11 (4) of the Protocol against the Smuggling of Migrants.

64 Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America.

65 The IATA/CAWG Vision Statement at http://www.iata.org/oi/committees/pfwg/_files/InadpaxRemovalsGuidelines.pdf.

66 Among the main tasks for ILOs, '...5.3 training airline staff in the general principles of passport and visa requirement, passenger profiling and awareness of fraud and forgery; 5.4 advising airline staff on whether passengers have the right travel documents and visas for their proposed journey; 5.5 assisting in establishing the bona fides of individual passengers who are properly documented, but about whose documents airline staff have doubts; 5.6 advising airline staff on whether travel documents and visas are genuine, forged or fraudulently obtained; 5.7 assisting the local immigration and police authorities in identifying criminals involved in the illegal movement of inadequately documented passengers...' IATA CAWG *A Code of Conduct for Immigration Liaison Officers* Oct 1998. IATA CAWG has indicated that where ALOs are not able to refer to UNHCR or to the relevant diplomatic mission, they are expected to have other procedures in place to manage asylum claims.

transit hubs for global migratory movements, States[67] have deployed extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. In addition, airline liaison officers, including from private companies, have been posted at major international airports both in countries of departure and in transit countries, to prevent the embarkation of improperly documented persons.

Australia has selected, trained and placed at key overseas posts additional compliance and liaison officers for the purpose of investigating people smuggling, liaising with authorities in the host country, exchanging information, and providing training to assist in combating irregular migration. One facet of these outposted personnel are the Airport Liaison Officers (ALOs).[68] In accordance with the IATA/CAWG code of conduct for Immigration Liaison Officers, the primary role of Australian ALOs is to provide advice to airlines about the travel documentation held by passengers and whether such documentation meets the entry and clearance requirements to Australia.

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67 Within IATA/CAWG, the following countries have ALOs (or their equivalents): Australia, Canada, United Kingdom, Netherlands, Germany, United States, Norway, Switzerland. Several other States, such as Finland and Sweden, will on occasion, organise short term visits by their officers to problem airports under bilateral agreements.

68 Australia's Airline Liaison Officer (ALO) programmme commenced in 1990 in Singapore and Bangkok. Over the last decade, the programmme has been expanded and currently there are 9 ALOs stationed at 6 key airports. ALOs have played a vital role in protecting Australia's border at overseas airports by preventing the travel to Australia of inadequately documented passengers. Australian ALOs do not consider the bona fides of a passenger's travel intentions to Australia nor the fulfilment of any associated visa conditions. ALOs provide information on irregular movements and emerging trends in the use of fraudulent documents. To the extent possible, ALOs also provide information on people smuggling activities, although this is more a role for the dedicated Compliance officer covering the region. The ALOs are part of Australia's Overseas Compliance Network which includes 26 specialist compliance officers who are strategically located at various posts where people smuggling activities may impact on Australia's border protection. Awareness of refugee policy is a prerequisite for successful ALO placement. During 2000-01, 231 Australia bound passengers were intercepted by ALOs.

The New Zealand Government will use the APP system to identify and screen passengers bound for New Zealand, prior to their boarding an aircraft. The New Zealand Government has announced that:[69]

> APP will be an invaluable tool in our ability to scrutinise people before they get on the plane, which means we can prevent people who are attempting to circumvent our immigration laws from arriving in New Zealand.

The EU has liaison officials deployed at key locations abroad. As part of a Global Plan to fight Illegal Immigration and Trafficking in Human Beings approved by the Union in February 2002, measures include creation of common consular offices in third countries and strengthening the coordination of liaison officials in countries of origin.[70]

Canada has used interception since 1989 to prevent improperly documented persons from coming to Canada. Measures include the establishment of a network of Immigration Control Officers (ICOs) stationed overseas. The ICOs are responsible for assisting and training host country officials and carrier (mostly airline) personnel in fraudulent document detection and Canadian entry requirements. Canada has two cooperation agreements on interception, with the UK and the Netherlands.[71]

The US Immigration and Naturalisation Service (INS) carries out operations at foreign airports. Similar to the Canadian ICO programmes, these involve training and cooperation with airlines and local authorities to identify false documents and to break up smuggling operations.[72]

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69 www.beehive.govt.nz/ViewDocument.cfm?DocumentID=14066

70 Details of the plan can be found at: http://www.ue2002.es/principal.asp?idioma=ingles

71 Presentation by Citizenship and Immigration Canada (CIC) to Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection, Ottawa, 14-15 May 2001. During their initial training, ICOs are sensitized to Canadian refugee policy. Where persons seeking protection are intercepted in countries which have ratified the Refugees Convention, Canada expects that country to provide protection against refoulement. ICOs are governed by the IATA/CAWG Code of Conduct, which directs them to refer asylum seekers to UNHCR or the appropriate diplomatic mission. During 2000, 6,238 persons were intercepted seeking to come to Canada without proper documentation (85% were intercepted in countries which have ratified the 1951 Convention).

72 Presentation by INS to Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection,

Tough security and interception measures have also been introduced to deal with the large numbers seeking to move irregularly from France to England.[73]

B Interception in Transit Countries

A number of transit countries have received financial and other assistance from prospective destination countries in order to enable them to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.[74]

Transit countries in SE Asia,[75] supported by Australia and with the involvement as appropriate of UNHCR and IOM,[76] disrupt the flow of people to

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Ottawa, 14-15 May 2001. INS also carries out 'pre-flight inspections' by INS inspectors stationed in Canada, the Caribbean and Ireland.

73 Cherbourg, France's second biggest port is reported to be the new target for asylum seekers heading for the UK following the introduction of tough new security measures at Calais and the Eurotunnel entrance, the common route for people trying to come to Britain.

"Wave of migrants descends on France's 'new Sangatte'", The Telegraph (U.K.), August 25, 2002 at: http:www.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F08%2F25%2Fwasy25.xml. Asylum seekers have managed to smuggle themselves on to lorries entering ferries despite measures to stem the tide such as carrier sanctions and increased border patrol police. The number of asylum seekers caught at the port attempting to smuggle themselves across the channel has risen from a couple every night to more than 40. According to the mayor of Cherbourg, the situation had worsened markedly in his town since July, when Britain and France announced a joint agreement to close the Sangatte camp near Calais by April 2003. A spokeswoman for Brittany Ferries, said the company risked being fined £2,000 by the British Government for every stowaway, as well as having to pay the cost of lodging and repatriation. The company is now employing a private security firm with sniffer dogs and carbon dioxide monitors to check every lorry entering its ferries. France's interior minister, Nicolas Sarkozy, promised new laws to crack down on illegal immigration and announced round-the-clock checks at Cherbourg and increased numbers of border patrol police at the port. He also promised to deploy a group of paramilitary police and about 15 extra interpreters and border officials in Cherbourg.

74 UNHCR Standing Committee draft paper on interception, op cit, p 3.

75 Indonesia, Cambodia and East Timor Australia has recently also signed an agreement with the South African Government, to discourage illegal migrants from using South Africa as a transit to Australia. Under the agreement, illegal migrants who travel to Australia via South Africa will be sent back to South Africa, whose officials will process any claim for asylum. Officials from both countries will work together to reduce the number of people smugglers and illegal entrants, MPS 073/2002 'Agreement

their country and onwards to Australia by taking concerted action to intercept those who are breaching their immigration laws.[77]

These cooperative arrangements are proving to be an effective and important initiative to address the issue of irregular migration and people smuggling. As a result, there are signs that some smugglers are seeking to move their operations elsewhere.

The arrangements bring transit countries, destination countries and international organisations together in partnership to combat irregular people movement. Importantly they contain mechanisms to ensure that any protection needs are identified and met.

C Interception at Sea

The phenomenon of people using smuggled passage over the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus

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with South Africa on People Smuggling', 2 August 2002 at: http://www.minister.immi.gov.au/media_releases/media02/r02073.

76 IOM advise the detainees of their options, particularly voluntary return, and refers to UNHCR any person who signals an intention to claim asylum. UNHCR then assesses any protection claims and seeks durable solutions for those people determined to be refugees. Australia assists the transit country by supporting IOM in meeting the reasonable costs for the upkeep of those third country nationals who have been detained and the costs for the voluntary removal of those who wish to depart the transit country. Australia also assists UNHCR with administrative and processing costs associated with refugee status determination procedures and reasonable cost of readmission to countries of prior protection or first asylum of those assessed as needing protection.

As at 15 September 2002, IOM advised that 3 826 illegal immigrants had come under its program. Some 741 illegal immigrants were currently in IOM care and advice from immigration officials in the Australian Embassy in Jakarta suggests that there are a further 500 to 600 illegal immigrants in Indonesia.

According to UNHCR figures, at 31 August 2002 the intercepted caseload awaiting resettlement stood at 535 refugees (276 cases) of whom 197 (104 cases) had been provisionally approved for resettlement by various countries. Another 135 people (85 cases) were waiting to be referred to a country for resettlement. In addition, there were 666 asylum seekers, most of whom had been found not to be refugees in a preliminary assessment by UNHCR and were in the review process.

77 In mid 2001 these cooperative arrangements helped to bring about the joint interdiction of a vessel bound for Australia carrying third country nationals who did not have permission to enter Australia.

of Vietnamese boat people throughout the 1970s and 1980s was followed in the 1990s by large-scale departures from places such as Cambodia, Albania, Cuba, Haiti,[78] and from North Africa.[79]

While smuggling along land routes involves danger,[80] the transport of illegal migrants by sea presents grave risks.[81]

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78 Illegal Haitian immigrants intercepted trying to enter the Bahamas so far this year (August 2002) was more than 3,000. Haitians often take the sea route through the Bahamas towards Florida, or end up in the Bahamas. From January to July this year, the Bahamas immigration department had repatriated 3,044 Haitians and 444 people of other nationalities (Reuters, August 20, 2002).

79 Every year thousands of illegal immigrants from Morocco and other African states, as well as Asian countries including Pakistan try to cross the Gibraltar Strait in unsafe boats and many die in the attempt. Spanish immigration officials say nearly 45,000 people were stopped while trying to enter Spain illegally in 2001, an increase of about 10,000 from the previous year. About 18,000 immigrants were intercepted trying to illegally enter the country by sea and 44,800 were deported or refused entry (Reuters, August 25, 2002).

80 Spanish police recently arrested a Moroccan truck driver for homicide a day after the discovery of the bodies of four Moroccans, suspected of being illegal immigrants, in the back of his sealed container (Reuters, August 22, 2002). In June 2000, 58 Chinese migrants found in Dover, UK lost their lives when they suffocated in the container of the truck they were being transported in.

81 It has been reported that Spanish civil guards have rescued 730 people from the sea in the Strait of Gibraltar since 2000 and humanitarian organisations say several thousand people are likely to have drowned in this way. Thirteen bodies washed up on the shore near Tarifa on August 1 after traffickers forced their passengers to jump into the water some distance from the beach. (Reuters, August 14, 2002) An Italian fishing boat had rescued 151 illegal immigrants crowded on a 12-metre boat that was shipping water about 50 miles off the coast of Sicily. The Italian coastguard helped tow the boat towards the nearest port as some immigrants threatened to jump in the water unless they were rescued (Deutsche Presse – Agentur, August 19, 2002). The rescue of 433 persons from a sinking Indonesian fishing boat by the MV Tampa highlights the risks associated with attempting to enter Australia in dangerous, unsafe and often overcrowded vessels. On 19 October 2001, 353 suspected illegal migrants, including 150 women and children drowned in international waters south of Java on its way to Christmas Island. Only 44 survived. US Coast Guard Statement on Interdiction (ibid). For example in December 2001 CG brought to Florida 185 Haitians floundering on a dangerously overcrowded boat, due to safety concerns [Miami Herald, 4 December 2001]. In May 2002 at leat 14 Haitian migrants drowned and 73 were rescued when their overcrowded boat sank off the Bahamas [Miami Herald, 5 July 2002, at http://www.miami.com/mld/miamiherald/3602634.htm].

Many States have pointed out that smuggling often endangers the lives of persons, in particular those travelling in unseaworthy boats. Their interception directly reduces the need for rescue of persons in distress at sea and can help save lives.[82]

Interception can occur in the form of physical interception (or as it is sometimes called interdiction) of vessels suspected of carrying irregular migrants or asylum-seekers, either:

- within the territorial sea[83] or contiguous zone[84] of the country of embarkation or transit;
- on the high seas;[85] or
- within the territorial sea or contiguous zone of the country of destination.

Different legal regimes apply to interception, depending where on the sea it takes place and on the flag status of the vessel.

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82 Interdiction is seen as serving both humanitarian and national security functions for the US. A significant number of cases handled by the US Coast Guard begin as search and rescue and the Coast Guard considers its duty under international law is to first render assistance, given the extremely unsafe conditions under which illegal migrants travel. Issues of status and disposition are left to be resolved once immediate safety concerns are addressed.

83 The 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows a state to claim a territorial sea of up to twelve nautical miles from baselines [Article 3] and most states, including Australia by proclamation in 1990, claim the full twelve mile zone. In Blay, Piotrowicz and Tsamenyi, *Public International Law in Australia* (Oxford University Press, Melbourne, 1997) 333.

84 The 1982 UNCLOS grants the coastal state jurisdiction over the waters that lie immediately beyond the limits of the territorial sea up to 24 miles from the baselines [Article 33(2)]. Australia claimed a contiguous zone up to 24 miles in the Maritime Legislation Amendment Act 1994. Blay, Piotrowicz & Tsamenyi, op cit, p 334.

85 The high seas is the area that is not included in the internal waters, territorial sea, Exclusive Economic Zone (from the outer edge of the territorial sea to 200 miles from baselines – Articles 55 and 57 of UNCLOS), or archipelagic waters of a state (Article 86 of UNCLOS).

1 *Interception within the territorial sea or contiguous zone of the country of embarkation or transit*

Ships of all States are permitted to enjoy the right of innocent passage through the territorial seas,[86] including in transit through the territorial sea for the purposes of navigating an international strait,[87] provided it is continuous and expeditious, with stopping and anchoring only if incidental to ordinary navigation or rendered necessary by *force majeure*, distress or for the purposes of rendering assistance to persons, ships or aircraft in danger or distress.[88] Passage is considered innocent so long as it is not prejudicial to the peace, good order or security of the coastal State and takes place in conformity with the United Nations Convention on the Law of the Sea (UNCLOS) and with other rules of international law.[89] A coastal State may adopt laws and regulations relating to innocent passage in respect of *inter alia*:[90]

> the prevention of infringement of the customs, fiscal, immigration...laws and regulations of the coastal State.

A foreign ship whose passage is not innocent may be excluded from the territorial sea by the coastal state.[91]

A coastal State is allowed to exercise the control necessary in the contiguous zone to prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial seas, and to punish infringement of these laws and regulations committed within its territory or territorial sea.[92]

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86 Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS).

87 Blay, Piotrowicz & Tsamenyi, op cit, p 345.

88 Article 18 of UNCLOS.

89 Article 19(1) of UNCLOS. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State' (Article 19.2. (g) of UNCLOS).

90 Article 21(h) of UNCLOS.

91 Article 25 of UNCLOS.

92 Article 33 of UNCLOS. Australia amended in 1999 the Migration Act to give effect to its jurisdiction in the contiguous zone with respect to immigration.

2 *Interception within the territorial sea or contiguous zone of the country of destination*

A vessel carrying inadmissible passengers, seeking to effect unauthorised entry is clearly not engaged in innocent passage and the destination state thus has the power to exclude and expel the vessel.[93]

However, the restriction on *non-refoulement* of any refugees on board clearly applies to an asylum-seeker within the territorial coverage of Refugee Convention obligations. Therefore a State interception in the territorial sea involving exclusion from entry needs a mechanism to ensure there is no subsequent *refoulement.*

3 *Interception on the high seas*

The international law of the high seas is dealt with in UNCLOS.[94] Article 87 sets out the general position that the high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is to be exercised in accordance with UNCLOS and other rules of international law, and it includes the freedoms of navigation and overflight, the right to lay submarine cables and pipelines, freedom of fishing, freedom to construct artificial islands and other installations and the freedom of scientific research.[95]

There are some limitations on these freedoms, but they are circumscribed. Vessels can be seized on the high seas when they have engaged in piracy.[96] States may exercise jurisdiction to arrest persons and vessels engaged in unauthorised broadcasting from the high seas, and seize the broadcasting apparatus.[97]

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93 Section 5.3.1 above refers.

94 Australia ratified UNCLOS on 5.10.94 and it entered into force for Australia on 16.11.94.

95 Article 87.1 of UNCLOS. Article 87.2 provides that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

96 Article 105 of UNCLOS.

97 Article 109 of UNCLOS.

There is a limited jurisdiction to board vessels on the high seas that is contained in Article 110 of UNCLOS, entitled *Right of Visit.* Under this Article, personnel from a government vessel may board another vessel where there are reasonable grounds for suspecting that the vessel concerned is engaged in piracy, the slave trade or unauthorised broadcasting. The other circumstances in which there is a right to visit is where a vessel is without nationality, or it is flying a flag other than a flag it is entitled to fly. Article 110 does however contemplate that States may enter into treaties conferring more extensive powers of intervention against vessels on the high seas than the minimalist ones set out in UNCLOS.

Article 111 of UNCLOS entitled *Right of hot pursuit* permits the hot pursuit of a foreign ship to be undertaken when the competent authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when:[98]

> 1 ...the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone...
>
> 3 The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

Interception on the high seas can take place only within the limits of authorisation given by the flag State.[99] This interception must be undertaken by

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98 http://www.unorg/Depts/los/convention_agreements/texts/unclos/closind.htm.

99 Article 8 of the Protocol against the Smuggling of Migrants states '1. A State Party that has reasonable grounds to suspect that a vessel ... is engaged in the smuggling of migrants by sea may ... request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State'.

Under Article 110.1.(d) of UNCLOS, except where acts of interference derive from powers conferred by treaty, a warship is justified in boarding a foreign ship on the high seas if there is reasonable ground for suspecting that the ship is without nationality.

vessels clearly identified as being on government service,[100] and shall be done in such a way that the safety and security of the passengers and the vessel and its cargo are ensured.[101]

The protection obligations of the flag State are not engaged on the high seas by a request for asylum. The principle of freedom of the high seas means that the high seas are common to all states and no state may purport to subject any part of them to its territorial sovereignty.[102] The legal order on the high seas is based primarily on the rule of international law, which requires every vessel sailing the high seas to possess nationality and to fly the flag of one State.[103] Consequently a ship on the high seas is subject to the almost exclusive jurisdiction of the flag state; however, this does not make it part of the territory of the flag State.[104] There is a legal distinction between an exercise of flag State jurisdiction on board a vessel on the high seas and the concept of territorial sovereignty. Thus while a vessel may carry the nationality of a party to the Refugees Convention, the Convention will travel with the vessel only within its territorial boundaries. In other words, a request for asylum made on board a vessel on the high seas does not itself engage the legal obligations of the flag State under the Convention unless it is made inside the flag state's territorial waters.

Similarly, Convention obligations cannot arise when a request for asylum from persons on board a vessel of one flag State is addressed to a person on board another vessel on the high seas from a different flag State.

4 State practice of interception at sea

The Migration Act 1958 (the Act) was amended by the Border Protection Act 1999 which inserted Division 12A into Part 2 of the Act. Division 12A contains provisions that relate to boarding of ships in the territorial sea, the contiguous

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100 Article 9(4) of the Protocol against the Smuggling of Migrants.

101 Article 9(1) of the Protocol against the Smuggling of Migrants states: 'Where a State party takes measures against a vessel in accordance with article 8 of this Protocol, it shall: (a) Ensure the safety and humane treatment of the persons on board; (b) Take due account of the need not to endanger the security of the vessel or its cargo...'.

102 Jenning, R and Watts, A, *Oppenheim's International Law* (9th ed, Longman, UK, 1993) 726.

103 Ibid, p 731.

104 Ibid.

zone and on the high seas. Section 245G for example provides for the boarding of certain ships on the high seas, and the exercise of particular powers by officers.[105] The power to chase foreign ships on the high seas for boarding is contained in Section 245C of the Act. Division 12A was structured to authorise Australian officials under Australian law to exercise to the maximum extent permitted by UNCLOS powers to enforce Australia's immigration laws. This included enabling Australia to enter into agreements with other countries to enable Australian authorities to exercise powers over their vessels, and to empower the making of regulations to give effect to such agreements. Australia has not yet entered into any agreements with foreign countries to enable the exercise of Australian jurisdiction over foreign flagged ships.

The Australian Government introduced new legislation,[106] passed by the Australian Parliament on 26 September 2001, which contains the following interception type measures:[107]

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105 Subsection 245B(7) is about requests to board ships without nationality that are on the high seas. Section 245G allows those ships to be boarded, even though the master of the ship has not complied with the request to board. Under subsection 245G(6) if an officer confirms that a ship is a foreign ship without nationality, the officer may search the ship.

106 The Migration Amendment (Excision from Migration Zone) Act 2001, The Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001, and the Border Protection (Validation and Enforcement Powers) Act 2001.

107 The Border Protection (Validation and Enforcement Powers Act) enhances the border protection powers found in the Customs Act and the Migration Act, including the provision of powers to move vessels carrying unauthorised arrivals and those on board. The Migration Amendment (Excision from Migration Zone) Act has defined some Australian territories (Ashmore and Cartier Islands in the Timor Sea, Christmas and Cocos (Keeling) Islands in the Indian Ocean and offshore installations) as 'excised offshore places'. This has the effect of prohibiting those who arrive at these places without lawful authority from making a valid visa application while they are unlawfully in Australia (unless the Minister intervenes in the public interest).

The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act provides powers to take persons who arrive unlawfully at one of the excised offshore places to another country where their claims, if any, for refugee status may be dealt with, provided that country meets requirements concerning *non-refoulement* and basic human rights standards. The Republic of Nauru and Papua New Guinea have been declared countries for this purpose.

- clarifies powers to detain, search and move people and ships in certain circumstances in Australian and international waters if suspected of being involved in a contravention of immigration laws. The new legislative powers enhance existing border protection powers in the Customs Act and the Migration Act, and exercised in line with Australia's international maritime obligations to ensure the safety of those concerned. Other initiatives to combat people smuggling and irregular migration include improving Coastwatch, Customs and Navy capabilities to detect, pursue, intercept and search boats carrying unauthorised arrivals;

- provides powers to take persons to another place, including a 'declared' country; and

- excises some territories from the coverage of Australia's Migration Act in respect of people who arrive there without authority.

In short the position with respect to vessels carrying prospective illegal immigrants to Australia is that they must engage in conduct that enlivens the provisions of Division 12A of Part 2 of the Act (other than the provisions relating to vessels flagged to a country with which Australia has an agreement or arrangement) or they must actually arrive in Australian territorial or contiguous waters before action can be taken against them.

Australia's approach in relation to interception under the new legislation is consistent with its international protection obligations. Unauthorised vessels detected approaching Australian territorial waters are warned that they cannot enter these waters without proper authorisation. When considering this approach, due regard is given to Australia's geographic position and the circumstances concerning the particular vessels. In recent years unauthorised vessels detected approaching Australian territorial waters are almost universally Indonesian flag ships, crewed by Indonesians, and are most likely to have left from an Indonesian port.[108]

Any action to intercept before arrival in Australia is discretionary and may take into account the seaworthiness of the vessel, the weather conditions and the country of origin of the persons being smuggled. Should a situation arise that

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108 Principled Observance of Protection Obligations paper, op cit. Passengers are almost never Indonesian nationals. In recent years almost all were from the Middle East and South West Asia.

suggests *refoulement* may occur or the safety of passengers may be jeopardised if a vessel were to be intercepted, Australia has the capacity to act differently to ensure protection obligations continue to be met and passengers' safety is assured.[109]

Legislation introduced by Australia to provide power to intercept and exclude and to take people to alternative processing sites in 'declared countries' sets out clear requirements to ensure *non-refoulement* and arrangements, reflected in Memoranda of Understanding, have been put in place to support care and welfare and processing of any refugee claims.[110]

The New Zealand Government has introduced measures increasing police and Immigration Service powers to deal with illegal immigrants.[111] The Transnational Organised Crime Bill also includes changes to the police's search and seizure powers so that they can board boats once they enter New Zealand's contiguous zone.[112]

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109 Principled Observance of Protection Obligations paper, op cit.

110 Since the Australian Government refused entry to those rescued by the MV Tampa in August 2001, 600 people on 4 boats have been intercepted at sea and escorted back on their boats to Indonesia, and 1834 have been transferred to offshore processing centres in Christmas Island and to the declared countries of Nauru and Papua New Guinea. There have been only two persons illegally crossing Australia's maritime border since August 2001, Fact Sheet No 76 Offshore Processing Arrangements. 5 July 2002 http://www.immi.gov.au/facts/index.htm.

111 The recent New Zealand budget also provided money to fingerprint all asylum-seekers who come forward to claim refugee status, including those who claim immediately at the border, and for an advance passenger processing system already used in Australia.

112 The New Zealand Herald, 'Boatpeople in open waters bound for New Zealand', 11 June 2002, at http://www.nzherald.co.nz/storyprint.cfm?storyID=2046020. The NZ Parliament has recently passed the Transnational Organised Crime Bill, enabling New Zealand to ratify the UN Convention on Transnational Crime and its two protocols on people smuggling and trafficking. The NZ Minister of Foreign Affairs, Hon Phil Goff, says that passing the legislation is a critical step towards ensuring that New Zealand can protect its borders against illegal migration and that the legislation and continuing efforts by New Zealand working regionally and in Indonesia were necessary to deter people smugglers and prevent human tragedies. Other powers in the new legislation enable New Zealand authorities to seize and detain craft in New Zealand's territorial waters, facilitate confiscation of ships used for smuggling and extradite people smugglers. [Media Statement by Hon Phil Goff, 'Government passes tough new anti people-smuggling legislation', 12 June 2002, at http://www.refugee.org.nz/news.htm].

The New Zealand Government has signalled its intentions to be involved in the interception of boats carrying illegal entrants on the high seas. The New Zealand Minister of Foreign Affairs is reported as saying that:[113]

> New Zealand is working with Indonesian authorities to ensure that any ships carrying boatpeople do not leave Indonesia seeking refuge in New Zealand...there were two reports of boats coming to New Zealand...New Zealand was working with Indonesia, Australia and the regional countries so that if any such ship passes through their waters, that ship would be intercepted and turned around.

The US Coast Guard enforces US immigration law principally by interdicting at sea illegal migrants/undocumented aliens, and the vessels carrying them, before they reach US shores and suspending their entry with the aim of eliminating most of the potential flow of undocumented migrants entering the US via maritime routes.[114] Most interdicted illegal migrants are returned to the country from which they originally departed.[115] PRC illegal migrants have been increasingly smuggled since 1998 to Guam as a gateway to continental US. Some of these have been interdicted and transported to tent cities in the Tinian and the Commonwealth of Northern Mariana Islands (CNMI), for processing.[116] People intercepted at sea in the Carribean by the US are sent to Guantanamo Bay.

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113 Helen Tunnah, 'Authorities link up to stop boatpeople' NZ Herald, 18 June 2002, at http://www.refugee.org.nz/news.htm.

114 US Coast Guard, Statement of Captain Anthony S Tangeman on Coast Guard Interdiction Operations before the Subcommittee on Immigration and Claims Committee on the Judiciary, US House of Representatives, 18 May 1999. Interdiction is done under authority of Presidential Executive Order of 1992. The Coast Guard along with other Federal law enforcement agencies also cooperate in suppression of alien smuggling, which includes interdicting illegal migrants at sea and responding to new illegal migration threats (this occurs by presidential Decision Directive 9 of 18 June 1993). A Presidential Directive of 11 March 1998 established the USA's strategy to combat the trafficking of persons around the world, and involves prevention, protection of victims, and prosecution and enforcement against traffickers. The US views trafficking as a global problem that must be addressed through country-specific, anti-trafficking initiatives as well as by regional cooperation.

115 Up to 5 July 2002, Bahamian authorities have intercepted more than 1400 Haitians at sea trying either to come to the US or enter the Bahamas. The Coast Guard has repatriated 427 Haitians in the same period [The Miami Herald, 5 July 2002, at http://www.miami.com/mld/miamiherald/3602634.htm].

116 US Coast Guard Statement on Coast Guard Interdiction, ibid.

At various times since 1981, the United States has intercepted more than 60,000 Haitian irregular migrants. Prior to 1991, more than 25,000 were returned in line with an accord signed between the Haitian and US Governments. Following a military coup in 1991, more than 38,000 Haitians were intercepted on route to the US. More than 20,000 Haitians were allowed to pursue asylum claims. The screening process took place at Guantanamo Bay, Cuba. The policy framework is similar to the Pacific Strategy undertaken by Australia.

According to a US State Department official, such a temporary refuge programme served an important purpose:[117]

> ...you accept all comers, you do not question their motives, you feed and protect them, but don't let them come to the U.S. In other words, you create a mechanism in which the boat people themselves are encouraged to decide whether the need for protection or the desire to immigrate is the primary motivation.

Most Haitians processed at Guantanamo Bay were repatriated or returned to Haiti by early 1996.

European States with borders to the Mediterranean Sea have increased their capacity to detect and intercept illegal migrants coming from North Africa and the Middle East. In 2001 Spanish Immigration officials estimate that 45,000 people were stopped from entering Spain. This is an increase of 10,000 in numbers on 2000. Spain has also increased its capacity to detect illegal migrants arriving by sea as it has recently installed a system of radars and night vision cameras to detect boats crossing into its territory.[118] The Italian Government has recently introduced a number of measures to combat illegal migration including increasing the Italian Navy's capacity to search for illegal migrants.[119]

In Greece the Parliament has passed a new aliens law, effective May 2001, which includes carrier sanctions and stiff penalties, such as fines and prison terms, for individuals who either employ or facilitate the entry of undocumented foreigners. The law also mandates that smugglers who knowingly transport undocumented aliens in unsafe conditions receive prison sentences of one year for

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117 www.soros.org/fmp2/html/carri_iii.html.

118 Morocco arrests 70 illegal immigrants, Reuters, August 22, 2002).

119 Italy's lower house of parliament approves immigration bill, Alessandra Rizzo The Associated Press, June 3, 2002.

each illegal alien transported. Greece strongly supported counter-immigration measures announced at a summit of EU leaders in Seville, Spain.

5 Rescue at sea

In any of the maritime zones, interception may occur in the context of a rescue at sea, bringing into play complex interrelationships between international maritime law, border protection legislation and refugee and human rights law.

Aiding those in peril at sea is one of the oldest maritime traditions. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions.[120] These Conventions explicitly contain the obligation on ship masters to come to the assistance of persons in distress at sea.[121] The obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The undertaking to rescue at sea is an obligation of ship's masters.[122] Where a ship is in distress, preservation of human life is the paramount consideration.[123]

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120 The United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the International Convention for the Safety of Life at Sea of 1974, as amended (SOLAS), the International Convention on Maritime Search and Rescue of 1979, as amended (SAR), the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

121 Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States, for example the UK and Germany (UNHCR, Background Note on the Protection of Asylum – Seekers and Refugees Rescued at Sea, 18 March 2002, Final Version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees,* held in Lisbon, Portugal on 25-26 March 2002.

122 Article 98 of UNCLOS provides that:

> 1. Every State shall require the master of a ship flying its flag, in so far as it can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to any person found at sea in danger of being lost;
>
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him...

123 In those circumstances international law confers a right of entry - see Article 18 of UNCLOS. Under circumstances where a ship is not in distress, maritime law would entitle a coastal state to require a vessel carrying illegal immigrants to leave its territorial sea - see Article 25 of UNCLOS.

The duty of the master begins with the actual rescue and ends when the rescue is completed by delivery to a place of safety.[124] Although the master's duty to render assistance is clear, the Convention does not create an obligation on any State to disembark those rescued.

Professor Eric Roseag of the Scandinavian Institute of Maritime Law in his article *Refugees as Rescuees – the Tampa Problem*[125] makes an analysis of customary international law and treaty law, and demonstrates that there is no duty on coastal states to allow disembarkation of rescuees. Professor Roseag states the view that there is no State practice of permitting disembarkation of rescuees, and that the position in Norway is that Norwegian immigration laws and regulations must be complied with. Professor Roseag also indicates that the SAR Convention confirms that the question of whether rescuees are received or not is within the discretion of the coastal State, and that a duty for a port State to allow disembarkation of rescuees cannot be deduced from the SOLAS Convention.

Coastal States do have a responsibility in accordance with UNCLOS to develop adequate search and rescue services.[126] The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission from the perspective of asylum-seekers and refugees.[127] These Conclusions are a response to mass

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124 International maritime law does not elaborate on any continuing responsibility of the master once a rescue has been effected (UNHCR Background Note, op cit, para 6).

125 SIMPLY, the Scandinavian Institute of Maritime Law Yearbook (in press).

126 Article 98.2 of UNCLOS requires every coastal State to '...promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.'

127 ExCom Conclusion No 14 (1979), para c, notes as a matter of concern: '...that refugees had been rejected at the frontier...in disregard of the principle of *non-refoulement* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives...'.

ExCom Conclusion No 15 (1979), para c, states: 'It is the humanitarian obligation of all coastal states to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum'.

ExCom Conclusion No 23 (1981), para 3 states: 'In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum seekers rescued at sea. In cases of large-scale influx, asylum-seekers

outflows of Vietnamese during the 1970s; and the serious concerns at the time that refusals to permit disembarkation, especially if only permitted on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international obligations.[128] According to UNHCR, the Executive Committee pronouncements, taken in conjunction with the obligations on ship masters under international maritime law to ensure delivery to a place of safety, call upon coastal states to allow disembarkation of rescued asylum seekers at the next port of call.[129] From a safety and humanitarian perspective, UNHCR considers ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.[130] This is by no means internationally agreed.

An Expert Roundtable co-convened by UNHCR and the Migration Policy Institute in Lisbon in March 2002 addressed the question of rescue-at-sea and

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rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities'.

128 UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued At Sea, 18 March 2002.

129 Ibid, para 29. UNHCR acknowledges that the term 'next port of call' in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from ExCom Conclusions. UNHCR puts forward a number of possibilities:

In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns;

Under certain circumstances the port of embarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory;

The next scheduled port of call in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course;

There may be instances where the next port of call may not be the closest one, but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications;

In other situations involving State vessels intercepting illegal migrants, the nearest port of the State could be regarded as the most appropriate port for disembarkation purposes.

130 Ibid, para 30.

specific aspects relating to the protection of asylum seekers and refugees.[131] In discussion, it was proposed that in order to ensure masters of vessels continue to rescue persons in distress at sea, their responsibility should be no more than undertaking the rescue and providing maintenance and care until those rescued can ultimately be disembarked.[132] It was recognised that there were difficulties associated with States agreeing to disembarkation of people rescued, and in particular legal gaps concerning where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions.[133]

The Australian Government has recently released a protocol to clarify the responsibilities of Australian and international ships' masters rescuing people at sea (Protocol for Commercial Shipping Rescuing Persons at Sea in or Adjacent to the Australian Search and Rescue Region).[134] The protocol contains certain

131 The roundtable was attended by Government representatives (including Australia), IOM, NGOs, academics and representatives from the shipping industry and maritime organisations. It was openly recognised that the meeting had been convened to discuss issues raised by the Tampa incident.

132 UNHCR, Rescue-at-Sea Expert Roundtable. A Summary of Discussions was released by UNHCR after the meeting. According to Proposition 6 'The master has the right to expect the assistance of Coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.

133 See UNHCR, Rescue-at-Sea Expert Roundtable, ibid, propositions 8-11.

134 The protocol can be accessed at: www.dotars.gov.au/latest.htm. The protocol does not make any distinction between persons who may or may not be suspected of being unauthorised arrivals. Nothing in the protocol is inconsistent with or will derogate from Australia's or the shipping industry's international obligations under relevant international conventions including the Refugees Convention.

principles that are relevant in the context of rescuing people who are attempting to enter Australia illegally by boat.[135]

An inter-agency[136] meeting was held on 2-3 July 2002 in Geneva in response to the International Maritime Organization (IMO) Secretary-General's concern over 'a number of incidents involving persons rescued at sea and/or asylum seekers, refugees and stowaways' and the expressed need for a coordinated and coherent approach to all relevant rescue at sea issues at an inter-agency level. The meeting sought to identify the gaps, inconsistencies or shortcomings of the relevant conventions, laws or regulations and inter-agency coordination in relation to rescue at sea issues.[137]

The Maritime Safety Committee (MSC) of the IMO at its 75th meeting in May 2002 agreed to an informal meeting to discuss the potential need for amendments

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135 Those principles are:

> Any decision to disembark rescued persons at a particular port of a State should not be made without the consent of that State;
>
> Australia has an obligation to give expeditious consideration to the identification of suitable options for the disembarkation of rescued persons and to not unreasonably withhold consent to use its port or ports for disembarkation;
>
> Disembarkation arrangements for survivors need to be consistent with any security or border protection arrangements developed nationally, internationally or regionally;
>
> There should be no encouragement or incentive for persons to be deliberately put at risk in pursuit of entry to Australia or for rescuees to use threat in an endeavour to dictate the place of disembarkation; and
>
> Australia has a sovereign right to determine who comes to Australia.

136 Representatives of the UN Office of Legal Affairs – Division for Ocean Affairs and the Law of the Sea, UNHCR, UN Office for Drug Control and Crime Prevention, UNCHR, IOM and the IMO.

137 In particular, the meeting focused on establishing the areas (geographical and legislative) of competence and/or co-competence of each of the participating agencies and programmes; agreeing on a general framework of responsibility that each should assume for follow-up action in emergency cases; establishing a coordinating mechanism to respond in a coherent and consistent manner to emergencies; and exchanging views on the meaning of the term 'place of safety'.

to relevant Conventions on maritime safety, search and rescue, having regard to the issues that arose out of the MV Tampa incident in 2001.[138]

The meeting, held in Norrkoping, Sweden on 2-5 September 2002, examined relevant Conventions and concluded that it may be desirable to clarify obligations on coastal states with respect to arrangements for the release of masters of vessels that have rescued people in distress at sea. The following proposed text for insertion in the relevant Conventions was developed and will be considered at MSC 76 in December 2002:

> Contracting governments shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking on board persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage, provided that releasing the master of the ship does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety taking into account the particular circumstances of the case. In these cases, the relevant contracting governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

This formulation imposes no obligations on coastal States to accept disembarkation of rescuees above and beyond that already provided for in international law, but accepts that contracting States must cooperate to remove the burden from masters expeditiously. The formulation also preserves the position that a place of safety could be the rescuing ship or another ship, and not only a place on dry land.

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138 The meeting discussed matters within the scope of IMO Resolution A.920(22) on Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea which called for a review of international conventions and other IMO instruments for the purpose of identifying gaps so that "survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found; ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and survivors, regardless of nationality or status, undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing maritime traditions" and on documents proposing amendments submitted to MSC75 by Norway, France and Germany, www.imo.org/newsroom/mainframe.aspq topic id=583@doc id=2069.

Other issues that are part of the proposal for consideration at MSC76 include:

- the humane treatment of rescuees while on board the rescuing vessel;
- non-interference by the owner, charterer or company operating the vessel with the professional judgment of the master in attempts to rescue persons in distress; and
- disregarding the status of persons in distress at sea during the process of search and rescue or providing assistance.

The final decision of disembarkation has never been one for the ship's master acting unilaterally and is ultimately a matter of national sovereignty and policy. International law recognises the rights of sovereign States to determine who may enter the territory and under what conditions, except in most exceptional circumstances relating to distress. The status of the person should never be a factor in the rendering of assistance to a person in distress at sea. However, the legal status of a rescued person and the circumstances surrounding their presence will necessarily be among the factors to be considered by the coastal State in making the decision on whether or not to accept disembarkation.

Providing ships' masters with the final decision of disembarkation places States' sovereignty and the system of international protection at risk of abuse. Where people who have been rescued deliberately engage in aggressive behaviour in an attempt to force or coerce the ship's master into taking them to a place of their own choosing, they are seeking to achieve an unlawful purpose.

D Interception in the Process of Attempting Illegal Entry at the Border of the Country of Destination

In line with a State's sovereign right to decide who may enter the State's territory, there is no obligation under international law to admit an individual, whether or not the individual is seeking asylum, even at the border.

There is, however, an obligation under the Refugees Convention not to *refoule* a refugee within the territorial coverage of the Convention. States have introduced a range of mechanisms at immigration control points at the border to ensure that their *non-refoulement* obligations are not breached, ranging from expedited procedures to readmission agreements to safe third countries.

Interception at the border is clearly envisaged by the Chicago Convention and by IATA/CAWG guidelines that set out the obligations of carriers to effect the return of non-documented passengers.

VI CONCLUDING COMMENTS

Interception is one of a series of initiatives taken to address problems associated with people smuggling, secondary movement and attempts to circumvent the orderly lawful system to enter a destination country. Interception is here to stay as it is an effective means of controlling irregular migration and combating people smuggling.

There are three key principles that should guide the use of interception:

- Interception should not be seen as a solution of itself, but rather as providing symptomatic relief while causes at source are addressed
- Interception must always be done within the parameters set by international obligations and domestic law
- States must ensure that the protection needs of any intercepted refugees are identified and met in ways that do not encourage further smuggling.

Interception will flourish unless and until collective action makes it unnecessary. It is one of the few measures that destination countries can take unilaterally in efforts to maintain control of their borders.

Solutions that address the need and demand for people to move irregularly can be delivered only through multilateral action and resolve.

The international legal regime governing interception has uneven coverage and application. Carrier obligations with respect to immigration issues are explicitly addressed for international air travel, and not at all for international sea or land travel. The Refugees Convention does not apply on the high seas and some would argue that international customary law is not yet developed sufficiently to impose *non-refoulement* obligations on non-signatory transit countries.

Some States have well-developed laws and protocols to ensure that intercepted refugees and asylum-seekers are dealt with appropriately, while others rely on the presence of UNHCR resources to deal with any asylum needs in transit countries where interception takes place.

A more developed international regime is needed which integrates the State's right to decide whether to accord or refuse admission to the territory of third country nationals and the obligation to protect those genuinely in need of international protection.

UNHCR has put forward a series of recommendations for a comprehensive approach in relation to interception of asylum seekers and refugees in the context of dealing with the problem of persons making secondary movements.[139] The participants at the UNHCR regional workshop on interception in Ottawa acknowledged the difficulty of finding durable solutions for intercepted persons who are determined to be in need of international protection.[140] The UN High Commissioner for Refugees, Ruud Lubbers, pointed out when opening the 53rd annual session of UNHCR's governing Executive Committee in Geneva recently that the Refugees Convention on its own did not suffice to meet new refugee protection challenges in a rapidly changing world.[141] According to Lubbers what is needed is a new approach which he called the 'Convention Plus' supplementing the Convention in areas that it does not adequately cover. He cited a number of areas that could be addressed by the Convention Plus approach, with countries in the North and South working together to find durable solutions for refugees:[142]

> It concerns comprehensive plans of action, in cases of massive outflows...it concerns agreements on secondary movements, defining the roles and responsibilities of countries of origin, transit, and potential destination, with regard to asylum seekers. It concerns better targeting of development assistance in regions of origin, helping refugee-hosting countries to facilitate local integration. It

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139 UNHCR Standing Committee paper on interception, op cit, recommendation (para 34 (g) states that 'In cases where refugees and asylum seekers have moved in an irregular manner from a country in which they had already found protection, Conclusion No.58 (XL) para 25) enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements'.

140 UNHCR Regional Workshop Ottawa, op cit. The workshop adopted as a key conclusion/recommendation [K. Durable solutions, para 16] that...it was recognised that...burden sharing is important, as are initiatives to avoid a situation where only one durable solution is available. Efforts need to made in the concerned regions to build up effective asylum systems, and it is critically important to reduce 'push' factors by making protection in first countries of asylum effective and viable...'.

141 UNHCR News, 'Lubbers Opens Annual Executive Committee Meeting, 30 September 2002, at www.unhcr.ch

142 UNHCR News, op cit.

concerns post-conflict reintegration. And, last but not least, it concerns multilateral commitments for resettlement.

The key to achieving the High Commissioner's objectives is the recognition of the importance of his own word 'comprehensive'.

States have multiple obligations under international law and to their own people. Policies and laws must accommodate that multiplicity. It can never be a choice between fighting crime in the form of people smuggling or protecting refugees. Both must be done in ways that do not compromise each other or other obligations. Laws and practice regarding interception and rescue at sea are no exception.

LEGAL ISSUES CONCERNING INTERCEPTION

*Penelope Mathew**

I INTRODUCTION

This paper addresses the interception of asylum-seekers and some related questions, such as return or sending on of intercepted asylum-seekers to other places. Although the paper draws on well-known examples of state practice in Europe and the United States, it deals mainly with the Australian experience and the progression (or regression) into ever more far-reaching forms of interception. There are many ways in which interception may occur.[1] The most spectacular is interdiction at sea, a practice adopted by the United States in response to Haitian arrivals during the 1990s and by Australia in response to the arrival of the Tampa

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* LLB, BA (hons) (Melb); LLM, JSD (Colum), Senior Lecturer, The Australian National University. This paper has been updated since delivery at the International Association of Refugee Law Judges Conference to incorporate significant reports which have placed further material concerning Australian practice on the public record. I thank Don Rothwell, Jean-Pierre Fonteyne, Rodger Haines and Don Anton for their comments on earlier drafts of this paper. Thanks are also due to Marie-Charlotte McKenna for her diligent research assistance. Any errors remain my own.

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1 *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UNHCR, Exec. Comm. of the High Commissioner's Programme, Standing Comm., 18th Meeting, EC/SO/SC/CRP.17 (2000).

in late 2001.[2] On dry land, closure of a border is the most dramatic form of interception. These strategies will often be accompanied by detention of the asylum-seekers and their return to the country of origin, to an alternative destination where asylum may be sought, or, in some cases, such as the Australian "Pacific Solution" or the United States' "offshore safe havens camps," to a situation of limbo where the final destination for any refugee is left uncertain.

Less visible forms of interception occur every day. For example, many states engage in quiet interception activities offshore. Carrier sanctions imposed on air and shipping lines are aimed at preventing the arrival of asylum-seekers, and many countries now have immigration officials working at airports abroad to assist in the achievement of this goal. A country's visa system may also be used to target potential asylum-seekers by making it more difficult for nationals from refugee-generating countries to obtain a visa. However, the focus of this paper will be on the more spectacular forms of interception and the paper will draw heavily on recent Australian practice in this regard. The legal issues addressed in the paper are:

- whether, in the case of maritime interdictions, interdiction is legal under the law of the sea and other relevant rules concerning extra-territorial exercises of state jurisdiction;
- whether the 1951 Convention Relating to the Status of Refugees, particularly the norm of *non-refoulement*, is upheld;
- related questions such as the legality of, and requisite conditions for sending or returning an asylum-seeker to another country in order to seek asylum; and
- the extent to which interception strategies may involve violations of human rights more generally, for example, rights to liberty and family unity.

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2 For analysis of the Australian reaction to the arrival of the Tampa, *see* Donald R. Rothwell, *The Law of the Sea and the MV Tampa incident: Reconciling Maritime Principles with Coastal Sovereignty*, 13 Pub L Rev 118 (2002); Graham Thom, *Human Rights, Refugees and the MV Tampa Crisis*, 13 Pub L Rev 110 (2002); Jean-Pierre Fonteyne, *Illegal refugees or illegal policy?*, *in* Refugees and the Myth of the Borderless World 16 (Christian Reus-Smit ed., 2002); Michael White, *MV Tampa and Christmas Island Incident, August 2001*, BIMCO Review (2002).

II *MARITIME INTERDICTION AND CONSTRAINTS ON THE EXERCISE OF STATE JURISDICTION*

We turn first to the question of the extent to which States may investigate, stop and/or remove ships suspected of carrying illegal immigrants. Section 245F(8) of Australia's Migration Act, introduced by the Border Protection (Validation and Enforcement) Powers Act (Cth) 2001, which validated the actions taken in relation to the *Tampa*, provides that in certain situations (essentially involving suspicion of illegal immigration), a ship or aircraft may be detained and brought "to a port, or *to another place* (including a place within the territorial sea or the contiguous zone in relation to Australia)."[3] The three situations enumerated in section 245F(8) are:

(1) a craft in Australia reasonably suspected to be or to have been involved in a contravention of the Act in or outside Australia;

(2) an Australian ship outside Australia where it is reasonably suspected to be, to have been, or that it will be involved in a contravention, either in or outside Australia, of the Act; and

(3) a foreign ship outside Australia where it is reasonably suspected to be, to have been, or that will be involved in a contravention of the Act in Australia.[4]

In addition to these legislatively based powers, section 7A of the Migration Act provides that "the existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders."[5] These powers of removal would extend, literally, to the

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3 Migration Act, 2001, § 245F(8) (emphasis added).

4 Id.

5 § 7A seeks to preserve the ruling in *Ruddock v Vadarlis* (2001) 110 FCR 49, the Australian full Federal Court's decision concerning the applications for *habeas corpus* by lawyers acting on behalf of the Tampa asylum-seekers. International law played hardly any role in the decision. The majority in that case found that executive power existed to repel illegal immigrants from the Australian border, despite the enactment of extensive legislative powers.

High Seas,[6] a zone in which both legislative or prescriptive jurisdiction and law enforcement powers are limited.

This section of the paper outlines possible ways in which States might attempt to justify interdiction and/or removal of boats, particularly when acting beyond the territorial sea or contiguous zone. As will become clear, I do not regard these arguments to be particularly persuasive. In particular, questions are raised concerning the practice of Australia, which has been to intercept boats within Australia's contiguous zone and then to tow them to a point beyond the contiguous zone or to escort them to the edge of Indonesian waters.[7]

The oceans are divided into various sectors over which States have decreasing levels of jurisdiction as the proximity to land recedes. These zones include the territorial sea,[8] the contiguous zone,[9] the exclusive economic zone (EEZ),[10] and the High Seas.[11] The extent to which powers concerning regulation of

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6 See the reference to "another place" in § 245F(8). It should be noted that the Migration Act's somewhat opaquely drafted powers concerning boarding of ships prior to removal try to avoid exorbitant exercises of jurisdiction and to comply with the law of the sea, and Australia's practice has been to remove boats from the contiguous zone. It should also be noted that Australian statutes will be interpreted to comply with international law where possible.

7 Senate Select Committee, "A Certain Maritime Incident," available at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/maritime/report/index.htm. [hereinafter Senate Select Committee]. *See* chapter 2, particularly the description of the "standard operating procedures" from 2.61-2.85.

8 The territorial sea is defined in the United Nations Convention on the Law of the Sea as an area of up to 12 nautical miles measured from the base line: *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, art 2-15, 1833 U.N.T.S. 3 (hereinafter "UNCLOS").

9 The contiguous zone is defined as the area of sea adjacent to the coast which extends up to 24 nautical miles from the same base line used to delimit the territorial sea. UNCLOS, *supra* note 8, at art 33(2).

10 The Exclusive Economic Zone or EEZ is an area extending up to 200 nautical miles from the territorial sea base line which may be used for the purposes of exploring, exploiting, conserving and managing natural resources, UNCLOS, above n 8, art 56, 57.

11 The High Seas are all those areas beyond any of the other zones in which States exercise a certain measure of sovereign power (the territorial sea, contiguous zone, EEZ etc), UNCLOS, above n 8, art 86.

immigration and enforcement of the law may be exercised vary from zone to zone. The territorial sea is in much the same position as State territory, although foreign ships have the right of innocent passage.[12] Beyond this zone, legislative jurisdiction is circumscribed and enforcement powers are limited accordingly.

States may exercise "control" in the contiguous zone to prevent and punish violations of immigration laws within the territorial sea.[13] The Australian government takes the view that it is permitted to "remove vessels to the edge of the contiguous zone".[14]

In the EEZ, the coastal State may exercise "sovereign rights" in relation to natural resources.[15] As a result of the overlap between the contiguous zone and the EEZ (the contiguous zone corresponds with the first 12 miles of the EEZ), Article 56(1)(c) of the 1982 UN Convention on the Law of the Sea ("UNCLOS")[16] refers to "other rights and duties provided for in this Convention" as being exercisable in the EEZ.[17] However, Article 56(1)(c) cannot be used to expand the express references to rights exercisable in the *contiguous zone* to prevent violations of, or to enforce immigration law[18] and enable them to be exercised in the rest of the EEZ. Thus, for present purposes, the EEZ's particular status is of diminished significance. In this zone, interception is primarily governed by the principles that govern the High Seas.

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12 See UNCLOS, above n 8, art 21, 25 (concerning the regulation of non-innocent passage in the territorial sea). See also Convention on the Territorial Sea and the Contiguous Zone, April 28, 1958, art 16(1), 516 UNTS 205 (hereinafter "TSC").

13 See UNCLOS, above n 8, at art 33 and TSC, above n 12, at art 24(1) (concerning exercise of control necessary to prevent violations of immigration laws within the territorial sea).

14 Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime - Australia's Commitment 4 (2001) (hereafter "Principled Observance," copy on file with author).

15 UNCLOS, above n 8, art 56, 57.

16 UNCLOS, above n 8.

17 RR Churchill & AV Lowe, *The Law of the Sea* 169 (3rd ed, 1999) (writing that Article 56(1)(c) would appear to include the rights that a State has in relation to its contiguous zone).

18 See UNCLOS, above n 8, art 33.

On the High Seas, of course, the general rule is freedom. Jurisdiction over persons on the High Seas rests with the flag state,[19] with limited exceptions. For example, in cases of piracy, in relation to which there exists universal jurisdiction, the ship may be seized.[20]

Stateless vessels raise different questions. Warships have the right of visit in relation to ships without a nationality[21] or whose nationality is uncertain,[22] but only in order to verify the right of the ship to fly its flag.[23] Although the freedom of the High Seas attaches to the State and a stateless vessel is therefore lacking an important means of protection,[24] a State would have to rely on some positive basis of jurisdiction - for example, the protective principle of jurisdiction, in order to exercise jurisdiction over persons on a stateless ship.[25] Some eminent jurists regard the protective principle as well established. However, there are controversies as to its extent and application.[26] It is questionable whether an immigration offence could be viewed as a threat to security such that it would bring the principle into play, although the US has asserted that drug smuggling is covered by the protective principle.[27]

States may exercise the right of hot pursuit onto the EEZ and High Seas from the territorial sea or contiguous zone where there is good reason to believe that the

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19 UNCLOS, above n 8, art 6; Convention on the High Seas, April 29, 1958, art 6, 450 UNTS 82 (hereinafter "High Seas Convention" or "HSC").

20 UNCLOS, above n 8, art 105; HSC, above n 19, art 19.

21 UNCLOS, above n 8, art 110(1)(d) (The situation of stateless vessels is not provided for in the HSC).

22 UNCLOS, above n 8, art 110(1)(e); HSC, above n 19, art 22(1)(c) (both refer to a ship which "though flying a foreign flag or refusing to show its flag...is, in reality, of the same nationality as the warship.").

23 UNCLOS, above n, art 110(2); HSC, above n 19, art 22(2).

24 See, eg, *Molvan v Attorney-General* for Palestine (1948) A.C. 351.

25 *See* Churchill and Lowe, above n 17, 214 (stating that "[t]he better view appears to be that there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them.").

26 See, eg, M Akehurst, *Jurisdiction in International Law*, 46 Brit YB Int'l L 145, 158 (1972-1973).

27 See Churchill & Lowe, above n 16, 139 (for a discussion of the US position).

ship has violated the laws of that State.[28] Pursuit may begin from the contiguous zone where there has been "a violation of the rights for the protection of which the zone was established,"[29] and these encompass the right of preventing violations of immigration laws in the territorial sea.[30] Moreover, the right of hot pursuit extends to so-called "mother ships" which have stayed beyond the limits of a State's jurisdiction and deployed smaller boats to ferry people into the territorial sea or contiguous zone.[31] Perhaps flight of a ship from the contiguous zone after a failed attempt to unload illegal passengers, or where it was clear that illegal entry had been intended, would be an example where hot pursuit may be exercised, particularly if a State's domestic laws prohibit attempts[32] or conspiracy to enter unlawfully, or the organisation of unlawful entry.[33]

Other than the situation of mother ships, if interdiction occurs when the target ship is outside the contiguous zone and has not been within it, any argument based on hot pursuit must surely fail. Hot pursuit is designed to enable the effective

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28 UNCLOS, above n 8, art 111; HSC, above n 19, art 23.

29 See id.

30 UNCLOS, above n 8, art 33; HSC, above n 19, art 24(1).

31 UNCLOS, above 8, arts 111(1) and (4). The sections were relied upon when Australia enacted the Border Protection Legislation Amendment Act in 1999. The second reading speech included the imagery of a "mother ship" deploying smaller craft to spawn its "human cargo" into Australia. *See* Border Protection Legislation Amendment Bill, Second Reading Speech, Hansard, September 22, 1999, House of Representatives, p 10147, available at http://www.aph.gov.au/hansard/reps/dailys/dr220999.pdf. The imagery is unfortunate as it inevitably provokes comparison with the racialised imagery used at the turn of the 19th century to describe the "threat" of Asian immigration to Australia. See Penelope Mathew, *Safe For Whom? The Safe Third Country Concept Finds a Home in Australia*, The Refugees Convention 50 Years On: Globalisation and International Law 135 (forthcoming Susan Kneebone ed, 2003). Moreover, it should be noted that mother ships are generally not used to ferry illegal migrants to Australia - one decrepit fishing boat is used.

32 But see DP O'Connell *The International Law of the Sea* 1088-89 (IA Shearer ed, 1984) (noting that it is controversial whether hot pursuit relates to attempted offences). The success of an argument based on attempted offences might also depend on whether the attempt to commit the offence may occur outside, rather than within, the state's territorial sea.

33 For example, since 1999, Australia's domestic laws have contained offences for people smuggling. See, eg, Migration Act 1958, § 233. Extradition requests for foreigners in countries such as Thailand have been made.

enforcement of laws, including immigration laws, by ensuring that offenders do not simply escape by fleeing the territorial sea or contiguous zone, rather than to give States the ability to apply their laws upon the High Seas which are free to all States and beyond national jurisdiction. Moreover, regardless of where the ship is intercepted, it does not seem right to characterise preventative action such as interdiction as hot "pursuit", the aim of which is to apprehend offenders and bring them to justice.

It is notable that the new protocol on people smuggling requires that the flag state's cooperation be obtained before action is taken to prevent people smuggling.[34] Article 8(7), which deals with ships without a nationality gives States greater powers to board and search vessels but is somewhat ambiguous as to what may be done at the end of the day:[35]

> A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

The reference to "appropriate measures in accordance with relevant domestic and international law" was derived from paragraph 16 of the International Maritime Organisation's circular on interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea.[36]

It would appear that the vessels with which Australia has been concerned are Indonesian vessels,[37] not stateless vessels. Thus Indonesia's cooperation would be

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34 Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, Nov 15, 2000, art 8(2), 40 I.L.M. 335.

35 Above art 8(7).

36 Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO MSC/Circ 896, para 16 (Dec 16, 1998). See Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention Against Transnational Organized Crime, UN GAOR, 7th Sess, note 96, Ad Hoc Comm on the Elaboration of a Convention against Transnat'l Org Crime; UN Doc. note 96: A/AC.254/4/Add.1/Rev 4 (1999).

37 See Principled Observance, above n 14, 5 (stating that "the vessels are almost universally Indonesian flag ships").

required in order to interdict its ships on the High Seas under existing international law, as well as under the protocol on people smuggling when it enters into force. The other major example of interdiction, the Haitian interdiction program, was premised on the consent of the flag state as formalised in an exchange of notes.[38] Australia, it appears, does not have such an agreement with Indonesia concerning interdiction of Indonesian craft, or with any other flag State.

Australia's practice is described in the report of the Senate Select Committee's inquiry into "a certain maritime incident."[39] (The incident referred to concerns an allegation that asylum-seekers on board one vessel had thrown some children overboard -- an allegation which proved to be incorrect.)[40] The committee's report outlines the process of interception of boats, known by the Australian Defence Force as "Operation Relex." Under this operation, 12 vessels were intercepted, the first being on 7 September 2001, and the last on 16 December 2001.[41] There have been no unauthorised boat arrivals in Australia for over twelve months.

According to the evidence before the select committee, interception did not take place until boats entered the contiguous zone,[42] where Australia has powers to prevent violations of its immigration law. Prior to this entry, the Australian navy had first contented itself with issuing warnings - without boarding the vessel - which were ignored.[43] In a later phase of Operation Relex, the navy stopped warning vessels prior to their entry into the contiguous zone. This was done in order to minimise the chances that asylum-seekers would sabotage their boats or jump overboard, thus requiring rescue[44] and bringing them within Australian jurisdiction, if not Australian territory. After the boat's entry into the contiguous zone, the navy either towed the boat to a point just beyond the contiguous zone - a

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38 See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Aliens*, 76 Am. J Int'l L 374, 374 (1982) (exchange of notes dated September 23, 1981, between the American Ambassador at Port-au-Prince, Haiti, and the Haitian Minister of Foreign Affairs).

39 Senate Select Committee, *supra* note 7.

40 Id xxi-xxii (executive summary).

41 Id para 2.4.

42 Id para 2.65.

43 Id para 2.62.

44 Id para 2.70.

practice which could be questionable from the perspective of safety of life at sea if the boat's engine was not working - or escorted them back to Indonesian waters.

Without the cooperation of the flag state (and there is certainly no formal agreement with any flag state), Australia would be interfering with the freedom of the High Seas by escorting a boat back to another country's maritime zones. Perhaps Australia might argue that the decision to return to Indonesia was "voluntary" in light of the clearly determined effort to prevent entry into Australian waters and the escort was simply to ensure the safe return of the vessel and did not involve interference with freedom of the High Seas. However, this seems a strained construction of events.

The question remains, what has been the level of Indonesian cooperation with Operation Relex, and why would cooperation with returns be forthcoming after entry of vessels into Australia's contiguous zone, if it has not been possible to secure Indonesia's prior consent to interdiction on the High Seas? According to Human Rights Watch, which undertook detailed research into Australia's practices under the Pacific Solution, it appears that Australia has merely notified Indonesia after the return of boats.[45] Australia may simply be relying on Indonesia not to assert its rights in light of the involvement of people-smugglers.

III THE REACH OF THE REFUGEE CONVENTION AND THE RELEVANCE OF "ENTRY"

In addition to adopting the new interdiction powers, Australia has designated a number of its outlying territories as "excised offshore places"[46] within which unauthorised arrivals (known as "offshore entry persons")[47] may not make an application for a protection visa - the normal means by which Australia meets its obligations under the Refugee Convention - unless the Minister for Immigration exercises a non-compellable discretion in their favour.[48] Offshore entry persons

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45 Human Rights Watch, *"By Invitation Only": Australian Asylum Policy*, December 2002, Vol 14, No 10(C), 14, 45 [hereinafter Human Rights Watch]. The report also contains disturbing accounts from the asylum-seekers of their treatment during interception and raises questions concerning the seaworthiness of the vessels. Interestingly, it also notes that in some cases women and children asylum-seekers were transported back to the edge of Indonesian waters on board Australian vessels.

46 See Migration Act, 1958, § 5 (containing the definition of "excised offshore places." A bill seeking to excise further territories has been defeated in Parliament).

47 See id. (containing the definition of an "offshore entry person").

48 See id § 46A.

may be taken to countries which the Minister declares to meet certain minimum criteria: namely protection from refoulement, access to asylum procedures and protection of "relevant" human rights.[49] Asylum-seekers intercepted at sea may also be taken to declared countries by virtue of section 245F(9) of the Migration Act which provides that where a ship has been detained under the section, persons on board the ship may be taken "to a place outside Australia."[50]

The interdiction program and the excision of territories from the Migration Zone for certain purposes reflect Australian Prime Minister John Howard's determination that no unauthorised asylum-seeker should set foot on Australian soil. This kind of analysis has received support from some international lawyers. Recently, Piotrowicz and Blay wrote that: "...the [Refugee] Convention does not dictate or determine what constitutes entry into a contracting state for the purposes of claiming its benefits or privileges. This is crucial because Articles 31 and 32 and, more significantly, the Article 33 provisions are dependent upon entry into the territory of a party."[51]

However, one should be wary of reading too much into the recognition of states' ability to control entry into their territories for the purposes of determining the "reach" of the Refugee Convention. In relation to Article 33, the plain language of the Convention does not support the argument concerning the relevance of entry at all. Article 33(1) provides that:[52]

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The provision says nothing about entry. Rather, expulsion or refoulement in "any manner whatsoever" is prohibited.[53] This clearly extends to chain refoulement. If this were not so, the parties to the Convention could simply avoid their obligations by sending an asylum-seeker to another country which was not

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49 Id § 198A.

50 Id § 245F(9).

51 Ryszard Piotrowicz & Sam Blay, *The Case of MV Tampa: State and Refugee Rights Collide at Sea*, Austl. LJ, Jan 2002, 12, 15.

52 Convention Relating to the Status of Refugees, 24 April 1954, art 33, 189 UNTS 2545.

53 Id.

party to the Refugee Convention and which would not observe the obligation of non-refoulement. In turn, this would make a mockery of the ordinary meaning of the words "return" and "in any manner whatsoever". The obligation of non-refoulement is both an obligation of result and an obligation of conduct, and there is no break in the chain of causation when a State has failed to ensure that an asylum-seeker receives protection from refoulement elsewhere. Accordingly, the State will bear joint responsibility for the fate of the asylum-seeker as a matter of international law.[54]

It is a short step from the proposition that chain refoulement is prohibited to the idea that rejection of asylum-seekers at the frontier is impermissible. Consequently, the idea that States may simply extend their jurisdiction in order to protect their territories from the arrival of asylum-seekers also falls foul of the principle of non-refoulement. Yet, the United States and Australia have adopted the view that entry to State territory is crucial to the reach of the Convention.

In *Sale v Haitian Centers Council*, an 8-1 majority of the United States Supreme Court accepted that the interdiction of Haitians on the High Seas was permissible because the Court thought that neither the relevant US statute nor the Convention extended to persons outside the territory of the United States.[55] Reliance was placed on the *travaux préparatoires*, particularly assertions by the Swiss and Dutch delegates that the Convention was only to apply to persons within State territory and that closure of borders was permissible.[56]

While it is undoubtedly the case that the framers of the Convention were concerned with refugees already in State territory, rather than refugees attempting to enter, these two tendentious passages from the *travaux* cannot outweigh the

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54 *See* James Crawford & Patricia Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 Int'l J. Refugee L 155, 171 (1989).

55 *Sale v Haitian Ctrs Council, Inc*, 113 S. Ct. 2549 (1993). For criticism of the case, see Guy S Goodwin-Gill, The Refugee in International Law 143 (2d ed, 1996); Arthur C Helton, *The United States Government Program of Intercepting and Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 NYL Sch J Hum. Rts. 325, 339-342 (1993).

56 *Sale*, 113 S Ct 2565-66. See also Marian Nash Leich, *US Practice*, 83 Am J Int'l L 905 (1989) (summarizing the evidence given by Alan J Kreczko, Deputy Legal Adviser of the Department of State, before the Subcommittee on Immigration, Refugees and International Law of the House Committee on the Judiciary concerning the compatibility of the Haitian interdiction program with international law).

ordinary meaning of the words of Article 33, which refers to expulsion or return "in any manner whatsoever." The *travaux* may be resorted to in order to confirm the meaning obtained by reference to the ordinary meaning of the terms of the treaty read in their context and in light of the object and purpose of the treaty,[57] or in cases of ambiguity or where the primary means of treaty interpretation have absurd or unreasonable results.[58] In this case the passages from the *travaux* relied upon are scant; they are contradicted by other passages;[59] they make clear words unclear; and they lead to the absurd proposition that States may exercise jurisdiction extra-territorially to ensure return of refugees to a place of persecution, contrary to the ordinary meaning of the treaty language. As the dissenter in *Sale v Haitian Centres Councils*, Justice Blackmun, said derisively of the majority decision, apparently "'return' does not mean return."[60]

Against the examples of state practice of interdiction, which include the US interdiction program, the Australian interdiction program, and the pushbacks by some South East Asian countries, notably Malaysia and Thailand, during the Vietnamese exodus,[61] stand the constant assertions of *opinio juris* to the effect that interdiction is impermissible. Numerous conclusions of the executive committee of the programme of the United Nations High Commissioner for

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57 See Vienna Convention on the Law of Treaties, May 23, 1969, art 31, 1155 UNTS 331 (stating the primary means of treaty interpretation). Furthermore, art 31 codifies customary international law and may be referred to when construing the Refugee Convention.

58 Vienna Convention on the Law of Treaties, *supra* note 57, art 32. Article 32 codifies customary international law and may be referred to when construing the Refugee Convention.

59 James C Hathaway, *Refugee Law is Not Immigration Law*, 2002 World Refugee Surv 38, 41 (2002).

60 *Sale*, 113 S. Ct, 2565-66.

61 See UNHCR, The State of the World's Refugees: Fifty Years of Humanitarian Action 83 (2000).

Refugees (ex com)[62] and the General Assembly's Declaration on Territorial Asylum[63] all state that rejection at the frontier is impermissible. Although state officials have sometimes asserted that this soft law is worthless, when it confirms the ordinary meaning of the hard law and stands against reasonably sparse state practice, it holds great weight.[64]

The fact is that forcing ships back out to sea may result in refoulement, or "refugees in orbit"[65] - that is refugees travelling around, trying to secure entry to countries and being turned away, which may itself amount to a violation of human rights. Without a determination of status, it is impossible to be sure that a State is merely preventing violations of its domestic immigration laws, rather than violating the prohibition on refoulement. This was the fundamental problem with the Haitian interdiction program. In some phases of the program, there were no

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62 Ex com has recognized the "fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State": See *Non-Refoulement*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 6 para CXXVIII) (1977). It has also stated that "[i]n all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed." See *Protection of Asylum-Seekers in Situotions of Large-Scale Influx*, UNHCR, Exec. Comm, Exec Comm Conclusions, No 22 para 2 (XXXII) (1981). Finally, ex com has recalled "the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs." *See Conclusion on International Protection*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 85 para q (XLIX) (1998). See also *Safeguarding Asylum*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 82 para diii (XLVIII) (1997). Ex com conclusions are available at UNHCR's website http://www.unhcr.ch/cgi-bin/texis/vtx/home/.

63 GA Res. 2312, UN GAOR, 22nd Sess, Supp No 16, 81, UN Doc A/6716 (1967).

64 Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 Int'l J Refugee Law 285 (1989) (Ex com conclusions are part of the soft law used to interpret the Refugee Convention). Volker Turk, *The Role of UNHCR in the Development of International Refugee Law, in* Refugee Rights and Realities: Evolving International Concepts and Regimes 165 (Frances Nicholson & Patrick Twomey eds, 1999) (ex com conclusions are an indication of consensus on particular questions of refugee protection).

65 Goran Melander, Refugees in Orbit (1978).

hearings. At other stages, the hearings were inadequate, being held at sea and with few procedural safeguards.[66]

While it appears that Australia's interdiction program has not lead to the direct return of an asylum-seeker to a place of persecution, there are insufficient safeguards against chain refoulement. If States are going to adopt measures that prevent the arrival of asylum-seekers, they must take measures to ensure that refoulement does not occur.[67] Interception of boats headed for Australia has occurred on a number of occasions, and the boats have been forced to return to Indonesia[68] - a country that is not party to the Refugee Convention. Although it is strongly arguable that Indonesia is bound by a customary obligation of non-refoulement,[69] Australia should assure itself that Indonesia will abide by that obligation. Thus, at the very least, Australia should have a readmission agreement with Indonesia and there should be communications concerning particular individuals in order to prevent misunderstandings and refoulement.[70] It appears that Australia does not have such an agreement, although it does have an arrangement concerning interception by Indonesian authorities of asylum-seekers

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66 For descriptions of the interdiction program and concerns about refoulement, see Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U Rich L Rev 139, 139-158 (1995); Carlos Ortiz Miranda, *Haiti and the United States during the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 San Diego L Rev 673, 693-694 (1995).

67 Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, UNHCR paras 76, 83 (2001), available at http://www.unhcr.ch/cgi-bin/texis/vtx/home (Lauterpacht and Bethlehem write that conduct amounting to rejection at the frontier, including that which occurs on the High Seas, will call into play this obligation). But see Guy S Goodwin-Gill, above n 55, 166, who distinguishes between denial of entry of ships to territorial waters and programs of interdiction which return passengers to the place of origin.

68 See Senate Select Committee, above n 7, para 2.4. See also Press Release, Minister for Immigration and Multicultural and Indigenous Affairs, Philip Ruddock, MP, Suspected Illegals Turned Back, December 21, 2001, at http://www.minister.immi.gov.au/media_releases/media01/r01193.htm.

69 For the argument that non-refoulement is not only customary international law, but a norm of *jus cogens*, see Jean Allain, *The jus cogens nature of non-refoulement*, 13 Int'l J Refugee L. 533 (2001).

70 Concerning such safeguards, see Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 Int'l J Refugee L 383, 404-405(1995).

in Indonesia who are likely to go on to Australia.[71] Further, rather than considering the conditions in Indonesia in general terms, the position of the individual should be considered, as is the case before Australian courts when they consider whether protection elsewhere is available.[72] A hearing, even if only to determine whether Indonesia is a safe third country for a person who is a refugee, should be required. This is consistent with the view that the Convention's obligation of non-refoulement requires access to refugee status determination procedures in some form in order to safeguard against refoulement.[73]

IV TRANSFER OF ASYLUM-SEEKERS TO "SAFE THIRD COUNTRIES"

In addition to returning asylum-seekers to Indonesia, which Australia apparently regards as a safe third country because of the presence of the UNHCR,[74] Australia has transferred asylum-seekers to countries participating in the "Pacific Solution," namely Nauru and Papua New Guinea. This can occur in two ways. A person may be transferred at sea pursuant to section 245F(9) of the Migration Act,[75] as was the case with asylum-seekers on board the *Tampa* and the *Aceng* prior to the enactment of that section.[76] Section 245F(9) does not mention

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71 Principled Observance, above n 14, 5-7. For further information about the arrangement, see US Committee for Refugees, *Paying the Price: Australia, Indonesia Join Forces to Stop "Irregular Migration" of Asylum Seekers*, 22/8 Refugee Reports (2001), available at http://www.refugees.org/world/articles/australia_rr01_8.htm. For a description of the "disruption" of people smuggling under this protocol, see Senate Select Committee above n 7, chapter 1. It is particularly pertinent that the agreement was suspended for around nine months during Operation Relex: Id para 1.50.

72 The Courts may do this under Migration Act, 1958 § 36(2), where the test (a test that is open to criticism in the way that it has been applied) is whether protection will be forthcoming as a matter of "practical reality and fact." See V872/00 *A v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268. Alternatively, the Courts are required to consider the possibility of protection elsewhere by virtue of Migration Act, 1958 § 36(3) (referring to a right to enter and reside in a third country and interpreted by the Courts to refer to a legally enforceable right). See *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 66 ALD 1.

73 As Marx notes, the obligation to have determinations flows from the principle of good faith. See Marx, above n 65, 401.

74 Principled Observance, above n 14, 6.

75 Migration Act, 1958 § 245F(9).

76 The *Aceng* was an Indonesian vessel stopped shortly after the Tampa incident.

"declared countries", but it can be used in order to take people to those countries. Alternatively, an "offshore entry person" may be taken to a "declared country" under section 198A of the Migration Act.[77]

There are two issues raised here. First, is there protection from refoulement? Second, is it the case that asylum-seekers can simply be carted off to another country without their consent?

Unlike the situation with respect to Indonesia, agreements negotiated between Australia and Nauru, and between Australian and Papua New Guinea may serve as some protection from refoulement,[78] although it should be noted that Australia may take the view that the agreements have less than treaty status,[79] and that Nauru is not party to the Refugee Convention. As far as "offshore entry persons" are concerned, section 198A of the Migration Act requires the Minister to declare that countries to which offshore entry persons are removed meet certain minimum criteria. Apparently, the Minister has made declarations in relation to Nauru and Papua New Guinea,[80] although he is not required to table his declaration before Parliament and the texts of the declarations in relation to Nauru and Papua New Guinea do not appear to have been made public. In any event, these ministerial declarations are not necessarily a satisfactory guarantee of an asylum-seeker's protection, as they do not consider the position of the individual. In addition, questions may be raised as to the standard of processing in Papua New Guinea and Nauru given that it is not open to the independent merits review which is

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77 Migration Act, 1958 § 198A.

78 Australia has concluded "agreements" with Nauru and Papua New Guinea concerning admission to these countries. See Statement of Principles, Sept 10, 2001, Austl.-Nauru (signed by the President of Nauru and Australia's Minister for Defence) (copy on file with author) [hereinafter Statement of Principles]. Memoranda of Understanding were subsequently entered into with both Nauru and Papua New Guinea.

79 The relevant documents are generally entitled "memoranda of understanding" and Australia usually treats these as non-binding.

80 Department of Immigration and Multicultural and Indigenous Affairs, *Migration Legislation, Regulations: Declared Countries*, available at: http://www.immigration.gov.au/legislation/refugee/03.htm (last modified April 15, 2002). It is stated that "currently, Nauru and Papua New Guinea are declared countries under § 198A of the [Migration] Act." See also Senate Select Committee, above n 7, para 11.4.

available in Australia.[81] Indeed, the lack of standardised determination procedures has been one of the most powerful arguments against reliance on "safe third countries."

The second question, whether persons may be taken to another country without their consent, requires us to examine two distinct scenarios - the case of transfer of asylum-seekers at sea, and the transfer of asylum-seekers from territory. In the case of those transferred at sea, a number of human rights may condition the exercise of state jurisdiction. In particular, asylum-seekers have the right to seek asylum,[82] as well as the right to leave their own country[83] and the right to liberty.[84] The law of the sea, discussed earlier, is also relevant.

It is up to the State of origin to control exit in a manner that conforms with the right to leave the country, rather than other States who fear the possibility of illegal entry. However, there is no right to be granted asylum in a particular state and no right of entry guaranteed either under the Refugee Convention or general human rights treaties, only the obligation not to refoule refugees. Thus it could be argued that, so long as the interdicting State ensures that non-refoulement is respected, sending asylum-seekers interdicted at sea on to another country without the asylum-seekers' consent is permissible as a matter of refugee law unless there is a right to choose the country of asylum in lieu of returning home.

Bill Frelick, an early proponent of what might be termed a "Caribbean Solution" to the Haitian boat-people outflow as an alternative to the policy of

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81 Processing is performed by Australian immigration officials in some instances, but instead of the independent merits review which is available in Australia through the Refugee Review Tribunal, review by another Australian immigration official is all that is available. This is modelled on UNHCR's own practice, and UNHCR has undertaken some of the status determination under the Pacific Solution. However, UNHCR has a different philosophy to national immigration departments and is not in a position where it can easily establish independent merits review. In any event, UNHCR is not immune from criticism. See generally Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 Int'l J Refugee L. 251 (1999). See also Human Rights Watch, above n 45, 57-59.

82 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., art 14, at 71, U.N. Doc. A/810 (1948).

83 See, eg, International Covenant on Civil and Political Rights, Dec 16, 1966, art 9, 999 UNTS 171, 6 ILM 368.

84 See id. I argue later in this paper that the right to liberty is a customary international norm.

interdiction, argued that any movement to other countries must be voluntary, but that the choices were clearly constrained.[85]

> In contrast to the way in which Guantanamo has been operated thus far...a safe haven camp must be predicated on voluntariness. The Haitians' camp would be for those who have chosen Guantanamo either by willingly allowing themselves to be rescued at sea and staying in Guantanamo awaiting screening, or those who chose Guantanamo over being deported to Haiti...

Those who continued to harbor genuine fears would stay and be provided for, but would know that there was no "future" for them at Guantanamo. Their situation would be essentially the same as a majority of the other 19 million refugees around the world, most of whom live in first asylum camps, with no prospect of third-country resettlement.

The responsibility of the United States would be to assist them so that they could live in safety in temporary asylum pending a durable solution."[86]

Whether there is a right to choose the country of asylum is a matter on which the Refugee Convention says relatively little. The one provision which touches on the question is Article 31, which will be analysed in detail later as it may have limited applicability in cases of interdiction. Article 31 refers to people present in state territory, and while the territorial sea is assimilated to State territory, this is not the case with other maritime zones, and while flag vessels are under the flag state's jurisdiction (this is relevant to Australia's practice of using naval vessels to transfer asylum-seekers), they are not floating territory. Australia's practice does, however, raise good faith issues concerning the avoidance of Article 31, particularly in relation to the discrimination inherent in the Australian visas subsequently issued to those asylum-seekers eventually resettled in Australia, which could constitute a prohibited "penalty" pursuant to Article 31 given that the asylum-seekers were initially within Australian jurisdiction and that Australia retains ultimate responsibility unless another country resettles the transferred

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85 Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 Cornell Int'l LJ 675 (1993).

86 Id 693-694.

asylum-seekers.[87] There are also questions concerning Australia's jurisdiction to transfer to another country foreign nationals on board a foreign-flagged vessel.

As to the question of seeking a country of asylum enshrined in Article 14 of the Universal Declaration on Human Rights, and which is contemplated by Article 31 of the Refugee Convention and reiterated in numerous ex com conclusions, Australia could argue that this is effectively what occurs when people are sent to the countries participating in the Pacific Solution. On the other hand, what really happens in those countries is that asylum-seekers are detained.[88] If screened in, the asylum-seekers may be accepted for resettlement elsewhere. However, this depends on a state of resettlement voluntarily coming forward. The asylum-seekers' destination is left uncertain, except for the fact that the agreements with the Pacific Solution countries state that Australia will take eventual responsibility for removing any asylum-seekers remaining in those countries.[89] To use Frelick's words, it does not appear that the asylum-seekers have a future anywhere, at least for the time being.[90]

According to the strict letter of the law, durable solutions are not required by the Refugee Convention so that an uncertain future is permitted to some degree. However, other human rights may condition the time for which States may continue with such a policy. While States generally retain the power to control immigration, the Human Rights Committee has stated that there may be a right to enter a country in cases involving torture or considerations of family life.[91]

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87 See Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 Am J Int'l L 661, 673 (2002) (dealing with the visa category for offshore entry persons, but the arguments would be similar for persons intercepted before they could become offshore entry persons).

88 For the situation in Papua New Guinea, see Human Rights Watch Briefing Paper, *"Not for Export": Why the International Community Should Reject Australia's Refugee Policies*, Sept. 2002, available at http://www.hrw.org/press/2002/09/ausbrf0926.htm (last visited Jan. 20, 2003).

89 See, eg, "Statement of Principles", above n 79, para 6.

90 Frelick, above n 85, 694.

91 Human Rights Committee, General Comment 15, para 5: *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN1/Rev.5, April 26, 2001, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument.

Furthermore, the conditions in which refugees are "warehoused"[92] under the Pacific Solution are also governed by general human rights law. The right to liberty is particularly significant, in this regard. To use the words of the European Court of Human Rights in Amuur's case, to detain people until such time as the "vagaries of international relations"[93] dictate that they are received somewhere else is unacceptable. The negotiations concerning the Tampa left asylum-seekers on board for a week or so, and now many of them have had to wait for prolonged periods in detention on Nauru. Even if future agreement with the countries participating in the Pacific Solution to accept more asylum-seekers is forthcoming,[94] new boat arrivals may similarly be subject to the "vagaries of international relations." Clearly, this treatment is not adequate "refugee protection," and I will argue later that Australia retains liability as a matter of international law for this treatment.

V THE MEANING AND RELEVANCE OF ARTICLE 31 AND ITS RELATIONSHIP WITH ARTICLE 32

Where the transfer of asylum-seekers takes place from Australian territory, there are questions concerning the rights due to asylum-seekers who are present in state territory: to what extent does illegal entry condition their rights? Two provisions are relevant here - Articles 32 and 31. Even in relation to these provisions, the relevance of "entry" may be overstated.

The application of Article 32 is premised, at least in the first instance, upon entry as defined by national immigration law. The text of Article 32 reads as follows:

> Article 32. Expulsion
>
> (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

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92 This term is used by Hathaway and Neve: James C Hathaway & R Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection*, 10 Harv Hum Rts J 115, 130-131 (1997).

93 *Amuur v France*, 22 Eur Ct HR 533, para 48 (1996).

94 Papua New Guinea and Nauru agreed initially to accommodate specific boatloads of asylum-seekers. For discussion of the way in which the agreements have been extended to further groups of asylum-seekers, see Peter Mares *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* 127-130 (2d ed, 2002).

(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.[95]

Article 32 extends to a person "lawfully" in State "territory". The term "lawfully" probably does describe someone who has been permitted to enter the State as a matter of ordinary domestic legal procedures.[96] "Territory" surely refers to the concept as defined in international law. The fact that Australia has redefined its national territory, through the excision of territories from the migration zone for certain purposes does not mean that asylum-seekers have not entered State territory. But it does mean that they are not lawfully within State territory, thus they do not benefit, initially, from the protection against expulsion in Article 32.

Article 31 is relevant to the situation of asylum-seekers unlawfully present in state territory. According to Article 31, penalties are not to be applied for illegal entry or *presence* on refugees "who enter or are present in [State] territory *without authorization.*"[97] Again, "territory" must refer to the concept as defined in international law. The plain language clearly applies to persons fictionally excluded from entry because they are intercepted in excised offshore places by law-enforcement personnel or immigration officials. Thus, persons described as "offshore entry persons" are entitled to such protection as Article 31 provides.

Article 31 provides protection against "penalties" for unlawful entry, but expulsion as the ultimate course of action in relation to a particular asylum-seeker

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95 Convention Relating to the Status of Refugees, Apr 24, 1954, art 32, 189 UNTS 2545.

96 Gunnel Stenberg, *Non-expulsion and Non-refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* 87-92, 121 (1989).

97 Convention Relating to the Status of Refugees, July 28, 1951, art 31, 189 UNTS 150 (emphasis added).

does not constitute a penalty. Nor does Article 31 grant, directly, a right to be lawfully admitted to State territory as a matter of national immigration law. The wording of Article 31 is as follows:

> Article 31. Refugees unlawfully in the country of refuge
>
> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[98]

The language "coming directly" and "good cause" is construed broadly. Article 31 does not refer solely to refugees coming directly from their country of origin. If a refugee is unable to secure protection in a country through which he or she has travelled after leaving the country of origin, the protection of Article 31 will still apply.[99] Moreover, it is generally accepted that mere transit in another country is not sufficient to deflect the protection of Article 31. It is notable that in relation to returns to countries through which an asylum-seeker has sojourned, the executive committee of UNHCR has referred to cases in which protection has already been secured in that country.[100] Ex com has also referred to the possibility of requesting persons to seek asylum from countries to which they

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98 Id.

99 Guy S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, prepared for the UNHCR Global Consultations (Oct 2001), available at http://www.unhcr.ch/cgi-bin/texis/vtx/home.

100 See *Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR, Exec Comm., Exec Comm Conclusions, No 58 (1989).

have some sort of connection, if fair and reasonable.[101] Otherwise, many would accept that there is an element of choice left open to asylum-seekers.[102] It should also be noted that the idea that asylum-seekers on State territory may simply be moved involuntarily from state territory to another country, particularly one to which the asylum-seeker has no links and through which she has not previously sojourned, is certainly not uniformly accepted in State practice. Even in cases of mass influx, such as the flight of Albanian Kosovars, the practice has been to secure asylum-seekers' consent before their transfer.[103] A recent EU directive on temporary protection confirms that consent of both the proposed safe third country and the asylum-seeker is required before transfer occurs.[104]

On the other hand, Article 31 clearly contemplates that some refugees might be required to seek admission to other countries. It should also be noted that a number of delegates at the drafting conference stated their views that expulsion did not constitute an impermissible penalty.[105] Given that the provision relating to expulsion (Article 32) is applicable only to refugees "lawfully" in State territory, a prima facie case can be made for the legality of sending an asylum-seeker elsewhere.[106]

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101 See *Refugees without an asylum country*, UNHCR, Exec Comm, Exec Comm Conclusions, No 15 para h i-iv. (1979).

102 See, eg, *Ex parte* Adimi, 4 All ER 520, 527-28 (1999). See also *id.* at 537; and Ex. Comm. Conclusion No 15, above n 92, para h. iii. (referring to the asylum-seeker's wishes).

103 UNHCR, Skopje, *Guidelines for the Humanitarian Evacuotion Programme of Kosovar Refugees in the Former Yugoslav Republic of Macedonia*, Apr 11, 1999, available at http://refugees.atvirtual.net/en/evacuations.html. Australia's regulations speak of asylum-seekers accepting offers of temporary stay in Migration Regulations, 1994, 2.07AC.

104 Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, art 26(1), 2001 O.J. (L 212) 12.

105 See Nehemiah Robinson *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 153 (1953); Paul Weis *The Refugee Convention 1951: The Travaux Preparatoires Analysed, with a Commentary* 302 (1995).

106 Thus Hathaway argues that there was no impediment to sending asylum-seekers to New Zealand. See Hathaway, above n 59, 43.

In practice, the unwillingness of other States to accept expelled refugees and the danger of refoulement often means that the option of requiring a person to seek admission elsewhere is impractical. The reality is that absent some connection between the State and the asylum-seeker or some prior agreement such as the Dublin Convention,[107] no other State will take the person, meaning that the asylum-seeker has effectively chosen the place of asylum. In this situation, the two options mentioned in Article 31 as being relevant to the period for which necessary restraints upon movement of refugees can be imposed - regularisation of status or admission to another country - may be seen as exclusive alternatives. Thus, Grahl-Madsen opined that if a refugee unlawfully within the territory of a State was unable to gain admission to another state, rather than refusing to regularize the refugee's status, the State concerned would have to regard the refugee as being lawfully on state territory and entitled to the rights owed to refugees "lawfully" and "lawfully staying" in State territory.[108]

Australia managed to secure agreement with New Zealand to take some Tampa asylum-seekers, thus creating the unusual situation where expulsion to a non-persecutory country through which the asylum-seeker had not transited could be effected. However, even here, I would urge a cautious approach concerning the relationship between Articles 32 and 31. It should not necessarily be assumed that because Article 32, which deals expressly with expulsion, only refers to refugees lawfully present, that all illegal entrants can simply be expelled at the earliest opportunity. Article 32 specifies serious grounds for expulsion of refugees lawfully in the territory of a State and it gives those refugees protections against expulsion that are not granted to refugees unlawfully in State territory. However, both lawful arrivals and unauthorised arrivals who have "come directly" are entitled to a "reasonable period" within which to seek legal admission into

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107 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991).

108 Atle Grahl-Madsen *The Status of Refugees in International Law* Vol. II 436-37 (1972). See also JJ Bolten, *From Schengen to Dublin: the New Frontiers of Refugee Law, in* Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police 8, 21 (H Meijers et al eds, 1991). Weis argued that there is no obligation to regularise status, although refugees should not be kept "behind barbed wire." Weis, above n 105, 303. However, Grahl-Madsen argued that it was never envisaged that there would be a category of "unprivileged refugees". Grahl-Madsen, above n 108, 437.

another country.[109] Thus, the idea that any refugee unlawfully in state territory may be sent immediately to another country regardless of the asylum-seekers' wishes has a weak foundation in the express language of the Convention.

In cases of previous sojourn in another country, and where the asylum-seeker may properly be viewed as not "coming directly" from a place where life and freedom are threatened, it is possible to argue that the Convention imposes obligations primarily on that other country.[110] Even if this logic can be extended to the case of a country through which an asylum-seeker has not travelled and to which there is no other connection, but which is nevertheless willing to accept the asylum-seeker, it appears that Australia gave no consideration as to whether the asylum-seekers shipped to New Zealand, Nauru or Papua New Guinea had "come directly" from places where life or freedom was threatened before deciding to ignore the last clause of Article 31(2).

There is also very little scope for consideration as to the reasons for asylum-seekers' routes of escape - the often compelling reasons for which are well-documented in the Human Rights Watch report[111] - under the new legislative arrangements in relation to the Pacific Solution. All unauthorised arrivals to the excised offshore places are treated as offshore entry persons. Unless the Minister uses his non-compellable discretion to lift the ban on applications for protection visas,[112] there is little scope to consider whether a person came "directly" to Australia or had "good cause" for unlawful entry into Australia, and there is certainly no consideration of this question before the person is shipped off to declared countries.

Nor does it appear that there is much consideration of these issues after the fact - that is, once asylum-seekers have been transferred to Nauru or Papua New Guinea. Changes to Australia's visa regime preclude persons from applying for

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109 See Convention Relating to the Status of Refugees, July 28, 1951, art 31, 189 UNTS 150; Convention Relating to the Status of Refugees, Apr 24, 1954, art 32, 189 UNTS 2545.

110 Thus Grahl-Madsen distinguished between "unwanted" and "migrant" asylum-seekers: Grahl-Madsen, above n 108, 438-441. Similarly, ex com has distinguished between asylum-seekers receiving "protection" (dealt with in ex com conclusion no 58, above n 100) and asylum-seekers without a country of asylum (in ex com conclusion no 15, above n 101).

111 Human Rights Watch, above n 43, 15-29, 34-38.

112 Migration Act, 1994 §46A(2).

permanent protection under the three major categories of offshore visas if they have stayed for as few as 7 days in a country in which they could have obtained "effective protection" from either the State concerned or UNHCR.[113] This means that asylum-seekers may only apply for the visa category for offshore entry persons - a rolling three year temporary visa[114] - or, if they were intercepted before they could become an offshore entry person, a 5 year temporary protection visa,[115] the terms of which do permit an application for a permanent visa subsequently.[116] It is uncertain how the terms "effective protection" will be construed, although there is case-law concerning the application of these terms in relation to the availability of protection visas under section 36(2) of the Migration Act to which reference might be made.[117] The reliance on UNHCR to provide "protection" is particularly disturbing when UNHCR must rely on States to provide protection: states that, in many cases, are not party to the Refugee Convention which is why Australia seeks to rely on UNHCR's presence in the first place. As the fourth panel of experts meeting for the global consultations in the context of the 50th anniversary of the Refugee Convention stated: "the mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country."[118]

Of course, if there was in fact no other place to which the asylum-seekers could have secured admission through their own efforts (as seems likely in the case of the Tampa asylum-seekers), the argument just outlined may push Article 31 beyond its limits, turning it into a right of entry into Australia, even though, at least in the case of New Zealand, there was a satisfactory place to which many asylum-seekers could go. (Asylum-seekers with family members in Australia would be in a different position, of course.) We are back at the point of arguing about the right to choose, versus the absence of a right of entry.

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113 See Migration Regulations 1994, sched 2, clauses 200.212, 202.212 and 204.213.

114 See Migration Regulations 1994, sched 2, part 447.

115 Senate Select Committee, above n 7, para 11.55.

116 See Migration Regulations 1994, sched 2, part 451.

117 See V872/00 *A v Minister for Immigration and Multicultural Affairs*, above n 67.

118 Geneva Expert Round Table, *Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees-Revised* para 10c, October 8-9, 2001, *available at* http://www.unhcr.ch.

As seen above, the answer to this circular argument depends, at least in part, on the materialisation of another country willing to take asylum-seekers. In the case of New Zealand's participation, Australia was lucky. Its luck does not appear to be holding. The available figures show that Australia has taken the greatest numbers of asylum-seekers intercepted on the Tampa and under the Pacific Solution, with New Zealand taking the second-largest number, and few other countries showing any interest.[119] By contrast with the position in relation to New Zealand, it seems that Australia has, at best, deferred its responsibilities in the case of countries participating in the Pacific Solution. Under the terms of the "agreements" with Nauru and Papua New Guinea, Australia takes responsibility for the eventual removal of all asylum-seekers because those countries will not take responsibility for them.[120] If no other country comes forward to resettle refugees, Australia would have to take responsibility for them. Realities, rather than the mantra of "no right of entry" must determine the position. Grahl-Madsen's point that asylum-seekers unlawfully present in State territory must eventually be treated as refugees lawfully present on State territory seems applicable to this scenario.[121] Moreover, it is important to remember that the refugee is also owed the human rights set out in the International Covenant on Civil and Political Rights[122] and the International Covenant on Economic, Social and Cultural Rights,[123] as these generally depend not on lawful status, but on the fact that the refugee is a human being. Indeed, these broader human rights obligations may compel the conclusion that there is an element of choice on the part of asylum-seekers as to their place of refuge, and a right of entry. In particular, obligations concerning the family and children in Articles 17, 23 and 24 of the International Covenant on Civil and Political Rights may compel the

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119 Megan Saunders, *Refugee Policy "a life saver,"* The Australian, Oct 2, 2002, 7; Human Rights Watch, above n 43, 74.

120 See Statement of Principles, above n 78.

121 Grahl-Madsen, above n 108, 437.

122 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

123 International Covenant on Economic, Social and Cultural Rights, Dec 16, 1966, 999 UNTS 3.

admission of asylum-seekers who are unable to re-establish family life anywhere other than the place of refuge or the place of persecution.[124]

VI INADEQUATE REFUGEE PROTECTION AND AUSTRALIA'S CONTINUING LIABILITY

Given that Australia in most cases will only have deferred its responsibilities by sending asylum-seekers to Nauru or Papua New Guinea, it then becomes important to question whether Australia may send asylum-seekers to places which are not required by the Refugee Convention to observe all the rights set out therein[125] and which are holding the asylum-seekers in detention.[126] What is the standard of protection to be observed in "safe third countries?" Often it is the lack of protection in a country of first asylum which compels an asylum-seeker to move on from the first port of call. Given that such persons are considered to have come "directly" for the purposes of Article 31, refugees could be regarded as having acquired rights under the Convention that cannot be "traded" away by sending them to non parties.[127] The Refugee Convention is a human rights convention after all, and the rights set out therein are owed to refugees themselves, not merely to the State parties, all of whom, theoretically, should take an interest in the adherence by other parties to these rights. However, the absence of an express right to enter, along with the gradation of Convention rights

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124 See Human Rights Committee, General Comment 19, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN1/Rev.5 (Apr 26 2001) available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument. See also Geneva Expert Round Table, Global Consultations, *Summary Conclusions on Family Unity* para 5 November 8-9, 2001, available at http://www.unhcr.ch; Geneva Expert Round Table, *Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees-Revised* para 10d, October 8-9, 2001, available at http://www.unhcr.ch.

125 Papua New Guinea maintains significant reservations to the Refugee Convention, while Nauru is not even a party.

126 For the situation in Nauru, see John Pace *Amnesty International, Report of Mission to the Republic of Nauru* Nov 8-13, 2001, at para 49.

127 Hathaway raises this argument, although on balance he does not find it a convincing basis upon which to criticise Australia's reallocation of its responsibilities to Nauru or Papua New Guinea. Hathaway, above n 59.

according to links established in a particular state's territory[128] may necessitate further consideration of the question. Clearly, the principle of non-refoulement must be observed. But what is required beyond that?

An extreme, theoretical view is that providing non-refoulement is guaranteed - the answer to which is rendered doubtful by virtue of the fact that if a country is not party to the Convention, nothing prevents eventual expulsion to a non party that will observe few other human rights. Unless we are dealing with human rights which carry with them an explicit or implicit non-refoulement guarantee, as is the case with Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[129] or Article 7 of the International Covenant on Civil and Political Rights, it could be argued that nothing prevents a State which is party to the Refugee Convention from sending a refugee to a place where human rights are not observed in fact.

The executive committee of the programme of the United Nations High Commissioner for Refugees has not taken this view. Ex com Conclusion 58 states that "irregular" movement of refugees and asylum-seekers from countries where a person has already been given "protection" (though not necessarily a durable solution such as local integration) is undesirable.[130] It provides that return of such asylum-seekers is permissible if the refugee/asylum-seeker is:

(1) protected [in the safe third country] against *refoulement* and

(2) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found there...[131]

Furthermore, "favourable consideration" should be given to cases where a refugee or asylum-seeker "may justifiably claim that he has reason to fear

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128 Compare the terminology in Article 26 relating to freedom of movement ("lawfully in") with art 28 relating to travel documents ("lawfully staying") and art 16(2) relating to legal assistance ("habitual residence").

129 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, art 3, 1465 UNTS 85.

130 *Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR, Exec Comm, Exec. Comm. Conclusions, No 58 (1989).

131 Id para f.

persecution or that his physical safety or freedom are endangered in the country where he previously found protection."[132] Similarly, general conclusion no. 85, which would apply to the situation of a person who has not found a country of asylum, for example, stipulates that any country to which a person is sent must protect the person from refoulement, permit the opportunity to seek asylum and treat the person in accordance with international standards. [133]

The status of the conclusions as a reflection of *lex lata*, particularly in the face of some conflicting state practice, may be open to question. However, reiteration in ex com of the principle that human rights must be observed in places to which asylum-seekers are sent may indicate that States accept this is a legal criterion.[134] This is particularly true when the contrary state practice is contradictory,[135] self-serving and far from universal. Moreover, it should be noted that, like so many others, these conclusions are designed to clarify situations of uncertainty in the application of the Convention and therefore carry weight as interpretative tools.[136] It has been argued on the basis of relevant ex com resolutions, and human rights norms - which of course are relevant to the interpretation of the Convention[137] - that Article 33 forbids return not only to persecution for Convention reasons, but to any place where life or freedom would be threatened.[138]

Certainly, the conclusions set out the essential elements of refugee protection, and they are realistic. The conclusions recognise that it is unrealistic and inhumane to expect refugees to remain in, return or go to places where they receive inadequate protection, meaning rights-regarding protection which gives

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132 Id, para g.

133 See ex com conclusion No 15, above n 101.

134 Jens Vedsted-Hansen, *Non-Admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?*, in Frances Nicholson & Patrick Twomey, Refugee Rights and Realities: Evolving International Concepts and Regimes 269 (1999). Contrast with analysis of Stenberg, supra note 96, at 128.

135 Australia, for example, is a member of ex com and in many cases was involved in drafting the relevant ex com conclusions.

136 See Vienna Convention on the Law of Treaties, May 23, 1969, art 31, 1155 UNTS 331 (stating the primary means of treaty interpretation).

137 See id (opened for signature May 23, 1969 and entered into force January 27, 1980), art 31(3)(c), 1155 UNTS 331.

138 See Lauterpacht & Bethlehem, above n 67, paras 127-141.

them a basis for moving on with their lives, rather than a precarious existence in which non-refoulement alone is guaranteed. They are also premised on the fact that generally one would not expect States to tolerate the presence of persons whose rights they were not willing to respect. However, Australia, through the use of financial incentives, has managed to secure exactly that result.

In Nauru, for example, asylum-seekers transferred from Australia are held in detention.[139] Moreover, it should be noted that children are among those detained.[140] While every state has the right to control entry, detention which is not reasonably related to the facilitation of entry or exclusion will be arbitrary.[141] The detention of asylum-seekers has constantly been decried by ex com and is clearly one of the human rights which should be protected according to the ex com conclusions on safe third countries referred to earlier.

Quite apart from the requisite standard of protection from a so-called "safe third country", both Nauru and Australia are responsible for this violation of international law. Nauru, though not party to any major human rights treaties other than the Convention on the Rights of the Child,[142] is bound by that treaty

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139 See Pace, above n 126.

140 According to Peter Mares, "in May 2002 there were 351 children in the camps in Manus [in Papua New Guinea] and Nauru, and they had been detained for between six and nine months." Mares, above n 94, 133.

141 In certain instances, treaty provisions will be violated. For example, see Article 9 of the International Covenant on Civil and Political Rights as interpreted by the Human Rights Committee in *A v Australia*, UN Human Rights Comm, Communication No 560/1003, UN Doc CCPR/C/59/D/560/1993 (1997). See also Convention on the Rights of the Child, November 20, 1989, art 37, 1577 UNTS 3 (opened for signature and entered into force September 2, 1990). According to the Human Rights Committee, the right to liberty is also protected by customary international law. UN Human Rights Comm., General Comment No 24, at paragraph 8, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN1/Rev.5 (Apr 26 2001), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument [hereinafter General Comment No 24].

142 Convention on the Rights of the Child, above n 130. On 12 November, 2001, Nauru signed the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, meaning that it has an obligation not to defeat the object and purpose of these treaties prior to becoming a party: Vienna Convention on the Law of Treaties, above n 126, art 18.

not to detain children unless as a last resort and then only for the shortest appropriate time,[143] as well as by the customary international law protection of liberty.[144] Australia is bound by the Convention on the Rights of the Child and by Article 9 of the International Covenant on Civil and Political Rights not to detain asylum-seekers for the duration of their status determination,[145] as well as the customary protection against arbitrary detention. Given that Australia has an agreement with Nauru concerning the asylum-seekers it may be responsible for assisting the violation of their rights in Nauru, in accordance with the International Law Commission's Articles on State Responsibility.[146]

Articles 16 and 17 of the Articles on State Responsibility provide that a State which aids or assists, or, alternatively, which directs and controls another State in the commission of an internationally wrongful act is responsible in part (Article 16) or for the entire act (Article 17) where the act would be wrongful if committed by the first State. The basic idea is that while each State is independently responsible for violations of international obligations, a State "should not be able to do through another what it could not do itself."[147]

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143 Convention on the Rights of the Child, above n 143, art 37.

144 Concerning this customary norm, see UN Human Rights Comm., General Comment No 24, above n 142.

145 *A v Australia*, above n 142.

146 See UNGA Res 56/83 "Responsibility of States for internationally wrongful acts" UN Doc A/RES/56/83. See also *ILC, Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Commission to the General Assembly*, UN GAOR, 56th Sess., Supp. No. 10 (A/56/10), ch IV.E.1. It should be said that the topic of complicity was included in the first draft of the Articles in 1980 in recognition of the existing state practice on the topic and that the final text of the relevant articles has met with general approval by states. Although there may be elements of progressive development, it is submitted that these articles should be viewed largely as an exercise in codification and the logical application of first principles.

147 See *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 149, 154 (James Crawford ed., 2002) [hereinafter International Law Commission's Articles on State Responsibility]. The quoted language refers to Article 17, but similar language is used in relation to Article 16 at p 149.

It may be questionable whether Australia's actions in relation to Nauru could be characterised as direction and control.[148] At the very least, however, I would argue that Australia should be held to account for the treatment of the asylum-seekers because it is aiding and assisting in their detention. The facts concerning the detention of the asylum-seekers are that the asylum-seekers would not be on Nauru if not for Australia's actions, and they are there under circumstances where Nauru is not to take final responsibility for the asylum-seekers and, indeed, where Australia will take final responsibility if no other State comes forward.[149] This distinguishes the situation from the usual case of reliance on a safe third country where it may be possible to argue - depending on whether or not we accept conditions concerning human rights as a prerequisite for relying on a country as a safe third country - that what happens to asylum-seekers is entirely a matter for that state. The asylum-seekers are on Nauru pursuant to an MOU. The original "Statement of Principles" concluded with Nauru spells out that Australia is to pay for all activities conducted under the "Statement of Principles"[150] and specifically refers to the two sites where the asylum-seekers are to be "received and accommodated,"[151] making clear that Australia pays for the establishment and operation of the sites.[152] Thus, while the detention centres are operated on Nauruan territory, and are run in practice by the International Organisation of Migration (IOM),[153] Australia is footing the bill.

It should be noted before embarking on the analysis of state responsibility that while international organisations such as the IOM have international personality[154] and may therefore bear liability for breaches of international law, a

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148 For discussion of the meaning of "direction and control", see the commentary on the Articles. Id.

149 Indeed, officers from the Australian Department of Immigration and Multicultural Affairs perform the status determinations in some cases, but this fact will not be fully explored from the perspective of state responsibility here since it is not a feature of all cases and may be a question which is distinct from the act of detention. Pace, above n 126, para 5.

150 Statement of Principles, above n 78, para 1.

151 Id para 7.

152 Id para 8.

153 Pace, above n 126, para 8.

154 See Reparations for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep 174 (Apr. 11).

subject on which the ILC's Articles on State Responsibility expressly do not take a position,[155] countries such as Nauru retain their own obligations to ensure the human rights of persons within their territory and jurisdiction. They cannot avoid this obligation by contracting out detention to an international organisation, thus it is unnecessary to undertake a detailed examination of IOM's responsibilities here. In any event, that is a subject complicated by the fact that IOM is not bound by relevant human rights treaties, it operates under a service agreement with Australia (a factor which points the finger back at Australia when determining responsibility), and the fact that the special purpose visa issued by Nauru regulates the movement of asylum-seekers (which bolsters the case concerning Nauruan responsibility).[156]

The requirements for liability under Article 16 of the Articles on State responsibility are, first and foremost, that both States must be bound by the same obligation under international law. This is the case with respect to children who are detained against Article 37(b) of the Convention on the Rights of the Child, and with respect to adults under the customary law prohibition of arbitrary detention, which it is submitted applies in exactly the same way as the treaty prohibition in Article 9 of the International Covenant on Civil and Political Rights.[157] Even on a more conservative view of the customary right to liberty, the large-scale and prolonged arbitrary detention of persons would be a violation of customary international law.[158]

In order to demonstrate that a State is aiding or assisting another State, there are further requirements as summarised in the commentary on the Articles:[159]

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act

155 See International Law Commission's Articles on State Responsibility, above n 149.

156 Pace, above n 126, para 53.

157 The Human Rights Committee appears to take this view. See General Comment No. 24, above n 142, para 8.

158 Restatement (Third) of Foreign Relations Law of the United States §702 cmt h (1987).

159 International Law Commission's articles on State Responsibility, above n 149, 149.

must be such that it would have been wrongful had it been committed by the assisting State itself.

There is little doubt in my mind that these requirements are met here. Of course, it might be possible for the Australian government to argue that it had not contemplated detention. When questioned about the treatment of asylum-seekers in Nauru, government officials have attempted to rely on an assertion that the IOM's Charter does not permit it to run detention centres.[160] However, it is highly likely that Australia always knew and contemplated that the asylum-seekers would be held in detention, particularly given that this is the practice it adopts itself and it would want detention to act as a deterrent on Nauru. Moreover, given that it is now apparent that the asylum-seekers are being detained[161] - a fact of which Australia must be aware if only because Australian immigration officials are involved in the processing of some of the asylum-seekers[162] - Australia may not simply avoid all responsibility by refusing to acknowledge that its money is being used in this way. Of course, a State "should not be required to assume the risk that [the aided State] will divert...aid for purposes which may be internationally unlawful."[163] However, given the ongoing relationship established by the memoranda of understanding with Nauru, it is difficult to see how Australia can escape all responsibility. Indeed, one wonders whether this situation is best characterised not merely as one where Australia aids and assists other countries, but one in which both States are jointly responsible for a single course of conduct.

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160 *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Senate Legal and Constitutional References Comm.*, Australian Senate. 163 (Aug. 19, 2002) (testimony of Mark Andrew Zanker, Acting First Assistant Secretary, Office of International Law, Attorney-General's Department). Mr Zanker stated that the asylum-seekers "are not in what are called detention centres. The International Organisation for Migration, which runs these places, does not have it in its charter to operate a detention centre, and it would not do so. They are processing centres").

161 Pace, above n149, paras 51-56.

162 Australian immigration officials interview asylum-seekers at the "State House" site in Nauru. UNHCR interviews those at the "Topside" site in Nauru. Id para 5.

163 UN International Law Commission, above n 137, 147.

VII CONCLUSION

Many of the aims underlying interception practices are clearly contrary to the legal obligations imposed by the Refugee Convention. Interception aims to prevent asylum-seekers from reaching state territory, in the hope that legal obligations will not be engaged. This, however, is a false hope. Article 33 of the Convention will stretch as far as exercises of state jurisdiction, whether or not these extensions are lawful according to accepted principles concerning state jurisdiction. The related questions of providing protection elsewhere raise more complex questions concerning the relationship between the norm of non-refoulement, Articles 31 and 32 of the Convention and other human rights norms, although I think it may be concluded that Australia retains responsibility for the unsatisfactory refugee protection in this case.

Questions concerning the allocation of responsibility for refugees are now firmly on the UNHCR's agenda as it recently proposed discussion of agreements concerning burden sharing to supplement the Refugee Convention. Some initial reports indicated that what was contemplated was a protocol,[164] which could legitimately modify the Convention, making the operation of "protection elsewhere" more clearly legal in all cases. However, it seems that what the High Commissioner has in mind "special agreements," referred to in Article 8.b. of the UNHCR statute,[165] which will supplement the Convention.[166] The High Commissioner has adopted the term "Convention plus" to describe these supplementary agreements.[167]

If such agreements are adopted, they must also establish high standards for refugee protection - standards at least the equivalent of those contained in the

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164 See Megan Saunders, *UN plans hi-tech refugee tracking*, The Australian, September 6, 2002.

165 GA Res 428 (V), (IV), UN GAOR, Supp (No 20), UN Doc A/1775 (1950).

166 UNCHR High Commissioner Rudd Lubbers, Address at an Informal Meeting of the European Union Justice and Home Affairs Council, Sept. 13, 2002, available at http://www.unhcr.ch/cgi-bin/texis/vtx/home/+IwwBme2_RQ8wwwwtwwwwwwwm FqhEyTfNhFqhEyTfNtFqhwmMoDAFqhEyTfNcFqdnqdDdMoqa1DodDDzmxwwww www/opendoc.htm.

167 Id. It should be noted that the High Commissioner is using "convention plus" in a way that is quite different to the way in which the Australian Minister for Immigration uses the term to denote that refugees should get only what the Refugee Convention obliges States to grant them and no more.

Refugee Convention. The latter aim could arguably be achieved by greater participation in the Convention, whether or not there are supplementary agreements on burden sharing. Greater participation in the Convention could itself help to share refugee-sheltering responsibilities. However, it is doubtful that such participation will be secured when states like Australia ignore their existing obligations.

Perhaps burden-sharing agreements might serve to recommit Australia to its existing obligations, and of course they might serve to share resources, financial or otherwise, thereby achieving higher standards of refugee protection. However, I cannot help but be cautious about the benefits that will flow for refugees and developing countries, as opposed to responsibility-shirkers like Australia. As has been pointed out by Anker, Fitzpatrick and Shacknove,[168] talk of burden-sharing may be used by "sophisticated Northern governments" to abrogate their own international obligations while neglecting to provide financial assistance to other states[169] who are then forced to continue to host most of the world's refugees.[170]

168 Deborah Anker et al, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 Harv. Hum Rts J 295 (1998).

169 Id 304.

170 According to Papademetriou, the West takes about 18% of the total refugee population. DG Papademetriou, *Migration*, 109 Foreign Policy, Winter 1997-98, 15, 23.

SOME REFLECTIONS ON DETENTION IN EUROPEAN ASYLUM POLICY

Philip Rudge*

UNHCR: "The detention of asylum seekers is inherently undesirable."

UNHCR: 10 Refugee Protection Concerns in the aftermath of September 11 2001

No 4. Treatment of asylum seekers: UNHCR is concerned that governments might be inclined to resort to mandatory detention of asylum seekers, or to establish procedures that do not comply with the standards of due process. UNHCR's long-standing position is that detention of asylum seekers should be the exception, not the rule. Detention is only acceptable when circumstances surrounding the individual case justify it, including when there are solid reasons for suspecting links with terrorism. But detention should always comply with due process. Similarly refugee status determination procedures put in place to deal with suspected terrorists must comply with minimum standards of due process, involve officials who are qualified and knowledgeable and contain the possibility of review.

I INTRODUCTION: THE POLITICAL AND SECURITY CONTEXT OF DETENTION

The detention of asylum seekers is an issue that raises passions. The right of an individual to liberty and security of the person is such a basic principle of international human rights law that the denial of liberty to persons who have committed no crime strikes at the fundamentals of human rights thinking. For asylum seekers the effects of detention can be particularly grave, given that many may have already endured persecution, imprisonment, even torture in their country of origin. For them, the additional psychological and emotional stress could well amount to inhuman and degrading treatment. Yet many governments

* Former Director, ECRE.

in Europe detain asylum seekers, with the UK (statistically) in the lead, for reasons they deem important for their national interest or security or expedition of the asylum system.

The total number of those who are detained is a very small fraction of the total number of persons who enter Europe to seek asylum. Critics of the use of detention, which include the UNHCR and the majority of non-governmental and legal opinion in Europe, draw attention to its use in the context of the growing restrictive and deterrent attitudes of governments in general to the arrival of asylum seekers and others in need of protection in Europe. The Council of Europe Parliamentary Assembly put it like this (in January 2000):

> in recent years, many European governments have introduced restrictions in their policies and practices with a view to substantially reducing the number of refugees and asylum-seekers on their territory;
>
> these restrictions can be divided into four types: (a) those designed to prevent undocumented travelers from arriving in Council of Europe member states at all, whether genuine asylum-seekers or not; (b) measures designed to expedite the consideration of applications by those asylum-seekers who do manage to reach their destination or to shift the determination procedure to other countries; (c) restrictive interpretations of international refugee law, and in particular the definition of the term "refugee"; (d) deterrent measures taken to make life uncomfortable for asylum-seekers awaiting a decision.

Detention "makes life uncomfortable", not only in practical terms for the asylum seekers themselves, but often also for those who detain them, and certainly for governments coming under criticism for resorting to this control measure. Critics argue that there are alternatives to detention which should be used, on the grounds of humanity and effectiveness, before detention is resorted to. They categorically reject the notion that detention can be used purely for the administrative convenience of the examining authorities.

Detention of asylum seekers is hardly new in European states and many governments have introduced safeguards on its use and permit independent review of its implementation. However, two recent factors give cause for concern that the use of detention may increase rather than diminish in Europe. The first is the fall-out from the "war on terrorism" with its security preoccupations which some legal observers believe constitute a serious threat to standards of international law.[1] The second is the arrival in the heart of some key European governments of explicitly xenophobic and anti-foreigner political forces.

On the first issue, namely security after September 11 2001, UNHCR's registers its anxiety thus:

> Our main concern is twofold:
>
> Firstly, that bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures. And secondly, that carefully-built refugee protection standards may be eroded. Any discussion of security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorism, and are not themselves the perpetrators of such acts.

Since September 11 individual nation states in Europe have stepped up their national measures of anti-terrorism control. Collectively also the 15 member states of the European Union are responding with shared, regional measures. The cost of these measures in terms of established civil liberties a matter of intense discussion. Concerns about the handling of asylum seekers in general and, for the purposes of this paper, the use of detention must be counted one of many preoccupations of those who believe that Europe is reacting with a worrying disregard for the civil liberties of aliens. Some responsible observers go so far as to talk of the EU measures on terrorism as "criminalising" refugees and asylum seekers (See the work of the organization 'Statewatch').

What is the evidence for this? Certainly the institutions of the European Union, especially the Council of Ministers, have been very active since the attack

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1 See article by Cassesse in the European Law Journal: "The terrorist attack of September has had atrocious effects not only on the human, psychological and political level. It is also having shattering consequences for international law. It is subverting some important legal categories, thereby imposing the need to re-think them on the one hand and to lay emphasis on important general principles on the other...". Otherwise Cassesse fears the setting in of "anarchy" in the international community which is one of the aims of the terrorists.

on the US. Indeed it has become clear in recent months that the way in which the EU treats the issue of refugees and the movements of people is becoming a touchstone of its very credibility in the face of widespread public disillusion about its lack of apparent grip on the refugee situation and with the remoteness of the decision making processes from their daily lives. At summit meetings of the EU leaders in 2002, the question of asylum and immigration has risen to close to the top of the international political agenda. It is the link with the concerns about terrorism that has contributed to putting it there.

To illustrate the trend, the EU Common Position (Article 16) on Terrorism states:

> Appropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards on human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.

In the case of European Union law, this 'Common Position' is binding on the member states. It could mean that all refugees and asylum seekers will be subject to vetting by the police and security services before their status can be granted. A file will be created on each person or family as to their political and trade union activity in their country of origin or any other country they have stayed in. Such a "Common Position" does not have to be submitted to national or the European Parliament for scrutiny. Article 15 of the Treaty on European Union gives a very general power simply to "adopt common positions", and "member states shall ensure that their national policies conform to the common positions". Effectively, by choosing to adopt these measures as Common Positions, the Council has not only by-passed the European parliament, but it also means that their validity cannot be challenged by the Court of Justice. Those who fear the worst of the terrorism applaud the introduction of measures to make them safe, and are indulgent if these measures may seem draconian. But others, and especially lawyers, have a role to ensure that whatever the provocations, some fundamental non-derogable human rights are asserted. And one of the most vital of these is the right of liberty of the person.

The second factor weighing heavily on European refugee policy is the extraordinary advance of political parties of the extreme right in some European states, most notably the Netherlands and Denmark, which have traditionally upheld progressive asylum policies. Their populist anti-foreigner platforms are full of the rhetoric of restrictive policies, deportation and detention, not so subtly infused with a generalised attack on progressive human rights thinking. The fear

is that they bring into the mainstream of government thinking intolerant and discriminatory ideas that once belonged on the fringes of politics. Through their traditional role as leaders in the European "harmonisation" debate, they also threaten the values underlying efforts of EU States to approximate their asylum and refugee policies. For ten years or more the issue for European States has always been to resist the temptation to harmonise at the level of the lowest common denominator. These recent political trends may well accelerate the rush to the bottom. If this hypothesis is correct, then the use of detention, as also summary rejection at borders, inadequate safeguards in accelerated procedures, and the doctrines of safe third country can be expected to increase. This is clearly a matter of concern for lawyers in their role as watchdogs of legal standards and legislative (or discretionary) innovations.

With regard to the state of asylum policy-making in general, it is not easy to find anyone in Europe who is content with the way states currently manage asylum flows to the region, nor the wider refugee phenomenon in the world. Refugees certainly find it harder to surmount the hurdles and obtain asylum; politicians in the receiving countries find their policies a source of stress and expense; lawyers, human rights organisations and the UN criticise the restrictive tendencies towards refugee protection, officials and civil servants struggle to make a coherent asylum system out of an inherently unpredictable phenomenon. Confidence in the practice of many European states is low. Where confidence in the system is missing and security concerns come to the fore, and when public opinion is disturbed or confused, then the temptation to resort to draconian measures grows inexorably.

When discussing approaches to refugee policy, it is important to distinguish the European Union (EU) from a totally distinct institution, namely the Council of Europe. The Union, headquartered in Brussels, is an economic pact of 15 European states with growing political aspirations and a large humanitarian role. The Council of Europe was established after the Second World War to promote democracy and human rights in Europe. Its growing membership is now in excess of forty States and its Secretariat is permanently based in Strasbourg. The Parliament of the Union is directly elected. The Parliamentary Assembly of the Council of Europe comprises members of the national parliaments of its member states who are sent to Strasbourg as delegates; they are not directly elected to this Assembly. Further confusion is easy since the European Parliament of the EU also has regular meetings in the same Strasbourg parliamentary buildings. The Council of Europe is best known through the European Human Rights Court system which is based in Strasbourg and oversees the implementation of the European

Convention on Human Rights. The Council of Europe traditionally takes a more progressive, human rights based view of refugee and asylum policy than either the individual nation states or the European Union. Since all the member states of the EU are also members of the Council of Europe, one can contrast the more aspirational positions of the Council of Europe with the increasingly fearful and defensive policies of the EU.

Real political power lies, however, with the European Union, and the domestic refugee policy of any European state is increasingly affected by the actions of the EU, with the Council of Europe far behind in terms of political muscle and influence. There is no doubting the ambition of the EU in the refugee and asylum field. It is trying to devise the architecture of a harmonised European policy for its current and future members. Its main ambition in the refugee field is described in the Treaty of Amsterdam which was signed in 1999 and whose objectives are supposed to be completed within 5 years, ie by 2004:

> The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution.

These simple words refer to a major exercise which will gradually move decision making away from national capitals and to Brussels. The Brussels model will be the one to which all new member states in central and eastern Europe will be required to adhere. The criticism of this process is well known: that harmonisation risks becoming a rush to the bottom, an agreement on the lowest common denominator. Its authors deny it; its critics assert it. The High Commissioner for Refugees, Ruud Lubbers, is a strong critic of trends in Europe:

> Many prosperous countries with strong economies complain about the large numbers of asylum seekers, but offer too little to prevent refugee crises, like investing in conflict prevention, or return, reintegration.

He goes on to say:

> it is a real problem that Europeans try to lessen their obligations to refugees...In any case, no wall will be high enough to prevent people from coming. The HC has said: "We cannot stand by while legal principles and international instruments that have protected refugees for over 40 years are eroded".

He is referring to what is widely referred to as the "deterrent approach" characterised by, inter alia:

- extension of visas to countries producing asylum seekers and the imposition of fines on transporters
- summary rejection of asylum seekers at ports of entry and the introduction of fast track procedures with inadequate legal safeguards
- the invention of safe third country doctrines so that asylum seekers can be returned to countries they transited and where they could have claimed asylum
- the restrictive interpretation of the refugee definition which is pushing up the standard of proof of persecution. In particular the refusal of many states to accept that not only governments persecute but non-state agents can also be responsible for persecution
- the reduction of rights to work or to welfare
- the development of international treaties, which seek to prevent asylum seekers submitting, claims elsewhere
- the use of detention.

The development of refugee policy in Europe in the last two decades has been to balance the sovereign rights of states to control immigration and ensure their national security on the one hand with, on the other hand, their obligation to protect the fundamental rights of all migrants, and specifically asylum seekers and refugees. In recent years the Council of Europe has repeatedly commented on the shortcomings of asylum policy in the wider Europe. It drew attention, for example, to the use of detention at airports. On 26 September 2000, the Parliamentary Assembly of the Council of Europe adopted a recommendation [1475(2000)] on the arrival of asylum seekers at European airports, noting that:

- since the mid-1980s the member states of the Council have been increasingly confronted with growing numbers of asylum-seekers, many of whom arrive at airports; besides the problem of ensuring that all asylum-seekers are treated in accordance with international refugee law, this increase in numbers has created a specific problem with regard to airport reception facilities; officials need to be clear that their role is to uphold asylum and not to be the agents of deterrence;

- the handling of requests for asylum at this stage is an important part of the refugee status determination procedure as a whole; access to a country's procedure for the granting of refugee status is essential to the concept of international protection; yet asylum-seekers arriving at airports may be denied access to this procedure, resulting in the risk of refoulement and violation of their human rights.

The Assembly recommended that the Committee of Ministers urge the member states, inter alia:

- to review their national legislation and practices with reference to the reception of asylum-seekers;
- to define the maximum duration of stay at an airport, as well as at any reception or detention centre pending the outcome of the determination procedure;
- to improve the conditions of detention of asylum seekers, and in particular to make sure that they are not detained together with common criminals, and review; and where necessary to improve the material and humanitarian conditions of reception at airports.

Among the EU member States detention is still largely a national procedural matter, but it is not untouched by the harmonisation drive. The November 2001 Communication from the Commission to the Council and the European Parliament on a "Common Policy on Illegal Immigration" reiterates "the obligation to protect those genuinely in need of international protection", and refers to the need to observe the principle of non-refoulement according to the 1951 Convention and Article 3 of the European Human Rights Convention. It looks to the future and suggests that for the EU states as a whole, and by extension the future member states, "common standards on expulsion, detention and deportation... could be developed".

The intention is clear, even if the rather tentative wording "could be developed" reveals the level of harmonisation possible at the present historical moment in Europe. Asylum and immigration are issues where states still jealously guard many sovereign prerogatives and are cautious in ceding authority to the European level. In addition there are within the European area very major regional differences as regards the political and economic capacity of the authorities to offer adequate levels of social care to asylum seekers or improve the conditions of those detained.

In April 2002 the EU published a Green Paper on a Community Return Policy on Illegal Residents, which states again that the minimum standards for the issuance of detention orders could be set at EU level as well as minimum rules on the conditions of detention "to ensure a humane treatment in all detention facilities in the member states". It says that any returnees who retained in ordinary prisons "might be separated from convicts in order to avoid any criminalisation" Of course regional and international standards require such a separation.

Critics of European Union legislation, for example Amnesty International, have noted that often it fails to incorporate minimum guarantees for detained asylum seekers who should have the right under Guideline 5 (UNHCR):

- to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and terms they understand
- to be informed of the right to legal counsel. Where possible they should receive free legal assistance
- to have the decision subjected to automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic review of the necessity for the continuance of detention, which the asylum seeker or his representative would have a right to attend
- to challenge the necessity of the deprivation of liberty at the review hearing either personally or through a representative, and the opportunity to rebut any findings made
- to contact and be contacted by the local UNHCR office, refugee assisting body or advocate. The right to communicate with these representatives in private should be assured.

UNHCR has been a consistent critic of European deterrence measures. It has also drawn attention to the risk that detention may be more widely used as a result of the new security concerns of states after September 11:

> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as human rights law do not preclude restrictions on the movement of asylum-seekers, including detention as the exception, not the rule, if necessary in circumstances prescribed by law and subject to due process safeguards. Detention would justifiably be deemed necessary, where there are solid reasons for suspecting links with terrorism in the individual case. Proposals to introduce automatic

> detention of all asylum-seekers entering illegally or coming from particular countries, as are being considered in a number of States in response to the resurgence of fears about terrorism, are not supported by UNHCR. They would, in UNHCR's view, contradict long established guidelines on detention agreed by States, and could be seen as an arbitrary, even discriminatory response which could then come into conflict with international legal norms.

In support of this position, the Parliamentary Assembly of the Council of Europe offers its caution:

> The Assembly expresses its conviction that introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism, and calls upon all member States to refrain from introducing such restrictive measures. Resolution 1258 (2001), 26 September 2001.

II SOME SELECTED NATIONAL LAW AND PRACTICE

From this brief description of the troubled political context of European refugee policy, let us turn to the fundamental norms and standards that should govern the use of detention for asylum seekers.

It is beyond the scope of this paper to document all the varying detention practices in the 15 member states of the EU, nor indeed of the 40 plus member states of the Council of Europe. Some efforts to monitor detention practices have been made by the US Lawyers' Committee for Human Rights and the Danish Refugee Council, from which illustrations are cited below. This paper will recall the international standards that govern the use of detention, and refer to the alternatives that have been proposed. The legal challenge to bad practice is always important to ensure respect for established human rights principles, though the negative political trends are dominating the policy arguments, and those will need to be challenged from a wider sector of society than legal practitioners. The current security and control emphasis in Europe puts particular pressure on the agents of immigration control at borders. Interesting research in the UK is throwing light on the process of decision making of border guards regarding detention and this paper will highlight the findings of this research which deserves to be done on a wider international level.

The Danish Refugee Council is currently researching the practice of detention in a number of European countries. At time of writing (October 2002) the results are not yet published and more detailed work would be valuable to get a greater insight into how far detention is being used. Some illustrations:

Austria: Asylum seekers are not subject to mandatory detention, although they may be detained in the border control area until the Federal Asylum office has decided on admissibility for up to 5 days. Asylum seekers who enter illegally and have no residence rights may be detained. They may also be detained to ensure their deportation. If they are denied asylum this detention may last for 2 months, with the possibility of a single 4 month extension. There is no independent review of a detention decision.

Belgium: Belgian Aliens Law allows detention of asylum seekers in border procedures during the processing of their claims under the admissibility procedure. In-country applicants who entered the country illegally may also be detained during this period for up to 2 months. The decision to detain is influenced by an assessment whether a case on appeal is likely to be rejected or the asylum seeker comes from a country from where few asylum claims are granted. There is no substantive review of the detention decision. There is a maximum of 5 months permissible detention in deportation cases. Unaccompanied minors who apply for asylum at the borders are usually detained.

Bulgaria: The asylum seekers law does not provide for detention though it is believed that border officials routinely detain asylum seekers with other undocumented immigrants, for an unregulated length of time. Rejected asylum seekers who remain in the country are subject to detention. There is no review of the detention decision, and no limit on the length of detention.

Czech Republic: There is generally no detention, save in two situations:

- where identity cannot be proved;
- if the Aliens Authorities expect that rejected asylum seekers may try to avoid expulsion.

Detention is limited to 30 days.

Denmark: Detention is very common in Denmark. Ninety per cent of aliens in detention are asylum seekers, and it is estimated that 50% of all asylum seekers in Denmark will be detained at some time. The grounds for detention are stated as the following:

- the need to assess whether the applicant will be returned to a "safe third country" whether outside the EU or to an EU member state in application of the Dublin Convention;

- in manifestly unfounded applications to allow the authorities to reach a decision on the claim;
- where asylum seekers refuse to stay in the accommodation centre where they have been allocated, or have a violent and threatening attitude towards the staff of the accommodation center;
- when the claim has been rejected, and alternative measures to detention are considered insufficient to ensure deportation.

There are no maximum limits to the length of detention, although prolonged detention must be reviewed monthly by the court.

Finland: Detention in police custody is permitted for up to 4 days for the purposes of establishing the identity of, and the route taken by, the asylum seeker. Detention is also permitted if there is reasonable cause to believe the asylum seeker will commit a crime or abscond. There are no time limits to this detention, but there are independent reviews of the detention decision and every 14 days the detention itself must be reviewed.

France: "Retention" is allowed for two reasons:

- The arrival at an external border when s/he may be kept in a waiting area for as long as necessary up to a maximum of 20 days to determine whether the claim for asylum is manifestly unfounded;
- For in-country applications under accelerated procedures. These are used in four situations: When another state is responsible for examining the asylum claim under the Dublin Convention; when a person comes from a country where the French authorities apply the cessation clause of the Refugee Convention; when the presence of the person poses a serious threat to public order; and when the applicant has "wrongfully resorted" to asylum proceedings.

An independent review of detention exists and the maximum permitted detention is 20 days.

Germany: Detention is mostly used in Germany after a negative decision on an asylum claim, and when the individual has no other right to remain in Germany and is asked to leave but does not. The German Aliens Act allows two types of detention: "preparatory" and "preventive". Preparatory detention is used after the negative decision but before the deportation order if it is deemed impossible to effect an expulsion order without detention. Such detention can last up to 6 weeks.

Preventive detention happens after the expulsion order if there is a suspicion that the asylum seekers will abscond or evade the expulsion. Such detention may last up to a week. Competent authorities can extend this detention for up to six months, or more under exceptional circumstances. Rejected asylum seekers who are detained have a right to review of detention every three months.

Greece: Asylum seekers applying at borders are held pending the outcome of an accelerated procedure from 1-15 days. Authorities may also detain rejected asylum seekers awaiting deportation. Those who have been arrested for illegal entry before applying for asylum may be detained with no specified maximum length of detention. Detainees who cannot be removed to their home countries remain in detention indefinitely. Detention decisions are subject to independent review.

Hungary: All asylum seekers, on permitted entry, are directed to either an open immigration reception centre or a closed, military camp style detention centre run by the National Border Guard. "Safe Third Country" claimants may be detained in an airport transit zone. Rejected asylum seekers may be detained if they are not removed. Detention decisions are independently reviewed and aliens may not be detained more than 18 months.

Ireland: An asylum seeker may be detained if s/he;

- Is reasonably suspected to be a threat to public order or national security
- Has committed a serious non political crime abroad
- Has not made reasonable efforts to establish identity
- Wants to leave and enter another state illegally
- Has destroyed travel documents without reasonable cause
- Is attempting to avoid a transfer under the Dublin Convention.

There is no maximum limit on detention, but cases are reviewed every 10 days.

Italy: Asylum seekers apprehended at border entry points are held for hours or days at temporary holding centres. Those arriving by air are detained in the transit zone of the airport until Border Police decide on admissibility. There is a judicial review of the decision to detain within 48 hours of detention. The length of detention should not exceed 20 days for those whose identity cannot be

established, or 30 days for rejected asylum seekers awaiting deportation. UNHCR is entitled to intervene with the authorities on detention cases.

Luxembourg: Detention is uncommon but may take place:

- if identification papers are false or nonexistent
- if asylum seekers enter illegally at the airport
- if they apply for asylum after their attempt at illegal entry is refused by border control.

There is an independent review of the detention decision if initiated by the asylum seeker. There is a maximum of 3 months, and detention is reviewed on a monthly basis.

Netherlands: Individuals arriving by air who are determined to have inadmissible or "manifestly unfounded" claims are always detained by the Immigration authorities. Other applicants have their admissibility determined in 48 hours and must stay during that time at an "Application Centre". Rejected asylum seekers awaiting deportation are detained if there is a risk they will not leave the country. Detention is automatically reviewed independently within 10 days. Depending on the availability of travel documents and appeals lodged, an asylum seeker may be detained for as long as 11 months.

Norway: Asylum seekers may be detained at the border by police if, on arrival, they are not able to produce identity documents or if that documentation appears fraudulent. All asylum seekers must stay at open reception centres for the initial phase of the procedure. Asylum seekers are rarely detained to ensure they comply with deportation orders. There is a limit of 12 weeks in detention, and detention is independently reviewed by a court each three weeks.

Poland: Border applicants for asylum must remain at the border while police establish identification. Rejected Asylum seekers are also detained to ensure removal. Decisions to detain may be appealed to a provincial court within seven days. Detention at the border is limited to seven days; and pre-deportation detention is limited to ninety days.

Portugal: Asylum seekers may be detained at ports of entry by the Aliens Service. At Lisbon airport they may be detained in a transit zone from 48 hours to 5 days for an admissibility decision. If detention is due to a failure to leave the country, a judicial review is possible within 48 hours. If a decision on

admissibility is not made in 5 days, the asylum seeker is released. Detention of rejected asylum seekers awaiting deportation is limited to 60 days.

Romania: Aliens attempting illegal entry are detained as this is a criminal offence. Asylum seekers from safe third countries arriving without necessary documentation are detained (though there is no official list of safe third countries). Asylum seekers whose first instance appeal of a negative decision is rejected are "directed" to de facto detention facilities. There is a theoretical review of the detention decision. Asylum seekers may not be detained at the airport for more than 20 days, and there is no judicial review of detention.

Spain: Asylum seekers arriving by air must remain at an airport facility or hostel pending an admissibility decision for a maximum of seven days. Aliens detained for illegal stay in Spain who apply for asylum while in detention are detained during the processing of their application which must be done in 60 days. Rejected asylum seekers awaiting deportation may be detained. There is an independent review of detention for rejected asylum seekers awaiting deportation. They may be detained for a maximum of 43 days. There is no periodic review of detention.

Sweden: Asylum seekers may be detained if their identity and nationality are in doubt, or if the asylum seeker is likely to be refused entry or to be expelled, to abscond or to commit a criminal offence. There is an independent review of detention. Detention to determine an asylum seeker's right to stay in Sweden is limited to 48 hours and detention to ensure removal or establish identity is generally limited to 2 weeks. Pre-deportation is limited to 2 months with the possibility of an unlimited number of extensions. Such detention could exceed a year, particularly for those who cannot be removed due to the situation in country of origin. There is a periodic independent review of detention.

Switzerland: Asylum seekers arriving at the airport may be detained for up to 15 days while awaiting a decision on admissibility (plus five days for an appeal). Grounds for detention at the border include:

- Failure to establish identity or nationality
- Presenting a false identity
- Prosecution for being a threat to public order
- Coming from a "safe third country"
- Having a prior order of removal from Switzerland

- Returning to the country of origin while an asylum claim is pending
- Pre-deportation of rejected asylum seekers.

There is an automatic judicial review of detention after 96 hours. Detention to prevent absconding allows for a maximum of 3 months. Rejected asylum seekers deemed likely to evade removal may be detained for a maximum of nine months. There is a periodic and independent review of detention every two months for those awaiting expulsion.

United Kingdom: Statutory provisions for immigration detention are found in the Immigration Act of 1971 and the Immigration (Places of Detention Directive) Act 1986. The power to detain rather than grant temporary admission lies with Immigration Officers. There is no mandatory or automatic detention. Asylum seekers whose claim is deemed "manifestly unfounded" by a Home Office caseworker and confirmed by the Secretary of State can be detained by immigration officers. Factors in determining whether detention is appropriate include community ties and prior history of compliance with immigration laws and procedures. The reasons given are:

- where there is a reasonable belief that the individual will fail to keep to the terms of temporary admission or temporary release;
- initially to clarify a person's identity and the basis of their claim;
- where removal is imminent.

Most asylum seekers are detained pending removal. There is no presumption in favour of bail. There is no independent review of the detention decision. There is no limit on detention pending removal, though the courts may exercise discretion if removal is greatly prolonged. Decisions are reviewed monthly by immigration officers.

III SOURCES OF LAW REGARDING DETENTION

From this brief survey, it is evident that detention of one form or another is virtually universal in European states, with largely similar motivation and greater or lesser safeguards. What, then, are the sources of law and the norms behind the practice according to international human right standards?

Article 14 of the Universal declaration of Human Rights states that everyone has the right to seek and enjoy asylum from persecution. EXCOM conclusion 44, and the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers require that the detention of asylum seekers should

normally be avoided (Detention is described as "inherently undesirable"). Both sets of standards require the authorities to distinguish between asylum seekers and other detainees.

The sources on international law relating to the detention of asylum seekers and to the deprivation of liberty include Articles 25, 31,33, and 35 of the 1951 Refugee Convention; Article 9 of the International Covenant on Civil and Political rights, Article 5 of the European Convention on Human Rights, and article 37 of the Convention on the Rights of the Child. The instruments are binding on all States Parties, including therefore the member states of the European Union.

Article 3 of the Universal Declaration states that "no one shall be subject to arbitrary arrest, detention or exile". There are other non-treaty soft law standards adopted by consensus by UN member states which reflect customary international law. Such standards are the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment; the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Specifically European standards on the detention of asylum seekers derive from:

Article 5 of the European Convention on Human Rights which states that:

> Everybody has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
>
> ...The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition;... Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The law and the practice of the member states of the European Union must comply with the standards contained in the European Convention on Human Rights.

ICCPR Provisions: Article 9:

> Article 9.1. Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
>
> Article 9.4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful;
>
> Article 9.5 Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Human Rights Committee has taken the view in its General Comment on Article 9 that it also applies to immigration control. The committee's definition of arbitrariness not only includes merely being against the law, but it also includes elements of inappropriateness, injustice and lack of predictability. The UN Working Group on arbitrary detention has stated:

> Article 14 of the UDHR guarantees the right to seek and enjoy asylum in other countries from persecution. If detention in the asylum country results from exercising this right, such detention might be 'arbitrary'.

IV UNHCR'S APPROACH TO THE ISSUE OF DETENTION

The position that UNHCR has elaborated in its Guidelines for states draws on the UN Body of Principles, the UN Standard Minimum Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

The main UNHCR Guidelines are as follows:

- The detention of asylum seekers is inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs.
- Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many cases, contrary to the norms and principles of international law
- Article 1 of the 1951 Refugee Convention, which is often applied inappropriately by member states, exempts refugees coming directly

from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those that are necessary, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country. The detention of asylum seekers who come "directly" in an irregular manner should, therefore, not be automatic, nor should it be unduly prolonged. This provision applies not only to recognised refugees but also to asylum seekers pending a decision on their status.

The concept of "coming directly" in should include a situation where an asylum seeker transits an intermediate country briefly without applying for or receiving asylum there. Given the particular needs of asylum seekers, it is not practical to apply a strict time limit to this notion. Detention of asylum seekers is only lawful, and not "arbitrary" if it is exercised in a non-discriminatory way, and it has to be subject to judicial/review or administrative review so as to ensure that it continues to be necessary in the circumstances. Release has to be effected if the authorities cannot continue to prove grounds to detain.

UNHCR also reminds states that for many asylum seekers the only option they have is to arrive at or enter a potential host state illegally, since it is not possible to obtain the lawful documentation from the persecuting state, and there is no recognised "refugee visa".

So, in summary, there should be a presumption against detention. Other options should be tried first unless they can be proven to be inadequate to the need, in other words only when the other alternatives have been considered.

V WHAT ARE THE ALTERNATIVES TO DETENTION?

UNHCR's position is widely shared by leading human rights and refugee protection organizations in Europe: asylum seekers should only be detained as a last resort where non-custodial alternatives can be proven on individual grounds not to achieve the stated lawful and legitimate purpose. The kinds of alternatives to detention which are advocated are:

- supervision systems
- a regime of reporting requirements

- bail or guarantee systems (with due regard to the very limited financial capacity of most asylum seekers. Such systems would only be reasonable if the amounts were regulated to not exceed a relatively low level and if there were organizations or community groups willing and able to help offer these securities on behalf of asylum seekers)
- the promotion of voluntary return through intensive and personalised counselling work prior to and during detention for all rejected asylum seekers.

VI CONDITIONS OF DETENTION

So far as the conditions in detention are concerned, articles 7 and 10 of the ICCPR addresses the prohibition of torture or cruel, inhuman and degrading treatment or punishment, a prohibition replicated in article 3 of the European Human Rights Convention.

UNHCR concedes that detention of asylum seekers is permitted under international standards on a limited basis, but stresses that the onus is on the detaining authorities to demonstrate why other measures are not sufficient for the purposes detention is supposed to fulfill. It is allowed if it is necessary, lawful and not arbitrary. The reasons are these:

- To verify identity;
- To determine the elements on which the claim to refugee status is based;
- To deal with cases where refugees or asylum seekers have destroyed their travel documents in order to mislead the authorities of the state in which they intend to claim asylum; to protect national sovereignty and public order.

In addition to these criteria, any asylum seeker who is detained legitimately should not be held in detention for longer than is necessary. Legal counselors for asylum seekers point out that "to verify identify" or "to determine the elements on which the claim to/refugee status or asylum is based" are only acceptable until the preliminary interview has taken place. In most cases this should not take more than a few days.

Consistent with its alarm at the developments in European states, UNHCR's further advice is noteworthy, namely that detention should never be used as a deterrence measure against future asylum seekers; nor should it be used in such a way as to persuade asylum seekers to withdraw a claim they have lodged. These actions would be contrary to the norms of refugee law.

Within the very limited area of permission to detain, UNHCR insists (guideline 20):

- All asylum seekers should undergo an initial screening at the outset of detention to identify trauma or torture victims for treatment
- Men should be segregated from women, and children from adults, except where they are part of a family group
- Separate detention facilities should be used to accommodate asylum seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups
- Asylum seekers should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to ensure such visits. Where possible such visits should take place in private unless there are compelling reasons to the contrary
- Asylum seekers should have the opportunity to receive appropriate medical treatment and psychological counseling where appropriate
- Asylum seekers should have the opportunity to continue further education or vocational training
- Asylum seekers should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities
- Asylum seekers should have the opportunity to exercise their religion in practice worship and observance and receive a diet in keeping with their religion
- Asylum seekers should have access to basic necessities such as beds, shower facilities, basic toiletries etc
- Asylum seekers should have access to a complaints mechanism (grievance procedure) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeals procedures, should be displayed and made available to detainees in different languages.

In addition to the right not to be unlawfully and arbitrarily detained, under international standards asylum seekers and refugees have the following rights if they are in detention:

- Right of access to legal counsel
- Right to notify their family of the fact and place of detention
- Right to be visited by and correspond with members of their family
- Right to communicate with the outside world
- Right to medical care
- Right to humane conditions of detention, which take into account their special status as asylum seekers: they should not be held in places where their physical safety is endangered and they should not be held with common criminals
- Refugee children should not be detained
- Families should not be separated.

VII TWO ILLUSTRATIONS, THE UK AND GREECE

A The Problem of Detention in the UK

December 2001 UN Human Rights Committee issued its observations on the report from the UK. The committee expressed concern that "asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant (ICCPR), including reasons of administrative convenience." The committee further noted that some rejected asylum seekers are held in detention "for an extended period when deportation might be impossible for legal or other considerations". This prolonged detention raises the anxiety of arbitrariness. The Working Group recommended that the UK "should ensure that detention of asylum seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice".

The explanations for this apparent carelessness may be found in the research done into the culture at the borders of the UK. In the present political climate in many European countries, it is important to look beyond the mere legal issues to attitudes held by detaining authorities toward asylum seekers. Very few empirical studies have been undertaken into the motivations of the examining immigration staff. One of the few was undertaken by the University of Essex Human Rights Department. In *Deciding to Detain: How Decisions to Detain Asylum Seekers are*

Made at Ports of Entry, researchers conducted many interviews with the cooperation of the UK Immigration service into how Immigration Officers at ports of entry make decisions to detain asylum seekers. The report gives an intriguing insight into the culture of border control. The studies were to examine the influence of the organisational context on decisions to detain. Its key proposition is that the specific physical and organisational context as well as the characteristics of individual decision makers play a crucial role in shaping how discretion is exercised.

The research deals with organisational influences on detention decisions including: occupational norms associated with the immigration officer role at ports, organisational incentives that reflect the activities that are penalised and those that rewarded; the effects of work load and administrative overload, and the implications of rapid organizational change. Through many interviews it reveals prevailing perceptions at ports about asylum seekers reasons for coming to the UK and immigration officers' assessments of the validity of claims for asylum. It considers the potential for stereotypes to develop due to the repetitive and nationality based nature of the work and how this reflects on the likely impact of policies which target identified groups. It also considers the relevance of personal characteristics and experience of individual immigration officers, including their reasons for being attracted to the Immigration Service, their preference for various aspects of the work and their assessment of the skills needed to be an immigration officer. It includes an explanatory framework for understanding variations between immigration officers in attitudes and decision-making styles, which draws on social psychology theory.

The policy implications of this report, based on many interviews with immigration officers in various entry points to the UK are fascinating, and the analysis merits replication in other European countries to understand the deeper personal reasons for the use of detention. Among the finding are:

- Policies aimed merely at deterring asylum applications which do not address root causes or consider reasons for inappropriate uses of asylum that can create escalating cycles of official reaction and individual resistance
- The restrictive approach is counterproductive from all perspectives, since any notional gain in terms of reduced numbers is offset by the increasingly desperate and devious actions of individual asylum seekers and organized "traffickers", which have made the job of immigration officers at ports more time consuming and difficult

- An "ideology of abuse" has developed and incorporates whatever is identified as an "immigration problem" Use of this broad terminology creates an ethos of extreme discretion among immigration officers. The labeling of asylum seekers or their actions as abusive is antithetical to the establishment of clear principles for the use of detention and also diverts attention away from a more critical analysis of the reasons for the perceived or actual misuse of asylum procedures

- The "honey pot" thesis has been hugely influential in asylum policy. It is sustained at ports by inference where other motives are not apparent to immigration officers

- In the face of an increased workload and overstretched resources, "passenger profiling" has been introduced to target controls towards categories of asylum seekers who are considered to be involved in "systematic abuse"

- An intelligence-based approach may be appropriate where there is concrete evidence about particular individuals which raises criminal or security concerns. But the wholesale application of intelligence at a group level in order to improve administrative efficiency is directly at odds with non-discrimination principles. The evidence suggests that to great an emphasis on intelligence patterns has resulted in prolonged detention and the misinterpretation of the facts of individual cases

- The nature of immigration work creates strong pressures to categorise passengers by nationality. This promotes direct discrimination whereby individuals may experience a greater risk of detention because of the negative characteristics associated with their national group. A particular effort is therefore needed to mitigate the formation of national stereotypes sand operationalisation of prejudice within the immigration service

- Detention has come to be used systematically for general deterrence and to expedite processing, and in an ad hoc fashion to encourage the withdrawal of applications. This may be in response to feelings of being administratively overwhelmed

- An absolute conception of "last resort" (based for example on principles of proportionality) requires that all alternatives to detention have been exhausted in any particular case. Immigration officers in the UK have available a limited range of non-custodial options compared with some

other countries, and several alternatives used regularly in enforcement contexts (bail, regular reporting) are either not available in law, or not considered at the time of arrival

- There is clear evidence of individual decisions and certain systematic practices which could be described as arbitrary. Detention might be arbitrary in its "everyday" sense (ie subject to personal whims, prejudices or caprice) where it is a punitive reaction to perceived "abuse"; in the 'legal' sense where it is motivated by broad policy objectives rather than by individual circumstances such as "special exercises" aimed at general deterrence or routine detention for administrative convenience, or where it is "experienced" as arbitrary by detainees who are often unaware of the reasons for their detention
- Pressures to detain and question asylum seekers of a particular ethnic appearance, from certain points of origin, or who lack adequate proof of identity are likely to increase in the context of the heightened security awareness following the September 11 attacks.

The authors of this research conclude that their research raises fundamental questions about the purposes for which immigration detention should be used, the specific circumstances which justify detention for these purposes and the proportionality of detaining on arrival to prevent absconding. They argue that resolution of these questions could be advanced by an exchange of views between legal practitioners, researchers, front line decision makers and policy makers.

B Greece

Greece is often cited as having a particularly harsh detention regime in terms of law, the training and behaviour of detaining officials, and the socio-economic rights afforded to those in asylum-related detention. A very critical detailed insight into the culture of detention in Greece is provided by a submission from the International Helsinki Federation to the Council of Europe Committee on Legal Affairs and Human Rights of 19 March 2002, quoted here verbatim.

Greece: Conditions of Detention in 2001

(Prepared for Submission by the International Helsinki Federation to a Hearing on Conditions of Detention at the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights, 19 March 2002)

In 2001 the European Court of Human Rights convicted Greece for violation of the Convention's Article 3 for inhuman detention conditions in police stations

(*Dougoz v Greece*, 6 March 2001) and in prisons (*Peers v Greece*, 19 April 2001) while on 8 May 2001 the UN Committee against Torture (CAT) stated that detention facilities in Greece are characterized by excessive or unjustified police violence especially against minorities and foreigners, harsh detention conditions, as well as inhuman long-term detention of undocumented migrants and/or asylum-seekers awaiting deportation.

Overcrowding is the main problem in those facilities, something acknowledged even by the Planning Directorate of the Ministry of the Environment, Planning and Public Works, which stated in July 2001 that around 8,295 inmates were crowded into the 5,267 officially available places. Greece's largest prison, the Korydallos Prison Complex, is a case in point. In February 2001, there were 2,193 inmates for the 640 available positions, showing that the situation had worsened since the 1999 CPT visit. This problem is compounded by "traditional" problems like lack of physical exercise, ventilation, appropriate health care and vocational activities for the prisoners, in addition to the widespread availability of drugs.

Besides, the year saw a substantial increase in the number of asylum-seekers and undocumented migrants arriving into Greece. This resulted in the harsher attitude of the Greek authorities who oftentimes acted in violation of the Geneva Convention of 1951 and the new Recommendation of the Council of Europe, as even UNHCR-Greece publicly stated. This was so, despite the fact that more than 75 percent of the approximately 7,000 aliens who were detained by the Hellenic Coast Guard since the beginning of 2001 came from countries that are internationally known as human rights violators like Afghanistan, Iraq, Iran, Turkey, Sierra Leone, a fact that makes these people legitimate applicants for asylum. Even after the introduction of Law 2910/2001, the Greek state falls short of fulfilling its responsibilities due to constant misinterpretation and misapplication of the laws.

In general, asylum-seekers were detained for long periods of time in conditions, which constitute ill treatment, including lack of proper food, insufficient supply of water and unhygienic and unhealthy living conditions with no proper ventilation and physical exercise. In some cases they were assaulted physically, during their arrest or detention, and were almost never allowed to see doctors to treat and certify their wounds. On expressing their wish to contact the consulate of their country and/or a lawyer, detainees alleged not having been given the appropriate phone numbers. The few who had been given a chance to get a lawyer were not able to have confidential meetings with him/her, because

none of the police establishments visited by CPT offered facilities for that purpose.

In addition to that, almost uniformly, detainees were not informed of their rights in a language they understand, both during their arrest and - when applicable - during their subsequent trial and many were forced to sign documents in Greek, naturally unaware of their content: in some cases, such documents have later been used to incriminate the persons or prepare their deportation orders. In most cases, not even when taken to the detention facilities, were people shown the Hellenic Police Informational Bulletin, which contains – In two different versions and in 14 languages - a list of detainees' and deportees' rights.

The Hellenikon Holding Center's six small cells inside a locked detention block usually hold 30-34 persons. At times the tiny cells have held as many as 11 detainees despite the severe lack of space. The Chios Detention Center comprises two dormitories with a smaller cell in the middle. Here too, space is insufficient both for the detainees and for the police. The Kos Detention Facilities of the Port Authority comprise a 15 sq. m. room with a bathroom that is inadequate for the numerous migrants detained there who also lack proper food and medical facilities. The part of the Kos facilities, operated by the police authorities, is an abandoned entertainment club with 150-200 migrants lying on mattresses on the floor. In May the GADA (General Police Directorate of Attica) Holding Center had 207 people, even though it was meant for only 80 people. According to the Ombudsman, the unhygienic conditions, and the fact that aliens were detained for more than six months at the Center showed that the authorities violated the Constitution, Art 3 of the ECHR, Law 2778/1999 (Correctional Code), and 2910/2001 (on the entry and stay of aliens).

In June the detention center on Asklipiou Street in Piraeus had 18 detainees, 11 of whom had been in detention, awaiting deportation, between 3-11 months in contravention to Art 44.3 of the new Law 2910/01. The conditions under which visitors may communicate with detainees at the center were unacceptable: the detainee standing behind bars of a corridor and surrounded by other detainees, while the visitor is on the other side, with the police officers a few steps away. Following the persistent efforts of GHM and the Greek Ombudsman, in late July the General Secretariat of the Attica Region decided to examine the files of the Piraeus detainees and another 59 detainees elsewhere and order their release.

Apart from the material problems at the places of detention, police brutality against detainees remained very widespread especially when dealing with Roma and migrants. On 14 June police in Athens detained Andreas Kalamiotis for

making too much noise with his friends. While in detention, Mr Kalamiotes was allegedly beaten with truncheons and repeatedly insulted with racial slurs. On 4 August Nikos Theodoropoulos (19), Nikos Theodoropoulos (18), Nikos Tsitsikos (23), Vasileios Theodoropoulos (17), and Theodore Stefanou (16) were all detained in connection with the robbery of an Argostoli, Cephalonia kiosk. All young Roma men alleged that they were beaten and repeatedly kicked by the policemen. On 1 November in Zaharo, Ilia (in Peloponnese) Yiorgos Panayotopoulos (16) was arrested with his cousins for carrying unregistered arms. While in detention, a policeman reportedly beat Mr Panayotopoulos, placed a loaded gun against his head and threatened to sexually assault him.

In late May 164 asylum seekers (including 20 women and 25 children) and others were towed by the Greek Coast Guard in Crete who allegedly assaulted most of the male migrants and inflicted injuries on at least 16 of them. Around the same time Piraeus Coast Guardsmen ran after, shot at, and then seriously beat five or six Kurdish detainees who had managed to escape into a schoolyard. Even 'though all migrants have their share of police abuse, Albanians take the lion's share. In February the 16-year-old Refat Tafili was arrested in Athens. The severe beating he allegedly received resulted in a double rupture of the spleen and an emergency operation. In March Arian Hodi, 24, was allegedly beaten with a truncheon at the Mytilene police station.

All these cases, however, pale by comparison to the 24 October murder of the unarmed Rom Marinos Christopoulos, 21, during a road check in Zefyri and the 21 November murder of the 20-year-old Albanian Gentjan Celniku during an identity check in central Athens.

VIII CONCLUDING REMARKS

This paper seeks to throw light on issues relating to detention in Europe. Detention may affect a small fraction of those who seek asylum, but since it requires the denial of individual liberty it needs to be handled in conformity with established legal principles and human rights standards as spelled out in international law and advisory guidelines.

In so far as detention forms part of a European deterrent approach to asylum seekers its use is very problematic. Deterrent measures may seem to reduce the flows, but all too often they divert movements elsewhere, leading a situation of buck passing, not burden sharing. As the asylum door closes tighter, the asylum seekers are thrown on the mercies of smugglers and traffickers in human beings whose business is now worth some 12 billion dollars a year.

People can be expected to continue to migrate in large numbers and for many reasons, some related to protection need. States are spending billions of dollars on border controls, asylum procedures and detentions facilities, and yet the budgets for development of the promotion of human rights and the resolution of conflicts in countries of origin are not increasingly, or they are even reducing.

Policies developed in Western Europe have an "export value". There is a positive export value regionally and globally if the northern receiving states maintain a progressive asylum policy and respect human dignity and established human rights norms. Put another way, it is not surprising that poorer and less secure states in the south and east of Europe and in the developing world cite western European restrictive practices as a justification for their own hard line policies. The irony of course is that 95 percent of the world's refugees stay in or move between countries of the south and do not enter Europe at all.

A further consequence of the "war on terrorism" is becoming clearer by the day in terms of political realignments, and hence changing perceptions of the persecutors and the persecuted. For example the west is easing the pressure on human rights in China which now declares itself to have a terrorism problem as justification for the oppression of dissent. In Europe, Germany has announced a "differentiated evaluation" of the situation in Chechnya from the one it had held prior to September 2001. Australia routinely incarcerates Afghani asylum seekers. North African states with grave human rights records are now accepted as allies against terrorism; the President of Zimbabwe uses rhetoric to describe long time political opponents as terrorists. The impact of this on the culture of the border authorities in receiving states can only be guessed at. The result of this 'war on terrorism' is a political climate which resembles the atmosphere of the Cold War.

Greater analysis is needed of the detention practices of states, the potential for alternatives, and evidence of good staff training and practice. Such evidence could be used for consultations between lawyers, policy makers and border officials and could contribute to ensuring that the practice of detention when necessary is carried out with respect to human dignity, and when not necessary is discontinued or substituted by alternatives that meet the needs both of states and of the asylum seekers themselves.

APPENDIX I

*EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)**

SUMMARY OF KEY RECOMMENDATIONS ON THE DETENTION OF ASYLUM SEEKERS

1. The European Council on Refugees and Exiles (ECRE) supports the well established position of the UN High Commissioner for Refugees and other human rights organisations that, as a general rule, asylum seekers should not be detained. Detention may only be used in exceptional cases, and should carry full procedural safeguards.

2. The grounds for detention prescribed by national law should, inter alia, reflect the fact that illegal entry to the territory of a European State is in itself unacceptable as grounds for the detention of an asylum seeker.

3. Alternative, non-custodial measures such as reporting requirements should always be considered before resorting to detention.

4. The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.

5. An absolute maximum duration for any such detention should be specified in national law.

6. Any review body should be independent from the detaining authorities.

7. Unaccompanied minors should never be detained.

8. Detainees should be given a clear understanding of the grounds for their detention and their rights while in detention.

9. Detainees should have unrestricted access to independent, qualified and free legal advice.

10. Specialised NGOs, UNHCR and legal representatives should have access to all places of detention, including transit zones at international ports and airports.

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* ECRE is a non-governmental organization comprising some 70 organisations working on the protection of refugees and asylum seekers in Europe. Its Secretariats are in London and Brussels.

11. Conditions in detention should reflect the non-criminal status of the detainees and be consistent with all international standards.

12. All staff should receive training related to the special situation and needs of asylum seekers in detention.

13. National authorities should provide detailed information on relevant policy, practice, and statistics in order to ensure transparency.

14. Any forthcoming efforts to harmonise the practice of European states in the area of detention of asylum seekers should reflect the standards which ECRE here advocates.

London 1996

APPENDIX 2

COUNCIL OF EUROPE

PARLIAMENTARY ASSEMBLY RECOMMENDATION 1475 (2000)[2]

ARRIVAL OF ASYLUM SEEKERS AT EUROPEAN AIRPORTS

(Extract from the Office database of the Council of Europe - September 2000)

1. Since the mid-1980s the member states of the Council of Europe have been increasingly confronted with growing numbers of asylum seekers, many of whom arrive at airports. Besides the problem of ensuring that all asylum seekers are treated in accordance with international refugee law, this increase in numbers has created a specific problem with regard to airport reception facilities. Officials need to be clear that their role is to uphold asylum and not to be the agents of deterrence. The challenge is particularly serious for the airports receiving the greatest numbers of applicants (such as Frankfurt, Paris or London), and those which have been confronted with this problem for a relatively short time (to be found mainly in central, eastern and southern European countries).

2. The handling of requests for asylum at this stage is an important part of the refugee status determination procedure as a whole. Access to a country's

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2 Assembly debate on 26 September 2000 (27th Sitting) (see Doc. 8761, report of the Committee on Migration, Refugees and Demography, Rapporteur: Mr Gross). Text adopted by the Assembly on 26 September 2000 (27th Sitting).

procedure for the granting of refugee status is essential to the concept of international protection. Yet asylum seekers arriving at airports may be denied access to this procedure, resulting in the risk of *refoulement* and violation of their human rights.

3. Moreover, incoherent and unjustifiably lengthy procedures, in particular combined with difficult conditions at the airport (for example, unsatisfactory reception centres) may cause undue hardship to asylum seekers.

4. The harmonisation of national asylum policies at European level is more than ever necessary. In this context, the Assembly recalls and reaffirms its past recommendations designed to improve the protection and treatment afforded to asylum seekers, in particular its Recommendation 1163 (1991) on the arrival of asylum seekers at European airports; Recommendation 1236 (1994) on the right of asylum; Recommendation 1309 (1996) on the training of officials receiving asylum seekers at border points; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe; Recommendation 1374 (1998) on the situation of refugee women in Europe; and Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union. The Assembly stresses the need for sustained co-ordination of asylum and immigration policies between the European Union and the Council of Europe.

5. The Assembly notes with satisfaction that in general reception conditions at the visited airports have considerably improved since it adopted Recommendation 1163 on the subject. It also welcomes the adoption of Recommendation No. R (94) 5 of the Committee of Ministers to member states on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports.

6. Nevertheless, the Assembly notes with concern that basic problems subsist at several airports receiving asylum seekers, including shortage of accommodation and inadequate material conditions and equipment. Further improvement may in some cases require a review of the nature and characteristics of the authority in charge of managing the airport.

7. The Assembly notes with particular concern that the material and humanitarian conditions in which asylum seekers are received at certain airports are well below acceptable standards. Even if in some cases these can be partly explained by poor economic conditions in the country itself, or by the large

number of applicants, the relevant national authorities should be urged to improve the situation as quickly as possible.

8. The Assembly welcomes the initiative of the Netherlands in setting up an *ad hoc* parliamentary committee to investigate the conditions in which asylum seekers are received at Schiphol airport. This example should be followed by all Council of Europe member states in the framework of a wider investigation into the treatment received by asylum seekers in general, throughout the whole refugee status determination procedure.

9. The Parliamentary Assembly recommends that the Committee of Ministers: step up the monitoring of member states' compliance with international refugee law with reference to the reception of asylum seekers, and with the relevant recommendations of the Committee of Ministers;

- instruct the appropriate committee to ensure that the situation at those airports where particular shortcomings have been noted are improved by the member states concerned
- further intensify Europe-wide co-operation in the field of asylum with a view to undertaking a general overview of the situation of asylum seekers in the light of international refugee instruments.

10. The Assembly also recommends that the Committee of Ministers urge the member states to:

- review their national legislation and practices with reference to the reception of asylum seekers, and in particular:
- to include guarantees to protect asylum seekers in the readmission agreements to which they are parties
- to ensure that the "safe third country" and "safe country of origin" principles are not applied in an arbitrary manner, and that clear criteria are used for designating certain countries as "safe" on the basis of those recommended by the *ad hoc* Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)
- to provide that in every case a rejected asylum seeker should have a right to appeal, and that such an appeal should have a suspensive effect
- to define the maximum duration of stay at an airport, as well as at any reception or detention centre pending the outcome of the determination procedure

- to improve the conditions of detention of asylum seekers, and in particular to make sure that they are not detained together with common criminals
- to re-examine the procedures used during forced deportations with a view to the elimination of inhuman or degrading treatment
- review, and, where necessary improve the material and humanitarian conditions of reception at the airports, and in particular:
- to provide separate accommodation for women and men, except for families, which preferably should stay together, even for a short stay
- to give particular attention to unaccompanied minors, and to ensure that they are interviewed by an appropriately qualified adult, and given absolute priority
- to give special attention to refugee women in accordance with Parliamentary Assembly Recommendation 1374
- to provide rooms which are properly heated and ventilated, and which have natural lighting for applicants staying at airports
- in the case of long stays, to provide applicants with access to fresh air outdoors for at least one hour each day
- to provide regular and nourishing meals
- to guarantee access to medical care during the stay at the airport
- to ensure the presence of interpreters not only during the formal procedure, but, in case of a prolonged stay, also outside the procedure
- to provide applicants with the immediate opportunity to contact family members and with the possibility, in case of prolonged stays, of telephoning them and receiving visits from them
- ensure that the above requirements are also met in reception or detention centres located outside the airport, to which applicants are transferred for the duration of the determination procedure
- strengthen relations with non-governmental organisations concerned with human rights, and promote the networking of their activities.

APPENDIX 3

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION No R (98) 15 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE TRAINING OF OFFICIALS WHO FIRST COME INTO CONTACT WITH ASYLUM SEEKERS, IN PARTICULAR AT BORDER POINTS

(Adopted by the Committee of Ministers on 15 December 1998, at the 652nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees as well as other provisions relevant to refugees and asylum seekers, adopted by the Council of Europe and other competent international fora;

Having regard to Resolution 1309 (1996) of the Parliamentary Assembly on the training of officials receiving asylum seekers at border points;

Bearing in mind that, in order to fulfil their important tasks in an effective manner and to prevent refoulement and the turning away of the asylum seeker at the border as well as to ensure unimpeded access to the asylum procedure by those seeking asylum, officials who first come into contact with asylum seekers, in particular those fulfilling their duties at border points, need appropriate and adequate, initial and in-service training on how to recognise requests for protection and handle specific situations in connection with asylum seekers;

Stressing that the responsibility for providing appropriate and adequate training and the selection of training methods for officials who first come into contact with asylum seekers lies primarily with member States and that international co-operation, both between states and between states and competent international organisations, is of high importance, with particular relevance to those member states which consider themselves in need of a special international assistance for such training;

Without prejudice to the guarantees enshrined in international and applicable regional provisions concerning training and instruction for officials who first come into contact with asylum seekers;

Noting that in member states, different practices and competences exist for the reception and processing of asylum requests;

Considering that in the respective practices of member States, there are different categories of officials who first come into contact with asylum seekers;

Recognising, therefore, the importance of member states' agreeing to common principles relating to certain asylum issues which can guide their respective practices,

Recommends to member states that officials who first come into contact with asylum seekers should receive training on how to recognise requests for protection and handle specific situations in connection with asylum seekers.

1. For those of such officials who are required to refer these asylum seekers to the competent asylum authority, their training should lead to the acquisition of:

- basic knowledge of the provisions of national legislation related to the protection of asylum seekers and refugees, including the relevant administrative issues and knowledge of internal instructions, wherever applicable, on how to deal with asylum seekers
- basic knowledge of the provisions of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees and general principles of refugee protection as provided by international law, in particular the prohibition of refoulement and the situation of refugees staying unlawfully in the country of refuge
- basic knowledge of the provisions relating to the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in the European Convention on Human Rights
- basic knowledge concerning limitations under national and international law to the use of detention
- skills to detect and understand asylum requests even in cases where asylum seekers are not in a position clearly to communicate their intention to seek asylum, as well as basic communication skills concerning how to address asylum seekers, including those with special needs
- the skill to make the correct choice and use of an interpreter when necessary.

2. For those officials whose responsibility is to receive and also to process asylum applications, and also whose responsibility might be to take a decision, bearing in mind that a decision on an asylum request shall be taken only by a central authority, their training should lead to the acquisition of:

- detailed and thorough knowledge of all the provisions and skills listed under 1
- interviewing techniques, including skills of interpersonal and intercultural communication
- knowledge concerning the human rights situation in the countries of origin of asylum seekers and in other relevant third countries
- skills in establishing the identity of asylum seekers
- knowledge of the application of the "safe third country" concept by some member states.

Training on the issues noted under paragraphs 1 and 2 above should be included in initial and in-service training programmes for the officials concerned. Those responsible within the national administration for such training for officials should be familiarised with available materials prepared, and participate in special programmes when they are made available, by competent international governmental or non-governmental agencies and by national agencies in the framework of bilateral or multilateral co-operation.

Finally, the Assembly recommends that the Committee of Ministers invite the Commission of the European Communities to give greater priority within its Odysseus Programme to training border officials from countries in Central and Eastern Europe through visits and exchanges, with a particular view to learning about the most humane airport reception procedures and conditions in the European countries with most experience in this field (for example, Denmark and the Netherlands).

APPENDIX 4

UNHCR: TEN REFUGEE PROTECTION CONCERNS IN THE AFTERMATH OF SEPT 11

The horrifying Sept. 11 terror attacks in the United States have changed the world profoundly affecting millions of people around the globe. The repercussions will be felt for years.

As the agency mandated to protect and assist millions of the world's most vulnerable people, the UN High Commissioner for Refugees, is particularly concerned about the impact of Sept. 11 on those most in need of international protection and assistance.

UNHCR is concerned, for example, about the increasing public perception of refugees and asylum seekers as "criminals" and over attempts to create unwarranted links between refugees and terrorism. Even before the tragic events of Sept. 11, asylum seekers faced increasingly difficult obstacles in a number of countries, including gaining access to asylum procedures or overcoming presumptions about the validity of their claims because of their ethnicity or mode of arrival.

UNHCR is also aware that several governments are now looking at additional security safeguards to prevent terrorists from gaining admission to their territory through asylum channels. This is understandable and UNHCR endorses all efforts – multilateral or national – aimed at rooting out and effectively combating terrorism. In fact, UNHCR will be looking at what might be termed the "better practices" of the many governments that are undertaking these reviews.

The question being posed – what additional, security-based procedural safeguards can be taken by governments – is an inherently reasonable one. But we need to ensure that it is answered correctly, and that any new safeguards strike a proper balance with the refugee protection principles that may be at stake. UNHCR stands ready to work with governments on these issues.

As more and more governments undertake such reviews, UNHCR's main concern is twofold:

Firstly, that bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures.

And secondly, that carefully built refugee protection standards may be eroded.

Any discussion of security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorism, and are not themselves the perpetrators of such acts.

It is also crucial that states understand that the 1951 Refugee Convention does not provide a safe haven to terrorists, nor does it protect them from criminal prosecution. On the contrary, the Convention is carefully framed to exclude persons who committed particularly serious crimes.

So as governments around the world look at various additional procedural safeguards in their efforts to combat terrorism in the wake of Sept. 11, UNHCR has formulated 10 specific concerns over possible actions that may directly affect asylum-seekers and refugees.

1. **Racism and Xenophobia:** UNHCR is seriously concerned over the all-too-common tendency to link asylum seekers and refugees to crime and terrorism. Making such unwarranted links incites racism and xenophobia and is provoking serious protection worries. Equating asylum with the provision of a safe haven for terrorists is not only legally wrong and unsupported by facts, but it vilifies refugees in the public mind and exposes persons of particular races or religions to discrimination and hate-based harassment.

2. **Admission and Access to Refugee Status Determination:** All persons have the right to seek asylum and to undergo individual refugee status determination. Rejection at the border can result in refoulement -- sending people back into danger. This is contrary to international refugee legal obligations. UNHCR's concern is that legislation may be enacted which effectively denies access to refugee status determination procedures – or even leads to rejection at the border – of certain groups or individuals because their religion, ethnicity, national origin or political affiliation are somehow assumed to link them to terrorism. The 1951 Refugee Convention already contains a so-called "exclusion clause" which excludes persons who have committed particularly serious crimes. In addition, it lifts the prohibition on refoulement for those who are a danger to national security. If properly applied, the 1951 Convention will exclude those responsible for terrorist acts, and may even assist in their identification and eventual prosecution. In short, the 1951 Convention does not extend protection to the non-deserving.

3. **Exclusion:** UNHCR is concerned that governments may automatically or improperly apply exclusion clauses or other criteria to individual asylum seekers based on the assumption that they may be terrorists because of their religion,

ethnicity, nationality or political affiliation. Genuine refugees are themselves the victims of terrorism and persecution, not its perpetrators. When appropriate, UNHCR encourages governments to rigorously use exclusion clauses contained in current international refugee instruments like the 1951 Convention. But the application of any exclusion clause must be individually assessed, based on available evidence and conform to basic standards of fairness and justice. The assessment has to be part of the overall status determination process.

4. **Treatment of Asylum Seekers:** UNHCR is concerned that governments might be inclined to resort to mandatory detention of asylum seekers, or to establish procedures that do not comply with the standards of due process. UNHCR's longstanding position is that detention of asylum seekers should be the exception, not the rule. Detention is only acceptable when circumstances surrounding the individual case justify it – including when there are solid reasons for suspecting links with terrorism. But detention should always comply with due process. Similarly, refugee status determination procedures put in place to deal with suspected terrorists must comply with minimum standards of due process, involve officials who are qualified and knowledgeable, and contain the possibility of review.

5. **Withdrawal of Refugee Status:** UNHCR is concerned that states may be inclined to withdraw the refugee status of individuals based on the assumption that they may be terrorists because of their religion, ethnicity, nationality or political affiliation. The rule is that the withdrawal of refugee status can only follow evidence of fraud or misrepresentation of facts that were central to the decision. A refugee's ethnicity or origin cannot in themselves be grounds for either denying or withdrawing status. The facts are what count.

6. **Deportation:** UNHCR is concerned that governments may be inclined to deport groups or individuals on the assumption that they may be terrorists because of their religion, ethnicity, nationality or political affiliation. While the 1951 Refugee Convention allows for the expulsion of individual refugees on grounds of national security or public order, it should only be done in pursuance of a decision reached under due process of law. This should include an opportunity for the refugee to counter the allegations.

7. **Extradition:** UNHCR is concerned that states may be inclined to expeditiously grant the extradition of groups or individuals on the assumption that they may be terrorists based on their religion, ethnicity, nationality or political affiliation. It is UNHCR's position that extradition should only be granted upon conclusion of the corresponding legal proceedings, and where it has been shown

that the extradition is not being requested as a means to return a person to a country for purposes which in fact amount to persecution, not prosecution.

8. **Resettlement:** Resettlement to third countries is one of three main durable solutions for refugees (the others are repatriation to the country of origin and integration in the country of first-asylum). UNHCR is concerned that states may now be inclined not to maintain their resettlement programs at promised levels, particularly for certain ethnic groups or nationalities. As far as UNHCR is concerned, resettlement remains imperative. This is especially true for some vulnerable refugees from places like Afghanistan, where women in particular may be at risk. Continued support for resettlement is vital. UNHCR is working to diversify the number of resettlement countries.

9. **UN Security Council Resolution 1373:** Security Council Resolution 1373 was adopted on September 28, 2001. Among other things, it calls on states to work together urgently to prevent and suppress terrorist acts and to complement that international cooperation by taking additional domestic measures. Resolution 1373, if properly interpreted and applied, is in line with principles of international refugee law. But care must be taken in its implementation to ensure that bona fide asylum seekers and refugees are not denied their basic rights under cover of the need to take anti-terrorism measures.

10. **Draft Comprehensive Convention Against Terrorism:** UNHCR would welcome the development and swift adoption of a comprehensive convention against terrorism. But it should not give legal force to unwarranted linkages between asylum seekers/refugees and terrorists. Nor should it be construed as implying that the 1951 Refugee Convention is inadequate for the exclusion of terrorists from refugee status, or that it somehow offers safe haven to terrorists.

THE UNHCR PERSPECTIVE ON DETENTION

*Michel Gabaudan**

I INTRODUCTION

I have been asked to speak to you today about the UNHCR's perspective on detention. The detention of asylum seekers is not a new issue, nor a new concern for the UNHCR. Large numbers of individuals falling within the mandate of the UNHCR continue to be subject to detention or other restrictive measures in various parts of the world and the UNHCR is concerned at the increasing institutionalisation of detention.

I would like to begin with an overview of the UNHCR's policy on detention, outlining the general principle underpinning our policy as well as the specific instances in which the detention of asylum seekers may be justified. I would then like to turn to some key areas of interest and, at times, controversy, and clarify the UNHCR's interpretation of these key concepts and issues. Finally, in light of the UNHCR's concerns with detention practices, it is important to highlight some alternatives to detention and examples of recommended practice.

II OVERVIEW OF UNHCR POLICY

A The General Principle

The UNHCR position is that the detention of asylum seekers and refugees is inherently undesirable and should normally be avoided. This position is based firmly in respect of each individual's fundamental right to liberty and to be free from arbitrary detention, as enshrined in a range of human rights instruments, such as the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights (ICCPR). These instruments of course apply equally to refugees and asylum seekers.

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* Regional Representative, UNHCR Regional Office, Canberra, Australia.

In addition, refugees and asylum seekers are in a different situation to other aliens by virtue of the fact that they may be forced by their circumstances to enter a country illegally in order to escape persecution. Hence article 31 of the 1951 Convention relating to the Status of Refugees prohibits refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Contracting States can also not apply restrictions of movement on refugees other than those that are necessary, and that restrictions shall only be applied until such time as their status is regularised or they obtain admission into another country.

UNHCR's Executive Committee, consisting of states, in a number of annual conclusions has expressed its serious and deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum and called upon States to intensify their efforts to protect refugees from these practices.

UNHCR is not alone in emphasising these principles of international law. The importance of freedom from arbitrary detention as a fundamental human right is underlined by the work of various other bodies in the international system. The agenda of the UN Commission on Human Rights' Working Group on Arbitrary Detention includes the situation of detained immigrants and asylum seekers. Since 1997, the Working Group has been visiting States to investigate this situation. Similarly, the Human Rights Committee has published General Comments and Individual Communications on various provisions of the ICCPR, several of which touch on the issue of the detention of aliens, including asylum seekers.

UNHCR has sought to bring together many of these international law principles and Executive Committee Conclusions in its Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, which were last updated in 1999. The Guidelines set out minimum standards for the treatment of detained asylum seekers and recommend a number of detention alternatives that could be considered. Most importantly, they reiterate that the detention of asylum seekers should ordinarily be avoided. The Guidelines emphasise that although States have a right to control persons entering their territory, for detention to be lawful, and not arbitrary, it must be not only in accordance with national law and subject to due process safeguards, but also consistent with Article 31 and international law.

Subsequent discussions at UNHCR's Global Consultations have reaffirmed the principles set out in the Guidelines. Participants acknowledged that they provide important guidance for States and that national law and practice should take full account of international obligations. Detention should never be applied unlawfully or arbitrarily, but only where it has been determined to be necessary in light of the circumstances of the case and on the basis of criteria established by law in line with international standards.

What, then, are those circumstances in which a resort to detention may be justified?

B Exceptions to the General Principle

In light of the strong general presumption against detention, it is evident that fairly exceptional circumstances are needed to justify detention. In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period. The Executive Committee in its Conclusion No 44 (1986) has outlined the limited and specific grounds on which detention measures can be considered. These grounds have also been reaffirmed in UNHCR's Guidelines on Detentions and in its Global Consultations discussions. They are:

(1) To verify identity,

(2) To determine the elements of an asylum seekers' claim,

(3) To deal with cases where refugees have destroyed their travel or identity documents or have used fraudulent documents to mislead authorities in the country of asylum, or

(4) To protect national security or public order (eg risk of absconding).

It should be emphasised that detaining authorities must identify a compelling need to detain a particular individual on one of these grounds, based on the personal history of that individual asylum-seeker. Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and establishing the elements of their claim should be minimised. Furthermore, detention prolonged beyond the initial period must be clearly justified for reasons of national security or public order, and be subject to administrative or judicial review.

UNHCR is particularly keen to stress that detention should not be used as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention for these purposes is contrary to article 31 of the Refugee Convention as well as relevant international human rights law, such as the 1966 International Covenant on Civil and Political Rights (article 9) and the Convention on the Rights of the Child (article 37).

Since September 11, 2001 and particularly in light of more recent terrorist activities, it is appropriate to say a few words about detaining asylum seekers on national security grounds. Detention can be justifiably deemed necessary if there are good reasons for suspecting links with terrorists in an individual case. But it must be stressed that the circumstances of an individual case must provide the grounds for detaining an asylum seeker. The automatic detention of asylum seekers, or their selective detention on the ground of their national, ethnic, racial or religious origin is not supported by UNHCR. Such measures could be seen as an arbitrary and even discriminatory response to recent events that would conflict with international legal norms.

To summarise UNHCR's position, when detention is permitted by a State, it should only be exceptionally applied for one of the specific and limited purposes where there is evidence that detention alternatives may not be suitable in an individual case. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period, be subject to prompt and periodic review, and allow for exceptions for vulnerable groups. It should also be in humane conditions.

III UNHCR INTERPRETATION OF KEY CONCEPTS AND ISSUES

A number of key concepts and issues relating to detention have created debate amongst relevant actors. I would like to take the time now to briefly clarify the UNHCR's interpretation of some of these concepts. Firstly, two points about the specific wording of article 31 of the 1951 Convention. I will than emphasise a few points about the UNHCR's Guidelines on Detention.

A Interpretation of Article 31

Two phrases have generated discussion about the scope of article 31: the reference to asylum seekers 'coming directly' and when restrictions on movement are 'necessary'.

1 Coming directly

UNHCR considers that the phrase 'coming directly' is not limited to situations in which a person enters the country of asylum literally directly from their country of origin. It also covers persons who transit briefly through an intermediate country without having applied for, or received, asylum there, or who are unable to find effective protection in a country of first asylum or other countries that they flee.

It is not possible or desirable to set out blanket circumstances in which asylum seekers will have not 'come directly' from their country of origin or unsafe third country. For example, the application of strict time limits to determine what period of transit in a third country may exclude an asylum seeker from the protection of article 31 is unhelpful. Instead, UNHCR affirms that each case must be assessed on its own merits. Equally, it is necessary to consider in each case whether an asylum seeker has genuinely available and effective protection in a third country. It is necessary to reiterate that refugees will frequently have justifiable reasons for illegal entry or irregular movement, as has been acknowledged by the UNHCR Executive Committee at various points, including in its Conclusions Nos 15, 22, 44 and 58, and may have good cause for not applying in a third country.

2 Necessary

A second phrase in article 31(2) that needs clarification is when restrictions on the movement of asylum seekers and refugees are considered 'necessary'. ExCom Conclusion No 44 outlines that authorities need to show that it is 'necessary' to detain an individual under the specific and limited grounds on which detention can be justified. Determining whether detention is necessary on one of these grounds is not a matter merely of sovereign discretion, rather authorities must also consider whether it is reasonable to detain and whether detention is proportional to the objectives it aims to achieve.

A decision that it is 'necessary' to detain a particular asylum seeker must also be made based on the circumstances and personal history of that particular individual. This is an area of particular concern for UNHCR. For example, many asylum seekers are detained on the general assumption that asylum seekers are likely to abscond before their status determination is completed or will not present themselves for removal if a negative asylum decision is received. Although national laws may make provisions for the automatic detention of asylum seekers on this basis, international standards require that there is some substantive basis

for such a conclusion in the individual case. In other words, national authorities must actively consider and assess each case to determine whether detention is 'necessary' and such a decision should be subject to administrative or judicial review.

Equally, the mandatory detention of asylum seekers who do not have identity documents or who use false documents is concerning. It is important to recognise that the circumstances that may prompt an individual to flee their home country, may also force an asylum seeker to leave without documents or to have recourse to false documentation. In these compelling circumstances, and where an asylum seeker is willing to cooperate with identity verification processes, or has not purposefully destroyed documents to mislead authorities, detention cannot be considered necessary to verify identity, in the absence of other factors.

B UNHCR Guidelines on Detention

I would like to emphasise three points about UNHCR's Guidelines on Detention. First, to say a few words about the scope of the Guidelines, then about the need for review of detention orders, and finally raise particular concerns about the detention of children and vulnerable groups.

1 Scope of the Guidelines

The Guidelines apply to all asylum seekers who are being considered for, or who are in, detention and detention like situations. For these purposes, UNHCR considers that detention is: 'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed or where the only opportunity to leave this limited area is to leave the territory'. It is important the States equally recognise that the minimum standards set out in the Guidelines, particularly regarding the conditions of detention, apply across all situations in which an asylum seekers' freedom of movement is substantially curtailed.

2 The need for administrative or judicial review of detention

UNHCR's Guidelines, consistent with article 9 of the ICCPR and a number of Executive Committee Conclusions, affirm that asylum seekers should have the right to challenge the legality and necessity of their detention, in accordance with the rule of law and principles of due process. The requirement that detention must be subject to review mechanisms is an essential safeguard against arbitrary detention.

In addition, although many states have review mechanisms of either a judicial or administrative nature, the degree to which asylum seekers can effectively access these procedures varies significantly. Unfamiliarity with legal processes and language difficulties both pose problems. These problems are made more acute when legal assistance is not available. To overcome these difficulties, UNHCR believes that there needs to be a prompt, and periodic judicial or administrative review of all detention orders before an independent and impartial body.

3 Detention of children and vulnerable groups

A strong theme that runs through the UNHCR Guidelines on Detention concerns the highly negative impact of detention on the psychological well being of those detained, particularly in relation to children and vulnerable persons including torture and trauma victims, unaccompanied elderly person and persons with a mental or physical disability.

The Guidelines stress that alternatives to detention should be actively considered prior to any decision to detain. If none of the alternatives can be applied and States do detain children, this should, in accordance with article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time in accordance with the exceptions outlined above. In addition, a qualified medical practitioner should certify that detention will not adversely affect their health and well being. Regular follow up and support by a skilled professional, as well as access to services, hospitalisation, medication and counselling should be available, if needed.

In relation to children, and drawing upon more general principles of human rights law, as enshrined in the Convention on the Rights of the Child, UNHCR is particularly concerned about the fact that minor asylum seekers are regularly detained or threatened with detention on account of their own, or their parents', illegal entry into the country. UNHCR welcomes measures taken by some States to bring their policies in line with international standards, and explore appropriate alternatives to detention. Wherever possible, unaccompanied minors should be released into alternative care arrangements with family members already residing in the country of asylum or competent child welfare authorities. Alternatives also need to be pursued for children accompanying their parents. Children and their primary care-givers should not be detained unless this is the only means of maintaining family unity. Where detention is used as a measure of last resort, special living arrangements must be made for children and their families.

IV ALTERNATIVES TO DETENTION AND RECOMMENDED PRACTICE

Having voiced UNHCR's strong view that the detention of asylum seekers is inherently undesirable, I would like to take this opportunity to mention some alternatives to detention. I have mentioned the need to particularly explore alternatives to detention for children and vulnerable groups, but my comments will be directed more generally at detention alternatives for all asylum seekers.

UNHCR's Guidelines on Detention identify a number of non-exhaustive options that allow authorities to monitor the whereabouts of asylum seekers, while ensuring that asylum seekers' liberty and basic freedom of movement are not unreasonably curtailed.

A Monitoring requirements

One option is to permit asylum seekers to live outside of detention situations provided they comply with ongoing monitoring requirements (eg Netherlands, Norway, United Kingdom). Such requirements may be that the asylum seeker periodically reports to officials during status determination procedures or reside at a particular address or within a particular region until their status has been determined, or they obtain prior approval to change locations. These requirements could be tailored to the circumstances of a particular asylum seeker and to meet the concerns of authorities.

B Provision of a Guarantor

A second alternative would be to require that an asylum seeker provide a guarantor who would be responsible for ensuring their attendance at appointments and hearings. If the asylum seeker absconds or fails to attend, a monetary penalty would be levied against the guarantor. It should be noted that asylum seekers with limited links to persons in the country of asylum may have difficulty in identifying a guarantor who is willing to support them.

C Release on Bail or Bond

This alternative is similar to the first two proposals, but would allow already detained asylum seekers to be released on a combination of monitoring conditions or financial guarantees (eg Canada's Toronto Bail Program, also trialed with a 90% success rate in the United Kingdom with a group who had been considered at a high risk of absconding). While allowing a high degree of flexibility, the amount of bail must not be set so high as to be prohibitive.

D Open centres

An additional option is to establish open centres (for example, pilot centres in the United Kingdom). Although asylum seekers would be required to reside at a specific collective accommodation centre, they would be allowed to obtain permission to leave the centre and return at stipulated times.

YOU HAVE TO BE STRONGER THAN RAZOR WIRE: LEGAL ISSUES RELATING TO THE DETENTION OF REFUGEES AND ASYLUM SEEKERS

*Mary Crock**

This article explores the international legal principles that do or should determine state practice in detaining refugees and asylum seekers. The issues fall into two broad categories: the circumstances in which it is permissible to detain; and the treatment and entitlements of detainees. The author examines both relevant international standards and the way in which key authorities would like state parties to interpret those standards. She identifies some common themes that have emerged from national jurisprudence on detention, arguing that it is possible to discern patterns in the law and practice based on the extent to which states have codified a rights regime for refugees. While acknowledging the indeterminacy of

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* BA (Hons) LLB (Hons), PhD (Melb), Senior Lecturer in Law, University of Sydney. This article was prepared for the International Association of Refugee Law Judges "Stemming the Tide or Keeping the Balance – The Role of the Judiciary", Conference 22-25 October 2002, Wellington, New Zealand. I would like to acknowledge the help of Ben Saul who assisted me in researching the comparative material considered. I am also grateful to Ron McCallum, Tim Stephens, Pene Mathew, Rodger Haines, Tony North, Joulekhan Pirbay and Margaret Taylor for their helpful comments on drafts of this article. Thanks also to Joel Butler for proofreading. Any opinions expressed and errors that remain are my own.

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language, she exhorts refugee adjudicators to draw upon the framework provided by international law when construing domestic legislation.

I INTRODUCTION

If "refugee" is a legal term of art, redolent with complexities for those involved in the process of sifting and sorting claims for protection,[1] it is also a word that can invoke an extraordinary range of passions when dropped into the conversation of ordinary people. Throughout history, individuals displaced by catastrophe who seek shelter in another country have rarely been popular in their chosen land of refuge. After the attacks in America on 11 September 2001, concern at the arrival of uninvited refugees and asylum seekers has been magnified by fear and suspicion of previously unimagined terrors. The new threat of terrorism is so inchoate and disparate that compassion for the dispossessed is easy to portray as fatal weakness. The discourse on "protection", "resettlement" and "durable solutions" has been replaced by a mantra of containment and control. It is a climate wherein "detention" is not a dirty word.

The United Nations High Commissioner for Refugee's Executive Committee's 2002 *Agenda for Protection*[2] – the product of worldwide consultations – stands testament to the conflicting considerations with which UNHCR must contend. Arguments about the detention of asylum seekers slip seamlessly into the discourse about illegal migration, "secondary movement refugees", and persons who use refugee procedures to either "shop" for the best country of asylum, or to gain a simple immigration outcome by fraudulent means.

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1 The leading international instruments are the *United Nations Convention relating to the Status of Refugees* and its attendant Protocol, referred to hereafter as "UN" and "the Refugee Convention" respectively. The Refugee Convention was done at Geneva on 28 July 1951 and the Protocol in New York in 1967. The Refugee Convention entered into force on 22 April 1954, and the Protocol on 4 October 1967. The Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition to events occurring after that date.

2 Hereafter "UNHCR". See Executive Committee of the High Commissioner's Programme, Fifty-third Session *Agenda for Protection* UN Doc A/AC 96/965 26 June 2002.

This article draws on the work of the UNHCR consultative process,[3] but seeks to examine the vexed issue of immigration detention within the broader frameworks of international human rights law and comparative domestic law. My aim is to highlight the legal issues relating to the detention that are most relevant to refugee law adjudicators and to identify some of the factors that have lead to divergence in state practice and jurisprudence. The issues fall into two broad categories: the first relates to the circumstances in which it is permissible to detain refugees and asylum seekers; the second concerns the treatment and entitlements of detainees.

As refugee law practitioners know well, the process of deconstructing the law and practice relating to the detention of refugees and asylum seekers is complicated by the many diverse sources of law involved. There are legal standards governing the detention of refugees and asylum seekers under international law, both as a matter of "hard" legal principle and as a matter of "soft" law or aspirational principle. There are "official" interpretations of these standards, in the form of conclusions of UNHCR's Executive Committee, and rulings by UN Committees such as the Human Rights Committee and the Committee Against Torture. Overlying these sources of jurisprudence are the decisions of regional human rights bodies such as the European Court of Human Rights, as well as the rulings of domestic courts and tribunals that range from first tier adjudicators through to the highest judicial authorities in some of the most powerful countries on earth. The prominence of the detention issue in the human rights discourse around the world means that in addition to these sources of legal

3 For a description of this process, see http://www.unhcr.ch. See Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection", an article prepared at the request of the Department of International Protection for the UNHCR Global Consultations, available at http://www.unhcr.ch. See also, "Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised", available through the UNHCR website. These conclusions were based on discussions centred on Professor Goodwin-Gill's paper, together with written contributions that included a paper by Michel Combarnous for the International Association of Refugee Law Judges.

authority, there are now a great number of international[4] and domestic[5] reports, each of which offers perspectives on the legality of detaining refugees and asylum seekers. These reports mean that more is known now about the comparative practices of states in their treatment of asylum seekers and refugees than at any other time in history.

The article begins with a discussion of the legal standards governing the detention of refugees and asylum seekers under international law. A discussion of the "hard" legal principle contained in relevant international instruments is followed by a consideration of the "soft law" comprising the various interpretations of these principles by international and transnational organisations and authorities. Put another way, I examine both the international standards relevant to the detention of refugees and asylum seekers and the way in which

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4 This article benefits from the most recent comparative survey of state practice undertaken by the US based Lawyers' Committee for Human Rights (hereafter LCHR). See LCHR (prepared by Debevoise and Plimpton) *Final Report: Review of States' Procedures and Practices Relating to the Detention of Asylum Seekers*, September 2002, available through http://www.lchr.org. This report is discussed below, under the heading "Asylum seekers, liberty and culture".

5 Australia stands out as the State that seems to have spawned the greatest number of reports on its immigration detention regime. See Report of Bhagwati J, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, *Mission to Australia*, 24 May to 2 June 2002. The Human Rights and Equal Opportunity Commission (hereafter HREOC) has produced a number of significant reports, including (in reverse chronological order): *Human rights violations at the Port Hedland Immigration Processing Centre* (2001); *Visit to Curtin IRPC*, July 2000; *Human Rights violations in the Perth Immigration Detention Centre* (2000); and *Those who've come across the seas: Detention of unauthorised arrivals* (1998). All are available at http://www.hreoc.gov.au/asylum/home.html. HREOC is currently undertaking a major inquiry into Children in Detention. Parliamentary Committee Reports include: Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres* (2001); Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (Canberra, AGPS, 1994); and *Not the Hilton: Immigration Detention Centres: Inspection Report* (September 2000) 4 September 2000; Philip Flood, AO, *Report of Inquiry into Immigration Detention Procedures*, 27 February 2001. See also Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, March 2001, available at: http://www.comb.gov.au/publications/special_reports/IDCMarch1.pdf; and Australian National Audit Office, *The Management of Boat People*, Auditor-General Report No 32, Canberra 1998, available at http://www.anao.gov/au.

UNHCR and other key UN authorities would like state parties to interpret those standards.

The subsequent section focuses on comparative state practice and on some common themes that have emerged from national jurisprudence on detention. While there are many areas of divergence – even between states with similar cultural and historical backgrounds – it is possible to discern patterns in the law and practice. Beyond the front-line emergency situations,[6] I will argue that the strongest correspondences between practice and principle are apparent where the relevant international legal principles have been codified into domestic or binding transnational laws.

It is beyond the scope of this article to explore all the reasons behind the observable variations in state practice and jurisprudence. Rather, I have chosen to focus on five states that share a common heritage in English common law, but which differ in the regimes established to protect the rights of refugees and asylum seekers. The states chosen are New Zealand, the United Kingdom, Canada, the United States of America and Australia. It will be my contention that in these countries the codification and or articulation of rights does appear to have an impact on both the politicising of the asylum phenomenon and on the adjudication process itself. On the one hand, the existence of objective juridical standards seems to provide boundaries for politicians and administrators, reducing the scope for popularist reactive policies and practices. On the other, codified standards assist adjudicators by simplifying any interpretative process – giving them "hard" data on which to found their rulings. In the result, adherence to both the letter and spirit of international legal standards on detention appears to be strongest in those countries with both a codified refugee rights regime and independent review mechanisms to enforce the rights so articulated.

It will be apparent in these observations that my sympathies lie with the theorists who posit that codified "rights" are critical to empowerment.[7] For refugee law scholars, the issue is a live one. The inherent conflict that exists between the interests of the refugee and the power of state sovereignty has led some theorists to argue that talk of "rights" for refugees is futile, illusory and or

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6 See n 62 ff.

7 See, for example, Smart, *Feminism and the Power of Law* (Routledge, 1989) 8; and Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.*

ineffective.[8] With the tendentious issue of unauthorised entrants seeking protection as refugees, it will be my contention that the correlation between code and practice in the area of detention suggests that legislating "rights" *may* yet make a difference.

In arguing that the articulation of rights can make a difference, I do not question the importance of other factors that impact on the way codified rights are interpreted.[9] The Australian Government's repeated assertions that its laws and practices regarding refugees and asylum seekers are fully compliant with its international legal obligations[10] are testament to the malleability of words and legal concepts. Of the five countries studied, Australia stands out as the state with the harshest detention practices and the least articulated rights regime for refugees. Australia also shares with the United States the characteristic of a judiciary that generally shows little familiarity with any form of international law. Where the courts in those countries have intervened to rule against the legality of immigration detention, it has been in the context of resisting legislative attempts to reduce or remove altogether the oversight function of the judiciary.

In the conclusion, the article revisits the issue of the indeterminacy of language. I argue that even in those countries where the domestic law does not incorporate a rights regime for refugees, there is often scope for a contextual approach to both refugee status determinations and issues relating to immigration detention. On the one hand, such an approach may lead to concessions being made for asylum seekers within a determination process, or to the recognition of the practical impediments to fact finding that are implicit in some detention

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8 For example, see Hathaway (ed) *Reconceiving Refugee Law* (1997); Dauvergne, "The Dilemma of Rights Discourses for Refugees", (2000) 23 UNSWLJ at 56-74; and "Amorality and Humanitarianism in Immigration Law" (1999) 37 Osgoode Hall Law Journal at 597-623. Hathaway and Dauvergne both argue that there is a need to re-conceive international refugee law because of the tendency for notions of sovereignty to trump any putative rights ascribed to refugees at international law.

9 See, for example, Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991). See also Paolo Carozza, "Uses and Misuses of Comparative Law in Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights" (1998) 73 Notre Dame Law Review 1217; Michael Ignatieff et al, *Human Rights as Politics and Idolatry* (Princeton Uni Press, Princeton, NJ 2001).

10 See Department of Immigration and Multicultural and Indigenous Affairs (hereafter DIMIA), *Interpreting the Refugees Convention: An Australian Contribution* (DIMIA, 2002), available at: http://www.immi.gov.au.

situations. In other instances, it may lead a court to read down legislative concepts so as to ensure an outcome that is consistent with the spirit as well as the letter of international legal principle. In this exhortation to decision-makers, I join with Taylor[11] who argues that acknowledgement of and respect for the human rights of immigrants and refugees need not conflict with the (undisputed) sovereign right of nations to determine who enters or remains within their territory. While international standards may require "processing" or translation to be given full domestic effect, their mere existence provides a framework for decision-makers to draw upon when construing the legislation they have been given.

II THE INTERNATIONAL LEGAL FRAMEWORK RELATING TO THE DETENTION OF REFUGEES AND ASYLUM SEEKERS

A The International Instruments

A great deal has been written in recent times about the international legal norms established to protect refugees and asylum seekers from arbitrary loss of liberty and other abuses of their human rights.[12] What follows is no more than a brief account of the law, included so as to set the scene for a broader discussion of both the international jurisprudence on detention and of what the chosen domestic courts have had to say on the subject.

The difficulty in using international law to limit the ability of states to incarcerate refugees and asylum seekers is tied inevitably to the debate over the characterisation of these people. The detention of non-citizens who arrive without authorisation is regarded by many states as a natural first line of defence, the primary manifestation of the sovereign right of a country to protect itself.[13] Whatever the manner of their arrival, "refugees" are supposed to be "different". In theory, refugee status is a matter of fact, with determination processes declaratory,

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11 See Taylor, "Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine" (1995) 22 Hastings Constitutional Law Quarterly 1087; and discussion at Part III C below.

12 The issue has been a live one in international legal circles, with numerous background papers and reports prepared by international, governmental and non-governmental organisations. See nn 4-5.

13 See Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996), p 247; *Attorney-General for Canada v Cain* [1906] AC 542; *Shaughnessy v US ex rel Mezei* 345 US 206 (1953); and *Toy v Musgrove* (1888) 14 VLR 349.

rather than constitutive in their function.[14] However, this is often cold comfort for the asylum seeker who is characterised first as an illegal migrant by the state in which they arrive.[15] The major problem for refugees and asylum seekers is that there is no single source of international law that can be said to deal decisively and conclusively with the situation of those who throw themselves at the mercy of foreign states in their search for protection from persecution.

B Detention and the Refugee Convention

The delicacy of the compromise negotiated in the Refugee Convention is apparent in the omission from the document of the right to seek asylum that appears in the Universal Declaration of Human Rights.[16] It is evident also in the limitations and ambiguities of the rights regime that the Refugee Convention purports to establish for "refugees" as defined. The Convention places few constraints on the right of states to detain refugees, let alone asylum seekers. The instrument is silent on length of detention, or the reasons that might precondition such a measure.

Having said this, the Refugee Convention does contain some important provisions relevant to the detention debate. If the meaning of these is sometimes disputed, international human rights law supplies the omission. Viewed together, the standards set at international law can be seen to turn on two broad principles: first, the detention of refugees and asylum seekers cannot be punitive, and second, the detention must not be "arbitrary".

Article 7(1) of the Refugee Convention requires states to accord refugees the same (or more favourable) treatment to that which is accorded to aliens generally.

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14 See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva: Office of the United Nations High Commissioner for Refugees [1979]. United Nations High Commissioner for Refugee's Handbook provides at para 28:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

15 See nn 34-35 below.

16 Hereafter "UDHR". See UDHR, Art 14 which provides that every person has the right to seek and to enjoy asylum from persecution in other countries. See UN Doc A/810 71 (10 December 1948).

Article 9 permits states to provisionally limit the freedom of movement of refugees pending a determination of a person's status, but only in "grave and exceptional circumstances", such as war or in the interests of national security.[17] Article 26 provides that refugees lawfully present in the state's territory should be accorded the same freedom of movement as other non-citizens in the same circumstances. Although a significant provision, Goodwin-Gill points out that many states have made reservations to this article.[18]

The most important provisions in the *Refugee Convention* relevant to the detention of refugees and asylum seekers, however, are probably those proscribing the penalisation of refugees. As explored in the following section, these are the provisions that have given rise to most debates in international circles. Article 31(1) prohibits states from imposing penalties on refugees due to illegal entry. It provides:

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present on their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 31(2) permits states to restrict the movement of refugees who have entered a country illegally where it is "necessary", but only until their status in the country is regularised or they obtain admission in another country. The full text of the provision is as follows:

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

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17 Goodwin-Gill, n 3, 117.

18 Goodwin-Gill, n 3, 118.

C Other International Human Rights Instruments

International and regional human rights treaties impose wider limitations on detention. As the Executive Committee of UNHCR noted in 1999,[19] the right to liberty is a fundamental human right set out in all the major international and regional human rights instruments from the ICCPR and UDHR through to the Cairo Declaration on Human Rights in Islam.[20] The Universal Declaration of Human Rights (1948) prohibits arbitrary detention (Article 9), arbitrary interference with a person's privacy (Article 12) and also guarantees the right to liberty (Article 3).

These aspirational rights are made legally binding in the International Covenant on Civil and Political Rights (1966).[21] Article 9(1) of this instrument 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 procedures as are established by law.

Other human rights instruments provide similar protections in even stronger terms. The Convention on the Rights of the Child provides in Art 37:

> States Parties shall ensure that:
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> ...
>
> (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used as a measure of last resort and for the shortest appropriate period of time.

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19 See Executive Committee of the High Commissioners' Programme, Standing Committee 15th Meeting, "Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice", June 1999 EC/49/SC/CRP 13, 4 June 1999 (Hereafter UNHCR "Detention of Asylum Seekers and Refugees").

20 See also the European Convention on the Protection of Human Rights and Fundamental Freedoms, the African Charter in Human and Peoples' Rights, and the American Convention on Human Rights "Pact San Jose".

21 Hereafter "ICCPR". See UN Doc A/6316 (1966), 999 UNTS 171, 16 December 1966.

This Convention stands out from other instruments in that the phrase "refugee children" is used to cover both recognised refugees and asylum seekers who are children.[22]

D The Treatment of Detained Asylum Seekers

In addition to observing the pre-conditions for detention, states are also required to comply with minimum international standards governing the conditions of detention. Article 10(1) of the ICCPR requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Unconvicted persons must be separated from convicted persons.[23] A variety of international instruments prohibit torture and cruel, inhuman or degrading treatment or punishment.[24] These include the Convention against Torture and Other Cruel and Inhuman and Degrading Treatment or Punishment which defines torture and confirms it as a crime against humanity such that all state parties are enjoined to prosecute perpetrators found within their territory.[25]

Again, there are special regimes addressing the treatment of women and children detainees. The Convention on the Rights of the Child is underpinned by core principles relating to the protection of children. The rights contained in that Convention extend by virtue of Art 2 to every child within the jurisdiction of a state party without discrimination of any kind and irrespective of the legal status of the child or of his or her parents or legal guardians. Article 3 begins by stating that the best interests of the child must be a primary consideration in all decisions affecting him or her. Key rights enshrined in the instrument include the right to survival and development (Art 6) and the right to family life (Arts 5, 9, 18). Article 22 provides that states must ensure child asylum seekers "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth ... in other international human rights or humanitarian instruments

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22 Convention on the Rights of the Child, Art 22. The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989. See UN Doc A/RES/44/25 (1989).

23 ICCPR, Art 10(2)(a).

24 UDHR, Art 5; ICCPR, Art 7.

25 Hereafter the "Torture Convention". This Convention was adopted by the United Nations General Assembly in 1984: GA Res 39/46, 10 December 1984, UN Doc A/39/51. See 1465 UNTS 85.

to which the said states are parties". This includes the rights in the Refugee Convention.

There are numerous other rights relating to health and education; culture, language and religion; violence and abuse; freedom of expression, thought and conscience; rehabilitation; privacy and rest and play. Article 12 confers the right to meaningful participation in all matters affecting the child.

If detained, Art 37 provides that children must be treated with humanity and respect for their inherent dignity and in a manner which takes into account their age. All children are entitled to a standard of living adequate for physical, mental, spiritual, moral and social development (Art 27). The Convention also refers to the rights and responsibilities of parents to bring up their children "in an atmosphere of happiness, love and understanding".

The international human rights instruments also address other aspects of a person's treatment in detention, albeit with varying degrees of specificity. For asylum seekers, an obvious issue is the right to access asylum procedures; the right to legal advice; and the right to appeal decisions relating to detention and refoulement.

Once again, the Convention on the Rights of the Child provides the strongest statement of principle, with Art 37 providing that detained children must have access to legal assistance and the right to challenge their detention. In view of the debates that have arisen about the characterisation of asylum seekers, it is noteworthy that this Convention states quite expressly in Art 22 that no distinction is to be drawn between children who are refugees or those who are seeking recognition as refugees. The rights set out in the Convention apply to both in equal measure.

E Interpretation of the International Instruments by International Authorities

Beneath the formal treaties and conventions signed by state members of the United Nations, a variety of authoritative standards have been produced reflecting the preferred interpretation of the international instruments relevant to the detention of refugees and asylum seekers. For the Refugee Convention, there are the conclusions of the Executive Committee of UNHCR,[26] a body made up of representatives of states which are party to the Refugee Convention. Pursuant to

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26 For a collection of the conclusions relevant to this issue, see Goodwin-Gill, n 3 at Annex 2.

an optional Protocol, the Human Rights Committee is empowered to make rulings on complaints made by individuals alleging a breach of the ICCPR.[27] This Committee has also produced both general comments and rules on specific clauses of the ICCPR. The UN General Assembly has made or adopted Standard Minimum Rules for the Treatment of Prisoners[28] and a Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[29] In addition, the UN Commission on Human Rights established the Working Group on Arbitrary Detention in 1991. As noted below, this Working Group has issued "deliberations" or policy guidelines on what it considers to be "best practice" in this area.

As Australia has been at pains to point out,[30] to the extent that the principles enuncuiated by these bodies do not reflect international treaty obligations or customary international law, they do not have the status of binding law. At best, the various guidelines and statements of principle are "soft" law, policy, or indicia of the way the various UN authorities would like states to act or to interpret relevant international laws. To further complicate matters, the unofficial standing of the various policies can also vary, according to the status of the issuing body and the extent to which the UN General Assembly has given its imprimatur to the outcome of a particular process.[31]

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27 Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 MULR 428; see also n 48.

28 These rules were approved by the UN Economic and Social Council in 1957, and were adopted by the UN General Assembly in Resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/CONF/611, Annex 1.

29 GA Res 43/173, Annex: UN DOC A/43/49 (1988). See the discussion of these instruments in HREOC *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (HREOC 1998), at 40-42.

30 Department of Immigration and Multicultural and Indigenous Affairs, "Administrative Detention – its use in the Management of Irregular Migration", unpublished paper prepared for the International Association of Refugee Law Judges Conference, Wellington, New Zealand, 22-25 October 2002, copy on file with author. See p 6 of manuscript.

31 Note, for example, that while UNHCR's handbook on the Determination of the Status of Refugee (1978) was placed before the UN General Assembly for its approval, the various guidelines produced by UNHCR in and after 1999 have not yet been through this process. See n 34 below.

The issue of detention was prominent at the time the Refugee Convention was drafted.[32] It has also been prominent in the deliberations of UNHCR Executive Committee in recent years, and was a significant focus of UNHCR's recent Global Consultations on International Protection.[33] In a paper and in guidelines produced in 1999,[34] UNHCR recognised that the detention of asylum seekers – most of whom have committed no crimes and are not suspected of having done so – "raises significant concern, both in relation to the fundamental right to liberty, and because of the standards and quality of treatment to which they are entitled."[35] UNHCR notes that states have failed to make the "necessary distinction" between asylum seekers on the one hand, and illegal migrants on the other.

The official policy of UNHCR is that the detention of asylum seekers *and* refugees is inherently undesirable, and should normally be avoided. If found to be necessary, it may be resorted to only on grounds prescribed by law and only for specific and limited purposes. In other words, detention should be legitimate, consistent with international standards, a last resort, and for the shortest possible period.

F Characterising Asylum Seekers

In his discussion of Art 31 of the Refugee Convention, Goodwin-Gill argues that this provision would be "devoid of any effect" unless the allusion to refugees was read to include, at least to some extent, asylum seekers who have not yet had their status determined. The Goodwin-Gill's view is consistent with that expressed

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32 Weiss (ed) The Refugee Convention 1951 (1995) pp 281-299; Grahl-Madsen, "The Status of Refugees in International Law", *Asylum, Entry and Sojourn* (Nijhoff-Leiden, 1972), Vol 2 pp 420-21.

33 Goodwin-Gill, n 3.

34 UNHCR "Detention of Asylum Seekers and Refugees", n 19. See also the Office of UNHCR, Geneva "UNHCR Revised Guidelines Applicable Criteria and Standards Relating to the Detention of Asylum Seekers", in Goodwin-Gill, n 3 Annex 1.

35 UNHCR "Detention of Asylum Seekers and Refugees", n 19, 1.

by UNHCR through its Executive Committee.[36] In practice, asylum seekers face real problems in accessing the protections of the Convention without the evidence of official refugee status provided by an assessing authority of some kind. While the courts in some countries have been prepared to extend the protections of the *Refugee Convention* to "presumptive" refugees,[37] this approach has not been adopted by all state parties.

Australia is one country where the discourse of government frequently stresses the unlawful status of unauthorised arrivals (particularly those arriving by boat) over the status of these people as refugees. In spite of the statements in UNHCR's Handbook relating to the declaratory nature of any status determination process, the Australian Courts have been reluctant to accord asylum seekers protection as putative refugees.[38]

G What Constitutes "Detention"?

UNHCR's 1999 guidelines on the detention of asylum seekers begin by examining the meaning of the word "detention". Guideline 1 states:

> For the purposes of these guidelines, UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement.

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36 See *Executive Committee Conclusions: No 15 (XXX) – Refugees without an Asylum Country*, (Report of the 30th Session, UN Doc A/AC 96/572, para 72(2)); No 22 (XXXII) – 1981: *Protection of Asylum Seekers in Situations of Large-scale Influx* (Report of the 32nd Session, UN Doc A/AC 96/601, para 57(2)); No 58(XL) – 1989: *The Problem of Refugees and Asylum Seekers who move in an irregular manner from a country in which they have already found protection* (Report of the 40th Session, UN Doc A/AC 96/737, pt N, p 23. These conclusions are set out in Goodwin-Gill, n 3 at Annex 2.

37 For example, see *R v Uxbridge Magistrates Court; Ex parte Adimi* [1999] ImmAR 560, discussed in Goodwin-Gill, n 3, 42-47.

38 See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 398 (per Dawson J), 405 (per Toohey J), 414 (per Gaudron J); and 432 (McHugh J, Mason CJ concurring). Contrast the comments of Wilcox J in *Lek Kim Sroun v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455 at 462; and North J in *Victorian Council for Civil Liberties v Minister for Immigration, Multiculturalism and Indigenous Affairs* (2001) 110 FCR 452 at 471 (at [67]).

The restrictions on movement that will or will not amount to the detention of asylum seekers has been a live issue in the Australian and Pacific regions in recent times. First, there has been the line of authority developed in the Australian Courts creating a legal fiction of "voluntary detention" to justify the administrative detention of unlawful non-citizens, including asylum seekers. In the litigation surrounding the *Tampa* affair in 2001, a majority of the appeal judges in the Federal Court of Australia held that Australia's actions in using force to take control of the *Tampa* did not amount to detention of the asylum seekers on board of that vessel. The *Tampa* asylum seekers were described as being free to go anywhere in the world they desired – except Australia. In this way, the act of apprehending and restraining the asylum seekers was transformed into an act of repelling these people from Australian territory. The logic was borrowed from the reasoning employed by the High Court of Australia in the challenge mounted to the regime introduced in 1992 to mandate the detention of asylum seeker boat people coming from Cambodia and Southern China. In *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1[39] the High Court characterised the plaintiffs as voluntary detainees insofar as they were free to leave Australia at any time. On this basis the Court held that the detention regime was not punitive but was a valid exercise of the Commonwealth's power to legislate with respect to the entry, exclusion or deportation of non-citizens.[40]

Although UNHCR has not endorsed the line of reasoning used by the Australian courts, it has apparently had to tolerate the detention of refugees and asylum seekers in circumstances that give every appearance of being arbitrary. Of particular interest in this context is the argument being made about the arrangements for housing the asylum seekers and refugees from the *Tampa* and other vessels in camps in Nauru and Papua New Guinea's Manus Island. Leaving to one side the relevant provisions of the Refugee Convention and the ICCPR,

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39 See Crock, "Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia" (1993) 15 Syd L R 338.

40 *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 34 (Brennan, Deane and Dawson JJ); at 50 (Toohey J); at 71-72 (McHugh J). Whether the High Court would have extrapolated its 1992 line of reasoning to find that the *Tampa* asylum seekers were not "detained" is a moot point. Note that the High Court refused to entertain an appeal from the decision of the Full Federal Court because of the arrangements that had been made to assess the refugee claims of the asylum seekers on Nauru and in New Zealand. See *Vadarlis v Minister for Immigration and Multicultural Affairs* (unreported, High Court of Australia, M93/2001, 27 November 2001); (2001) 22(20) Leg Rep SL1.

both Nauru[41] and Papua New Guinea[42] are countries that have enacted Bills of Rights that incorporate provisions outlawing "arbitrary" detention.[43] In response to criticisms that the camps established in those countries amount to detention centres, inmates in both places have been issued with visas subject to conditions that restrict the residence and movement of holders to within the physical confines of the detention facilities. In both places, the detention facilities are being run with considerable involvement of both UNHCR and the International Office of Migration, funded by the Australian Government.[44]

H Characterising Detention as Either "Punitive" or "Arbitrary"

UNHCR's view of the permissible exceptions to the general rule that asylum seekers should not be detained are set out in Guideline 3 of the 1999 Guidelines, as well as in its Executive Committee Conclusion No 44.[45] These provide that detention will be regarded as acceptable when used for the purposes of verifying the identity of the asylum seeker; or determining the elements of a claim. The guideline also states that detention will be justified in cases where refugees have destroyed their travel and or identity documents or have used fraudulent documents, and to protect national security or public order. However, there must be a compelling need to detain based on the personal history of each asylum seeker, and "[a]lternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention."

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41 Note that Nauru is not a signatory to the Refugee Convention.

42 Papua New Guinea is a signatory to the Refugee Convention, although it has entered reservations with respect to the following Convention obligations: paid employment (Art 17); housing (Art 21); public education (Art 22); freedom of movement (Art 26); non-discrimination against refugees who enter illegally (Art 31); expulsion (Art 32); and naturalisation (Art 34).

43 For the Nauruan Constitution, see Pt II, Protection of Fundamental Rights and Freedoms, Art 3: http://www.vanuatu.usp.ac.fj/paclawmat/Nauru_legislation/Nauru_Constitution.html; and for the Constitution of Papua New Guinea, see the Preamble and Art 42 (Liberty of the Person): http://www.vanuatu.usp.ac.fj/paclawmat/PNG_legislation/Constitution.htm.

44 Oxfam and Community Aid Abroad, "Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution" (Oxfam and Community Aid Abroad, March 2002). Appendix One available at: http://www.caa.org.au/campaigns/submissions/pacificsolution/.

45 Reproduced in Goodwin-Gill, n 3, 491-492.

As Goodwin-Gill catalogues, the principle that detention should be the exception rather than the rule has lead UNHCR to prefer a generous interpretation of the prohibition on penalising refugees contained in Art 31 of the Refugee Convention. He notes that UNHCR's Department of International Protection considers that "an overly formal approach" to interpretation "will not be appropriate". Accordingly, it is said that refugees are not required to have come *directly* from a country where they face persecution. The provision may also apply to refugees who have travelled through one or more countries where the refugee was unable to gain protection. As Goodwin-Gill notes, the criterion of "good cause" for illegal entry is plainly flexible enough to allow the elements of individual cases to be taken into account.[46]

Although the word "penalties" seems to be directed in the first instance to prosecution, fines and imprisonment on criminal grounds, Goodwin-Gill points out that the term can also operate to preclude administrative detention that is not "necessary" or otherwise sanctioned by Art 31(2) of the Refugee Convention. In particular, the indefinite detention of an asylum seeker can constitute a penalty. He writes:[47]

> [T]hough penalties might not exclude eventual expulsion, prolonged detention of a refugee directly fleeing persecution in the country of origin, or of a refugee having good cause to leave another territory where life or freedom was threatened, requires justification as necessary under Art 31(2) or exceptional (sic) under Art 9. Even where Art 31 does not apply, general principles of law suggest certain inherent limitations on the duration and circumstances of detention.

UNHCR's preferred interpretation of Art 31 of the Refugee Convention finds echoes in what other UN bodies have had to say about what will constitute "arbitrary" detention. In *A v Australia*, the UN Human Rights Committee confirmed that the term "arbitrary" means more than "against the law", as laid down by a member state.[48] The Committee held that in considering whether a

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46 Goodwin-Gill, n 3 at [28]. Goodwin-Gill gives as examples of obstacles to protection in countries of transit, the "operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits".

47 Goodwin-Gill, n 3 at 10.

48 See *A v Australia* Communication No 560/1993, UN Doc CCPR/C/59/560/1993 (30 April 1997), para 9.4-9.5. On this case, see Poynder, "Human Rights: *A v Australia*: Views of the UN Human Rights Committee dated 30 April 1997", (1997) 22(2) Alt LJ 149.

legislative regime is arbitrary, it would consider whether the regime includes elements of "inappropriateness, injustice and lack of predictability".[49] The Committee accepted that Art 9(1) of the ICCPR extended to people in immigration detention.[50] It held that the article should be read in conjunction with Art 31 of the Convention relating to the Status of Refugees and with resolution 44 of the Executive Committee of the UN High Commission for Refugees. The cumulative effect of these provisions is to require states to detain asylum seekers only where such measures are necessary in order to determine a person's identity, or where a person represents a risk to national security.

Oversight of state parties to the ICCPR is also undertaken by the UN Working Group on Arbitrary Detention, which prepares reports on individual countries and publishes its deliberations on issues of general importance. In 1999, that body issued its Deliberation No 5, "Situation Regarding Immigrants and Asylum Seekers".[51] This document proposes ten principles (guarantees) concerning detention, two of which relate to the circumstances of detention. The first (Principle 6) is that any decision to detain must be taken by "a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law". The second (Principle 7) is that detention should be for a defined period "set by law" and "may in no case be unlimited or of excessive length".

As explored further below, the discourse on the detention of asylum seekers at state level is also focused in many instances on juridical notions of penalty, reasonableness and arbitrariness. The significance of the UN standards is most apparent in the jurisprudence of states that have adopted as their own, domestic or transnational human rights instruments incorporating the terms of the *Refugee Convention* and the ICCPR. However, it is also evident in the emergent jurisprudence of countries that have no domestic Bill of Rights.

I Inside Detention: Conditions of Detention and the Rights of Detainees

The body responsible for oversight of the ICCPR, the UN Human Rights Committee, has commented that the "fundamental and universally applicable" principle underpinning international law is that all persons in detention shall be

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49 *A v Australia*, Communication No 560/1993, n 48 at para 9.4. See also *Van Alphen v Netherlands*, Communication 305/1988.

50 *A v Australia*, Communication No 560/1993, n 48. See General Comment on Art 9.

51 UN Doc E/CN 4/2000/4, 28 December 1999 at Annex II.

treated with "humanity and with respect for the inherent dignity of the human person".[52] In addition to the minimum standards for the treatment of prisoners adopted by the UN General Assembly, UNHCR's Executive Conclusion No 44 reiterated the principle that conditions of detention be "humane". The Conclusion stresses the importance of various accountability mechanisms being put in place to oversee both the reasons for detaining asylum seekers and the treatment afforded them while in custody.

The principles enunciated by UNHCR have been developed further by the UN Working Group on Arbitrary Detention. This body's Deliberation No 5 proposes the following guarantees that should be afforded any "immigrant or asylum seeker" held in custody for questioning or for processing:[53]

(3) Being informed, at least orally and in a language understood by the detainee, of the nature and grounds for the decision refusing entry or permission for entry...that is being contemplated;

(4) Providing the detainee with the opportunity to communicate with the outside world by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives;

(5) Being brought promptly before a judicial or other authority;

(6) Registering or otherwise recording the identity of the detainee, the reasons and length of detention;

(7) Informing the detainee of the internal regulations and the rules (including disciplinary rules that might result in incommunicado detention) that will govern the detention;

(8) Formal notification of the grounds for detention, setting out the conditions under which the asylum seeker or immigrant must be able to apply for a remedy (ie release) to a judicial authority;

(9) Custody being effected in a public establishment intended for the purpose that is separate from premises used for the imprisonment of persons incarcerated under criminal law; and

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52 See ICCPR Art 7, Art 10 and Principle 1, "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment".

53 UN Doc E/CN 4/2000/4, 28 December 1999 at Annex II.

(10) Access to the place of custody being afforded to representatives of UNHCR, the International Committee of the Red Cross, and duly authorised non-governmental organisations.

Once again, the situation of refugee and asylum seeker children has been a matter of particular concern. In 1994 UNHCR issued Guidelines on the treatment of asylum seeker and refugee children.[54] UNHCR's Executive Committee[55] and other international bodies[56] have also issued standards relevant to the treatment of asylum seeker and refugee children.[57] These formal statements about how the international authorities would like state parties to interpret their legal obligations include exhortations that states make the reunification of refugee families a first priority, and that respect of the family unit be afforded in all cases.

The basic problem with much of the international jurisprudence and expository material such as guidelines and standards is the absence of effective international enforcement mechanisms. The Human Rights Committee does not have the power to enforce its decisions in any direct way. Rather, its efficacy is reliant on the states who are party to the Convention respecting the decisions it makes, or, at a more pragmatic level, paying heed to the opprobrium of other members of the international community if its rulings are ignored. Transnational bodies such as the European Court of Human Rights, and domestic courts and

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54 UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994).

55 UNHCR Executive Committee: *Conclusion 44 on detention of refugees and asylum seekers*; *Guidelines on Refugee Children* (1988); *Refugee Children: Guidelines on Protection and Care* (1994); *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997); *Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (1999); "Statement of Good Practice" of the Separated Children in Europe Programme (Save the Children/UNHCR) (2000).

56 See *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules)(1985); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988); *UN Rules for the Protection of Juveniles Deprived of their Liberty* (1990); *UN Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules); *UN Guidelines for the Prevention of Juvenile Delinquency* ("the Riyadh Guidelines")(1990).

57 In Australia, the Human Rights and Equal Opportunity Commission is currently undertaking a National Inquiry into Children in Immigration Detention. See HREOC, *National Inquiry into Children in Immigration Detention*: http://www.hreoc.gov.au/human_rights/children_detention.

tribunals can make rulings that are normative in their effect on domestic practice.[58] It is for this reason that the critical determinant of an asylum seekers' rights is often not the standards set at international law, but the extent to which such standards are incorporated or otherwise respected in the domestic law and jurisprudence of the asylum seeker's "host" state. It is to the domestic jurisprudence on the detention of asylum seekers that this article now turns.

III COMPARATIVE JURISPRUDENCE ON DETENTION

A Asylum Seekers, Liberty and Culture

The attention given to the plight of refugees and asylum seekers around the world means that we know more about comparative state practice than at any other time in history. For his study of Art 31 of the Refugee Convention, Goodwin-Gill used two unpublished studies by UNHCR and by the Lawyers Committee for Human Rights.[59] At time of writing, the UNHCR report cited in this study was not yet available, but the LCHR report had been finalised and released.[60] While the LCHR does not purport to provide exhaustive data on the detention practices of the states surveyed,[61] the report does provide a fair idea of comparative state practice across a range of areas.

One obvious point can be made about the way in which different states react to the phenomenon of asylum seekers. The size of the flow of refugees or asylum seekers is clearly a significant determinant of the reception, processing and detention arrangements that are made by the receiving state. For countries receiving huge numbers of refugees, practical constraints of cost and lack of infrastructure militate against sophisticated detention and or status processing

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58 For example, see the ruling by a Belgian tribunal that the detention of an asylum seeker and her newborn baby constituted inhuman and degrading treatment in breach of the European Human Rights Convention. See Tribunal civil (Ref)-Bruxelles, 25 November 1993, No 56.865, DD and DN c/ Etat belge, Ministère de l'Interieur et Ministère de la santé publique, de l'Environment et de l'Integration sociale.

59 Goodwin-Gill, n 3 at [52] ff.

60 LCHR Report, n 4. This Report surveys the practice of 52 states, ranging from countries that have been at the forefront of refugee receiving states in recent years, through to countries taking in as few as 72 asylum seekers a year.

61 In some instances, obtaining reliable statistical data does not appear to have been possible.

arrangements.[62] In this context it may not be so surprising that the countries singled out by the LCHR for the greatest criticism include countries that are privileged both in terms of their wealth and in terms of the small number of asylum seekers they receive.[63]

The LCHR Report examines both the legal framework governing the incarceration of asylum seekers in the countries surveyed, and (where possible) the actual practice of detention. If the emergent picture is one of diversity, there is an interesting correlation in the survey between state practice and the presence or absence of formal mechanisms for ensuring the protection of human rights.[64]

It is beyond the scope of this article to attempt an analysis of comparative jurisprudence on the detention of asylum seekers around the world. Instead, I propose to examine the work of courts from a selection of western countries with similar cultural and legal foundations, all of whom are parties to the Refugee

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62 For example, it would be simply impossible to set up Australian-style mandatory detention to deal with the influx of the two million plus fugitives who have sought refuge in Pakistan or Iran in recent years. As the LCHR Report demonstrates, many of the States receiving huge intakes of refugees are either not signatories to the Refugee Convention at all, and/or have handed the business of handling any refugee claims over the UNHCR. Of the 52 countries reviewed, all but 7 are signatories to the Refugee Convention. These 7, however, include a number of front-line refugee receiving states: among them Pakistan, with 2.22 million refugees, Bangladesh (122,000), Nepal (131,000) and Thailand (109,000). The others are Indonesia (81,000), Malaysia (57,000), and Nauru (800). Other front-line states have signed the Refugee Convention, but rely substantially on UNHCR for logistic support and status determination processes. Examples are Iran, with 2.55 million refugees, Guinea (390,000), Kenya (245,000) and Egypt (75,000).

63 The most notable examples are Australia, which received 13,015 asylum seekers in 2001; Austria (30,140); Israel (390); Japan (353); Spain (9,490); and the United States (48,000).

64 In 25 of the 52 countries, the national laws placed no official limit on the detention of asylum seekers entering without authorisation, but a much smaller number were found to detain asylum seekers indefinitely as a matter of practice. Those singled out for mention were Australia, Austria, Bangladesh, Bulgaria and Egypt, although LCHR acknowledged difficulties in obtaining accurate information in a number of instances. Of the 52 countries surveyed, in 24 countries no independent review of the detention of asylum seekers is available, while in 28 periodic review is provided. Only seven furnish detained asylum seekers with full legal aid, while 19 provide limited legal assistance and 26 none at all. Thirty-nine of the 52 states provide alternatives to detention, while 13 did not. The same number (13) acknowledged detaining children.

Convention and other human rights instruments outlined previously. As noted earlier, the countries chosen are Canada, New Zealand, the United Kingdom, Australia and the United States of America. My purpose is to examine more closely some of the legal factors that might explain divergences in practice and in jurisprudence.

As the liberty of the person is one of the most fundamental of human rights, it comes as no surprise that the extent and nature of the power to detain asylum seekers has been a current issue for domestic courts and tribunals in all of these countries. In spite of the differences in the legislative regimes and detention practices, interesting parallels emerge in the way courts have approached the detention cases brought before them.

The first point to be made is that there seems to be general acceptance that detention of asylum seekers outside the judicial process can be permissible. The notion that state officials should have the right to intercept and detain non-citizens seeking to enter a country without authorisation has long been accepted as a natural incident of state sovereignty.[65] Where state jurisprudence has varied is in the extent and nature of the power to detain asylum seekers and the role that is to be played by the Judiciary in overseeing the custody of these people.

The enactment of Bills of Rights in the United Kingdom and in New Zealand, and the constitutionally entrenched Charter of Rights and Freedoms in Canada[66] stand witness to a detention "culture" in those countries that is quite different from that pertaining to Australia, where there is no rights regime. At the same time, the existence of a Bill of Rights cannot be seen as the sole determinant of either state practice or jurisprudence. The United States has a constitutionally entrenched Bill

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65 For example, see *Shaughnessy v United States ex rel Mezei*, 345 US 206 (1953); *Robtelmes v Brenan* (1906) 4 CLR 395; *Musgrove v Toy* [1891] AC 272; *Attorney-General (Canada) v Cain* [1906] AC 542 at 547; *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 168, 172. For an interesting perspective on the nature and extent of the power of States to control who enters their territory as a matter of international law, see Nafziger, "The General Admission of Aliens Under International Law" (1983) 77 American Journal of International Law 804.

66 New Zealand has both the Human Rights Act 1993 (NZ) and migration legislation that incorporates important aspects of the Refugee Convention (see below). Canada has its *Charter of Rights and Freedoms* and is regarded by many as a showcase country for the protection of refugees and asylum seekers. The United Kingdom is of interest because of the passage of the Human Rights Act 1998 (UK), and its accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

of Rights, yet in some respects its practice and jurisprudence is closer to that of Australia than of Canada. A unifying characteristic of many of the recent cases seems to be that courts around the world regard infringements on the liberty of the person to be a matter of primary concern for the Judiciary, and that legislation and policy permitting detention will be scrutinised critically.[67]

B The Significance of Articulating Rights: Detention cases in Canada, New Zealand and the United Kingdom

While there are considerable differences between the experiences and practices of the first three countries chosen for study, the discourse on detention in Canada, New Zealand and the United Kingdom share at least one feature in common. In each instance, juridical discussions about the lawfulness of detaining refugees and asylum seekers have included consideration of the international legal principles contained in the Refugee Convention and or in relevant international human rights instruments. The three countries also stand out for their tendency to favour community release over detention and for the willingness of their judiciary to step in so as to protect the rights of detained asylum seekers.

1 Canada

In countries where the dominant policy has been to allow asylum seekers to wait out any processing time in the community, domestic courts have only become involved in the detention debate when changes have occurred in either legislation or practice. The need for a source of juridical controversy explains why the jurisprudence on immigration detention in Canada is negligible. That country not only boasts a constitutionally entrenched Bill of Rights, but it has also tended to adhere closely to the terms of relevant international law and guidelines in formulating its domestic legislation. Until November 2001, when Bill C11 became law, the Canadian legislation and policy relevant to the detention of asylum seekers[68] reflected closely the terms of the UN Guidelines on the Detention of Asylum seekers.[69] While there have been controversial episodes

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67 For example, see *Tan Te Man v Tai A Chau Detention Centre* [1997] AC 97 at 111; *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 490.

68 See Immigration Act (1985) (Can).

69 Detention could be ordered only where a person's identity could not be established or where the person was "inadmissible" for health or security reasons; posed a danger to

involving detained asylum seekers in Canada's recent past,[70] the jurisprudence emanating from the Canadian courts has tended to focus on the substance of refugee status decisions, or on the procedural entitlements of refugee claimants rather than on the fact of detention.[71]

Two other countries in which changes to the law have resulted in a codification into domestic law of a rights regime for refugees and asylum seekers are New Zealand and the United Kingdom. Both are nations that operate under a legislated Bill of Rights. In addition, New Zealand's domestic immigration laws make specific reference to the key provisions of the Refugee Convention, a fact that is reflected in a domestic refugee jurisprudence that analyses closely the terms of Arts 31(1) and (2) of that instrument.[72] Just as importantly, in both countries the detention of asylum seekers is subject to express judicial oversight. In the United Kingdom, it is not only the British courts that operate as accountability mechanisms: aggrieved persons can also bring complaints before the European Court of Human Rights at Strasbourg.

2 New Zealand

New Zealand introduced legislation to detain asylum seekers in 1999 in response to (false) rumours of boats carrying asylum seekers making their way to that country. However, before September 2001, as few as 5% of asylum seekers

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the public, or was considered unlikely to appear at an immigration hearing: see *Immigration Act* s 103(3) and 103.1. The Act also provided for regular review of detention (ss 103(2)-(5)), and specified that detainees had a right to counsel (s 103(13)). See also *Citizenship and Immigration Detention Policy*, which reinforces the principle that detention should be used as a last resort for minors; that it should not be used to punish; and that all reasonable alternatives should be considered. The policy lists alternatives to detention that have to be considered by officials.

70 In 1999, a series of boats carrying asylum seekers from China were intercepted and detained amid considerable controversy. For an account of the affair, see Kumin "Between Sympathy and Anger: How Open Will Canada's Door Be?" US Committee for Refugees, *Worldwide Refugee Information*, online at http://www.refugees.org/world/articles/ wrs00_sympathy.htm.

71 Cases have also tended to turn on terms of the Canadian Charter. For an account of recent practice and jurisprudence in Canada, see Delphine Nakache *La Détention des Demandeurs d'asile au Canada* (Unpublished Master of Laws Thesis, Université du Québec à Montréal, June 2002, copy on file with author). See further, n 164.

72 See n 73 ff.

entering the country unlawfully were actually detained.[73] This fact may explain why the first legal challenge to the 1999 laws failed. In *E v Attorney-General* [2000] 3 NZLR 257 (CA), a majority of the Court of Appeal held that the legislative discretion[74] to either detain or to grant a temporary permit militated against any presumption (or legitimate expectation) in favour of granting temporary permits to asylum seekers pending determination of their claims.[75] Thomas J dissented, noting the relevance of the Refugee Convention and related interpretative material to the exercise of the discretion in question.[76] His Honour's reasoning was revisited by Baragwanath J of New Zealand's High Court in a more recent challenge,[77] instituted in response to an abrupt policy reversal on 19 September 2001.

On that day, the New Zealand Immigration Service issued an Operational Instruction which requires immigration officers to detain asylum seekers where their identity cannot be established and there are no "particular reasons for

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73 Between October 1999 and 18 September 2001, only 29 of the 595 New Zealand asylum seekers were detained. See *Refugee Council of New Zealand Inc v Attorney-General* (High Court Auckland, M1881-AS01, Baragwanath J, 31 May 2002) – Interim Judgment at [17].

74 See ss 128 and 128A of the Immigration Act 1987 (NZ).

75 *E v Attorney-General* [2000] 3 NZLR 257 (CA). Note that the plaintiffs in that case had been released from detention by the time the case came before the Court of Appeal.

76 Thomas J acknowledged that the UNHCR Guidelines on detention were not binding on the New Zealand authorities because they did not have the status of international law and had not been adopted or otherwise incorporated into New Zealand law. However, the judge held that to dismiss the guidelines as irrelevent to the appeal evinced an "unacceptably minimalist approach", especially given the breadth of the discretion vested in the Immigration Service. He attacked the majority's reliance on an "operational instruction", which had no statutory basis and which was contrary to New Zealand's international legal obligations (see Judgment para 53).

77 See *Refugee Council of New Zealand Inc and the Human Rights Foundation of Aotearoa New Zealand Incorporated and 'D' v Attorney-General* (High Court Auckland, M1881-AS01, Baragwanath J, 31 May 2002) – Interim Judgment. Final judgment delivered 27 June 2002. Both documents are available at http://www.refugee.org.nz.

allowing them to enter the community unrestricted".[78] The terms of the Immigration Act were left unchanged. However, rather than focussing on the "bail" provisions in s 128A, reliance appears to have been placed on the turn-around provisions in s 128 which are designed to facilitate the removal of non-citizens entering the country without authorisation. Section 128(15) provides that persons detained under s 128 "shall not be granted bail".

Between 19 September 2001 and 31 January 2002, 208 of 221 (or 94%) of undocumented asylum seekers coming into New Zealand were detained. The Refugee Council of New Zealand and a number of other parties[79] mounted a successful challenge to the policy change, arguing that the general provisions in the Immigration Act allowing for the grant of bail overrode s 128.[80] Justice Baragwanath of the High Court ruled that judges of the District Court do have jurisdiction to grant bail under s 128A, and that it is not only proper, but also a legal requirement, that they have regard to the provisions of the 1951 Refugee Convention.[81] His Honour noted the conflict between New Zealand's sovereign and undisputed right to control the entry and presence on its territory of non-citizens and the terms of the Refugee Convention and the Universal Declaration of Human Rights.[82] However, in the final analysis he reasoned that the references to the Convention in the legislation amounted to incorporation of parts of that instrument into New Zealand domestic law. He then turned his attention to the Art 31(2) requirement that restrictions on the movement of asylum seekers be "necessary". He ruled that "necessary" means the "minimum required" to:

(1) allow the Refugee Status Branch to perform their functions;

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78 The government argued that the policy was justified by: an increase in people smuggling and unlawful arrivals without documentation or with fraudulent documentation; New Zealand's decision to process asylum seekers rescued by the *MV Tampa* and thereafter in Australian custody; the increased security risk following the 11 September terrorist attacks in the US; and the availability, as a humane alternative to detention in a penal institution, of the Mangere Accommodation Centre.

79 *Refugee Council of New Zealand Inc and Human Rights Foundation of Aotearoa New Zealand Incorporated and 'D' v the Attorney-General* (High Court Auckland, M1881-AS01, Baragwanath J, 31 May 2002) – Interim Judgment.

80 Compare s 128(15) and s 128A of the Immigration Act 1987 (NZ).

81 See s 129X, Immigration Act 1987 (NZ).

82 See *Attorney-General for Canada v Cain* [1906] AC 542 at 546; interim judgment at [23]-[24].

(2) avoid real risk of criminal offending;

(3) avoid real risk of absconding.

In his final judgment, he added that New Zealand's Refugee Status Branch is required by s 129D to "act in a manner that is consistent with New Zealand's obligations under the Refugee Convention". He ruled that it would be unusual that detention could be "necessary" to facilitate the work of the Refugee Status Branch.

Justice Baragwanath found that the policy instruction to detain asylum seekers where there is difficulty or delay in obtaining identity information is contrary to Art 31(2), "which requires liberty except to the extent that necessity otherwise requires". Obtaining identity information is "relevant to the proper exercise of discretion" but is not "decisive" of it.[83]

The interim ruling potentially affected more than 200 asylum seekers detained in either gaols or the Mangere Accommodation Centre. On 4 June 2002 the Crown applied for a stay of execution of the interim judgment, pending appeal to the Court of Appeal. The application was declined because the Crown's right of appeal would not be rendered nugatory or the public interest damaged if the stay was refused. Baragwanath J pointed out that under the Immigration Act 1987 other categories of people, including those who are suspected of being terrorists, have the right to apply for bail and for that reason he was loath to deprive refugee status claimants of a similar entitlement. On 10 June 2002 a Sri-Lankan fisherman became the first asylum seeker to be released on bail after the interim ruling.[84]

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83 On the question whether the detention policy itself is lawful, Baragwanath J invited counsel's submissions on whether, given that the claimants will have access to bail, the power to detain asylum seekers should be dealt with not by the Court but by parliament. It was noted that parliament was considering the issue in the Transnational Organised Crime Bill, which would allow asylum seekers to be released. This Bill remained before the New Zealand Parliament at time of writing.

84 The question whether one of the plaintiffs is entitled to damages for wrongful imprisonment was left for a future hearing. On 1 July 2002 the Minister of Immigration, the Hon Lianne Dalziel, stated that the Attorney-General will appeal to the Court of Appeal against the decision. She said that the Crown believes the finding was based on too narrow an interpretation of the Refugee Convention. See "Refugee case appeal", NZ Herald, Monday July 1, 2002, p A3.

3 *United Kingdom*

A second country in which the administrative detention of asylum seekers has been an issue is the United Kingdom. Its jurisprudence on this point is interesting because of its recent enactment of a Bill of Rights and because of the integration process that has been taking place between England and Europe. The lawfulness of administrative detention was challenged in the *Saadi* case,[85] which involved four Iraqi asylum seekers who entered Britain without permission and claimed that they were fleeing from persecution by various organisations. All four applicants had their asylum claims rejected but were granted temporary admission to Britain to appeal their cases. They were sent to Oakington Reception Centre while their appeals were pending.

Oakington is a former military barracks, designated as a fast-track processing centre under the UK Government's 1998 Asylum White Paper for asylum seekers whose claims are considered unfounded and unlikely to succeed. The apparent objective is to turn cases around within 10 days. The facility is termed a "reception" centre rather than a detention centre because people sent there have not committed unlawful acts nor are they thought likely to abscond. In principle the people sent there are not supposed to be subject to restraint, but under the centre's rules, asylum seekers are locked in their rooms and required to return to their rooms when ordered by staff. Fathers are separated from their children at night and mail must be opened in front of officers. Detainees can only eat at set times, must carry identification cards, obey all staff instructions and are only allowed restricted visits.

At first instance, on 7 September 2001 Collins J held that the administrative detention of asylum seekers at Oakington was both arbitrary and a breach of Art 5(1)(f) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[86] Justice Collins stated that his ruling might affect other Oakington refugees, but cautioned that not all detention of asylum seekers, including at Oakington, was illegal. He said that the government could still detain people individually with "good reason" but it could not detain a person purely on the grounds of their nationality, or simply in order to speed up administrative procedures. Detention, he said, should only be used as a last resort. Pending an

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85 *R (on the app of Osman) v Secretary of State for the Home Department (SSHD)*, 07/09/01.

86 *R (on the app of Osman) v SSHD*, 07/09/01.

appeal by the Secretary of State for the Home Department, the applicants remained detained at Oakington.

On 19 October 2001, the Court of Appeal overturned Collins J's decision.[87] First, it held that the detention was lawful under the Immigration Act 1971 (UK), which authorises the detention of a person "pending his examination and pending a decision to give or refuse him leave to enter".[88] The power persisted until a decision was taken to grant or refuse entry, but it was implicitly limited to detention for as long as was reasonably necessary to perform the examination and to reach a decision.[89] The Court found that a short period of detention, no longer than about a week, *can* be reasonably justified where it will enable speedy determination of an application for leave to enter.[90] Detention longer than a week must be justified by special circumstances, such as a risk of absconding or misbehaviour.

The Court held further that the detention did not infringe the right to liberty under Art 5 of the European Convention, as scheduled to the Human Rights Act 1998 (UK) (Sch 1, Pt 1, Art 5(1)(f)). Article 5(1) of the Convention guarantees the right to liberty subject to exceptions, which include: "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". The Court ruled that the drafters of the European Convention in 1951 intended that the exception to the right to liberty in Art 5(1)(f) would preserve the right of states to decide whether to allow aliens to enter their territories on any terms whatsoever.

The Court found that the jurisprudence of the European Court of Human Rights ensures that those processes must not be unduly prolonged.[91] The test of

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87 *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512 (Lord Phillips of Worth Matravers MR, Schiemann and Waller LJJ).

88 See Immigration Act 1971 (UK), Sch 2, para 16.

89 The Court of Appeal cited *R v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704 at 706; and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111.

90 See *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512 at [67].

91 The Court of Appeal cited: *Chahal v United Kingdom* (1996) 23 EHRR 413; *Ali v Switzerland* (1998) 28 EHRR 304 at 310; *Amuur v France* (1992) 22 EHRR 533.

proportionality prescribed by Art 5(1)(f) required the Court to consider whether the process of considering an asylum application, or arranging a deportation, had gone on too long to justify the detention of the person concerned, having regard to the conditions in which the person was detained and any special circumstances affecting him. Proportionality does not apply to the need to prevent absconding. Applying that test, the Court found no disproportionality in this case.

Although the case was on appeal to the House of Lords at time of writing, the Court of Appeal's decision extended the Home Office's powers of administrative detention by permitting detention without specific proof that detention is necessary to prevent unlawful immigration. The Government's February 2002 White Paper signals numerous changes to the UK's detention regime.[92] The key modification is the introduction of a "managed system of induction,[93] accommodation,[94] reporting and removal centres to secure a seamless asylum process".[95]

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92 UK Home Office, *Secure Borders, Safe Haven Integration with Diversity in Modern Britain*, CM 5387, February 2002.

93 Induction centres for newly arrived asylum seekers are designed to explain the processes in claiming asylum and support, obligations to comply with temporary admission and reporting arrangements, the requirement to leave the UK should the asylum claim fail, and how to obtain assistance to return. These centres also provide information about legal advice, dispersal and voluntary departure; undertake basic health screening; book asylum interviews and travel warrants. Asylum seekers remain in induction centres for one to seven days, depending on whether they have applied for support and dispersal or whether they are relocating to an agreed address or an Accommodation Centre. Induction Centres will host between 200-400 asylum seekers and their dependants, providing full-board accommodation, with smaller facilities for single or pregnant women or those with special needs. See UK Home Office, n 92 at 53-54.

94 The Government is trialing new Accommodation Centres, based on European models, for up to 3,000 new asylum seekers for the duration of processing and appeal (if any). The centres will provide full-board, accommodation and health care, education, interpretation and "purposeful" activities such as training in English language, IT skills, and community volunteering. A proportion of new asylum seekers eligible for government support will be allocated places in Accommodation Centres and will be expected to accept the place or receive no alternative support. The criteria for admission include: availability of a suitable place; language; family circumstances; and the port of entry or Induction Centre. The centres will result in the phasing out of existing voucher-only or cash-only support, although asylum seekers will receive a cash allowance for incidental expenses. Asylum seekers will be permitted to come and go, receive visitors, and access legal advice but will be subject to residence and reporting requirements.

The induction and accommodation centres are intended for only a proportion of asylum seekers, with the remainder placed in existing dispersal accommodation, selected for fast-track processing at Oakington Reception Centre, or otherwise detained. The 2002 White Paper reiterates the rationale for the Oakington Reception Centre – that short-term detention is necessary to ensure the success of fast-track asylum claims processing and decision-making, and the availability of failed applicants for removal. The White Paper states that Oakington is designated as a place of detention, with facilities similar to removal centres, although it is a more "relaxed" regime with "minimal physical security" and access to legal advice and support.[96]

C *Playing politics with human rights: Detention jurisprudence in the United States and in Australia*

In the case of Canada, New Zealand and United Kingdom, the jurisprudence on administrative detention is focused very much on the provisions of domestic or transnational Bills of Rights or on the terms of the Refugee Convention itself. In Australia, and to a certain extent in the United States of America, the discourse is

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Non-compliance may damage their credibility and thus affect the outcome of their asylum claims. See UK Home Office, n 92, 55-57.

95 See UK Home Office, n 92 at 15 and 66. The 2002 White Paper states the government's intention to redesignate existing detention centres as "Removal Centres" (other than Oakington), the purpose of which is to effect the removal of failed asylum seekers. The number of immigration detention places increased from 900 in1997 to 2,800 by the end of 2001, with new facilities at Harmonsworth, Yarl's Wood and Dungavel. A further 40% increase is planned by 2003 to create a total of 4,000 detention places. While the focus of detention is on those subject to removal, the 2002 White Paper reiterates the detention criteria elaborated by the 1998 White Paper. These criteria state that there is a presumption in favour of granting temporary admission or release, with certain exceptions. The criteria further to permit the detention of whole families where necessary to establish their identities or claims, or to prevent absconding. The Government intends to eliminate the use of prison accommodation, with exceptions, after the opening of new Immigration Service Detention Centres.

The 2002 White Paper also proposes extending the power of detainee escorts to search detainees to also allow entry to, and searches of, private premises, for safety reasons. It also proposes that non-Immigration Service staff be given power to detain overstayers and illegal entrants or require them to report periodically. See UK Home Office, n 92 at 68.

96 The maximum processing capacity is 250 applicants per week, or 13,000 per year. See UK Home Office, n 92 at 58, 64-65.

sited as much in constitutional and administrative law as in human rights law. Put another way, debates about the lawfulness of detaining asylum seekers are focussed very much on domestic law. In both of these countries, detention arguments have raised issues about the scope of the Judiciary's power to correct legal errors in the administrative process. (Although Australia has no entrenched rights regime, it does have a written Constitution.) The one source of law that is conspicuous by its absence is international refugee law. It will be my contention that it is no mere coincidence that in these two countries, the policies relating to the detention of asylum seekers is appreciably tougher than that pertaining in Canada, New Zealand or the United Kingdom.

It is a feature of both Australian and United States immigration law that no recognition is given to the special situation of asylum seekers and refugees. In Australia, the Migration Act 1958 makes no reference to Art 31 of the Refugee Convention. Refugees and asylum seekers who enter the country without a visa are subject to the same mandatory detention provisions as other immigration outlaws. In the United States there is no general legislative provision for the detention of asylum seekers who have lodged applications. However, those who lodge asylum applications in the course of a removal or deportation proceeding may be detained in the same way as other non-citizens in such proceedings.[97] Asylum seekers may be held without bond, released on bond, or paroled without bond. Legomsky notes that the US has increasingly detained asylum seekers pending final determination in order to deter people from lodging asylum claims solely to prolong their stay, to assure the removal of failed applicants. Aliens subject to expedited removal procedures[98] who lodge asylum applications may be detained where the immigration officer finds there is no credible fear of persecution[99] or even where the officer does find a credible fear of persecution,

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97 Legomsky, *Immigration and Refugee Law and Policy* (2nd ed, 1997) p 917; Immigration and Nationality Act (UK), s 236(a).

98 See Refugee Act 1980 (US), Pub L No 96-212, 94 Stat 107 (1980), 8USC para 1253(h) (1988), amending para 243(h) of the Immigration and Nationality Act. Note that moves were also made to restrict the access of illegal entrants to appeal and judicial review mechanisms. See Illegal Immigration Reform and Immigrant Responsibility Act 1996; and Musalo, Gibson, Knight and Taylor, "The Expedited Removal Study: Report on The First Three Years of Implementation of Expedited Removal", (2001) 15 (1) Notre Dame Journal of Law, Ethics and Public Policy 130-145.

99 See 8 USC 1225(b)(1) (Supp II 1996). The concept of "summary exclusion" was created by the Antiterrorism and Effective Death Penalty Act 1996 (US) (AEDPA), but modified by the Illegal Immigration Reform and Immigrant Responsibility Act 1996

pending final determination by an immigration judge and until removal from the US. The legislative construct in the two countries has, inevitably, had an impact on the jurisprudence coming from the courts.

As countries with a shared ancestry in English common law, in both Australia and the United States the ability of the courts to review the legality of executive action is constitutionally entrenched. In both countries the traditional vehicle for reviewing the lawfulness of administrative detention is the writ of habeas corpus. Whereas the United States Constitution makes specific provision for the issue of this writ, constraining the circumstances in which it can be suspended,[100] the Constitution of the Commonwealth of Australia (Cth) ("Constitution") merely safeguards the general right to curial oversight of administrative actions taken by "officers of the Commonwealth" (Constitution, s 75(v)). In practice this means that habeas corpus will issue only in conjunction with one of the remedies enumerated. Where the jurisprudence of the two countries converges is in the acceptance that the "great writ" of habeas corpus is subject to the will of the legislature.[101] In other words, the right to judicial oversight does not in itself imply any substantive right to freedom from detention.[102]

The gap between the international legal jurisprudence on detention and Australia's domestic rule of law became apparent in the early 1990s with the challenges made to Australia's first mandatory detention regime. In *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1,[103] the

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before taking effect. See AEDPA 422, Pub L No 104-132, 1996 USCCAN (110 Stat.) 1214 (1996). See Legomsky, n 97 at 290-291.

100 See 2nd amendment to US Constitution. See Neuman, "Habeas Corpus, Executive Detention and the Removal of Aliens" (1998) 98 Colum L Rev 961 at 970-976.

101 On the history of the writ, see Duker, *A Constitutional History of Habeas Corpus* (1980) pp 12-94; Holdsworth, *A History of English Law* (3rd ed, 1944) pp 104-125; Sharpe, *The Law of Habeas Corpus* (1976) pp 1-19; Clark and McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (The Federation Press, 2001).

102 See *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 123 ALR 478 where the High Court held that habeas corpus could not be used as a means of collaterally impeaching the correctness of orders made by a court of competent jurisdiction that had not been shown to be a nullity. In that case the High Court also held that the jurisdiction to entertain this writ could only arise as an incident of an action brought within the Court's original jurisdiction. See further, n 169.

103 See discussion above, n 39 ff.

Cambodian asylum seeker litigants argued that their incarceration was unlawful because it constituted a penalty and therefore amounted to an exercise of judicial power by the Executive. Under the terms of the Australian Constitution, only the courts can exercise the judicial power. The High Court rejected this argument,[104] even though the majority acknowledged that the regime established to detain the Cambodians at the centre of the action would be unconstitutional if applied to Australian citizens. The constitutionality of the detention provisions in *Lim* were upheld as a valid exercise of legislative power incidental to the "aliens" power contained in s 51(xix) of the Constitution.[105] The court justified the situation facing the incarcerated asylum seekers by characterising their detention as "voluntary". The court stated that the Cambodians were free to leave detention at any time provided that in so doing they left Australia. As noted earlier,[106] the High Court created a legal fiction acutely inappropriate to the position of asylum seekers that re-emerged in the course of the litigation surrounding the *Tampa* affair in 2001.[107]

One decade later, this reasoning was echoed in the majority ruling in the *Tampa* litigation. There, a majority of the Federal Court affirmed that the right to a remedy in the nature of habeas corpus would only lie if the actions taken were contrary to the law as determined by the Australian Parliament under the

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104 In other words, because the plaintiffs were aliens, their administrative detention was lawful. See n 39.

105 This section confers on the Federal Parliament the power to make laws for the peace, order and good government of Australia in respect of naturalisation and aliens.

106 See n 39 ff.

107 Namely, the notion that asylum seekers taken into custody are restrained, rather than detained, because they are free to go home or anywhere else of their choosing save Australia. See n 37. For accounts of the incident in 2001 which lead to Australia's decision to refuse admission to boats traveling to its territory carrying unvisaed asylum seekers, see Rothwell, "The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty" (2002) 13 PLR 118; Hathaway "Immigration Law is Not Refugee Law"in US Committee for Refugees, *World Refugee Survey 2001*, pp 39–47; Tauman, "Rescued at Sea but Nowhere to Go: The Cloudy Legal Waters of the *Tampa* Crisis" (2002) 11(2) Pacific Rim Law and Policy Journal 461, 477-478; and Fonteyne, "All Adrift in a Sea of Illegitimacy: An International Law Perspective on the *Tampa* Affair' (2001) 12 PLR 249.

Constitution. For Beaumont J, one decisive factor working against the asylum seekers was the fact that they could point to no legal right to enter Australia.[108]

When one of the Cambodian asylum seekers affected by the ruling in *Lim* brought the same issues before the UN Human Rights Committee,[109] the Committee's findings were dramatically different to the rulings made by Australia's High Court. The Committee held Australia's detention regime to be arbitrary,[110] and contrary to Australia's obligations under Arts 9(1), 9(4) and Art 2(3) of the ICCPR. Mr A also sought a ruling that he was entitled to compensation under Art 9(5) of the ICCPR. Although this aspect of the complaint was ruled inadmissible by the Human Rights Committee in the preliminary stages of the

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108 Beaumont J held that the action had to fail because there was no "relevant substantive cause of action [that is, a legal right] recognised by law and enforceable by [the] court." He held that the Federal Court had no inherent jurisdiction to issue a writ of habeas corpus. His Honour cited *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 123 ALR 478 where the High Court held that *habeas corpus* could not be used as a means of collaterally impeaching the correctness of orders made by a court of competent jurisdiction that had not been shown to be a nullity. In that case the High Court also held that the High Court's jurisdiction to entertain this writ could only arise as an incident of an action brought within the Court's original jurisdiction. See *Ruddock v Vadarlis* (2001) 110 FCR 491, Beaumont J 102-103.

109 The failure of the attempt in *Chu Kheng Lim* to gain the release of the predominantly Cambodian boat people opened the way for a complaint to be lodged with the Human Rights Committee. It is a precondition of a communication that the author have exhausted all local remedies in her or his attempt to seek redress for a breach of the ICCPR. See Opsahl, "The Human Rights Committee" in Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992). On the workings of the Committee and its history, see McGoldrick, *The Human Rights Committee* (Clarendon Press, 1991).

110 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997). The anonymous Mr A was one of 26 Cambodians who arrived in Australia by boat in November 1989. He was placed in detention in Broome, Sydney, Darwin and finally Port Hedland. He was not released until January 1994 when his wife was granted refugee status in Australia. Mr A claimed that the provisions requiring the detention upon arrival in Australia of all "designated persons" was arbitrary (see ss 177-178 of the Migration Act 1958). He alleged that the legislative regime allowed no scope for considering whether his detention in custody for approximately five years was necessary or reasonable in the circumstances and that as a result his detention was "arbitrary." The restrictions placed on the judicial review of his detention under what is now s 183 meant that he was denied his right to bring legal proceedings in a court to challenge his release.

complaint, the Committee nevertheless made a ruling on this point in its final opinion.[111]

The Australian Government chose not to alter its laws to comply with the spirit of the Human Rights Committee's findings in *A v Australia*.[112] The country's domestic courts have also maintained their reasoning on the lawfulness of administrative detention per se. A more recent challenge to the law and practice mandating the detention of asylum seekers as unauthorised arrivals, saw the Federal Court reiterate the notion that if a law is "properly characterised as incidental to the Executive power to process visa applications and to remove or deport unlawful non-citizens, then the law will not be punitive or penal in character". (*NAMU v Minister for Immigration and Multicultural Affairs* [2002] FCA 907 9-12.)

The tendency for the Judiciary to make concessions in favour of broadening the powers of the legislature and the Executive in their handling of asylum cases is apparent also in American jurisprudence. Many of the guarantees contained in the United States Constitution have been found not to apply in cases involving non-citizens. Congress, it is said, has "plenary" (or unlimited) power to legislate with respect to the admission, exclusion or deportation of "aliens".[113] On at least one line of authority, the due process rights contained in the Fifth Amendment to the Constitution are said to be inapplicable in the immigration context – at least in the case of "excludable aliens".[114]

As Taylor notes, the plenary power jurisprudence is matched at least to some extent with case law which affirms the rights of non-citizens affected by unlawful

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111 See para 11 of the Committee's Assessment of the merits. See also n 39 ff.

112 The detention regime was altered after the ruling in *Chu Kheng Lim* with the introduction of provisions allowing for the release from detention of five classes of people, defined as "eligible non-citizens". In practice, however, unauthorised arrivals are still subjected to mandatory detention in most instances. While some children have been released, in most instances the authorities opt for detention on the basis that it is not in the interests of the children to be separated from their parents. See Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998) pp 214-217.

113 Legomsky, "Immigration Law and the Principle of Plenary Congressional Power" (1985) 1984 Sup Ct Rev 255.

114 *Shaughnessy v US ex rel Mezei* 345 US 206 (1953) is a classic example in point. See also Schmidt "Detention of Aliens" (1987) 24 San Diego Law Review 305 at 321.

executive action.[115] Although the older case law on this point has varied,[116] recent Supreme Court rulings support the view that the jurisprudence is turning to favour judicial protection over notions of plenary power.[117]

In comparing the recent rulings of the Australian and American Courts on the issue of immigration detention, interesting parallels are to be found in two areas. The first point of convergence between the two countries occurs in cases where legislative and Executive action to detain involves a direct attempt to exclude judicial oversight of the actions taken. The second involves cases where the courts have been faced with construing the scope of detention legislation.

In *Lim*, the one point in which the High Court ruled in favour of the Cambodian detainees was the challenge they mounted to the then s 52R of the Migration Act 1958. (Cth). This provided that no court could order the release of a "designated person". The High Court ruled that this provision offended the guarantee of curial oversight of actions taken by "officers of the Commonwealth" in s 75(v) of the Australian Constitution. The ability of the courts to review the lawfulness of administrative detention was seen as being of foundational importance.

In both the United States and Australia, harsh detention policies have been implemented in recent times in the context of quite deliberate moves to exclude judicial review. The United States enacted "court stripping" provisions in 1996 which on their face purport to preclude judicial review of immigration

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115 See Taylor, n 11 at 1139-1143.

116 One old (and later repudiated) example is the case of *Fernandez-Roque v Smith* 567 F Supp 1115 (1983). Shoob J in the US District Court Atlanta Division held that once detention is no longer justifiable on the basis of excludability, then a legitimate expectation arises that the detention will end, unless some new justification for continuing detention arises. His Honour held that the constitutional principle of liberty in the US Constitution gives rise to this expectation. The Court found further that even though the government is authorised to detain excludable aliens indefinitely where immediate exclusion is impracticable, the determination of excludability itself only provides a basis for an initial, temporary period of detention. Thereafter, some other basis for detention must be found, such as that the detainee is likely to abscond, pose a risk to national security, or pose a serious and significant threat to persons or property in the US. This was one of the early claims made by Marielito asylum seekers. For a later case that was more representative of the way these people were ultimately treated by the Courts, see *Barrera-Echavarria v Rison*, 44 F 3d 1441 (9th Cir 1995).

117 See discussion, n 120 ff.

decisions.[118] In September 2001, the Australian Parliament passed similar laws, with the introduction into the Migration Act 1958 (Cth) of a privative clause to similar effect.

In America, the Constitutional guarantee of curial oversight of executive detention has seen habeas corpus become a significant portal for the judicial review of all immigration-related decisions.[119] In *Immigration and Naturalization Service v St Cyr* 121 S Ct 2271 (2001),[120] the US Supreme Court ruled that the 1996 judicial review provisions did not eliminate habeas corpus jurisdiction over St Cyr's challenge to his removal order.[121] A narrow majority of the Court[122] agreed with the appellant's contention that the restrictive provisions in the immigration legislation did not override the operation of the general habeas corpus statute. The Court agreed that the denial of any judicial forum in which to adjudicate the issues raised by St Cyr would violate the Suspension Clause in the *Constitution*.

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118 See 8 USC 1252 (Supp V 1999), enacted by the Illegal Immigration Reform and Immigrant Responsibility Act 1996, Pub L No 104-208, Division C, 306(a), 110 Stat 3009-546 (1996). For a discussion of the effect of this legislation, see Benson, "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings" (1997) 29 Conn L Rev 1411; and Benson, "The 'New World' of Judicial Review of Removal Orders", in 2 Immigration and Nationality Law Handbook 32 (Murphy (ed), 1997).

119 Detention is seen as the precursor of both exclusion and removal from the country. See Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens" (1998) 98 Colum L Rev 961.

120 For a discussion of the case, see Neuman, "The Habeas Corpus Suspension Clause After INS v St Cyr" (2002) 33 Colum Human Rights L Rev 555.

121 St Cyr was a lawful non-citizen resident who was convicted on a guilty plea of a drug offence. His conviction rendered him liable to removal. But for the changes to the immigration laws in 1996, he would have been immune from deportation because of the length of time he had spent in America as a lawful resident. St Cyr argued unsuccessfully before the Board of Immigration Appeals that he should not be deported because he had accrued a right to remain in the country. He then petitioned for a writ of habeas corpus, arguing that the removal order was unlawful because it was made on the basis of an (impermissible) retroactive application of the 1996 amendments. See *Immigration and Naturalization Service v St Cyr* 121 S Ct 2271 (2001) at 557-559.

122 Dissents were filed by Rehnquist CJ, Scalia, and Thomas JJ, with O'Connor J joining in part.

The lawfulness of immigration detention was considered more directly in a second case decided by the Supreme Court in late 2001 which, this time, has direct parallels with similar litigation in Australia. In *Zadvydas v Davis* 533 US 678 (2001) the Supreme Court was asked to construe legislation that authorises the further detention of aliens who are the subject of a removal order, but whose removal has not been secured within 90 days after the final order has been entered. The Supreme Court ruled that aliens ordered deported cannot be detained indefinitely without realistic prospect of another country accepting them, except in instances where release would harm the national security or the safety of the community. Writing the opinion of the majority, Breyer J said at 682:[123]

> Based on our conclusion that indefinite detention of aliens...would raise serious constitutional concerns, we construe the statute to contain an implicit "reasonable time" limitation, the application of which is subject to Federal Court review.

In so doing, the Supreme Court confirmed as correct an earlier ruling by the 9th Circuit Court of Appeals in *Ma v Reno*.[124] Although neither St Cyr or

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123 Note that Rehnquist CJ, Scalia and Thomas JJ again dissented, with O'Connor J joining in part.

124 *Ma, Petitioner-Appellee, v Janet Reno, Attorney General; and Robert Smith, District Director of the Immigration and Naturalisation Service*, Seattle, Washington, Respondents-Appellants No 99-35976. Appeal from the US District Court for the Western District of Washington, Robert C Lasnik, District Judge Presiding, 14 February 2000, Seattle, Washington Filed 10 April 2000. The case involved a refugee, Kim Ho Ma, who left Cambodia at the age of two. He had resided lawfully as a permanent resident in the United States from the age of six but became liable for removal after being convicted of manslaughter during a gang shooting at the age of seventeen. After serving a two-year prison sentence, the INS took Ma into custody pending removal. The removal was, however, frustrated because the US had no repatriation agreement with Cambodia, which would not permit him to return. In the District Court for the Western District of Washington, Ma challenged the legal authority of the Attorney General to hold him in indefinite detention, by filing a petition for habeas corpus (under 28 USC § 2241). The Court ruled that the detention violated Ma's substantive due process rights under the Fifth Amendment. The Attorney General and the INS appealed to the US Court of Appeals for the 9th Circuit. That Court affirmed the decision of the lower court but on a different basis. The Court of Appeal held that the INS had no authority under immigration laws (particularly under 8 USC § 1231(a)(6) to detain an alien who has entered the US for more than a reasonable time beyond the regular 90-day statutory period authorised for removal. Where there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, the Court found that the INS might not detain the alien beyond the statutory period. The statute was thus interpreted not to permit indefinite detention. For a

Zadvydas involved the detention of asylum seekers, the cases are significant as they demonstrate a willingness on the part of the US Supreme Court to construe a statute narrowly so as to limit the discretion of the administration and thus meet overarching constitutional requirements.

The Australian Federal Court has been faced with similar cases involving "non-removable" unlawful non-citizens being held for long periods in detention. Although challenges made by non-citizens convicted of crimes have floundered,[125] in a recent case involving a failed refugee claimant, Merkel J of the Federal Court ruled that the detention in question was unlawful.[126] His Honour based his ruling on a close reading of the provisions in the Migration Act 1958 (Cth) governing the removal of non-citizens who have no right to remain in the country and who have made a formal request to be removed. Al Masri was a Palestinian asylum seeker whose claim for protection as a refugee was rejected. The applicant chose not to appeal against the decision made at first instance, and asked to be returned immediately to the Gaza Strip in Palestine. However, the Australian authorities proved unable to gain permission from any of the countries adjoining the applicant's home territory for the man to land and transit through to his destination. The action in the Federal Court was taken after Al Masri had spent more than a year in the notorious Woomera detention centre, by which time he had been reduced to a near suicidal state.

Merkel J examined earlier cases in which the Federal Court ruled that length of time does not in itself alter the legality of detention. The first of these was *NAMU's case*, in which Beaumont ACJ affirmed that the lawfulness of administrative detention will turn always on the particular *statutory* context and purpose. Beaumont ACJ concluded from this that the lawfulness of a statutory authority to detain cannot be altered by personal matters pertaining to an applicant

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discussion of these cases, see Taylor, "Behind the Scenes of St Cyr and Zavydas: Making Policy in the Midst of Litigation" (2002) 16 Geo Immigr LJ 271; and Aleinikoff, "Detaining Plenary Power: The Meaning and Impact of Zavydas v Davis" (2002) 16 Geo Immigr LJ 365. On the issue of indefinite detention of migrants in the US under the new laws, see Morris, "The Exit Fiction: Unconstitutional Indefinite Detention Of Deportable Aliens" (2001) Houston Journal of International Law 255.

125 For example, see *Vo v Minister for Immigration and Multicultural Affairs* (1998) 98 FCR 371 (FFC).

126 *Al Masri v Minister for Immigration and Indigenous and Multicultural Affairs* [2002] FCA 1009.

such as length of time spent in detention.[127] Merkel J did not take direct issue with the judge's reasoning, but differed sharply with his colleague in his analysis of the legislative provisions governing Al Masri's detention. He noted that the provisions mandating the detention of unlawful non-citizens are matched with specific duties imposed on immigration officials to remove persons who submitted a request in writing to be removed.[128] His Honour ruled that the legal authority to detain Al Masri ceased at the moment the Australian authorities became unable to accede to the man's written request to be returned home.[129]

The ruling in *Al Masri's case* seems to have begun a trend of sorts in the Federal Court. Although the prevailing jurisprudence in that Court on the effect of the 2001 privative clause has induced a mood of judicial deference in the review process, there have been other occasions where single judges have ordered the release of asylum seekers in detention. An example in point is the recent decision by Gray J ordering the release of an Afghan detainee who was determined to be a refugee in late 2001. The man was kept in detention after the fall of the Taliban in that country on the basis of an informal "wait and see" policy.[130]

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127 *NAMU of 2002 v Secretary, Department of Immigration, Indigenous & Multicultural Affairs* [2002] FCA 907 (4 July 2002), at [11]-[13]. (Note that the Australian courts are now forbidden from disclosing the name of asylum seekers or refugees. See Migration Act 1958 (Austl), s 91X(2)). See also *Vo v Minister for Immigration and Multicultural Affairs* (1998) 98 FCR 371 (FFC).

128 See Migration Act 1958 (Cth), s 189 (officer required to detain a person suspected of being an unlawful non citizen); s 196 (obligation to maintain an unlawful non-citizen in detention until removed, deported or granted a visa); and s 198 (obligation to remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be removed).

129 Interestingly, when Merkel J declined to stay his order and secured Al Masri's release, the Australian authorities renewed their efforts to secure Al Masri's passage through to Palestine, and quickly managed to secure the necessary permissions. The young man left Australia within days of winning his release from Woomera. In spite of this fact, the Minister has lodged an appeal against Merkel J's decision, using the costs order made by the judge as a lever for re-litigating the issues raised by the case before the Full Federal Court.

130 See *VHAF v Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA)* [2002] FCA 1243; and *Abbas v MIMIA* [FCA], Unreported Mansfiled J, 5 November 2002.

D Jurisprudence on the Rights of Asylum Seekers in Detention

The absence of an articulated rights regime for asylum seekers in either Australia or the United States has also affected the way the courts have treated claims made by detained asylum seekers in these two countries. As noted earlier, in both Australia and America, asylum seekers are seen as a mere subset of unlawful non-citizens. They have no entitlement to special treatment. In the United States, the existence of a constitutionally entrenched Bill of Rights should make a difference. In the case of non-citizens detained after being admitted into the country, it is fair to say that the rights regime has resulted in some gains for detainees. However, the same is not always true for persons who are literally or figuratively outside the country, and who are incarcerated in the course of trying to gain admission. Nowhere is the particular plight of asylum seekers – the quintessential outsiders trying to access protection – more apparent than in the cases involving detainee children.

Taylor begins her article on immigration detention in the United States with an account of Jenny Flores who was a teenager when detained by the Immigration and Nationality Service for as long as two years in "highly inappropriate conditions".[131] Subjected to routine strip searches, forced to share sleeping quarters and bathrooms with unrelated adults, Flores became a celebrated test case in a class action challenging the constitutionality of the conditions experienced by children in detention. Taylor[132] and Olivas[133] recount the trials faced by unaccompanied minors from Haiti and Cuba held in custody at Krome Service Processing Centre in Florida and at the now infamous Guantanamo Bay detention facility.[134] Taylor writes that it took years of litigation to win victories for the children in detention, and even then the results were achieved by negotiated settlement rather than through judicial order.[135] In *Flores v Meese* 681 F Supp

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131 Taylor, n 11, 1088.

132 Taylor, n 11 at 1124-1125.

133 Olivas, "'Breaking the Law' on Principle: an Essay on Lawyers' Dilemmas, Unpopular Causes and Legal Regimes", (1991) 52 U Pitt L Rev 815 at 821-824.

134 For a description of the Krome facility, see http://www.inshealth.org/tour/krome/krome.html. The home page of the Guantanamo Bay facility is available at http://www.nsgtmo.navy.mil/.

135 Taylor, n 11, 1124. For more recent work on this issue, see Women's Commission on Refugee Women and Children, "Prison Guard or Parent?: INS Treatment of

665 (CD Cal 1988) the practice of strip-searching was declared unconstitutional, but when the litigation made it to the Supreme Court, that court refused to consider constitutional arguments that conditions in detention were unduly oppressive for "juvenile alien detainees".[136] Taylor writes "court orders and consent decrees requiring the INS to improve its treatment of alien detainees have sometimes been met with a pattern of non-compliance".[137] She then charts what she identifies as the leakage of the "plenary power" doctrine into the general jurisprudence on the due process rights of non-citizens in immigration detention. She uses as examples a series of cases in which the Constitutional protections to due process[138] and freedom from cruel and unusual treatment[139] have been read down or distinguished altogether in cases involving non-citizens in immigration detention.[140]

In the Australian context, the incarceration of children has become a matter of acute public concern, both because of the number of children being held and because of the traumas they have experienced while in custody. Numerous

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Unaccompanied Refugee Children", available at; http://www.womenscommission.org/reports/wc_children_in_INS detention_05.02.pdf.

136 *Reno v Flores*, 113 S Ct 1439, 1446-47 (1993). The Supreme Court declined to consider these arguments because similar claims had been settled by consent decree. See Taylor, n 11 at 1092.

137 Taylor, n 11, 1125. Taylor cites *Orantes-Hernandez v Meese*, 685 F 2d 1488 (CD Cal 1988), aff'd, 919 F 2d 549 (9thCir 1990), where the district court issued a permanent injunction against the INS after documenting many instances of non-compliance with earlier orders to change the operation of the detention facilities. See also Johnson, "Responding to the 'Litigation Explosion': The Plain Meaning of Executive Branch Privacy over Immigration" (1993) 71 NCL Rev 413 at 447. See also the LHCR Report *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, August 1999, available at http://www.lchr.org/refugee/refugees_2.htm#Reports.

138 Taylor, n 11, 1149-1150.

139 Taylor, n 11, 1153-1154.

140 On this topic, see also the LCHR Reports: *Is This America? The Denial of Due Process to Asylum Seekers in the US*, October 2000; and *Slamming "The Golden Door": A Year of Expedited Removal*, April 1998, both available at http://www.lchr.org/refugee/refugees_2.htm#Reports.

assertions have been made that Australia is in breach of a range of international legal obligations.[141] Rayner writes:[142]

> Life for children in immigration detention means seeing and hearing distressed and desperate men and women involved in acts of violence, suicide attempts, and self-harm. It means being under video surveillance, addressed by a number, not their name; having no play facilities. It means being moved, when the authorities decide, whatever that may do to their relationships, education and sense of control – and we know from the resilience literature that a child who does not have an internal locus of control will not survive what life throws at them.[143] There may be no medical facilities specifically for children who live behind razor wire, surrounded by uniforms, identification badges, roll calls and searches. It means that the law permits child abuse, because the children are "unlawful non citizens" – our new "illegitimate" children.

While few actions involving juvenile asylum seekers in custody have made it to the courts, the cases decided offer little relief for the detainees. This is in spite

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141 In November 2001, the Human Rights Commissioner instituted a major inquiry into Australia's immigration detention laws as they affect children. HREOC describes the project as:

> an inquiry into the adequacy and appropriateness of Australia's treatment of child asylum seekers and other children who are, or have been, held in immigration detention. The terms of reference for the Inquiry include consideration of the mandatory detention of child asylum seekers, alternatives to their detention and additional measures which may be required in immigration detention facilities to protect the human rights of all detained children.

See http://www.hreoc.gov.au/human_rights/children_detention/background/detention.html. The inquiry had yet to report in October 2002, but had attracted an extraordinary range of detailed and instructive submissions, including: Commission for Children and Young People "On the Experiences of Children Living in Immigration Detention"; and a 244 page joint submission from a range of individuals across Australia entitled "Kids in Detention Story", available at: http://members.ozemail.com.au/~burnside/hreoc-submission.pdf. Access to the many submissions made to the inquiry is available through the inquiry website at http://www.hreoc.gov.au/human_rights/children_detention/submissions/index.html

142 Rayner, "The Use of the Law to Protect Human Rights and Freedoms – A Morality Tale", Plenary Address, Australasian Law Teachers' Association Annual Conference, Perth Western Australia, 30 September 2002. Unpublished article, on file with author.

143 Rayner and Montague, *Resilient Children and Young People.* Deakin Human Services Australia, Deakin University, 1998.

of the fact that the leading case on the interface between Australian domestic law and the international legal obligations incurred with ratification of the Convention on the Rights of the Child was an immigration case.[144] The reasoning of Beaumont J in *NAMU* – that the lawfulness of administrative detention will turn always on the particular statutory context and purpose – neatly removes from consideration anything personal to a litigant. The special status of children is lost altogether.

In relation to UNHCR's taxonomy of rights for the asylum seeker in detention,[145] one of the greatest defaults in Australia's regime relates to the detainees' access to legal advice and other information concerning both their detention and the refugee status determination process.[146] For unaccompanied minors, the default is particularly acute because of the extra challenges facing child asylum seekers in trying to understand what is happening to them. Australia

144 See *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273. The case concerned a Malaysian citizen who was married to an Australian citizen and who had the primary responsibility for the care and control of no less than seven Australian born children. Mr Teoh was seeking permanent residence on the basis of his marriage, but was denied a visa and placed under a deportation order because he had been convicted of a criminal offence. The High Court accepted arguments that Australia's ratification of the Convention on the Rights of the Child created a legitimate expectation that the Minister would take into account the terms of Art 3 of this Convention when making a decision as to whether to order Mr Teoh's deportation. On the significance of the case, see Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 Syd L Rev 204; Mathew and Walker, "Case Note: *Minister for Immigration v Ah Hin Teoh*" (1995) 20 MULR 236.

145 See discussion above n Part II G.

146 This point was made in 2000 in an important Parliamentary report on Australia's refugee and humanitarian programme. See Australia, Parliament; Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (Canberra, June 2000), 82-85. The Committee declined to recommend that the domestic laws should be changed to guarantee universal access to independent immigration advice for persons in detention, opting to maintain the current system whereby legal advice is provided to detainees only when requested. At the same time, it rejected the contention that providing information to detainees would necessarily result in unfounded claims, and thereby complicate and lengthen the process. The Committee recommended that "DIMA investigate the provision if videos or other appropriate media in relevant community languages, explaining the requirements of the Australian on-shore refugee determination process. This material should be available to those in detention and to (government funded service) providers." (See rec 3.1)

has legislation governing the protection of immigrant children. Under the Immigration (Guardianship of Children) Act 1946 (Cth) (Guardianship Act), the Minister for Immigration is the statutory guardian of all non-citizen minors who do not have a parent or other legal guardian in Australia. However, the same Minister is responsible for the immigration detention of unlawful non-citizens. Under the Migration Act 1958, immigration detainees have a right to legal advice about their detention, but only upon their request. There is no statutory obligation on immigration officials to advise people of their rights. While most asylum seekers in detention are given access to government funded advisers, this only occurs after a screening process, and detainees have no choice in the adviser allocated to them.[147] Most importantly, the legislation imposes strict time limits on appeals and applications for judicial review that the courts are precluded from waiving or extending.[148]

The impact of this regime on unaccompanied minors seeking protection as refugees has been considered by Australia's Federal Court in a number of cases. Although some Federal Court judges have conceded the conflict of interest inherent in the dual role of the Minister as guardian and gaoler,[149] the court has not been prepared to find that the conflict undermines the legality of either the detention or conditions of detention. In a succession of cases, the Federal Court has ruled that the Minister is not obliged by law to appoint a next friend, tutor or guardian to represent and advise minors in detention before either the Refugee Review Tribunal or before a court.[150] In *WACB v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 246, the Full Federal Court confirmed that

147 Crock, "A Sanctuary under Review: Where to From Here for Australia's Refugee and Humanitarian Processes?" (2000) 23 UNSWLJ 246, 265 ff.

148 See Migration Act 1958 (Cth), s 412 (28 days to RRT); s 477 (28 days to Federal Court) and s 486A (35 days to High Court). The last provision has been attacked as unconstitutional because of the guarantees contained in s 75(v) of *the Australian Constitution*. See *Plaintiff S157 of 2002 v Commonwealth of Australia* High Court transcript S157/2002 (3 September 2002).

149 See *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194.

150 See *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194; *WACA v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 163 (31 May 2002); and *WACB v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 246 (21 May 2002).

the juvenile status of an unaccompanied minor from Afghanistan could not alter the literal operation of the time limits in the legislation. It rejected arguments that the notification provisions in the legislation should be read down so as to imply a special duty of care in the case of unaccompanied child detainees. The Court summarised and endorsed the findings of the first instance judge in the following terms at [7]-[8]:

> There is nothing in the Act to say that a notification to an unaccompanied minor is not a notification for the purposes of the Act. If the unaccompanied minor be of tender years then it may be, as a matter of fact, that no effective notification could be given for that word presupposes a giver and a receiver who can understand what it is that he or she has been told. As appears from the Shorter Oxford English Dictionary the relevant meaning of the word "notify" is "to give notice to; to inform"[.] Notification is not effective to a receiver who cannot understand it. This no doubt has implications for those cases in which it can be shown as a matter of fact that the recipient of the notification did not comprehend what he or she was being told. This may arise in a case of persons of tender years. It may arise also in the case of persons under an intellectual disability. It also has the consequence that notification must be in a language comprehensible to the recipient of the notification.
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> His Honour was satisfied that the appellant was told of the Tribunal decision and understood its import. *This was evidenced by the fact that the appellant became distressed when he heard of the Tribunal's decision.* His Honour was also satisfied the appellant was told that he had 28 days in which to lodge an application for review.[151] Further, his Honour did not think the status of the Minister under the

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151 The appellant's account of the notification process is set out by the Court in *WACB v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 246, 5:

> The appellant's evidence was that Mr Wallis, an Afghan interpreter and two other people were present when Mr Wallis told him of the Tribunal's decision. The appellant said that he became very upset and began crying. He denied that Mr Wallis gave him any papers. The appellant stated that they were given to one of the people present, a Ms El Ham, and that Mr Wallis did not tell the appellant anything about applying to the Federal Court for a review of the decision. He said that other detainees told him that he could apply. The appellant also said that Ms El Ham did not give him the copy of the Tribunal's decision on that day. He only obtained it some weeks later when he went to ask for it. The Tribunal's decision had never been translated for the appellant by anyone from the Minister's department.

> *Guardianship Act* affected "the conditions under which notification may be given and under which time begins to run for the purposes of an application to this Court".
>
> (emphasis added)

More sophisticated arguments about the implication of special duties in the treatment of child asylum seekers were made in the cases of *Odhiambo* and *Martizi (Odhiambo and Martizi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194). Simon Odhiambo claimed to have been born on 26 March 1984 in Sudan to a Christian family. He fled at age 11 when his father was killed by Islamic militants, made his way to Kenya and spent some time in Nairobi and Mombasa, living on the streets. He left Kenya by stowing away on a ship, with five other people (including the other appellant, Peter Martizi). Martizi was also a minor, claiming to be a refugee from the genocidal massacres in Rwanda.

Odhiambo presented as a Swahili speaker, and was rejected by the Refugee Review Tribunal on credibility grounds. The Tribunal relied on a linguistic analysis of the young man's speech which cast doubts on the young man's claims of Sudanese nationality. Both Odhiambo and Martizi were assisted by a legal adviser in the preparation of their written claims but they appeared by themselves before the Tribunal. In fact, neither appellant physically attended the Tribunal, as both were heard using video conferencing (at [8]).

Both argued, without success, that the Minister had an implied legal obligation to appoint a guardian at the hearing before the Tribunal. The two went further to argue that the Tribunal's decisions refusing refugee status was legally flawed because the Tribunal had failed to modify its procedures to account for the applicants' young age. Intervening as amicus curiae, Australia's Human Rights and Equal Opportunity Commission (HREOC) argued that the codified procedures in the Migration Act and the Guardianship of Children Act should be interpreted consistently with Australia's human rights obligations – most particularly the obligation imposed by the Convention on the Rights of the Child. HREOC argued that the Tribunal erred in law "in failing to identify its legal obligations" and in "failing to apply the law to the circumstances of this case". It

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The reference to Mr Wallis is to the Senior Departmental officer heading the management team of the Curtin Centre in remote Western Australia, where the appellant was detained.

said that, as child applicants, "the best interests of the appellants should have been the primary consideration at all stages of the processing of their claims".

HREOC contended the Tribunal should have ensured that the appellants had a guardian or representative with them during the proceedings. It claimed that the mode of hearing given to the appellants was also inadequate at law. The Commission argued that the use of video conferencing in place of a face-to-face hearing was so inappropriate for children that the procedures followed could not be said to constitute a "hearing" within the terms of the legislation. HREOC also attacked the factual findings made by the Tribunal, claiming that it failed to exercise its statutory function because it did not properly take into account and assess the following relevant matters:

- the age, maturity and state of development of the appellants both at the time of the hearing and at the time of the relevant events occurring; and
- the capacity of the appellants to communicate their experiences and the impact of any trauma suffered by the Appellants at a young age on this capacity.

The issue of the applicants' youth seems to have only been considered in the most cursory terms at first instance (*Odhiambo v Minister for Immigration and Multicultural Affairs* [2001] FCA 1092).[152] On appeal (*Odhiambo v Minister for*

152 Tamberlin J said at [4] – [6]:

> The decision-maker took into account, of course, that the applicant was young when he allegedly left Sudan and that the traumatic events which he asserted had occurred might affect the applicant's behaviour and memory. However, the applicant's vagueness and lack of local and geographic knowledge of Sudan, the several different versions of how he left Sudan and arrived in Kenya, and his statements in relation to the language Dinka, led the decision-maker to conclude that he was unable to accept that the applicant had been truthful about his origins.
>
> In my view, this conclusion was not a final ruling independent of the linguistic evidence, but was a step on the way towards the ultimate finding which was made. The consequence of this is that if the linguistic analysis evidence could be shown to have been wrong or incorrect or if it could be demonstrated that an error was made by the RRT in principle, in the way in which it approached this evidence, then the applicant may have some prospect of succeeding. There is nothing before me or in the evidence, however, to contradict the material which came from the linguistic analysis or from the applicant, apart from his assertion that he came from Sudan.
>
> In my view, it was open to the decision-maker to rely on this material.

Immigration and Multicultural Affairs [2002] FCAFC 194), the Full Federal Court declined HREOC's invitation to read down the code of procedures in the migration legislation to take account of the obligations assumed by Australia at international law (at [12]). Instead, the Court emphasised the narrow scope it was allowed in the judicial review of the Tribunal's rulings in the two cases. It confirmed that formal compliance with the bare terms of the legislation was all that could be required of the Tribunal in this case.

This decision by Australia's Full Federal Court stands in sharp contrast to the ruling of the Canadian Federal Court in *Uthayakumar v Canada* (Blais J, 18 June 1999). That case also involved two unaccompanied minors whose refugee claims were rejected on credibility grounds. The Canadian Court overturned the decision of the Refugee Panel on the ground that the Panel had failed to take into account the age of the children at the time of their travel to Canada and the fact that they did not "keep a log throughout their travels". The first point of divergence in *Odhiambo* is that the Australian Federal Court was (and still is) precluded from declaring a migration ruling unlawful on grounds of failure to take into account relevant matters.[153] This point aside, it is instructive that in the Australian context the court did not consider that the terms of the UN Convention on the Rights of the Child could even have a bearing on the interpretation of the procedural obligations of the tribunal in question.

E Some Concluding Comments on the "Excision" of International Law

The parallels between America and Australia in both practice and jurisprudence are not just apparent in the way juvenile asylum seekers are treated in the two countries. While it is difficult to envisage the United States taking the step of "excising" parts of its territories for migration purposes as Australia has done,[154] there are many features of Australia's current laws and practices that are modelled closely on United States precedent. The "Pacific Solution", with its detention facilities on Nauru and Papua New Guinea's Manus Island find resonances in Camp X-Ray operated by the United States at its trust territory at

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153 See Migration Act 1958, s 476. On the operation of Pt 8 of this Act at the relevant time see Crock, n 113, pp 271-273. On 1 October 2001, these provisions were replaced with legislation that, on its face, precludes any curial review of migration decisions, including those relating to detention. On the interpretation of the new regime, see *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) FCFCA 228 (15 August 2002).

154 See Migration Amendment (Excision from Migration Zone) Act 2001 (Cth).

Guantanamo Bay in Cuba. At the height of the parliamentary debates that followed the *Tampa* Affair,[155] it was no mere coincidence that Australian Parliamentarians were given detailed information about the 20 year program instituted by the United States to intercept or "interdict" asylum seekers from Haiti.[156]

One interesting feature of the case law in these two countries is the obvious discomfort suffered by the courts as a result of the politicising of asylum issues. In both instances the dominant response of the courts has been to retreat from the heat of the fight brought on inevitably by public interest advocates. The litigation induced by the decision to refuse admission of the *Tampa* asylum seekers failed before Australia's Full Federal Court and leave to appeal to the High Court was denied in *Ruddock v Vadarlis* (2001) 110 FCR 491.[157] America's Haitian interdiction program also spawned a number of unsuccessful legal actions.[158]

In both America and Australia the key judicial rulings relied heavily on both a narrow and formalist reading of relevant domestic laws, and what might be called a principle of strict territoriality. The US Supreme Court in *Sale v Haitian Centers Council Inc* 113 S Ct 2549 (1993) held simply that the *non-refoulement* obligations assumed by America at international refugee law did not adhere to actions taken outside of US territory (at 2560-2567).[159] In *Ruddock v Vardalis*,

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155 For a description of the seven Bills passed on 26 September, see Crock, "Echoes of the Old Countries or Brave New Worlds: Legal Responses to Refugees and Asylum Seekers in Australia and New Zealand" (2001) 14(1) Revue Québécoise de Droit International at 55-91.

156 Hancock, "*Border Protection (Validation and Enforcement Powers) Bill* 2001 (Cth)", Bills Digest No 62 2001-2002 (Available at http://www.aph.gov.au/library/pubs/bd/2001-02/02bd062.htm). See also the same author's *Current Issues Brief*, available at http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm. Bills Digests are opinion pieces prepared by researchers in the Office of Parliamentary Library specifically for the benefit of parliamentarians.

157 Leave to appeal to the High Court was refused on the ground that the dispersal of the plaintiffs rendered any application for remedial relief academic. See n 108.

158 For example, see *Sale v Haitian Centers Council Inc* 509 US 155 (1993); 113 S Ct 2549 (1993). See also Blackmun, "The Supreme Court and the Law of Nations" (1994) 104 Yale LJ 39.

159 For a discussion of the case, see Villiers, "Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States" (1994) 60 Brooklyn L Rev 841, 890 ff.

the majority judges also characterised the aspiring asylum seekers very much as outsiders -- both literally and figuratively out of reach of the protections to be afforded by the refugee protection provisions of Australia's Migration Act.[160] In the majority, Beaumont J held that, whatever the event, a writ to force release from detention could not be used to compel the government to admit an individual outside Australia onto Australian territory. He ruled that the Executive alone has "power to authorise such an entry". Beaumont J's ruling in the *Tampa* case is interesting in the wider context of the affair. Although he chose not to articulate the relationship between the *Tampa* affair and the panic, fear and xenophobia that followed the 11 September attacks in America, Beaumont J's judgment is replete with a sense of urgency. The judge underscores passages and words. His conclusion – that an alien has no right to enter Australia – is placed quite literally in bold print. The effect is to emphasise and re-emphasise the *outsider* status of the rescuees. The word "alien" appears no less than 27 times in the 30 paragraphs of his judgment.

IV RIGHTS IN CONFLICT: RECONCILING STATE SOVEREIGNTY WITH REFUGEE PROTECTION

The detention of asylum seekers represents challenges for refugee status adjudicators at several levels. Judges presented with legal actions brought on behalf of asylum seekers in detention quite often find themselves figuratively between a juridical rock and a hard place. Although imbued with the primacy of the human right to liberty and freedom from arbitrary detention, courts must operate within the confines of the legal structures given to them.

The foregoing discussion of state practice and comparative jurisprudence suggests the codification of a rights regime for refugees and asylum seekers does make a difference. Courts and adjudicators in this situation have more "hard" legal data to play with, and the role of the courts in arbitrating human rights as principles of law is less conflicted. New Zealand's experience demonstrates that the existence of a Bill of Rights does not guarantee harmony between the Executive and the Judiciary. Nevertheless, it seems to be no mere coincidence that the countries most noted for respecting the rights of refugees and asylum seekers are those where relevant rights and duties are codified in law and where entrenched, apolitical mechanisms exist for ensuring adherence to the law thus codified. Conversely, those most obviously in breach of the letter and spirit of the international standards are those countries where there is either no legislated

160 See above n 109.

rights regime at all or where there are inadequate mechanisms for ensuring compliance with the international standards.

The issue of immigration detention also raises sharply conflicting issues at another theoretical level. In recent times there has been a growing tendency to conflate the discourse on detention with the discourse on border control and national sovereignty. In Australia this is manifest in repeated assertions that mandatory detention is essential to the control and protection of the country's borders, and thus constitutes a fundamental expression of state sovereignty. In the United States, similar rhetoric surrounds the tradition that the Executive and Congress have "plenary power" to control all aspects of immigration.

In her article on immigration detention in America, Taylor[161] argues convincingly that the plenary power doctrine in that country is not impossible to reconcile with what she identifies as the "aliens' rights" tradition. The detention of undocumented asylum seekers and other immigration outlaws is, at its heart, a procedural measure that stands apart from substantive entitlements to any immigration outcome. Concerning herself primarily with the conditions of incarceration, Taylor argues that treating people with humanity, dignity and in accordance with minimum human rights standards need do nothing to compromise national sovereignty.

In fact, Taylor's argument can be applied to the debates about detention per se as well as the entitlement of asylum seekers in detention. There is little hard evidence to support the Australian Government's repeated assertions that "there is no alternative" to mandatory detention if a country is to protect its sovereign right to control immigration. The detention regime in this country has never been an effective deterrent to unauthorised immigration; and has done little to make the asylum determination system more effective or efficient. While the removal of failed asylum seekers from Britain and Germany has been difficult, this is not a uniform experience in "non-detention" countries. The problem of returning asylum seekers to their country of origin is not always due solely to an inability to locate the individuals involved.[162] Put another way, detention and border control to some extent have been mutually exclusive issues.

The final issue for refugee law judges is the extent to which it is proper for them to engage in the debate about the rights of detained refugees and asylum

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161 Taylor, n 11 at 1145-1158.

162 On this point, see the discussion above at n 129 ff.

seekers. In countries like Australia, the question is a difficult one, given the electoral unpopularity of refugees and asylum seekers. Judges pushing the boundaries of the law risk vilification or, worse, they risk encouraging "retaliative" legislation that will make matters even worse for the people whose rights they seek to protect.[163] Having said this, it is my view that judges around the world could be taking a much more contextual approach to both the interpretation and application of the law in cases involving the detention of asylum seekers.[164]

The courts in some countries have begun to acknowledge the particular problems facing asylum seeker children in detention, interpreting the law so as to force administrators to modify their behaviour to accommodate the children's needs. The particular plight of women asylum seekers has also been well documented, with the work of key academics acknowledged in the emerging jurisprudence.[165] In cases like *Odhiambo*, the Australian Federal Court had the opportunity to continue this tradition in Australia, but declined the invitation. Sadly, in Australia the interpolation of procedural requirements so as to ensure compliance with international human rights standards is still regarded as radical.

The case for a contextual approach to the interpretation of the law in detention cases involving asylum seekers is a strong one, not the least because of the potential for procedural misfeasance to result in the failure to identify a Convention refugee. As well as taking into account matters such as gender, culture, age, language and prior experience of torture, I would like to see refugee

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163 There is something of a history in Australia of parliament legislating to contradict or otherwise alter judicial pronouncements on immigration and refugee law. See Crock, "Administrative Law and Immigration Control in Australia: Actions and Reactions", Unpublished PhD Thesis, University of Melbourne, 1994.

164 See Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation" (1990) 100 Yale LJ 545, who comments on the tendency of US Courts to avoid constitutional questions in immigration when interpreting statutes.

165 There is a great deal of academic writing on the issue of gender bias in refugee law and policy. For example, see Crawley, Refugees and Gender: Law and Process (2000); Greatbach, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1(4) International Journal of Refugee Law (IJRL) 518; Kelly, "Gender-related Persecution: Assessing Asylum Claims of Women" (1993) 26 Cornell International Law Journal 625; UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends" (1997) IJRL (Special Issue – Aug 1997) 79; and other articles in this special issue.

law judges articulate and respond to the particular impediments to good administration created by the detention process.[166]

If the essence of good refugee status procedure is in the facilitation of fact finding and free and honest story telling, there is much detention that is antithetical to either good practice or adherence to the spirit of legal norms. Detention has the effect of corralling asylum seekers together, fostering the development of rumour mills and stock stories as asylum seekers compare notes and try to work out the "best bet" for a win in the determination process.[167] For young people, and those with a history of torture or trauma, detention can exacerbate post-traumatic stress and create depressive conditions so as to impede the communication of any sort of narrative.[168] Put another way, in some instances detention can make it impossible for the asylum seeker to get a hearing in anything more than the most cursory sense. I personally find it difficult to see how situations like this can be compliant with the rule of law.

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166 See Legomsky, "An Asylum Seeker's Bill of Rights in a Non-Utopian World" (2000) 14 Geo Imm LJ 619. Legomsky draws heavily on the work of Cramton, "Administrative Procedure Reform: The Effects of Section 1663 on the Conduct of Federal Rate Proceedings" (1964) 16 Admin L Rev 108, 111-112.

167 In Australia, this problem has been addressed by isolating new arrivals from the general detention centre population until they have gone through a screening process. There are also punitive provisions for persons who change their story after their initial interview. Detainees are not given access to legal advice until they have passed through this screening process. See Crock, n 112 at 269-271.

168 An example in point is *SCAW v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 810, a case involving an unaccompanied minor of Hazara ethnicity. The case was dismissed with a note in the heading: "no matter of principle".

As the world readies itself for further conflicts in the new "war against terror", the issue of asylum seekers and detention is unlikely to go away.[169] It is in times of fear and great uncertainty that the human rights of the outsiders are most at risk. It is also in such times that the world is most in need of judges imbued with the spirit as well as the letter of the law.

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169 The 11 September terrorist attacks on the United States heightened security concerns surrounding the unlawful entry of migrants and asylum seekers in many countries. States have become more willing to detain asylum seekers in order to undertake more rigorous security checks and screen out suspected terrorists. For example, in the United Kingdom, Pt 4 of the Anti-Terrorism, Crime and Security Act 2001 (UK) made changes affecting immigration and asylum law. The Act enables the Home Secretary to certify people as suspected international terrorists, not entitled to the protection of Art 33(1) of the 1951 UN Convention relating to the Status of Refugees. It also permits the indefinite detention without trial of suspected international terrorists where there is no immediate prospect of removing them to another country. In doing so it excludes judicial review and requires derogation from the European Convention on Human Rights. See generally, Anti-Terrorism, Crime and Security Bill: Pts IV and V: Immigration, Asylum, Race and Religion Bill 49 of 2001-02, House of Commons Library Research Paper 01/96, 16 November 2001.

In the United States, the Patriot Act 2001 (US) purports to codify the decision in *Zadvydas v Davis* by providing that an alien detained after being certified as a terrorist can bring a habeas corpus action in any US district court which has jurisdiction. However, all appeals of District Court decisions would go to the US Court of Appeals for the District of Columbia. See House Judiciary Committee Majority Staff Description of the latest version of the Patriot Act, October 12, 2001.

In Canada, as a matter of policy the Government announced after the 11 September attacks that it intended to increase its use of detention and deportation powers. It planned to conduct more thorough security screening and detention for security reasons, resulting in both more detentions and longer periods of detention. The Government authorised $4 million (Can) in additional funding for detention purposes in the short term. The new legislative detention regime, outlined earlier above, was enacted on 1 November 2001. See Canadian Minister of Citizenship and Immigration, "Strengthened Immigration Measures to Counter Terrorism", News Release 2001-2019, 12 October 2001.

THE COURTS AND INTERCEPTION: THE UNITED STATES INTERDICTION EXPERIENCE AND ITS IMPACT ON REFUGEES AND ASYLUM SEEKERS

Lory Diana Rosenberg[*]

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* Director, Defending Immigrants Partnership; Adjunct Professor, American University, Washington College of Law; Former Board Member, Board of Immigration Appeals (1995-2002). I wish to acknowledge the prior analysis and commentary of colleagues Deborah Anker, Ignatius Bau, Richard Boswell, Steve Forrester, Guy-Goodwin Gill, Lucas Guttentag, James C Hathaway, Harvey Kaplan, Harold Hongju Koh, Ira Kurzban, Cheryl Little, David Martin, Hiroshi Motomura, Karen Musalo, Gerry Neuman, Michael Ratner, Robert Rubin, all other counsel in the *Sale* case, and the dedicated work of many others too numerous to name, from whose thinking on the Refugee Convention, interdiction, and Haitian interdiction in particular, I have drawn in this paper. I apologize in advance for failing to individually credit all of your contributions and those of many unnamed colleagues. Any inaccuracies or errors in the analysis or perspective presented in this paper are mine alone.

This paper, originally prepared for the 2002 5th Biannual World Conference of the International Association of Refugee Law Judges, held October 22-25 in Wellington, New Zealand, has been modified to incorporate discussion of the significant development in United States' interdiction and refugee policies, triggered by the October 29, 2002 arrival in Key Biscayne, Florida of a vessel containing 211 Haitians and 3 Dominicans.

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I INTERDICTION: 1. THE ACT OF PROHIBITING[1]

Article 33 of the 1951 United Nations Convention on the Status of Refugees [hereinafter Refugee Convention] mandates that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion".[2] Article 31 of the Refugee Convention cautions that contracting states shall not impose penalties for illegal entry or unauthorized presence on a refugee who presents him or herself to the authorities, and shall not restrict a refugee's movements pending a determination of status except as necessary.[3]

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees [hereinafter Protocol],[4] which incorporates by reference the terms of the Refugee Convention. Twelve years later, in the Refugee Act of 1980,[5] the United States Congress amended the Immigration and Nationality Act [hereinafter INA] to implement the Protocol in domestic law.[6] Specifically, Congress added a new statutory section to the INA, making asylum a discretionary form of protection available to persons within the United States and at United States borders[7] who qualified under the definition of "refugee"[8] and met

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1 *Black's Law Dictionary* (7th ed, 1999).

2 Convention Relating to the Status of Refugees, Apr 24, 1954, art 33, 189 UNTS 2545.

3 Convention Relating to the Status of Refugees, Apr 24, 1954, art 31, 189 UNTS 2545.

4 Protocol Relating to the Status of Refugees, Nov 1, 1968, 19 UST 6223, 606 UNTS 267.

5 Refugee Act of 1980, Pub L No 96-212, 94 Stat 107 (codified in scattered sections of the INA).

6 See *INS v Cardoza-Fonseca,* 480 US 421, 424 (1987) (ruling that the Refugee Act of 1980 amended the INA to fully implement the United States' obligations under the Protocol). See also *INS v Stevic,* 467 US 407, 418, 421 (1984).

7 Immigration and Naturalization Act § 208(a)(1), 8 USC. § 1182(a)(1). See Deborah Anker, The Law of Asylum in the United States 4 (3d ed, 1999).

8 Immigration and Naturalization Act § 101(a)(42)(A), 8 USC §1101(a)(42)(A). A "refugee" is "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person

other statutory criteria. Congress also amended existing section 243(h) of the INA, ostensibly to conform to the Refugee Convention (Article 33), by providing that, "[t]he Attorney General *shall not deport or return any alien*... to a country if the Attorney General determines that such alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion".[9]

Within one year of the codification of these provisions, pursuant to Executive Order No 12,324, a bilateral executive agreement signed with the Haitian government,[10] the United States began interdicting and screening any Haitian found in international waters. The U.S.-Haiti Agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly

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last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." In "such special circumstances as the President after appropriate consultation (as defined under section 207(e) of the INA) may specify," the term "refugee" may mean any person within that person's country of nationality or habitual residence who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Id. § 101(a)(42)(B), 8 USC § 1101(a)(42)(B).

9 Immigration and Naturalization Act § 243(h), 8 USC § 1253(h) (emphasis added). As amended by the Refugee Act of 1980, section 243(h) of the INA applied only to aliens "within the United States," which limited its scope to aliens facing deportation proceedings and expulsion from the United States, but not to those facing exclusion proceedings, which were then prescribed for aliens who had not effected an "entry" into the United States. Section 243(h) has since been amended and codified as section 241(b)(3) of the INA (providing that "the Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion.") (emphasis added). A discussion of the criticism of sections 243(h) and 241(b)(3) of the INA for treating asylum as discretionary and perpetuating the use of the "would be threatened" standard of proof, rather than adopting the "well-founded fear" standard contained in the Refugee Convention and made applicable to asylum claims, is beyond the scope of this paper.

10 See Exec Order No 12,324; Agreement on Migrants-Interdiction, Sept 23, 1981, US-Haiti, 33 UST 3559, 3560, TIAS No 10241 [hereinafter US-Haiti Agreement] (including a guarantee from the Haitian Government that its repatriated citizens would not be punished for illegal departure).

acknowledged that even on the high seas, the United States was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees"[11]

On September 29, 1981, six days after the US-Haiti Agreement was signed, President Reagan issued Presidential Proclamation No 4865, characterizing "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States".[12] Accordingly, President Reagan suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin.[13] Consistent with the terms of the U.S.-Haiti Agreement, however, the proclamation provided expressly that "no person who is a refugee will be returned without his consent".[14]

These interceptions and repatriations continued for ten years. Following the September 30, 1991 military coup that overthrew the government of Jean Bertrand Aristide, the first democratically-elected president in Haitian history,

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11 Id. A "credible fear" standard was used to determine which interdicted Haitians might be "screened in" to apply for protection from return to Haiti under US laws implementing the Protocol.

12 Proclamation No 4865, 3 C.F.R. §50-51 (1981-1983 Comp.). According to an INS Fact Sheet, This Month In Immigration History: November 1991, available at http:/www.ins.usdoj.gov/graphics/aboutins/history/nov91.htm (last visited Jan. 31, 2003) [hereinafter INS fact sheet], this program was known as the Haitian Migrant Interdiction Operation (HMIO), until the acronym was later changed to the Alien Migrant Interdiction program (AMIO) to reflect the fact that not all of the interdicted persons were Haitian. See also *Sale v Haitian Ctrs Council, Inc*, 509 US 155, 160-61 (1993) (discussing the recent history of Haitian interdiction under various executive orders and proclamations).

13 Sale, 509 US 160-61.

14 Id. (citing Exec Order No 12,324, 3 C.F.R. § 2(c)(3), 181 (1981-1983 Comp)). See also Proposed Interdiction of Haitian Flag Vessels, 50 Op. Off. Legal Counsel 242, 248 (1981) [hereinafter OLC Opinion] (concluding that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted...must be given an opportunity to substantiate their claims."). In the face of contrary views expressed by the legal adviser to the State Department, however, this Office of Legal Counsel opinion was later withdrawn.

several hundred Haitians fled Haiti and were interdicted and held on United States Coast Guard cutters, circling in international waters in the Caribbean.[15]

On November 18, 1991, citing concern for the health and safety of the several hundred Haitians and crew on the cutters, the United States announced that the program of forced repatriation of "screened-out" Haitians would resume.[16] The Haitian Refugee Center, representing the Haitians, immediately sought injunctive relief, alleging that the government had failed to establish and implement adequate screening procedures to protect Haitians who qualified for asylum from being returned to Haiti.[17] During the temporary period in which the district court suspended all forced repatriations, the United States opened the U.S. Naval Station at Guantanamo Bay, Cuba and erected tent camps to house and process the refugees.[18]

On May 24, 1992, pursuant to Executive Order 12,807, also known as the Kennebunkport Order, President George H Bush ordered that refugee determinations were no longer required in the cases of Haitian and other migrants coming to the United States by sea.[19] Instead, to prevent illegal migration to the United States, the Coast Guard was authorised to stop and board vessels intercepted beyond the territorial sea of the United States, and to return the vessel

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15 See INS Fact Sheet, above n 12 (indicating that although the interdicted Haitians were screened by INS officers according to the informal "credible fear of return" standard, senior officials in Washington were uncertain how to handle the Haitians who were either "screened in" or "screened out").

16 Id.

17 *Haitian Refugee Ctr v Baker*, 783 F Supp. 1552 (SD Fla 1991) (granting temporary relief that precluded any repatriations until February 4, 1992). But see *Haitian Refugee Ctr v Baker*, 949 F.2d 1109 (11th Cir. 1991) (*per curiam*) (reversing and remanding the order), *cert denied*, 502 US 1122 (1992); and *Haitian Refugee Ctr v Baker*, 953 F2d 1498 (11th Cir 1992).

18 See INS Fact Sheet, above n 12 (stating that the informal "credible fear" standard was then formalised in an administrative memorandum from the INS Deputy Commissioner).

19 Exec Order 12,807, Interdiction of Illegal Aliens, 57 Fed Reg 23,133 (May 24, 1992) (suspending the entry of aliens coming by sea to the United States without necessary documentation and declaring that the international obligations of the United States do not extend to persons located outside the territory of the United States). See also id., § 4 (revoking and replacing Exec Order No 12, 324).

and its passengers to the country from which it came. The order states explicitly that nothing in it shall be construed "to require any procedures to determine whether a person is a refugee".[20] Therefore, refugees interdicted under these circumstances were to be repatriated.[21]

In 1993, the Supreme Court in *Sale v Haitian Centers Council Inc,* found that in the decade following enactment of the Refugee act of 1980, "the Coast Guard interdicted approximately 25,000 Haitian migrants".[22] The Supreme Court acknowledged that "[a]fter interviews conducted on board Coast Guard cutters, aliens who were identified as economic migrants were 'screened out' and promptly repatriated," while "[t]hose who made a credible showing of political refugee status were 'screened in' and transported to the United States to file formal applications for asylum".[23]

Nevertheless, the Supreme Court reported that, "[f]or 12 years, in one form or another, the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those [refugee] protections".[24] Apparently, even under the original system, in which those found to have a credible fear were "screened in," it appeared that few bona fide claims to refugee status were presented, with the result that "all interdicted have been returned to Haiti".[25]

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20 Id.

21 According to the INS Fact Sheet, above n 12, repatriated Haitians were allowed to pursue their claims "through in-country US refugee processing established under section 101(a)(42)(B) of the INA."

22 *Sale v Haitian Ctrs. Council Inc*, 509 US 155, 161-62 (1993).

23 Id. The informal "credible fear" screening standard, originally introduced in 1981 in President Reagan's high seas extraterritorial interdiction program, was the precursor in name and operation to the "credible fear" determination now required by statute in the case of every putative refugee who appears at a United States port of entry without valid documents. See Immigration and Naturalization Act §§ 235(b)(1)(A)(ii), 235(b)(1)(B)(ii)-(iii).

24 *Sale*, 509 US 160.

25 See, eg, *Haitian Refugee Ctr v Gracey*, 809 F2d 794, 797 (DC Cir 1987) (concluding that "over 78 vessels carrying more than 1800 Haitians have been interdicted," and that after interviewing all interdicted Haitians the government found that "none has presented a bona fide claim to refugee status"). According to INS reports, between 1981

In the ten years since the *Sale* decision, the United States' increasingly restrictive interdiction policy has undoubtedly reduced refugee claims made by Haitians and other refugees who may have warranted consideration and protection under United States refugee law. Most recently, in the wake of the October 29, 2002 arrival in Key Biscayne, Florida of a vessel containing 211 Haitian and 3 Dominican men, women and children, the Department of Justice adopted a new policy making fast-track expedited removal procedures applicable to all those arriving by sea.[26] In a self-described effort to "assist in deterring surges in illegal migration by sea," which "threatens national security,"[27] the policy requires a refugee arriving by sea to satisfy the "credible fear" test before being allowed to present an asylum claim. Immediately thereafter, President George W. Bush issued Executive Order 13,276, [28] affirming Executive Order 12,807 and authorizing the Attorney General to maintain custody and conduct screening of any undocumented aliens intercepted in the Caribbean region at Guantanamo Naval base or any other appropriate location.

This paper examines the background, scope and implementation of United States' policies related to refugees interdicted on the high seas or in extra-territorial waters that culminated in the Supreme Court decision in *Sale v. Haitian Centers Council, Inc.* It also considers the recent federal regulations, which resort to expedited removal and mandatory detention as a means of deterring others from coming to the United States by sea to seek asylum. In light of these policies and practices, the paper raises questions concerning the United States' adherence

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and 1991, more than 25,000 were interdicted, "while only six had been 'screened in' for transfer to the United States." INS Fact Sheet, above n 12.

26 INA § 235(b)(1)(A)(iii), 8 USC. § 1225(b)(1)(A)(iii) permits the Attorney General, "in his sole and unreviewable discretion," to designate as subject to expedited removal any alien who is not a described in subparagraph (F) (referring to Cubans), who has not been admitted or paroled and is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the INA, and who has not affirmatively shown that he has been physically present in the United States for a 2-year period immediately prior to the date inadmissibility is determined.

27 Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed Reg 68,923-26, 68,924 (Nov 13, 2002) [hereinafter November 13, 2002 Notice].

28 Exec Order No 13,276, 67 Fed Reg 69,983-86 (Nov 19, 2002).

to the terms of Articles 33 and 31 of the 1951 Refugee Convention, to which it is bound by virtue of its accession to the 1967 United Nations Protocol.

II INTERDICTION AND DOMESTIC AND INTERNATIONAL LAW RELATING TO REFUGEES

The United States' interdiction practices relating to refugees are governed by various international treaties, domestic statutes, regulations, and executive orders. International law, as expressed in Article 33 of the Refugee Convention provides:

> 1 No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2 The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

In addition, Article 31 provides:

> 1 The Contracting States shall not impose penalties, on account of illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2 The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country.

Under Article 33, a contracting state undertakes a duty not to return a refugee to circumstances in which he or she risks being persecuted based on one of the five attributes covered in the refugee definition[29] - an obligation that must attach prior to the time refugee status is confirmed and asylum is granted by the

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29 Convention Relating to the Status of Refugees, Apr 24, 1954, art 33, 189 UNTS 2545.

contracting state.[30] In discussing Australia's 2001 interception and repulsion of the Norwegian container ship "Tampa" carrying more than 400 refugees, Professor James C Hathaway posits that withholding the fundamental protection against refoulement in Article 33 until there has been an official confirmation of a refugee's qualifications for refugee status is likely to place genuine refugees at risk and call into question the contracting state's compliance with its obligations under the Refugee Convention.[31]

Accordingly, a putative refugee's basic right to at least provisional protection "applies as soon as a refugee comes under the de jure or de facto jurisdiction" of a contracting state, as the Refugee Convention does not qualify "Article 33 protection to 'refugees'. . . based on the level of attachment to the asylum state."[32] Furthermore, Article 31 arguably limits the detention or the imposition of other restrictions on refugees to justifiable reasons, such as pending a determination of the refugee's identity, or whether he or she poses a risk to the contracting state's security.[33]

The United States domestic statute relating to protection from return to a country in which an individual's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group or political opinion has been modified twice since the United States acceded to the Protocol and enacted the Refugee Act of 1980. Specifically, section 241(b)(3)(A) of the INA currently provides:[34]

> Notwithstanding paragraphs...[relating to arriving aliens and others], the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion.

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30 See James C Hathaway, *Refugee Law is not Immigration Law,* in United States Committee for Refugees, World Refugee Survey 38 (2002). As Professor Hathaway explains, this duty continues until there has been a fair determination that the putative refugee does not so qualify.

31 Id 41.

32 Id. (citing James C Hathaway & Anne K Cusick, Refugee Rights are Not Negotiable, 14 Geo Immigr L J 481, 491-93 (2000)).

33 Id 42.

34 INA, § 241(b)(3)(A) (emphasis added).

Additionally, prior to its amendment in 1996, section 243(h) of the INA, as amended by the Refugee Act of 1980, provides:[35]

> The Attorney General *shall not deport or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

In contrast, the pre-1980 provision, which was not mandatory and referred to an alien "within the United States", read:[36]

> The Attorney General *is authorized to withhold* deportation of any alien...within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

In addition, a refugee arriving at a land border or port of entry may apply for asylum.[37] However, since the enactment of "expedited removal" provisions in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), which apply to any alien arriving without valid documents for admission, the statute and regulations condition access to apply for both asylum and withholding of removal on the refugee's ability to assert and establish a "credible fear" of "persecution".[38]

The United States' relevant executive authority includes 3 significant proclamations and executive orders relating to interdiction and refugees. The first of these authorities was Executive Order No 12,324,[39] which allowed interdiction, screening and return of Haitian migrants. The second authorization, Presidential Proclamation No 4865, precluded entry and ordered interception and repatriation

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35 INA, § 243(h) (emphasis added).

36 Id.

37 Immigration and Naturalization Act § 208(a), 8 USC § 1158 (covering any alien who is physically present or who arrives in the United States, including "an alien who is brought to the United States after having been interdicted in international waters).

38 Immigration and Naturalization Act § 235(b)(1)(A)-(B); 8 CFR § 235.3.

39 Exec Order No 12,324, above n 10. See also 46 Fed Reg 48,109 (1981).

of all undocumented migrants intercepted on the high seas.[40] Both Order No. 12,324 and Proclamation 4865 provided that an individual claiming refugee status would be given an opportunity to substantiate his claim.[41] The third of these authorities, Executive Order No 12,807 ("Kennebunkport Order"), terminated the screening process provided in Executive Order 12,324 and allowed the Coast Guard to interdict Haitians on the high seas and immediately repatriate them to Haiti without making any determination of refugee status.[42]

In addition, as noted above, there is now executive authority providing that various agency heads, and in particular, the Attorney General, may carry out their duties relating to "migration of aliens in the Caribbean region", consistent with applicable law.[43] Specifically, the Attorney General may maintain custody of any alien who is believed to be seeking to enter the United States and who is interdicted or intercepted in the Caribbean region.[44]

III UNITED STATES INTERDICTION POLICY AND PRACTICE

The United States Coast Guard has the lead responsibility for at-sea enforcement of United States immigration law and related international agreements.[45] The Coast Guard, which has been involved in immigration enforcement since the passage of anti-slavery legislation in the late eighteenth and early nineteenth centuries, "conducts patrols and coordinates with other federal agencies and foreign countries to interdict undocumented migrants at sea, denying them entry via maritime routes to the US, its territories and possessions."[46]

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40 Proclamation No 4865, above n 12.

41 Exec Order No 12,324, above n 10 and Proclamation No 4865, above n 12.

42 Exec Order No 12,807, above n 19.

43 Exec Order No 13,276, above n 28.

44 Id.

45 14 USC. §§ 2, 14.

46 See generally Department of Transportation, United States Coast Guard homepage, available at http://www.uscg.mil/uscg.shtm (last visited Jan. 31, 2002) [hereinafter Coast Guard Website Materials] (with links to Alien Migration Interdiction, available at http://www.uscg.mil/ hq/g-o/g-opl/ mle/AMIO.htm [hereinafter Alien Migration Interdiction], and History of the Coast Guard in Illegal Immigration, available at http:// www.uscg.mil/hq/g-o/g-opl/mle/amiohist.htm.).

The Coast Guard's stated operational goal is to eliminate most of the potential flow of undocumented migrants entering the United States by sea.[47] The Coast Guard's current migrant interdiction operations are principally directed by national security goals under Executive Order No. 12,807.[48] As described in an overview of its Alien Migrant Interdiction program, "[i]nterdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States".[49]

The Coast Guard reports that starting with the "Mariel Boat Lift" from Cuba in 1980, which brought some 124,000 Cubans to the United States, there has been a steady-state flow of several migrant nationalities via the Caribbean, including Haitians, Cubans, and Dominicans.[50] An initial mass exodus of Haitians followed the collapse of the Duvalier regime in the early eighties.[51] In 1991, a second exodus of Haitian refugees followed the military coup that overthrew the democratically-elected government of Jean Paul Aristide.

According to the Coast Guard, during the 6-month period following the 1991 coup in Haiti, it interdicted over 34,000 Haitians.[52] A third exodus of Haitian migrants occurred in 1993-1994. The Coast Guard responded with "Operation Able Manner", involving a large number of Coast Guard units from both the Atlantic and Pacific Areas.[53] In addition, the Operation, which addressed another exodus of Cubans in 1994, resulted in the interdiction of 38,560 Cubans. The

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47 Id.

48 Exec Order No 12,807, above nn 18 and 36. See generally *Coast Guard Migrant Interdiction Operations Before The House Comm. on the Judiciary, Subcomm. On Immigration and Claims,* 106th Cong. (May 18, 1999) (statement of Captain Anthony S Tangeman, US Coast Guard), available at http://www.house.gov/judiciary/tang0518.htm (last visited Feb. 3, 2003) [hereinafter Statement of Captain Anthony S Tangeman].

49 See Alien Migration Interdiction, above n 46.

50 Id.

51 Id.

52 See INS Fact Sheet, above n 12 (reporting that of these 34,000, 10,000 established a "credible fear" and were "screened in.").

53 See Alien Migration Interdiction, above n 46.

Coast Guard's "surge response" to these two mass migrations in 1994 resulted in the rescue and/or interdiction of over 64,000 migrants.[54]

The other principal source of maritime migration to the United States in the past decade has been from the People's Republic of China, and includes migrants who have sought entry via numerous maritime regions, including the east and west coasts of the United States, Puerto Rico, the United States Virgin Islands, Hawaii, and Guam. In its 1999 testimony to the United States House of Representatives Committee on the Judiciary, the Coast Guard posited that China has been the greatest source of human trafficking by sea, with "an estimated 15,000-20,000 illegal Chinese aliens entering the Western Hemisphere by sea each year, most ultimately destined for the United States".[55]

The Coast Guard reported that, since 1991, it had interdicted over 5,000 Chinese migrants, the vast majority of whom have been repatriated to China.[56] Most Chinese migrants were found on coastal freighter-type vessels or retired fishing vessels interdicted by the Coast Guard far offshore.[57] The Coast Guard explained that in response to Coast Guard interdiction efforts during the mid-nineties, smugglers from China shifted their routes to Mexico and Central America, causing the number of interdictions off the immediate shore of the United States to taper off significantly.[58] Although there were still two to three large Chinese migrant interdictions off United States shores in the late nineties,

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54 Id. As a result, in fiscal year 1996 under Operation ABLE RESPONSE, the Coast Guard directed available resources at the Mona Passage (between the Dominican Republic and Puerto Rico), causing the interdiction of Dominican migrants, who ordinarily do not present refugee claims, to double to more than six thousand.

55 Statement of Captain Anthony S Tangeman, above n 48. The testimony indicates specifically that recent smuggling ventures carrying migrants from the People's Republic of China are typically planned and crewed by violent, highly organized criminal operators known as "snakeheads."

56 Id.

57 Id. (noting that "[a]s long as these cases do not become search and rescue, the Coast Guard complies with the national policy of keeping interdicted PRC migrants outside the reach of US shores. Once these migrants are interdicted, it can often take weeks to finalise disposition as the US government negotiates direct repatriation or the assistance of a third government").

58 Id.

Chinese smugglers appeared to have discovered that Guam, which is only 1700 miles from China and subject to United States immigration laws, offered a "gateway to the continental United States".[59] Therefore, in the late nineties, Chinese interdiction efforts increasingly focused on the seas surrounding Guam.

The Coast Guard report on its Alien Migration Interdiction program indicates that in 1999 and 2000, Coast Guard cutters on counter drug patrol in the Eastern Pacific encountered increasing numbers of migrants being smuggled from Ecuador to points in Central America and Mexico.[60] In its most recent report, the Coast Guard indicates that during fiscal year 2001, it continued to interdict migrants from the traditional source countries of Cuba, Haiti, and the Dominican Republic, and that Ecuadorian cases also continued as a consistent trend in migrant interdiction.[61] Although maritime migration from the People's Republic of China tapered off in 2001, and Cuban migration was steady but slightly less than previous years, Haitian migration to the Bahamas appeared to be increasing, and over 1000 Ecuadorian migrants were interdicted in six events in Pacific waters.[62]

For some reason, on October 29, 2002, the Coast Guard did not stop the vessel carrying 214 persons, including 211 Haitians, when the boat entered United States' waters. Although authorities apparently allowed the boat to enter Biscayne Bay and discharge its passengers, many of whom either jumped off of the ship into the bay or were found on the Rickenbacker Causeway, these individuals were

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59 Id.

60 See Alien Migration Interdiction, above n 46 (noting that while such maritime migration may not have a direct connection to the United States, the Coast Guard acts for humanitarian reasons, as the vessels used by smugglers operate under inhumane conditions and lack emergency safety equipment).

61 See Migration Interdiction Years in Review, at http://www. uscg.mil/ hq/g-o/g-opl/mle/amioyear.htm

62 Id.

apprehended shortly thereafter and, with few exceptions, remain in detention.[63] In response, the Department of Justice immediately issued harsh new rules limiting access to ordinary removal procedures, including the opportunity to apply for asylum, and restricting the freedom of movement of those who arrive in the United States illegally by sea.[64]

IV SALE v HAITIAN CENTERS COUNCIL, INC

It has been vigorously argued that Article 33 of the Refugee Convention, section 243(h) of the INA, and the US-Haiti Agreement all prohibit the United States from returning Haitians interdicted on the high seas to Haiti without first making individualized determinations regarding their claims of persecution in that country. It was pursuant to such legal precepts that the United States followed an interdiction program of "preliminary screening before return" for ten years during the eighties. Yet, by 1991, Haitian flight had escalated to the extent that interdiction and "screening in" based on a "credible fear" evaluation no longer seemed either a desirable or a viable option to the United States government. Instead, interdiction and involuntary repatriation took its place.

Notwithstanding the contention of refugee advocates that Article 33's prohibition against "refoulement" applied categorically and without geographic limitation, the Kennebunkport Order stated expressly that, as far as the United States was concerned, Article 33 "do[es] not apply to persons located outside the territory of the United States".[65] The plan was simple: catch or "interdict" a

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63 In a statement issued November 8, 2002, the INS specified that although the policy of expedited removal of aliens arriving by sea would apply from November 13, 2002 forward, "our policy of deterring mass migration has led us to seek the continued detention of the migrants arriving on the October 29 vessel as well." INS Statement, *INS Announces Notice Concerning Expedited Removal* (Nov 8, 2002), available at http://www.ins.usdoj.gov/graphics/publicaffairs/statements/expremnotice_ST.htm (last visited Feb 3, 2003).

64 See Immigration and Naturalization Act § 235(b)(1)(A)(iii). See also 67 Fed Reg 68,923-68,926, above n 27. These restrictions do not apply to an "arriving alien" coming to the United States by sea, who is already covered under the definition in 8 CFR 1.1(q), ie, "an alien interdicted in international or United States waters brought into the United States by any means, whether or not to a designated port of entry, and regardless of the means of transport."

65 Exec Order 12,807, above n 19.

putative refugee on the high seas before Article 33 takes hold, and the need for a refugee evaluation simply evaporates.[66]

In addressing the Haitian Centers Council challenge to the United States interdiction program in *Sale*, the Supreme Court endorsed this plan, ruling that:[67]

> The President has directed the Coast Guard to intercept vessels legally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees...We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast on the high seas.

The Supreme Court framed the "question presented...[as] whether such forced repatriation, 'authorized to be undertaken only beyond the territorial sea of the United States,' violates §243(h)(1) of the Immigration and Nationality Act of 1952".[68] The Court acknowledged that because aliens residing illegally in the United States or arriving at the border (including those temporarily paroled into the country) were subject to eventual removal, they could request asylum or withholding of deportation under the INA.[69] In contrast, it appeared that aliens interdicted by the United States Coast Guard on the high seas could not.

A Background to the Haitian Cases

As the Supreme Court recognized, on September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history.[70] The Supreme Court

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66 See Alien Migration Interdiction, above n 46; Statement of Captain Anthony S Tangeman, above n 48 (discussing the "costly processes required if migrants successfully enter the United States" and the fact that "illegal immigration can potentially costs US taxpayers billions of dollars each year in social services.").

67 *Sale v Haitian Ctrs Council Inc*, 509 US 155, 159-160 (1993) (footnotes omitted).

68 Id.

69 Id. 159 ("When an alien proves that he is a 'refugee' the Attorney General has discretion to grant him asylum pursuant to § 208 of the Act. If the proof shows that it is more likely than not that the alien's life or freedom would be threatened...the Attorney General must not send him to that country.") (citing *INS v Stevic*, 467 US 407, 423, n 18 (1984)). See also *INS v Cardoza-Fonseca*, 480 US 421, 424 (1987).

70 *Sale*, 509 US, 162.

reported that "since the military coup 'hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding.'"[71]

Many years before *Sale*, the Court recounted that the Coast Guard's announcement on November 18, 1991 that it would proceed with interdiction, screening and repatriation despite the coup, was met with litigation alleging that the government had failed to provide adequate procedures to protect Haitians who qualified for asylum.[72] Subject to an injunction to provide an adequate screening process, and because "so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to accommodate them during the screening process".[73] However, after interdicting more than 34,000 Haitians and intercepting 127 vessels carrying 10,497 undocumented Haitians in May 1992 alone, the Navy determined that it could no longer safely accommodate any other Haitians at Guantanamo.[74]

On May 24, 1992, under the authority of Executive Order 12, 807, the Coast Guard and the INS instituted a new interdiction program of "summary return without screening",[75] and forcibly returned bona fide refugees, without any process or questioning whatever, to Haiti.[76] As described by the Supreme Court:[77]

> With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many

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71 Id.

72 Id. See also above n 17.

73 *Sale*, 509 US 162.

74 Id. (referring to the United States Naval base maintained at Guantanamo, Cuba).

75 Exec Order 12,807, above n 19.

76 By superseding Executive Order 12,324, which had afforded refugees a measure of due process, Executive Order No 12,807 allowed the Coast Guard and INS to dispense with theretofore acknowledged legal obligations not to return refugees to a country where their lives or freedom would be threatened.

77 *Sale*, 509 US 163.

had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees.

This policy was also adopted by President Clinton, who decided not to modify the order when he became President. Accordingly, the United States' interdiction and involuntary repatriation policy under the Kennebunkport Order, gave rise to litigation on behalf of Haitian refugees who were turned back without either screening or any other opportunity to apply for protection under INS provisions governing asylum and withholding of deportation.[78]

B Supreme Court Decision in Sale v Haitian Centers Council, Inc

In *Sale v Haitian Centers Council Inc*, the Supreme Court eschewed consideration of the wisdom of such policy choices and focused on "whether Executive Order No. 12,807...which reflects and implements those choices, is consistent with § 243(h) of the INA"[79] The Supreme Court stated at the outset that the dispute between the parties turned on the statutory language in section 243(h)(1) of the INA.[80]

The Court concluded that the language of section 243(h)(1) restricted the action of the Attorney General, but could not be read as restricting the President's

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78 See generally K Highet, G Kahale III, and AN Vollmer, *Aliens-Interdiction of Haitians on the High Seas*, 88 Am J Int'l L 114 (1994). See also *Haitian Refugee Ctr Inc v Baker*, 949 F.2d 1109 (1991) *(per curiam), cert. denied*, 502 US 1122 (1992) (reversing a district court's temporary grant of relief precluding repatriation), and Haitian Ctrs. Council, Inc v McNary, 969 F.2d 1350 (2d Cir 1992) (reversing a district court's denial of relief, finding that the 1980 amendment of section 243(h) of the INA to remove the reference to aliens within the United States mandated a different result).

79 *Sale*, 509 US 166. A full discussion of the prior decisions of the Eleventh and Second Circuit Courts of Appeal in *Haitian Refugee Center v Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert denied*, 502 US 1122 (1992) and *Haitian Centers Council v McNary*, 969 F.2d 1350 (2d Cir), *cert granted*, 506 US 814 (1992) is beyond the scope of this paper.

80 *Sale*, 509 US 170 ("Both parties argue that the plain language of § 243(h)(1) is dispositive.").

authority to repatriate aliens interdicted in international waters.[81] In particular, the Court pointed to section 212(f) of the INA, which confers power on the President to suspend the entry of any aliens that "would be detrimental to the interests of the United States..."[82] Accordingly, the majority effectively ruled that the reference to *the Attorney General* in section 243(h)(1) did not circumscribe the authority of *the President* to order the interdiction and involuntary repatriation of Haitian refugees.[83]

Also at issue in *Sale* was the removal of the words "within the United States" from the pre-1980 version of section 243(h)(1) of the INA, and the addition of the word "return" to the post-1980, pre-1996 version of section 243(h)(1) of the INA. Arguably, this language was modified by Congress to conform section 243(h)(1) with Article 33(1) of the 1951 Refugee Convention and 1967 Protocol.

The respondents in *Sale* (the Haitian advocates) argued that section 243(h)(1) of the INA, read in harmony with Article 33, must be construed to apply extraterritorially, even to refugees picked up as migrants on the high seas. Rejecting this view, the Supreme Court ruled that the reference to the Attorney General in the statutory text applied principally to his or her responsibilities to conduct expulsion and deportation proceedings in United States territory, the forum in which a request for asylum or withholding of deportation could be advanced.[84] Moreover, the Court noted that even if the relevant portion of the statute were not limited to strictly domestic procedures, "the presumption that

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81 Id 172. Indeed, the Court found that other provisions of the INA conferred powers or responsibilities on the Secretary of State, the President, the Secretary of Labor, the Secretary of Agriculture and even the federal courts.

82 Id. The Supreme Court found, both Executive Order Nos. 12,324 and 12,807 "expressly relied on statutory provisions that confer authority on the President to suspend the entry of 'any class of aliens' or to 'impose on the entry of aliens any restrictions he may deem to be appropriate.'" Id.

83 Id (emphasis added).

84 Id 173 ("Since there is no provision in the statute for the conduct of such proceedings outside the United States...we cannot reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she has not been authorised to conduct such proceedings.")

Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory".[85]

The Court found that there was no provision in the INA authorising the Attorney General to conduct such proceedings in geographic areas outside the United States and thus, no specific reference to an extraterritorial application of section 243(h) of the INA.[86] Rather, the legislative history reflected that section 243(h)(1) of the INA was simply meant to provide access to refugee protection to both deportable and excludable aliens,[87] whereas previously, only aliens subject to deportation could claim non-refoulement protection.[88]

The Supreme Court rejected the respondents' theory that the 1980 excision of the words "within the United States" in the domestic statute meant that the United States had embraced an extraterritorial application of Article 33. The Court recognized that given the "extensive consideration to the Protocol" that preceded the 1980 Act and Congress' amendment to harmonise the two, it might be argued that Congress intended to impose any extraterritorial obligations imposed by Article 33 on the United States.[89] The Court, however, went on to reason that "the

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85 Id (citing *EEOC v Arabian Am Oil Co*, 499 US 244, 248 (1991) (citing, in turn, *Foley Bros v Filardo*, 336 US 281, 285, (1949))).

86 Id at 176 ("It would be extraordinary for Congress to make such a important change in the law without any mention of that possible effect."). See also id at 177 ("When the United States acceded to the Protocol in 1968...[i]t offered *no* such protection to any alien who was beyond the territorial waters of the United States...we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope.").

87 Id 176, n 33 (citing HR Rep No 96-608, p 30 (1979)) (the changes "require...the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation proceedings."). See also S Rep. No 96-256, 17 (1979); US Code Cong. & Admin. News 141, 157.

88 *Cf. Sale*, 509 US at 175 (citing *Leng May Ma v Barber*, 357 US 185, 186 (1958) (holding that even though an alien was physically present within our borders, she was not "within the United States" as those words were used in § 243(h)). ("It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission...and those who are within the United States after an entry, irrespective of its legality) Id (citing *Shaughnessy v United States ex rel Mezei*, 345 US 206, 212 (1953); *Kwong Hai Chew v Colding*, 344 US 590, 596 (1953)).

89 *Sale*, 509 US at 178.

text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders".[90]

The Court found that within the context of the Refugee Convention, "return" denoted "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination... In the context of the Convention to 'return' means to 'repulse' rather than to 'reinstate.'"[91] Additionally, the court construed that the phrase "deport or return" in section 243(h)(1) of the INA, as amended, merely paralleled the phrase "expel or return ('refouler')" in Article 33.[92] Furthermore, it found that, as used in section 243(h)(1) of the INA, the prohibition against return...refers to the exclusion of aliens who are merely "on the threshold of initial entry".[93]

Accordingly, the Court concluded that "[w]hile we must, of course, be guided by the high purpose of both the treaty and the statute, we are not persuaded that either one places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States."[94] The majority ruled that "[w]hether the President's chosen method of preventing the "attempted mass migration" of thousands of Haitians...poses a greater risk of harm to Haitians...is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits".[95]

Justice Blackmun, the sole dissenter, focused on Congress' use of the specific language in the amended statute, stating that "[T]hat Congress would have meant what it said is not remarkable."[96] He emphasized that the majority was able to

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90 Id.

91 Id 182 (referring to a state's authority under the Refugee Convention to send a refugee back to his homeland or to another country).

92 Id 180.

93 Id (citing *Leng May Ma v Barber*, 357 US 187 (quoting *Shaughnessy v United States ex rel. Mezei*, 345 US 212)).

94 Id 187 (finding it perfectly clear that "section 212(f)...grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores").

95 Id 187-88.

96 Id 189.

conclude that the forced repatriation of Haitian refugees is perfectly legal only because it found that the word "return" does not mean return, that the opposite of the phrase "within the United States" is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.[97] Justice Blackmun thus differed with the majority's finding that it was "'extraordinary' "...that Congress would have intended the ban on returning 'any alien' to apply to aliens at sea" (emphasis added),[98] concluding that "the duty of nonreturn expressed in both the Protocol and the statute is clear." He emphasized forcefully that "[w]hat is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors - and that the Court would strain to sanction that conduct".[99]

V INTERDICTION COMES TO SHORE: EXPEDITED REMOVAL AND DETENTION AS A DETERRENT

The application of expedited removal procedures[100] to those arriving illegally by sea directly extends the prohibitive purpose of United States' interdiction policies and practices to interceptions made on dry land. As the supplementary information accompanying the "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A) (iii) of the Immigration and Nationality Act" states, it "will ensure that all aliens...[with the exception of Cuban migrants] who arrive illegally by sea, *whether interdicted or not*, will be subject to expedited removal".[101]

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97 Id 188-89.

98 Id 189.

99 Id.

100 See above n 41. "Expedited removal" under section 235 of the INA was first imposed in the "IIRIRA," effective April 1, 1997. The statute now allows INS inspectors to issue binding removal orders applicable to aliens who arrive at a port of entry without proper documents or who attempt to enter the United States through fraud or misrepresentation. Prior to April 1, 1997, only an immigration judge was allowed to issue an order of deportation. Individuals subject to expedited removal are not entitled to a hearing or review of the justification for the order, and are cannot establish eligibility for re-entry into the United States for a period of five years.

101 November 13, 2002 Notice, above n 27, 68,925 (emphasis added).

In effect, the expedited removal provisions of the statute provide that an immigration officer shall order an alien arriving in the United States without proper entry documents, who is determined to be inadmissible under section 212(a)(6)(C) or section 212(a)(7) of the INA, removed without further hearing or review.[102] If an alien subject to expedited removal indicates either "an intention to apply for asylum under section 208 or a fear of persecution," then the officer shall refer the alien for a credible fear interview by an asylum officer.[103]

The statute applies these provisions to any alien who has not been admitted or paroled, and who has not affirmatively shown to the satisfaction of an immigration officer that he or she has been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under the statute.[104] This authority has been delegated by the Attorney General to the INS Commissioner by regulation.[105]

The November 13, 2002 Notice represents the first time the expedited removal procedures have been applied to a new class of arriving aliens under the rule.[106] The supplementary information provides:[107]

> This Notice authorizes the Immigration and Naturalization Service (the Service) to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat, or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under this Notice.

Thus, pursuant to the November 13, 2002 Notice, a refugee coming to the United States by sea is subject to expedited removal even if he or she has been physically present in the United States for months, a year, or even as long as 23 months and 30 days after arrival. In essence, if he or she asserts a fear of persecution, he or she is "screened" and must be determined to have a "credible

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102 Immigration and Naturalization Act § 235(b)(1)(A)(i).

103 Id § 235(b)(1)(A)(ii).

104 Id § 235(b)(1)(A)(iii).

105 8 CFR § 235.3(b).

106 November 13, 2002 Notice, above n 27, 68,924.

107 Id 68,924-25.

fear" before being afforded an opportunity to apply for asylum or withholding of removal.[108] In addition, the Notice provides that "[a]liens falling within this newly designated class who are placed in expedited removal proceedings will be detained, subject to humanitarian parole exceptions, during the course of immigration proceedings, including, but not limited to, any hearings before an immigration judge".[109]

The supplementary information accompanying the November 13, 2002 Notice explains that the Service believes that by detaining this group of aliens, will deter surges in illegal migration by sea, including mass migration, which it describes as "threaten[ing] national security by diverting resources from counter-terrorism and homeland security responsibilities".[110] Furthermore, "Placing these individuals in expedited removal proceedings and maintaining detention for the duration of all immigration proceedings, with limited exceptions, will ensure prompt immigration determinations and ensure removal from the country of those not granted relief."[111]

In limiting access to asylum and withholding of removal through the use of expanded expedited removal procedures, and imposing the burden of arbitrary and discriminatory detention on asylum seekers, the policies and practices prescribed in the November 13, 2002 Notice appear to be inconsistent with the substance of Articles 31 and 33 of the Refugee Convention.[112]

Critics of the United States' expedited removal policy have noted that "[t]he right to seek and enjoy asylum is a fundamental human right guaranteed by Article 14 of the Universal Declaration of Human Rights...[y]et, the Service

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108 Immigration and Naturalization Act § 235(b)(1)(A)(ii).

109 November 13, 2002 Notice, above n 27, 68,924.

110 Id.

111 Id. See also Exec Order No 13,276, above n 28.

112 The new policy has met with considerable criticism from human rights organizations such as the United Nations High Commissioner on Refugees, Amnesty International, the Florida Immigrant Advocacy Center, the National Immigration Forum, and others who submitted comments to the INS in response to November 13, 2002 Notice. As the Notice indicates, comments, including those submitted by these organizations, are available for public inspection by contacting the INS. November 13, 2002 Notice, above n 27, 68,924.

seeks to employ detention in order to specifically deter victims of persecution from seeking asylum, intending to frustrate individuals from escaping harm and seeking safety elsewhere."[113] According to Amnesty International:[114]

> [m]andatory detention of an entire class of asylum-seekers based on their mode of arrival and lack of proper travel documents appears on its face to violate both Article 31 of the Refugee Convention, which prohibits States from penalizing or unnecessarily restricting the movement of refugees on account of their illegal entry or presence and Article 9 of the International Covenant on Civil and Political Rights, which prohibits arbitrary detention.

Moreover, the United Nations High Commissioner on Refugees ("UNHCR") raised concerns over the coupling of expedited removal and mandatory detention, commenting that "[g]iven that the Notice mandates detention throughout immigration court proceedings, which severely limit an individual's ability to secure legal representation... the Notice would impair the ability of asylum seekers who arrive by sea to fully access the asylum process."[115] Likewise, a study conducted by Georgetown University's Institute for the Study of International Migration indicated that asylum seekers in detention are more than twice as likely as those who are not detained to be without legal representation and that persons with attorneys are four to six times more likely to be granted asylum.[116]

These concerns are not unfounded. On its face, the expedited removal process restricts access to asylum and withholding of removal at the outset by requiring a refugee to qualify under the "credible fear before being afforded the opportunity to prove eligibility under the well-founded fear of prosecution" standard contained

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113 Comments of the Florida Immigrant Advocacy Center, on file at the INS. See also comments of Amnesty International, USA, on file at the INS (stating that "[d]etention for purposes of deterrence seriously compromises the exercise of the right to seek asylum from persecution outside one's country, a right enshrined in Article 14 of the Universal Declaration of Human Rights."). See above n 112.

114 Comments of Amnesty International, USA, on file at INS. See above n 112.

115 Comments of the UNHCR, on file at INS. See above n 112.

116 Comments of Amnesty International, USA, above n 112, (citing Dr Andrew I Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, *Asylum Representation*, Summary Statistics, (May 2000)).

in the Refugee Convention and incorporated in United States statutory refugee definition.[117] Indeed, Amnesty International noted in its comments that according to INS and Government Accounting Office sources, in FY 1999, "these low-level INS inspectors [charged with screening arriving aliens subject to expedited removal] only referred 0.6 percent of the 89,035 persons for "credible fear" interviews.[118]

Unlike the refugees covered by the United States' present interdiction policy, and notwithstanding the Supreme Court's decision in *INS v Sale*, the refugees arriving in the United States by sea who will be subjected the expedited removal under the Notice are not outside the territorial waters of the United States. In fact, they will be physically present in the United States. Nevertheless, the impediments associated with the expedited removal procedure may frustrate a refugee's ability to apply for asylum and put a legitimate refugee at risk of being erroneously returned to circumstances in which he or she will face persecution in violation of Article 33.

In addition, as noted by many of the commentators critical of the November 13, 2002 Notice, the mandatory detention prescribed by the November 13, 2002 Notice for purposes of deterring others inappropriately penalizes and restricts the movement of refugees arriving by sea. Such detention is not only contrary to Article 31, but likely to compromise the ability of those who do succeed in being screened in for an interview and who meet the credible fear standard to successfully present their asylum claims. Unlike the refugees interdicted at sea and repatriated, these refugees will have at least the possibility of obtaining legal representation. However, as a practical matter, lack of funds, unavailability of pro bono legal representation, geographic isolation of the detention facility, language barriers, and other factors make it is extremely difficult to retain the services of an attorney while detained. A refugee who is without counsel and subject to the institutional restrictions imposed by the detention facility, is often unable to adequately fill out the application forms, obtain the necessary supporting

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117 Immigration and Naturalization Act § 101(a)(43).

118 Comments of Amnesty International, USA, on file at INS ("AIUSA has had experience in the past year of trying to bring to the INS's attention arriving aliens who appeared likely to be seeking asylum, but who were nevertheless summarily returned to their countries of origin without having had the opportunity for a credible fear interview."). See above n 112.

documentation to corroborate her claims, locate witnesses and otherwise complete the preparation that is essential to a full and fair asylum hearing.

VI CONCLUSION

Although it remains to be seen whether the United States' policies over the last two decades have actually deterred migration surges, the United States has successfully imposed and expanded methods of limiting the refugee flow and repelling refugees. Interdiction and forced repatriation remain in force, and the majority's holding in *INS v Sale* authorises high seas interdictions to this day.[119] According to the Supreme Court's decision in *Sale*, such interdiction is merely rescue or repatriation, a wholly permissible policy and practice well within the authority of the President.[120] Notwithstanding the terms of Article 33 of the Refugee Convention, it is not "return," and is not prohibited by section 243(h)(1) – or by the current provision mandating withholding of removal, section 241(b)(3) of the INA.

Moreover, the United States policy of interdiction on the high seas and forced repatriation of putative refugees has found an adjunct: expedited removal and mandatory detention for any migrant coming to the United States by sea, including a refugee who manages to reach United States shores and is discovered within two years of arrival. Although the November 13, 2002 Notice does not absolutely preclude a refugee who comes to the United States by sea from applying for asylum and withholding of removal, and does not authorize forced repatriation, it undeniably encumbers a refugee's access to the asylum process and restricts a refugee's liberty to the extent that it calls the United States' compliance with Articles 31 and 33 into question.

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119 See eg, *Cuban-American Bar Ass'n Inc v Christopher*, 43 F.3d 1412 (11th Cir 1995). Cf *Ahmed v Goldberg*, 2001 WL 1843382 (DN Mar I) (Not Reported in F Supp 2d) (finding asylum and withholding of deportation procedures to available persons outside of the geographic United States, but emphasising that under section 207 of the INA, the statute does provide a mechanism for aliens not within the United States or at its borders to apply for refugee status through United States consular offices).

120 *Sale*, 509 US 155.

COURTS AND IMMIGRATION DETENTION: THE AUSTRALIAN EXPERIENCE - "ONCE A JOLLY SWAGMAN CAMPED BY A BILLABONG"

Justice AM North and Ms Peace Decle*******

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* Federal Court of Australia.

** LLB (Hons) BSc Grad Dip LP; Associate to Justice North, 2002.

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I INTRODUCTION

This paper deals with the way in which the courts in Australia have considered and determined issues of immigration detention.

Litigation on the subject cannot be divorced from both the history of the global movement of people and, in particular, the history of migration to Australia. Nor can it be divorced from the legislative and policy changes which have occurred over the years. Thus, the paper sketches the history of these matters so far as it is necessary to provide a coherent picture.

In the course of the narrative thus undertaken, the paper seeks to locate the role of the Australian courts in an historical place, and to reflect on the developments which might occur in the future in the courts in Australia dealing with such issues.

This brings us to the subtitle – "Once a jolly swagman camped by a billabong".

These words are the opening line of the well-loved Australian folksong written by Banjo Patterson. The song tells the story of a swagman camped by a billabong. A swagman is a person who wanders the countryside with a swag, being his bedding, on his back. He is usually down on his luck, shabbily dressed, and rather a cast-off of society.

The important image is the billabong. The word comes from an Aboriginal language. A billabong is usually a branch of a river which is dried up except for a small remaining waterhole. The billabong is cut off from the main river until perhaps a major flood rejoins the dried bed with the river.

The question which this paper examines is whether Australian courts dealing with immigration detention issues have been camped by a billabong. That is to say, whether issues of immigration detention have been litigated by reference to a drying-up bed of local law more and more isolated from the 'main stream'. The 'main stream' is the body of international human rights law embodied in the Convention Relating to the Status of Refugees of 28 July 1951 and the Protocol Relating to the Status of Refugees (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CROC). The paper examines whether there might be a flood in the future which will reunite the billabong with the 'main stream'.

II THE EARLY APPROACHES TO IMMIGRATION DETENTION IN AUSTRALIA

A Pre-1901 Immigration Laws

Before federation, in colonial Australia, the courts applied the prevailing view that every sovereign nation had the right to exclude aliens.

One case which suggests this view, and which is of inherent historical interest, is *Toy v Musgrove*.[1] The case was heard by all six judges of the Supreme Court of Victoria. It came to the Full Court as a case stated by the primary judge.

The plaintiff was a Chinese national who arrived in Hobson's Bay, Victoria, on the British vessel, *Afghan*, on 27 April 1888. The *Afghan* carried 268 Chinese immigrants.

The Chinese Act 1881(Vic) provided that if a ship arrived with more than one immigrant for every hundred tons of the tonnage of the vessel, the Master was liable to a penalty of 100 pounds for each immigrant carried in excess of the limitation. The *Afghan* was of 1439 tonnes. Consequently, it arrived with 254 Chinese immigrants more than permitted under the Act.

The Act also provided that no Chinese immigrant could enter Victoria unless the Master paid to the Collector of Customs ten pounds for each immigrant. The Master of the *Afghan* was at all times prepared to pay the ten pounds in relation to the plaintiff. The Collector of Customs refused to accept the payment and refused to allow the plaintiff to land.

A majority of the Full Court[2] held in favour of the plaintiff on the ground that there was no law in Victoria which permitted the authorities in Victoria to exclude aliens. The decision was, thus, concerned with the constitutional arrangements between the colony and Britain.

On appeal the Privy Council reversed the decision of the Supreme Court. [3] The Privy Council analysed the plaintiff's claim as dependent upon establishing that the Collector of Customs had a duty to accept the ten pounds from the Master. This followed, so their Lordships said, because the plaintiff had contended that he had been hindered and impeded from landing by reason of the breach by the Collector of Customs of a duty. The Privy Council held that, on the proper construction of the Act, it was made unlawful to bring in more Chinese immigrants than stipulated. There was therefore no right on the immigrant to compel the Collector to receive payment of the ten pounds. The Privy Council concluded:[4]

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1 (1888) 14 VLR 349.

2 Justices Williams, Holroyd, A'Beckett, and Wrenfordsley.

3 *Musgrove v Toy* [1891] AC 272.

4 Ibid 282.

> Their Lordships have so far dealt with the case, having in view only the enactments of the legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal.

B Post-1901: Federal Immigration Law – the Kisch *Case*

Since 1901, the power to make laws for the detention of non-citizens has been vested in the federal Parliament by the Australian Constitution (the Constitution) in the form of powers to make laws for the peace, order and good government of Australia with respect to immigration and emigration,[5] naturalization and aliens,[6] and external affairs.[7] These powers are exercised by the Federal Department of Immigration and Multicultural and Indigenous Affairs (the Department), as it is currently known.

Pursuant to these constitutional powers, detention of illegal immigrants has been a feature of Australia's immigration laws since 1901.[8] The Immigration Act 1901 (Cth)[9] (Immigration Act) contained the first provisions for detention of immigrants in Australia. Under the Immigration Act, persons deemed to be

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5 *Australian Constitution* s51(xxvii).

6 *Australian Constitution* s51(xix).

7 *Australian Constitution* s51(xxix). In *Robtelmes v Brenan* (1906) 4 CLR 395, the High Court held that any of these three provisions of the Constitution provided the federal legislature with the authority to make laws fulfilling its sovereign power to detain and exclude aliens from Australia.

8 Don McMaster, *Asylum Seekers: Australia's Response to Refugees* (2001) 68.

9 Assented to on 23 December 1901.

'prohibited immigrants'[10] were guilty of an offence and liable upon summary conviction to imprisonment for six months as well as deportation.[11] Persons became prohibited immigrants, for example, if they failed to pass the well-known dictation test, if they did not pass certain health standards, if they suffered from insanity, dementia or idiocy, if they had been convicted of a crime and sentenced to imprisonment for one year or more, or if they were a prostitute.[12]

Despite these provisions, illegal immigration was largely unknown in Australia during these early years, largely due to its geographical isolation and strict White Australia Policy.[13]

The state of the law, and the role of the courts, at this time, are illustrated by the saga which Egon Kisch endured.[14] Mr Kisch hailed from Czechoslovakia. He was a renowned foreign correspondent and peace activist. The year was 1934. Mr Kisch boarded the *SS Strathaird* (*Strathaird*) intending to travel from Marseilles to Australia to speak at anti-war rallies.

The Immigration Act gave the Minister power to make a declaration that a person was undesirable as a visitor to the Commonwealth. The declaration, relevantly, had to be based on the opinion of the Minister from information received from the government of the United Kingdom through official or diplomatic channels. The person in respect of whom such a declaration was made was a prohibited immigrant, and as a result was not permitted to enter Australia.

The Immigration Act also provided that the master of a vessel on which there was a prohibited immigrant was entitled to take reasonable measures to prevent that person entering Australia on the vessel.

Captain Carter sought to prevent Mr Kisch leaving the *Strathaird* when it berthed in Sydney on the basis that the Minister had made a declaration that Mr Kisch was an undesirable person to visit Australia.

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10 For example, see s3 Immigration Act 1901-1935 (Cth).

11 Section 7 Immigration Act 1901-1935 (Cth).

12 Section 3 Immigration Act 1901-1935 (Cth).

13 Andreas Schloenhardt, "Australia and the boat people: 25 years of unauthorised arrivals" (2000) 23(3) University of New South Wales Law Journal 33, 36.

14 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234.

Mr Kisch sought the issue of a writ of *habeas corpus* in the High Court against Captain Carter. The case was argued on two grounds. First, it was contended that the power to make a declaration was unconstitutional, because it was not a law with respect to immigration. Second, it was argued that the Minister had not made a valid declaration under the Immigration Act because the grounds necessary to support the declaration did not exist.

The case was heard by Evatt J sitting alone. He rejected the constitutional argument, but upheld the argument based on the failure to comply with the provisions of the Immigration Act. His Honour found that, as a matter of fact, the declaration was not based on information received from the government of the United Kingdom through official channels. The Immigration Act made the declaration conclusive evidence of the opinion of the Minister. His Honour held that the Immigration Act did not make the declaration conclusive evidence of the existence of the information necessary for the formation of the opinion. His Honour held that the declaration was not conclusive on this aspect. On 16 November 1934, Evatt J therefore ordered the release of Mr Kisch.

A few days earlier, Mr Kisch had injured his leg. In obedience to the order of the Court, stewards from the *Strathaird* carried Mr Kisch on a chair onto the wharf at Circular Quay. There he encountered Customs Officer Wilson, who asked him to accompany him to Central Police Station. At Central Police Station, Officer Wilson, who had been born in Northern Scotland, dictated a passage of seventy words of Scottish Gaelic and asked Mr Kisch to write out the passage. Although a proficient linguist, Mr Kisch knew little or nothing of Scottish Gaelic. He declined to complete the dictation test.

Mr Kisch was then charged with being a prohibited immigrant. The Immigration Act provided that a person was a prohibited immigrant if the person failed to pass a dictation test of not less than fifty words in an European language directed by an officer. A magistrate convicted Mr Kisch of the offence and sentenced him to six months imprisonment. The decision was challenged in the High Court which held by a majority[15] that Scottish Gaelic was not an European language within the meaning of the Act. The majority construed "an European language" to mean " a standard form of speech recognised as the received and ordinary means of communication among the inhabitants in an European

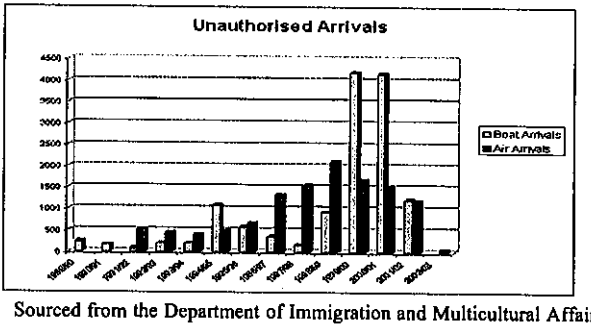
15 Rich, Dixon, Evatt and McTiernan JJ, Starke J dissenting.

community for all the purposes of the social body." The Court found that Scottish Gaelic was not such a language. Rich J said:[16]

> Census figures show that it is the speech of a rapidly diminishing number of people dwelling in the remoter highlands of Scotland, and the western islands. It is not the recognized speech of a community organized politically, socially or on any other basis. There are very few indeed who now use it as their only tongue and not many, comparatively speaking, who speak it in addition to English. No doubt it is a division of the Celtic branch of the Indo-European languages. It may excite the interest of scholars, and perhaps the enthusiasm of the descendants of the Gauls, but in ordinary practical affairs it plays no greater part than a local dialect might.

III A STATISTICAL SNAPSHOT

Before the circumstances by which mandatory detention came to be part of immigration law in Australia are discussed, it is useful to briefly outline the number of asylum seekers who have arrived in Australia over the years without authorisation, and how many of those have been detained pursuant to immigration detention policies and The Department publishes statistics concerning the number of unauthorised arrivals in Australia. From this information we find that, from 1989 to present, a total of 13,475 asylum seekers arrived in Australia by boat.[17] However, the numbers arriving have not been consistent over the years as is shown by the following table.



Sourced from the Department of Immigration and Multicultural Affairs, 'Fact sheet: 74. Unauthorised Arrivals By Air And Sea, 9 August 2002, <http://www.dima.gov.au>.

16 *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234, per Rich J at 241-2.

17 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 74. Unauthorised Arrivals By Air And Sea, 9 August 2002, <http://www.dima.gov.au>.

It is interesting to contrast the above with the number of unlawful non-citizens in Australia whose visa has expired, or who had not complied with the conditions of their visa. As at 30 June 2001, there were 60,103 unlawful non-citizens (referred to by the Department as 'overstayers') in Australia.[18]

The Department does not provide current statistics concerning the number of asylum seekers who, having arrived in Australia without authorisation, were detained during the period from 1989 to present. However, information is available concerning the current make-up of persons in immigration detention. As at May 2002, the Department held only 1,184 unlawful non-citizens in detention centres[19] around the country.[20] Approximately 56% of the presently detained unlawful non-citizens arrived in Australia by boat without authorisation.[21] Of the detainees, 27.7% are Afghan, 13.2% are Iraqi, 7% are Iranian, 5.2% are Chinese

18 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 86. Overstayers And People In Breach Of Visa Conditions, 8 November 2001, <http://www.dima.gov.au>.

19 These include the Maribyrnong Immigration Detention Centre (IDC) in Victoria, the Perth IDC, the Curtin Immigration Reception and Processing Centre (IRPC) and the Port Hedland IRPC in Western Australia, the Villawood IDC in New South Wales, and the Woomera IRPC and Woomera Residential Housing Project in South Australia.

20 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 82. Immigration Detention, 7 May 2002, <http://www.dima.gov.au>.

21 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 74a. Boat arrival details, 1 August 2002, <http://www.dima.gov.au>. Note, as at 3 July 2002, 705 unlawful non-citizens who arrived in Australia by boat were in detention. The statistic was produced by the authors from available information.

and 4.5% are Indonesian. Men make up 76.2% of the detainee population, women make up 14.4% and children make up 9.5%.[22]

IV AN EMERGING POLICY – FROM DISCRETIONARY TO MANDATORY DETENTION 1976 - 1994

A Overview

The following section deals with the legislative changes and some major issues faced by the courts as Australian immigration law developed from discretionary to mandatory detention of illegal immigrants, and in particular asylum seekers.

While detention has been a feature of Australia's immigration laws since federation, mandatory immigration detention is a more recent phenomenon. Mandatory immigration detention has developed as both policy and law in Australia in direct response to the arrival of asylum seekers through unofficial immigration channels.

The best-known group are those who arrived on Australia's northern shores in overcrowded, leaky vessels, from neighbouring Asian and Middle Eastern

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22 Table produced by authors from information obtained from the Department at www.immi.gov.au:

Detention Centres as at 5 July 2002	**Men**	**Women**	**Children**	**Total**
Maribyrnong IDC	45	7	10	62
Perth IDC	48	1	1	50
Port Hedland IRPC	115	7	11	133
Villawood IDC	364	106	16	486
Woomera IRPC	119	28	36	183
Woomera Residential Housing Project	0	3	7	10
Curtin IRPC	211	18	31	260
Total	*902*	*170*	*112*	*1184*
Percentages	*76.2%*	*14.4%*	*9.5%*	

countries, and who were often referred to as "boat people". The first group of such asylum seekers arrived in 1976. This group was predominantly from Vietnam. However, immigration detention only became a serious issue in Australia from 1989 when a number of boats carrying mainly Cambodian nationals, Sino-Vietnamese and Chinese nationals began arriving in Australia. During the decade that followed, detention of asylum seekers became an established feature of Australian immigration policy.

A survey of the period from 1976 to 1994 shows that the arrival of asylum seekers in Australia has been linked to worldwide refugee crises and failed humanitarian efforts in neighbouring countries. While the Australian government's strategy for dealing with asylum seekers in Australia has included prevention of the conditions giving rise to making people refugees, and disruption of people smuggling,[23] the following account shows that the Australian government has devoted considerable effort to preventing asylum seekers entering Australia, and to the introduction of legal and administrative mechanisms to detain, process and remove those that do manage to land in Australia.

With detention increasingly used by the government as the primary method of dealing with asylum seekers, the courts have been concerned with lawfulness of detention. In the landmark case of *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[24] (*Lim*), the High Court set limitations on the power of the executive to detain non-citizens in Australia and rejected the attempt by the legislature to remove the court's jurisdiction to release persons who are unlawfully detained.

B The Vietnamese Asylum Seekers

From 1976, Vietnamese asylum seekers who fled Vietnam following the end of the war began arriving in Australia by boat. By 1979, 2011 Vietnamese asylum seekers, including those fleeing the Sino-Vietnamese war,[25] had reached Australia

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23 Philip Ruddock MP, "Refugee Claims and Australian Migration Law: A Ministerial Perspective (2000) 23(3) University of New South Wales Law Journal 1, 3; Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Issues: Australia's Response* (2001).

24 (1992) 176 CLR 1.

25 Schloenhardt, above n13, 34; Department of Immigration and Multicultural and Indigenous Affairs, above n21.

in this way.[26] The arrival of these asylum seekers in Australia and surrounding countries[27] did not lessen following the United Nations resettlement program for refugees and displaced persons in South East Asia, developed in 1979 with Australia's involvement. More asylum seekers fled Vietnam than was anticipated, and many countries were not willing to take the excess numbers.[28]

Under the Migration Act 1958 (Cth) (Migration Act) in force at the time, a prescribed authority could order persons who entered Australia without a permit to be detained for up to 7 days.[29] Consequently, upon arrival, the Vietnamese asylum seekers were held in a form of loose detention along with other asylum seekers and persons who had been granted visas under Australia's humanitarian and refugee program.[30]

The public reaction against the unprecedented 'influx' of Vietnamese asylum seekers in Australia was significant and, despite Australia's participation in the Vietnam war, there was substantial debate as to whether they were genuine asylum seekers or not.[31] In an attempt to stem the flow of on-shore refugee claims which was anticipated from other Vietnamese asylum seekers, the Australian government signed bilateral agreements with Hong Kong, Indonesia and Malaysia by which they would take steps to prevent asylum seekers travelling to Australia, and, in return, Australia would take selected refugees from camps in those countries.[32]

The Australian government also regarded the existing immigration legislation as too limited to deal with the situation. Consequently, legislation was enacted providing for harsh penalties for masters of vessels who brought unauthorised immigrants to Australia, the detention of persons who did not hold, or who were

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26 McMaster, above n 8, 70.

27 See Henry Litton, "The Vietnamese Boat People Story: 1975-1999" (2001) 25(4) Alternative Law Journal 179.

28 Schloenhardt, above n 13, 34-5.

29 Section 38 Migration Act as amended by section 23 of the Migration Amendment Act 1979, No. 117 of 1979; Adrienne Millbank, "The Detention of Boat People" (2000-1) 8 Current Issues Brief.

30 Millbank, above n 29.

31 McMaster, above n 8, 70.

32 Schloenhardt, above n 13, 36.

not granted entry permits upon arrival, as well as new and enhanced powers to board, search, detain and forfeit vessels. This legislation, however, was of limited operation and ceased to operate 12 months after it came into effect.[33]

Nonetheless, when the Vietnamese asylum seekers visa applications were processed, most were found to be refugees and were granted permanent residence.[34]

C The Cambodian Asylum Seekers

Between November 1989 and January 1992, the second wave of asylum seekers arrived by boat in Australia. During that period, nine boats and 438 Cambodian, Vietnamese and Chinese nationals arrived in Australia.[35] This new wave also coincided in a marked increase in the number of offshore asylum applications arising from the end of the Cold War and associated disintegration of the Soviet Union, along with the Tiananmen Square massacre in Beijing in June 1989.[36] Although the number of asylum seekers that arrived was not large compared with the number of illegal arrivals by air during that period,[37] the arrivals nonetheless provoked a much stronger reaction from the Australian government and community than the reaction to the asylum seekers who had arrived a decade earlier.

The government reacted swiftly to the perceived invasion from the north and amended the Migration Act to provide that persons arriving by boat who were suspected of not holding an entry permit could be detained in custody until their vessel was returned or until such earlier time as an authorised officer directed.[38]

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33 Immigration (Unauthorised Arrivals) Act 1980 (Cth), No 112 of 1980.

34 Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (1989), 173.

35 Department of Immigration and Multicultural and Indigenous Affairs, above n21.

36 Schloenhardt, above n 13, 39, 42.

37 Ibid 42.

38 Section 88 Migration Act as amended by the Migration Legislation Amendment Act 1989 (Cth), No 59 of 1989. Crock notes that this detention provision was applied as though there was a requirement that asylum seekers be held in custody until their status as an illegal entrant was determined. However, the section is expressed as a discretionary provision (Mary Crock, "A Legal Perspective on the Evolution of Mandatory Detention" in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) 27-8).

Departmental policy provided that an application for a protection visa would now be subject to a preliminary assessment. If a claim was considered to be 'manifestly unfounded', entry into Australia could be refused, and new mandatory deportation provisions[39] came into operation. If a 'claim of substance' was identified, the claimant could be detained pending determination of the application.[40]

The mandatory deportation provisions created unforseen problems for asylum seekers who had arrived in Australia without a valid entry permit. A non-citizen who arrived without authorisation was not granted a temporary entry permit and pursuant to government policy was detained upon arrival. Such a person was automatically ineligible for a protection visa.[41] Consequently, a person who had a claim of substance could be subject to the strict mandatory deportation provisions. Concerns about *refoulement* of potential refugees led to a further amendment of the Migration Act to include an administrative device that required the Minister to check that potential deportees had not claimed refugee status before the Minister ordered their deportation.[42] Departmental policy provided that if a potential deportee had claimed refugee status, then a deportation order would not be made until that claim was determined. Nevertheless, concerns were raised that this procedure was unsatisfactory because there was no legal prohibition against the Minister making an order for deportation.[43]

While the power to detain was still theoretically discretionary at that stage, all the Cambodian asylum seekers were detained upon arrival and a large number

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39 Section 59 Migration Act. Deportation would occur after a total of 28 days had passed from the date of becoming an illegal entrant, not including any period where an application for an entry permit was being determined. See also s4 and s13 Migration Act.

40 James Crawford, "Australian Immigration Law and Refugees: the 1989 Amendments" (1990) 2 International Journal of Refugee Law 626.

41 Section 48 Migration Act.

42 Section 59(2) Migration Act was amended by the Migration Legislation Amendment (Consequential Amendments) Act 1989 (Cth) to provide that the Minister could only order the deportation of an illegal entrant after he/she had considered certain prescribed procedures, which were set out in Regulation 178 *Migration Regulations* (Cth). The prescribed procedures involve checks that the illegal entrant does not have any extant claims for a protection entry permit.

43 Crawford, above n 40, 633.

remained in detention for several years. Government policy on detention distinguished between authorised and unauthorised asylum seekers. Unauthorised entrants were detained. Because the Cambodians arrived by boat and their entry was not authorised, they were immediately detained. The government justified the continued detention of the Cambodians on the basis of its general power to detain non-citizens until their vessels were returned. This was despite the fact that the vessels no longer existed, having being burned by quarantine officials not long after they arrived.[44] Furthermore, major delays occurred in the processing of the Cambodian asylum seekers' protection visas, largely due to the unprecedented numbers of protection visa applications from Chinese students following the violent response to the student uprising in 1989. This situation created an obvious disconformity between the treatment of the Cambodians and particularly the Chinese students who had been studying in Australia.[45] The students were not detained and a substantial number were granted permanent residence visas in June 1990. It was at this point that the first concerns were raised about the possibility that Australia's policy of detaining and deporting asylum seekers might breach its international obligations under the Refugees Convention.[46]

The plight of the detained Cambodian asylum seekers was compounded following an amendment to the Migration Act in 1992, which attempted to prevent any chance that they would be released from detention.[47] These amendments introduced the first mandatory detention provisions into the Migration Act as described in the following section.

D The Introduction of Mandatory Detention – the Lim *Case*

Against this background, the circumstances of 35 Cambodians and one of their children, spurred the government into action. Twenty-two of these people arrived by boat in Australian territorial waters on about 27 November 1989. Thirteen arrived by boat in Australian territorial waters on about 31 March 1990. None of these people had permission to enter Australia. They were detained purportedly under the existing legislation.

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44 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane & Dawson JJ at 21.

45 McMaster, above n 8, 73-7.

46 Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: achieving a balance between refuge and control* (1992).

47 Migration Amendment Act 1992 (Cth), No 24 of 1992.

Shortly after arrival they applied to the Minister for refugee status under the Refugees Convention. After a little over two years, the Minister rejected the applications. The asylum seekers applied to the Federal Court for judicial review of the decisions rejecting their applications for refugee status. On 15 April 1992, just over a week after the earliest application was made, O'Loughlin J set aside each of the decisions and remitted the applications for further determination by the Minister.

The applicants also applied to the Federal Court for orders for release from custody pending the reconsideration of their applications. They had been held in custody, by this time, for over two years. The hearing of the application for release from custody was fixed for 7 May 1992.

On 5 May 1992, Parliament passed the Migration Amendment Act 1992 (Cth) (the Amendment Act). The Amendment Act received Royal Assent on the following day, 6 May 1992. It was clearly designed to prevent the application to the court for release from custody from proceeding further.

The Amendment Act introduced a new Division 4B entitled "Custody of non-citizens". The provisions required a designated person to be kept in custody. A designated person was a person who was on a boat in Australian territorial waters between 19 November 1989 and 1 December 1992, who was in Australia without an entry permit, and who had been given a designation by the Department. Section 54R provided that: "A Court is not to order the release from custody of a designated person." Thus, Division 4B, if valid, permitted the Department by administrative designation to require the compulsory detention of asylum seekers in the position of the 35 Cambodians under a regime in which no court could order their release from custody. The applicants commenced proceedings in the High Court seeking a declaration that certain provisions of Division 4B were invalid.[48]

For the purposes of Australian law, the validity of the legislation centrally depended on a constitutional issue. Federal Parliament is given power by the Constitution to make laws with respect to aliens. It was accepted that this law was a law with respect to aliens. However, all laws are required to conform to the requirements of Chapter III of the Constitution. Chapter III vests the judicial power of the Commonwealth in the Judiciary. The Constitution thereby reflects the doctrine of separation of executive and judicial powers. The accepted

48 *Lim*, above n 44.

interpretation of the Constitution is that the Executive is not permitted to exercise any part of the judicial power. Thus, the issue was whether the power to detain non-citizens provided by Division 4B allowed for an invalid exercise of judicial power by the Executive.

The Court relied on previous decisions which recognised that the aliens power authorised laws providing for the expulsion and deportation of aliens by the Executive, and also providing for the Executive to restrain an alien in custody in order to make the deportation effective. Brennan, Deane and Dawson JJ (with whom the remaining members of the High Court agreed[49]) said:[50]

> By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers. Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident.

Their Honours then explained why the specific sections were valid:[51]

> Section 54L is the pivotal section of Div 4B. It requires that, subject to s 54Q, a 'designated person must be kept in custody' unless and until he or she is removed from Australia or given an entry permit. Section 54N requires that a designated person who was not in custody immediately after the commencement of Div 4B must be detained in custody even if he or she was 'a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court' (s 54N(2)). *In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for*

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49 *Lim* (Mason CJ at 10, Toohey J at 46, Gaudron J at 53 and McHugh J at 67), above n 44.

50 *Lim* (Brennan, Deane & Dawson JJ), above n 44, 32.

51 Ibid 32-33. Emphasis added by authors.

an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

The powers of detention in custody which are conferred upon the Executive by ss 54L and 54N are limited by a number of significant restraints imposed by other provisions of Div 4B. Section 54Q effectively limits the total period during which a designated person can be detained in custody under Div 4B to a maximum total period of 273 days after the making of an application for an entry permit. For the purposes of that maximum period, time does not run while events beyond the control of the Department, such as delay in the supply of information or delay in court or tribunal proceedings, are preventing the finalization of the entry application. Section 54P(2) requires that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application. Section 54P(3) requires the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalization of any appeals against, or reviews of, that refusal. Those limitations upon the executive powers of detention in custody conferred by ss 54L and 54N go a long way towards ensuring that detention under those powers is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered. Nonetheless, in circumstances where the facts of the present case demonstrate that Div 4B could authorize detention in custody for a further 273 days of persons who had already been unlawfully held in custody for years before the commencement of the Division, those limitations would not, in our view, have gone far enough were it not for the provision of s 54P(1).

Section 54P(1) sets the context in which the other provisions of Div 4B operate. It provides that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed. It follows that, under Div 4B, it always lies within the power of a designated person to bring his or her detention in custody to an end by requesting to be removed from Australia. Once such a request has been made, further detention in custody is authorized by Div 4B only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal 'as soon as practicable'. It is only if an alien who is a designated person elects, by failing to

make a request under s 54P(1), to remain in the country as an applicant for an entry permit that detention under Div 4B can continue. In the context of that power of a designated person to bring his or her detention in custody under Div 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application. It follows that the powers of detention in custody conferred by ss 54L and 54N are an incident of the executive powers of exclusion, admission and deportation of aliens and are not, of their nature, part of the judicial power of the Commonwealth.

Brennan, Deane and Dawson JJ (with whom Gaudron J agreed on this issue) then held that s 54R, which prevented the courts from releasing persons from custody, was an invalid derogation from the judicial power. Their Honours said:[52]

Section 54R provides that a court 'is not to order the release from custody of a designated person'. The operation of the section is limited to the extent that it does not purport to exclude a person to whom the Department has purportedly given 'a designation' from challenging his or her status as a 'designated person'. The section must, however, be read with s 54U which provides that a statement by a Departmental officer that the Department has given a person 'a designation described in paragraph (e) of the definition [of designated person]' is 'conclusive evidence' of that fact. Subject to the effect of that section, s 54R is inapplicable to a person who does not satisfy all of the six elements of the definition of a 'designated person'. On the other hand, if a person does satisfy all those elements and is a 'designated person' for the purposes of the Division, s 54R purports to direct the courts, including this Court, not to order his or her release from custody regardless of the circumstances.

If it were apparent that there was no possibility that a 'designated person' might be unlawfully held in custody under Div 4B, it would be arguable that s 54R did no more than spell out what would be the duty of a court of competent jurisdiction in any event. If that were so, s 54R would be devoid of significant content. In fact, of course, it is manifest that circumstances could exist in which a 'designated person' was unlawfully held in custody by a person purportedly acting in pursuance of Div 4B. The reason why that is so is that the status of a person as a 'designated person'

52 Ibid 35-36. Emphasis added by authors.

does not automatically cease when detention in custody is no longer authorized by Div 4B. One example of such circumstances would be a case where a designated person continued to be held in involuntary custody notwithstanding that ss 54L and 54P had become inapplicable by reason of the provisions of s 54Q(1) or (2). Another would be a case where a designated person continued to be held in custody in disregard of a request for removal duly made under s 54P(1). Yet another would be a case where a designated person who had elected not to make an entry application continued to be held in custody against his or her will notwithstanding that the maximum period of two months prescribed by s 54P(2) had well and truly expired. In all of those cases, the person concerned would remain a designated person for the purposes of Div 4B (including s 54R) but could no longer be lawfully held in involuntary custody in Australia pursuant to the provisions of the Division. It is unnecessary to seek further examples. Once it appears that a designated person may be unlawfully held in custody in purported pursuance of Div 4B, it necessarily follows that the provision of s 54R is invalid.

Ours is a Constitution 'which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires'. All the powers conferred upon the Parliament by s 51 of the Constitution are, as has been said, subject to Ch III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). *A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.* Moreover, even to the extent that s 54R is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Ch III In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch

> III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

The minority[53] upheld section 54R because they construed it to mean that the court could not release a person who was lawfully detained. Read in this way, the section did not prevent a court from enquiring into the lawfulness of the detention, and granting a remedy in the event that the detention was unlawful.

The applicants also argued that Division 4B was inconsistent with certain international obligations which Australia had assumed. Brennan, Deane and Dawson JJ said as to this argument:[54]

> It is unnecessary to do more than make brief reference to a number of submissions advanced on behalf of the plaintiffs in relation to alleged inconsistencies between Div 4B on the one hand and the provisions of some international treaties to which Australia is a party and Commonwealth legislation relating to those treaties on the other. First, it was argued that Div 4B is invalid or inapplicable to the extent that its provisions purport to remove, limit or exclude rights of the plaintiffs under the *Human Rights and Equal Opportunity Act*, the Human Rights Covenant set out in Sched 2 of that Act and the Refugee Convention and Protocol. The answer to that argument is that s 54T, which expressly provides that the provisions of Div 4B prevail over any other law in force in Australia, unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties. Next, it was submitted that the provisions of Div 4B were, to the extent of any such inconsistency, beyond the legislative power conferred upon the Parliament by s 51(xxix) of the *Constitution* with respect to external affairs. The answer to that submission is that, putting to one side the invalid and severable provision of s 54R and the arguably invalid provision of s 54U, the enactment of Div 4B was within the legislative power conferred upon the Parliament by s 51(xix) with respect to "aliens". Finally, it was submitted that the provisions of Div 4B should be read down to the extent necessary to avoid any such inconsistency and that the result of such a reading down would be that they did not make compulsory the detention in custody of the plaintiffs. We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a

53 *Lim* (Mason CJ, Toohey and McHugh JJ), above n 44.

54 *Lim* (Brennan, Deane & Dawson JJ), above n 44, 37.

Commonwealth statute which accords with the obligations of Australia under an international treaty. The provisions of Div 4B which require that, in the circumstances which presently exist, the plaintiffs be detained in custody are, however, quite unambiguous.

On this argument Toohey J said:[55]

Once it is accepted that ss 54L and 54N are a valid exercise of the power to detain aliens pending their deportation, the plaintiffs' reliance on the Convention, the Protocol and the Covenant in the case stated is somewhat obscure. The defendants argued that the plaintiffs did not allege any particular breach of the Covenant and it should not be assumed that there had been any. But the plaintiffs said that they relied upon Art 9 of the Covenant which is set out in Sched 2 to the *Human Rights and Equal Opportunity Commission Act*, in particular Art. 9(1) and (4). Article 9(1) reads:

> '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.'

Article 9(4) reads:

> 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

However, s 54T of the Act gives clear precedence to Div 4B if the Division 'is inconsistent with another provision of this Act or with another law in force in Australia'. If ss 54L and 54N are valid laws of the Parliament, their contents prevail over the *Human Rights and Equal Opportunity Commission Act* and any relevant provision of the Schedules thereto. The plaintiffs have not demonstrated that the Convention or the Protocol has any specific bearing on their pending applications for release from custody. Had they done so, questions may have arisen for consideration as to the operation of the Convention and the Protocol in Australian municipal law, but again s 54T of the Act would have prevailed.

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55 *Lim* (Toohey J), above n 44, 51.

And McHugh J said:[56]

The HRC Act was enacted pursuant to s 51(xxix) of the *Constitution* - the external affairs power. It gives partial effect to the Covenant. The plaintiffs contend that Div 4B, if valid, would constitute a breach of Australia's obligations pursuant to the Covenant and would have the result that the HRC Act would not conform to the Convention because it could no longer apply to designated persons. The plaintiffs then contend that the HRC Act, as impliedly amended by the enactment of Div 4B, would no longer be regarded as appropriate to giving effect to Australia's obligations pursuant to the Convention and would therefore be invalid. It must follow, according to the argument of the plaintiffs, that the Amendment Act was not validly enacted because there was no express or implied intention in the Amendment Act to repeal the HRC Act.

To dispose of this argument, it is not necessary to determine whether the enactment of Div 4B constitutes a breach of Australia's obligations under the Convention. The entry into a treaty by Australia does not change the domestic law. The validity of legislation enacted by the Parliament (other than some legislation enacted pursuant to s 51(xxix)) does not depend on it being consistent with a Convention to which Australia is a party. If any inconsistency between the Amendment Act and the provisions of the HRC Act exists, the Amendment Act prevails. There is no principle of statutory interpretation which requires a later Act to be consistent with an earlier enactment. Given that Parliament cannot bind its future legislative power, it would be unconstitutional for such a principle of statutory interpretation to be adopted. Moreover, there is no principle of statutory interpretation that an Act is invalid if it has the unforeseen consequence of repealing an earlier Act.

Independently of these general considerations, however, Parliament has made it clear that Div 4B is to be operative regardless of its effect on earlier enactments. Section 54T provides:

> 'If this Division is inconsistent with another provision of this Act or with another law in force in Australia, whether written or unwritten, other than the Constitution:
>
> (a) this Division applies; and
>
> (b) the other law only applies so far as it is capable of operating concurrently with this Division.'

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56 *Lim* (McHugh J), above n 44, 74-75.

> In any event, the Amendment Act does not have the effect of rendering the HRC Act invalid. It is not the case that a law which gives effect to Australia's obligations under a treaty can only be supported by s 51(xxix) if it gives effect to all obligations under that treaty. As long as the legislation can reasonably be regarded as appropriate for implementing the provisions of the treaty, it will be valid. Regardless of the effect of the Amendment Act, the HRC Act can still reasonably be so regarded.

While the High Court found that the Cambodian asylum seekers were lawfully detained under Division 4B of the Migration Act, the saga of the Cambodian asylum seekers did not end there. In the course of coming to this decision, the High Court determined that the detention prior to the enactment of Division 4B had been unlawful. However, shortly after the decision in the *Lim* case, the Australian Parliament passed further amendments to the Migration Act[57] which retrospectively "extinguished the right of the Cambodians to damages for false imprisonment and set the rate of damages payable to a designated person for wrongful detention at one dollar a day"[58].

Several Cambodian asylum seekers instituted proceedings in the High Court challenging the validity of these amendments in *Ly Sok Pheng v Minister for Immigration, Local Government and Ethnic Affairs*. Shortly afterwards, the Australian government introduced legislation into Parliament that intended to repeal the dollar-a-day legislation and the proceedings were adjourned. Consequently, the proceedings were adjourned, and it is presumed, ultimately discontinued once the legislation came into effect[59].

The power of the court to release designated persons who had been in detention for 273 days was exercised in 1993 by the Federal Court in *Xin v Minister for Immigration and Ethnic Affairs (No 1)*[60] and *Xin v Minister for Immigration and Ethnic Affairs (No 2)*[61]. Those cases concerned a Chinese detainee, who was a designated person for the purposes of the Migration Act, who claimed that he had been in detention for periods totalling 273 days and was

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57 Migration Amendment Act (No 4) 1992 (Cth), No 235 of 1992.

58 McMaster, above n 8, 83.

59 Section 6 Migration Legislation Amendment Act (No 6) 1995 (Cth), No 102 of 1995.

60 (1993) 116 ALR 329 (Neaves J).

61 (1993) 116 ALR 349.

therefore entitled to be released pursuant to the Migration Act. As the applicant had been in detention from 18 January 1992 until the date of the hearing on 6 August 1993, a period well in excess of 273 days, the case largely turned on the application of certain exclusion periods to the 273 days. His Honour found in favour of the applicant and made a declaration that he be released from detention on reporting conditions. The Full Federal Court[62] and the High Court[63] both dismissed appeals by the Minister from the original decisions.

E The Policy Reasons Given in Support of Mandatory Detention

Since 1992, the Australian federal government has maintained an official policy of compulsorily detaining non-citizens who arrive in Australia without authorisation[64]. Mandatory detention of unauthorised arrivals, it is said, ensures the integrity of Australia's migration program, and in particular that the universal visa system, is upheld. In evidence to the Joint Standing Committee on Migration in 1994, the Department explained:[65]

> If you build a system which requires individuals to present to the Australian Government in advance of arrival – through one form or another – to seek approval for entry and if the system says that not following that requirement will be ignored on arrival, that undermines our universal visa system.

In an information paper released in 2001, the Department stated that detention is designed to achieve a number of public policy objectives, including to provide that:[66]

> [1] detainees are readily available during processing of any visa applications, and, if applications are unsuccessful, ensuring they are available for removal from Australia; [2] detainees are immediately available for health checks which are a requirement for the grant of a visa; [and 3] unauthorised arrivals do not enter the Australian community until their identity and status has been properly assessed and they have been granted a visa.

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62 *Minister for Immigration and Ethnic Affairs v Xin* (1993) 118 ALR 603.

63 *Minister for Immigration and Ethnic Affairs v Xin* (1994) 69 ALRJ 8.

64 Department of Immigration and Multicultural Affairs, *Unauthorised Arrivals and Detention* (2001) 8.

65 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994) 109.

66 Department of Immigration and Multicultural and Indigenous Affairs, above n20.

Other policy reasons for detention suggested by the Department include the "assessment of character and security issues ... providing asylum seekers access to appropriate services for the processing of refugee applications, and helping them through the culture shock of coming to a new country".[67]

V MANDATORY DETENTION AS A KEYSTONE OF AUSTRALIA'S MIGRATION PROGRAMME 1994 - PRESENT

A Expanding the Scope of Mandatory Detention

In September 1994, the detention regime under the Migration Act was radically changed and the first general mandatory detention provisions came into operation.[68] To a large extent, the changes form the basis of the current detention regime under the Migration Act. There were four changes of particular note.

First, there was a general reform of the various designations by which persons became eligible for detention. For example, persons formerly described as illegal entrants and over stayers were now all termed 'unlawful non-citizens' and were subject to the same detention provisions. This change was directed at criticisms about the distinction made between those people who arrived in Australia unlawfully and those people who became unlawful after they arrived here.[69]

Second, a discretionary bridging visa was introduced allowing the release of certain eligible non-citizens from detention pending the grant of a visa or deportation. To be eligible for this visa, non-citizens have to be immigration cleared or fall within a prescribed class of persons.

The third major change was the removal of the discretionary component of the detention provisions. Under the new regime, the Minister and his officers have a duty to detain all unlawful non-citizens who are either in Australia, or who are suspected of trying to enter Australia.

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67 Department of Immigration and Multicultural Affairs, above n 64, 8-9.

68 Migration Reform Act 1992 (Cth), No 184 of 1992; Migration Laws Amendment Act 1993 (Cth), No 59 of 1993. Section 2 of the Migration Reform Act 1992 (Cth) provides that the main provisions of the Act commence on 1 November 1993. Section 2 of the Migration Laws Amendment Act 1993 (Cth) provides that certain amendments contained in the Migration Reform Act 1992 (Cth) commence on 1 September 1994.

69 Joint Standing Committee on Migration, above n 65, 203.

Finally, there was no longer a time limit on the length of detention to which an unlawful non-citizen could be exposed. The Migration Act clearly specifies that the only reasons for releasing an unlawful non-citizen from detention are if they are removed, deported, or granted a visa. Of course, following *Lim*, this does not prevent the release by a court of persons found in fact to be unlawfully detained.

B The Afghan Asylum Seekers

The mandatory detention provisions of the Migration Act came under scrutiny again in 1999 when Australia received its greatest number of unauthorised asylum seekers yet.[70] From January 1999 to August 2001, approximately 10,361 asylum seekers of predominantly Middle Eastern origin arrived on Australia's shores by boat.[71]

The government responded by introducing amendments to the Migration Act.[72] This time the amendments focused on deterring those persons who profited from trafficking in migrants by creating new offence provisions. However, the amendments went further than that. They modified the government's pre-existing obligations to provide unlawful non-citizens with visa and refugee status information, or access to legal advisors by providing that such assistance need only be extended if express requests were made.[73]

The government took further initiatives beyond legislative changes. As the numbers of asylum seekers arriving in Australia showed no signs of slowing, the Prime Minister established a special Task Force on Coastal Surveillance to report on ways of better managing Australia's coastline and preventing further asylum seekers from arriving. On the basis of the recommendations in the report, border protection legislation was passed which amended the Migration Act to create a legal framework for various measures aimed at preventing and deterring the arrival of further asylum seekers.[74]

As a final measure to deter asylum seekers from seeking refugee status through unlawful channels, the government amended the Migration Regulations

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70 Schloenhardt, above n 13, 52.

71 Department of Immigration and Multicultural and Indigenous Affairs, above n 21.

72 Migration Legislation Amendment Act 1999 (Cth), No 89 of 1999.

73 Schloenhardt, above n 13, 52.

74 Border Protection Legislation Amendment Act 1999 (Cth), No 160 of 1999.

1994 (Cth) (Migration Regulations) to create a new category of temporary protection visas. In contrast to those who applied successfully for asylum from offshore and became entitled to permanent protection visas, asylum seekers who arrived in Australia without authorisation were only entitled, if successful, to temporary protection visas. The temporary protection visa lasts for three years, when the refugee's continuing status is reviewed by the Department. Furthermore, under the temporary protection visa the refugee's entitlements to welfare benefits and family reunification are restricted.[75]

In August 2001, the issue of detention of asylum seekers was raised in the highly publicised litigation concerning the *MV Tampa*.

C The MV Tampa Litigation

On Sunday 26 August, a 20 metre wooden fishing boat with 433 people on board was sinking in the Indian Ocean about 140 km north of Christmas Island. A Norwegian container vessel, the *MV Tampa* (*Tampa*), licensed to carry no more than 50 people was on its way from Fremantle to Singapore. The Australian authorities asked the Captain of the *Tampa*, Captain Rinnan, to rescue the people on board the sinking fishing boat. He did so, and headed towards Indonesia. Several of the rescuees threatened to jump overboard if he did not change course for Christmas Island, which is part of the territory of Australia. He acquiesced.

The Australian government ordered the *Tampa* to remain outside Australian territorial waters. The Australian government asked the Administrator of Christmas Island to close the port, Flying Fish Cove, and ensure that no boats attempted to reach the *Tampa*. The government, despite requests from Australian lawyers to contact the rescuees, failed to facilitate contact.

Captain Rinnan became concerned for the health of a number of the rescuees and the welfare of his crew. On Wednesday 29 August, he defied the Australian authorities and headed towards Christmas Island into Australian territorial waters. In response the *Tampa* was boarded by 45 Special Armed Services troops. They took control of the vessel.

On Thursday 30 August, the Norwegian Ambassador went aboard the *Tampa* and was handed a letter from the rescuees. The rescuees mainly came from Afghanistan and Iraq and the letter, in effect, asked for asylum under the Refugees Convention.

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75 Migration Amendment Regulations 1999 (No 12) (Cth), No 243 of 1999.

The following day proceedings were commenced in the Federal Court[76] in Melbourne against the Commonwealth of Australia, the Minister for Immigration and Multicultural Affairs, The Attorney General, and the Minister for Defence by a lawyer concerned about the fate of the rescuees and by the Victorian Council of Civil Liberties. The hearing of the case continued over the weekend. In the course of the hearing the Prime Minister announced the 'Pacific Solution' whereby the government intended that the rescuees would be dispersed to Nauru and New Zealand, and their refugee claims would be assessed in those places. They would not be permitted to land in Australia.

In the proceedings, the central claim of the applicants was for an order in the nature of *habeas corpus* requiring the respondents to bring the rescuees to Australia. It was contended that the rescuees were detained without lawful authority on board the *Tampa*.

The respondents argued that the rescuees were not detained because they were free to go anywhere other than towards Australia. The respondents also contended that the Executive retained a prerogative power to expel non-citizens and to detain them for that purpose. The respondents throughout emphasised that the government acted entirely outside the statutory regime concerning non-citizens. It was contended that the migration legislation was never brought in to play. Rather, the Executive had a power to detain, in the circumstances, outside the statutory provisions.

Leave to intervene was granted to Amnesty International (Amnesty) and to the Human Rights and Equal Opportunity Commission (HREOC). These organisations adopted the arguments of the applicants, but also contended that the rescuees were being held in arbitrary detention contrary to Article 9 of the ICCPR. They argued that the detention was inappropriate, unjust and unreasonable in the circumstances of the case because it was for an indeterminate period, and it was without legitimate purpose. As the detention was not authorised by statute, the rescuees were entitled to be released.

The primary judgment was handed down on 11 September 2001 at about 2.15pm, Australian EST. It turned out that, at the very time, terrorists were readying themselves to destroy the World Trade Centre towers in the attack which has dominated world concerns since.

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76 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

The primary judgment concluded that relief in the nature of *habeas corpus* should be granted, and that the respondents should bring the rescuees ashore in Australia. First, it was decided that the circumstances amounted to detention by reference to the cases concerning *habeas corpus* and false imprisonment. Second, it was decided that the Executive had no independent surviving prerogative power to detain non-citizens for the purpose of expulsion in view of the comprehensive provisions contained in the Migration Act on this subject. These provisions alone empowered the Executive to detain unlawful non-citizens. The Migration Act did not provide the authority to detain the rescuees because the government purposely relied on the prerogative powers and ensured that the provisions of the Migration Act were not brought into operation.

The matter was taken on appeal immediately, and heard within two days. Less than a week later the Full Court handed down its decision.[77] The Chief Justice wrote an extensive judgment and would have dismissed the appeal on the grounds relied upon in the primary decision. French J also wrote an extensive judgment which concluded, contrary to the primary decision, that the rescuees were not detained on the *Tampa*, and that, in any event, the executive power contained in section 61 of the Constitution empowered the Executive to prevent the entry of non-citizens and do all things necessary to effect such exclusion, and the provisions of the Migration Act had not abrogated any of that power. Beaumont J agreed with French J, and added some further comments. In the result, the appeal was allowed by a majority.

As to the function of the Refugees Convention in the circumstances of the case, French J said:[78]

> Australia has obligations under international law by virtue of treaties to which it is a party, including the Refugee Convention of 1951 and the 1967 Protocol. Treaties are entered into by the Executive on behalf of the nation. They do not, except to the extent provided by statute, become part of the domestic law of Australia. The primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 not to expel or return them to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group or their political opinions. The question whether all or any of the rescuees are refugees has

77 *Ruddock v Vadarlis* (2001) 110 FCR 491.

78 Ibid 545.

not been determined. It is questionable whether entry by the Executive into a convention thereby fetters the executive power under the Constitution, albeit there may be consequences in relation to the processes to be applied in the exercise of that power or relevant statutory powers - Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273. In this case, in my opinion, the question is moot because nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of non-refoulement under the Refugee Convention.

An application for special leave to appeal to the High Court was heard and refused on 27 November 2001.[79]

Shortly following these proceedings, the Migration Act was amended again.[80] These amendments confirmed the legality of the government's actions concerning the *Tampa*, formalised the arrangements made under the 'Pacific Solution' for future use and introduced further obstacles in the way of applications for protection by asylum seekers.

The amended Migration Act declared certain places to be an 'excised offshore place' and therefore excluded from Australia's migration zone for the purposes of the Migration Act. The places included Christmas Island, Ashore and Cartier Islands, Cocos (Keeling) Islands, any Australian sea or resources installation, and any other prescribed area.[81] Persons who enter Australia at an excised offshore place after the excision time (2pm on 8 September for Christmas Island) without a visa are designated as an 'offshore entry person'.[82] Migration officers are empowered to take any offshore entry person from Australia to any country in respect of which the Minister has made a declaration that that country will process visa applications.[83] This provision formalised the process undertaken in the

79 *Vadarlis v Minister for Immigration and Multicultural Affairs* (unreported, High Court of Australia, M93/2001, 27 November 2001).

80 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).

81 Section 5(1) Migration Act.

82 Section 5(1) Migration Act.

83 Section 198A Migration Act.

'Pacific Solution' for future use. Furthermore, any visa application made by an offshore entry person who is in Australia is deemed to be invalid.[84]

Taking effect on 27 September 2001, the Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) provided that any action taken by the Commonwealth between 27 August and 27 September 2001 in relation to the *Tampa* and certain other vessels is taken for all purposes to have been lawful. Furthermore, no proceedings may be instituted in respect of such action.

D The Features of Mandatory Detention in Australia

It is worth reviewing the detention regime in Australia as it now stands. The Migration Act provides that non-citizens must be detained in the following circumstances.[85]

- First, where an unlawful non-citizen, being a non-citizen who does not hold a valid visa, is suspected of seeking to enter Australia.
- Second, where a non-citizen in Australia is suspected of being an unlawful non-citizen because their visa has expired or has been cancelled.

Unlawful non-citizens detained under these provisions must be held in immigration detention[86] until they are removed, deported or granted a visa.[87] Also, an unlawful non-citizen who arrives in Australia on board a vessel used in connection with the commission of an offence, and who is detained under these provisions, may be held in immigration detention while the Minister considers whether or not to prosecute that person for the offence, and for such period that the prosecution entails.[88] A more limited form of detention applies to any non-citizen whom it is suspected holds a visa that may be cancelled on the basis, inter alia, that the non-citizen provided incorrect information, or for non-compliance with the conditions of the visa. Under this provision, non-citizens may be detained for a maximum of four hours at any one time.[89]

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84 Section 46A Migration Act.

85 Section 189 Migration Act.

86 Section 5 Migration Act.

87 Section 196 Migration Act.

88 Section 250 Migration Act.

89 Section 192 Migration Act.

In respect of unlawful non-citizens in detention who did not hold a valid visa when they entered Australia, immigration officials are not required to advise them of their right to apply for a visa or when they will be released from detention. Furthermore, the Minister is not obliged to provide them with an application form for a visa, the opportunity to apply for a visa, or access to legal advice concerning an application for a visa.[90]

Unlawful non-citizens may otherwise avoid detention if they are granted a bridging visa. A bridging visa is a temporary visa[91] that remains in force until a substantive visa is granted to the non-citizen, or for 28 days following notification that a substantive visa has been refused.[92] A bridging visa may only be granted to an eligible non-citizen[93] who satisfies certain criteria under the Migration Regulations. To be an eligible non-citizen, a non-citizen must be either immigration cleared, or fall within a prescribed class of persons, or be determined by the Minister to be an eligible non-citizen.[94] This definition precludes unlawful non-citizens who did not hold a valid visa when they first arrived in Australia because they would have been refused immigration clearance.[95] The categories of eligible non-citizens who are not immigration cleared, which are aimed at children, aged and persons with special needs are 'very limited in practice'.[96]

Not only is detention unavoidable for unlawful non-citizens who arrive in Australia without authorisation, those persons are also liable for the costs of their detention and removal.[97] This general provision does not appear to exempt those persons who are later found to be genuine refugees or who are granted a

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90 Section 193 Migration Act.

91 Section 37 Migration Act.

92 R50.511 Migration Regulations.

93 Section 73 Migration Act.

94 Section 72(1) Migration Act.

95 Section 172; Note - unlawful non-citizens who are not immigration cleared may be eligible for other specific types of temporary visas (ie Border (Temporary) (Class TA) Visa).

96 Human Rights and Equal Opportunity Commission, *Those who've come across the seas* (1998) 20.

97 Division 10 Migration Act.

substantive visa. Detention costs are approximately $120 per day per person.[98] Such costs may be passed on, if the Minister decides, to the owner of a vessel that brought the non-citizens to Australia.[99] Furthermore, the Migration Act creates an offence for owners of vessels that bring non-citizens into Australia who do not have a visa or right to enter, carrying a penalty of up to $10,000.[100] Persons who arrange for groups of non-citizens who do not have visas to travel to Australia are liable to imprisonment for a maximum of 20 years.[101]

The Migration Act specifically provides that unlawful non-citizens detained under the Migration Act may not be released from detention by a court unless they have made a valid application for a visa, *and* have been granted a visa.[102] Of course, following *Lim*, the Court still has power to order the release of persons detained unlawfully. However, for unlawful non-citizens, the bar has been lifted yet again. Apart from the question of whether the requirements of the Migration Act and the Migration Regulations have been satisfied with respect to the lodgement of visa applications, the Migration Act deems that applications made by unlawful non-citizens while they are in specified 'excised offshore places'[103] in Australia are invalid.[104]

Finally, courts are precluded by the Migration Act from determining that a non-citizen is entitled to the grant of a visa. Under the new judicial review regime introduced to the Migration Act on 2 October 2001,[105] if a court finds that a decision of a relevant Tribunal not to grant a visa to a non-citizen under the Migration Act was made without jurisdiction, it can only make a declaration that the decision is null and void.[106] The result is that the decision whether or not to

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98 Section 208 Migration Act.

99 Section 213 Migration Act.

100 Section 229 Migration Act.

101 Section 232A Migration Act.

102 Section 196 Migration Act.

103 Section 5(1) Migration Act.

104 Section 46A Migration Act.

105 See Part 8 Migration Act.

106 *Awan v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 594, 192; *Boakye-Danquah v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 438, 72.

grant a visa to the non-citizen lies solely with the Department, and on review by the Refugee Review Tribunal.

E Indefinite Detention – the Al Masri Case

Detention pending removal was considered in the recent case of *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs*[107] (*Al Masri*). The applicant was a Palestinian detainee who, having been refused a protection visa by the Refugee Review Tribunal, determined to take the application no further and applied in writing to the Minister to be sent back to Palestine. Section 198(1) of the Migration Act provides that an officer must remove "as soon as reasonably practicable" an unlawful non-citizen who asks to be removed. Efforts were made by the Department to arrange for the applicant's return to Palestine. However, Israel, Jordan and Egypt all refused to allow the applicant permission to transit through those countries into Palestine. The result was that the applicant remained in detention eight months after his request to be removed. Consequently, he applied to the Federal Court for the issue of a writ of *habeas corpus* on the basis that his continued detention was unlawful.

The case was argued as a matter of statutory construction. Section 196(1) of the Migration Act relevantly provided that an unlawful non-citizen must be kept in detention until he or she is removed. The applicant argued that the power to detain is impliedly limited to a reasonable time and terminates when there is no reasonable likelihood of removal. Sections 196(1) and 198 therefore do not permit indefinite detention.

The Minister argued that the length of detention is irrelevant to the lawfulness of the detention. The only relevant question to be determined is whether the detention is for the authorised purpose, namely, the purpose of removal.

Merkel J held that the apparently unlimited power to detain in s 196 had to be read together with s 198 and the result was that detention is only to be until removal as soon as reasonably practicable. His Honour relied on the judgment of Woolf J *R v Governor of Durham Prison; Ex parte Hardial Singh*[108] which was an application for release from detention pending deportation. Merkel J cited the following passage from his Lordship's judgment:[109]

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107 [2002] FCA 1009 (Unreported, Merkel J, 15 August 2002).

108 [1984] 1 WLR 704.

109 *Al Masri* (Merkel J), above n 107, 25.

> ...as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time. ...

Merkel J also relied on the decision of the Supreme Court of the United States in *Zadvydas v Davis*[110] (*Zadvydas*) which, in similar circumstances, and in a 5-4 decision denied that the Attorney General had power to detain a deportee indefinitely where no country would accept the deportee. *Zadvydas* was a constitutional case which turned on the due process requirement of the Fifth Amendment. Merkel J concluded:[111]

> Accordingly, in my view ss 196(1)(a) and 198 are to be construed as authorising detention only for so long as:
>
> - the Minister is taking all reasonable steps to secure the removal from Australia of a removee as soon as is reasonably practicable;
> - the removal of the removee from Australia is 'reasonably practicable', in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future.
>
> If a court is satisfied that the Minister is not taking 'all reasonable steps' or that removal is 'not reasonably practicable' the implicit limitations on the detention power will not have been complied with or met and continued detention of the removee will no longer be authorised by the Act.

His Honour found that there was no real likelihood of the applicant's removal in the reasonably foreseeable future and ordered that the applicant be released.

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110 533 US 678 (2001).

111 *Al Masri* (Merkel J), above n 107, 38-9.

The Minister instituted an appeal from this decision. The appeal was held on 2 October 2002, and the decision is reserved.

It is interesting to note the comments made by Merkel J about the status of an unlawful non-citizen in Australian law. His Honour was dealing with the question whether the applicant's status as an unlawful non-citizen provided a discretionary reason to refuse relief by way of an order for release. He said:[112]

> 60. ... while it is literally correct to describe the applicant as an 'unlawful' entrant and an 'unlawful non-citizen' that is not a complete description of his position. The nomenclature adopted under the Act provides for the description of persons as 'unlawful non-citizens' because they arrived in Australia without a visa. This does not fully explain their status in Australian law as such persons are on-shore applicants for protection visas on the basis that they are refugees under the Refugees Convention.
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> 61. The Refugees Convention is a part of conventional international law that has been given legislative effect in Australia: see ss 36 and 65 of the Act. It has always been fundamental to the operation of the Refugees Convention that many applicants for refugee status will, of necessity, have left their countries of nationality unlawfully and therefore, of necessity, will have entered the country in which they seek asylum unlawfully. Jews seeking refuge from war-torn Europe, Tutsis seeking refuge from Rwanda, Kurds seeking refuge from Iraq, Hazaras seeking refuge from the Taliban in Afghanistan and many others, may also be called 'unlawful non-citizens' in the countries in which they seek asylum. Such a description, however, conceals, rather than reveals, their lawful entitlement under conventional international law since they early 1950's (which has been enacted into Australian law) to claim refugee status as persons who are 'unlawfully' in the country in which their asylum application is made.
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> 62. The Refugees Convention implicitly requires that, generally, the signatory countries process applications for refugee status of on-shore applicants irrespective of the legality of their arrival, or continued presence, in that country: see Art 31. That right is not only conferred upon them under international law but is also recognised by the Act (see s 36) and the Migration Regulations 1994 (Cth) which do not require lawful arrival or presence as a criterion for a protection visa. If the position were otherwise many of the protection obligations undertaken by

112 Ibid 60-3.

signatories to the Refugees Convention, including Australia, would be undermined and ultimately rendered nugatory.

63. Notwithstanding that the applicant is an 'unlawful non-citizen' under the Act who entered Australia unlawfully and has had his application for a protection visa refused, in making that application he was exercising a 'right' conferred upon him under Australian law. As he is entitled to do under the Act, the applicant has now requested his removal and the Minister is obliged to remove him but, in the circumstances of the present case, the Minister is no longer entitled to detain the applicant pending his removal.

VI DIVERSE VIEWS AS TO WHETHER AUSTRALIA'S MANDATORY DETENTION LEGISLATION CONFORMS TO INTERNATIONAL LAW

A Overview

In the Australian courts, mandatory detention of asylum seekers has been litigated by reference to claims for the issue of writs of *habeas corpus* (*Tampa*), or by reference to the constitutional question whether legislation conferred judicial power on the Executive (*Lim*), or by reference to questions of statutory construction (*Al Masri*).

At least during the time when the more recent cases have been litigated, there has been an established and growing jurisprudence concerning international human rights obligations which impact on the situation of asylum seekers in detention. Australia has been criticised on the basis that the mandatory detention regime is in breach of international conventions and international customary law.

Some of these criticisms are described in this section. Reference is also made to the responses from the government to the criticisms. Despite this body of jurisprudence, international legal obligations have not figured in the domestic litigation, save for brief references such as in *Lim* and *Al Masri* set out earlier in this paper. The absence of these considerations in the Australian decisions is starkly illustrated by the contrast in the way in which the matter was considered by the Human Rights Committee in *A v Australia*.[113]

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113 Human Rights Committee, *A v Australia*, Communication No 560/1993: Australia. 30/4/97 (CCPR/C/59/D/560/1993).

B View of the Human Rights Committee - A v Australia

The applicant in this communication was one of the plaintiffs in the *Lim* case heard by the High Court. It will be recalled that the High Court dealt with the matter as a constitutional question, namely, whether the Executive was impermissibly exercising judicial power. Having failed in that litigation, the applicant submitted a communication to the Human Rights Committee claiming to have been a victim of violations by Australia of, inter alia, Article 9, paragraphs 1 and 4 of the ICCPR. Article 9, paragraph 1 provides:

> 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 provisions as are established by law.

Article 9, paragraph 4 provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The applicant, a national of Cambodia, arrived in Australia by boat in November 1989. Shortly afterwards he applied for refugee status. His application was first rejected in April 1992. He commenced judicial review proceedings in the Federal Court, and also proceedings seeking his release from custody. It will be recalled from the recitation of the facts in *Lim* that the Australian Parliament passed the new Division 4B of the Migration Act two days before the application for release was to be heard. The High Court gave judgment in Lim in December 1992 with the result that the applicant remained in custody. At the time of the communication to the Human Rights Committee the applicant had been in detention for about four years.

The Human Rights Committee found that the detention was arbitrary within the meaning of Article 9, paragraph 1. It said:[114]

> 9.2 ... the Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to

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114 Ibid 9.2 – 9.4.

justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these ground are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the mean of article 9, paragraph 1.

The Human Rights Committee also found that the detention involved a breach of Article 9, paragraph 4. On this subject it said:[115]

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a 'designated person' within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of

115 Ibid 9.5.

ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a 'designated person' within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

C *View of the United Nations High Commissioner for Refugees*

One function of the Executive Committee of the United Nations High Commissioner for Refugees program (EXCOM) is to advise the High Commissioner on his or her protection function. The conclusions published by EXCOM represent an important body of opinion on the obligations of states under the Refugees Convention.

As early as 1986, EXCOM published Conclusion 44 relating to the obligations concerning detention in the light of Article 31 of the Refugees Convention.[116] The conclusion included the following:[117]

[I]n view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

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116 Executive Committee, United Nations High Commissioner for Refugees, *Detention of Refugees and Asylum Seekers*, (No. 44 (XXXVII) – 1986).

117 Ibid.

In 1998 EXCOM published Conclusion 85 which included the statement that the Committee:[118]

> Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention;

Australia was a member of EXCOM in both 1986 and 1998.[119]

In February 1999, the UNHCR published "Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers".[120] In the introduction it is said that the detention of asylum seekers is, in the view of UNHCR, inherently undesirable especially for vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

Guideline 3 provides that the detention of asylum seekers may be resorted to for the reasons set out in EXCOM Conclusion 44 "as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law".[121] Those norms and principles are contained in the main human rights instruments including Article 9, paragraph 1, of the ICCPR. Guideline 3 also states:[122]

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118 Executive Committee, United Nations High Commissioner for Refugees, *Conclusion on International Protection,* (No 85 (XLIX) – 1998).

119 *Addendum to the Report of the United Nations High Commissioner for Refugees* (General Assembly, Forty-first session, Supplement No.12A, A/41/12/Add.1, 13 January 1987); *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-ninth session* (General Assembly, Fifty-third session, Supplement No.12A, A/53/12/Add.1, 5-9 October 1998).

120 UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum (1 February 1999).

121 Ibid.

122 Ibid.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.

D View of the Human Rights and Equal Opportunity Commission

HREOC is an Australian statutory body, one of the functions of which is to examine whether Australian legislation conforms to Australian's human rights obligations.

On 11 May 1998, HREOC published a major report entitled "Those who have come across the seas" of HREOC's enquiry into many aspects of the detention of unauthorised arrivals in Australia.[123] Following a very comprehensive examination of international human rights law, HREOC made the following findings and recommendations on this aspect of its enquiry:[124]

The Commission finds

- The detention regime in the Migration Act violates the ICCPR and CROC and is therefore a breach of human rights under the HREOC Act.
- The mandatory detention regime under the Migration Act places Australia in breach of its obligations under ICCPR article 9.1 and CROC article 37(b). The ICCPR and CROC require Australia to respect the right to liberty and to ensure that no-one is subjected to arbitrary detention. If detention is necessary in exceptional circumstances then it must be a proportionate means to achieve a legitimate aim and it must be for a minimal period. The detention regime under the Migration Act does not meet these requirements. Under current practice the detention of unauthorised arrivals is not an exceptional step but the norm. Vulnerable groups such as children are detained for lengthy periods under the policy. In some instances, individuals detained under the Migration Act provisions have been held for more than five years. This is arbitrary detention and cannot be justified on any grounds.
- The Migration Act does not permit the individual circumstance of detention of non-citizens to be taken into consideration by courts. It does not permit the

123 Human Rights and Equal Opportunity Commission, above n96.

124 Ibid 52-54.

reasonableness and appropriateness of detaining an individual to be determined by the courts. Australia is therefore in breach of its obligations under ICCPR article 9.4 and CROC article 37(d) which require that a court be empowered, if appropriate, to order release from detention.

- To the extent that the policy of mandatory detention is designed to deter future asylum seekers, it is contrary to the principles of international protection and in breach of ICCPR article 9.1, CROC articles 22(1) and 37(b) and human rights under the HREOC Act.

The Commission recommends

R3.1 In accordance with international human rights law the right to liberty should be recognised as a fundamental human right. No-one should be subjected to arbitrary detention. The detention of asylum seekers should be a last resort for use only on exceptional grounds. Alternatives to detention, such as release subject to residency and reporting obligations or guarantor requirements, must be applied first unless there is convincing evidence that alternative would not be effective or would be inappropriate having regard to the individual circumstances of the particular person. A detailed model for conditional release is set out in Chapter 16.

R3.2 The grounds on which asylum seekers may be detained should be clearly prescribed in the Migration Act and be in conformity with international human rights law. Where detention of asylum seekers is necessary it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the following legitimate aims

- to verify identity
- to determine the elements on which the claim to refugee status or asylum is based
- to deal with refugees or asylum seekers who have destroyed their travel and/or identifications document to mislead the authorities of the state in which they intend to claim asylum and
- to protect national security or public order.

The detention of asylum seekers for any other purpose is contrary to the principles of international protection and should not be permitted under Australian law.

R3.3 Detention is especially undesirable for vulnerable people such as single women, children, unaccompanied minors and those with special medical or psychological needs. In relation to children article 37(b) of CROC states that the

arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children and other vulnerable people should be detained, even as permitted by R3.2, only in exceptional circumstances. For children, the best interest of the individual child should be the paramount consideration.

R3.4 Detention should be subject to effective independent review. Review bodies should be empowered to take into consideration the individual circumstances of the non-citizen including the reasonableness and appropriateness of detaining him or her. Review bodies should be empowered to order a person's release from detention. The lawfulness of detention should be subject to judicial review. Migration Act sections 183, 196(3) and 72(3) so far as they provide that the Minister's discretion is personal and non-compellable should be repealed.

E Views of Some Scholars

In relation to the *Tampa* litigation, Professor Hathaway has noted:[125]

> Perhaps most significantly, Australia was also at this point [when the Tampa entered Australian territorial waters] prohibited from imposing limits on the freedom of movement of the refugee claimants unless able to justify the restrictions. Under Art. 31(2) of the Refugee Convention, authorities are allowed to detain refugees only for reasons generally agreed to be justified, including the need to satisfy themselves of an asylum seeker's identity, or to determine whether or not he or she presents a security risk to they asylum state. The refugee must, of course, submit to all necessary investigations of his or her claim to protection, and file whatever documentation or statements are reasonably required to verify the claim to refugee status. But once any such prerequisite obligations have been discharged, the refugee's presence has been regularized in the receiving state, and refugee-specific restrictions on freedom of movement must come to an end. This critical international legal limitation on the right of states to detain refugees appears not even to have been considered in adjudicating the application for habeas corpus in the Federal Court.

Quite apart from the question whether the detention of the rescuees violated the Refugees Convention, it has been observed that the *Tampa* incident may have

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125 James Hathaway, "Refugee Law is not Immigration Law" (2002) World Refugee Survey 38, 42. Emphasis added by authors.

involved other breaches of conventional international law. Thom[126] argues that principle of *non-refoulement* applies from the moment asylum seekers present themselves for entry. There is thus an obligation not to reject an applicant at the border. This obligation applies despite any attempts by the States to keep aliens technically or legally outside the territory of the State. Further, at least where a State exercises its jurisdiction by taking control of a ship, whether in territorial waters or not, the State is bound to abide by the principle of *non-refoulement*. Thom argues that Australia was obliged after the SAS boarded the *Tampa* to give the rescuees access to Australian processing procedures. He also argues that the failure to permit access to Australian asylum procedures violated the principle of non-penalisation in Article 31 of the Refugees Convention.

F View of the Australian Government

The Australian government indicated its position on a number of the criticisms raised above in a paper prepared for the UNHCR Global Consultations process.[127] Key to its position is the view that Article 31 paragraph 2 of the Refugees Convention preserves "the right of States to impose restrictions on illegal entrants, provided they are considered 'necessary', and until their status in the country is regularised or they obtain admission to another country".[128] Therefore, while the Australian government "supports the recognition of the right to liberty, as articulated in international instruments such as the ICCPR, and considers that no one should be subjected to arbitrary detention ...[and views] prolonged or indefinite detention as undesirable",[129] it nonetheless considers its reception and detention arrangements as consistent with international law.

Its position is explained as follows:[130]

> The administrative detention of illegal entrants pending the decision whether to remove them or grant them a visa to enter or stay is consistent with Australia's entitlement under international law to determine whom it admits to its territory. It is

126 Graham Thom, "Human Rights, Refugees and the MV Tampa Crisis" (2002) 13 Public Law Review 110.

127 Department of Immigration and Multicultural & Indigenous Affairs, *Interpreting the Refugees Convention – an Australian contribution* (2002).

128 Ibid 152.

129 Ibid 162.

130 Ibid 163-5.

> required by legislation passed by the Australian Parliament [the Migration Act], has been held as lawful and non-punitive in Australian jurisprudence [the Lim decision], and represents an appropriate balance between pursuing legitimate public policy objectives and considering the interests of those adversely affected.
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> ...
>
> The Australian Government in its response to the Committee in relation to A v Australia did not accept that the detention was arbitrary, nor that Australia had provided insufficient justification for his detention. It was noted that the Committee had not indicated what, in its view, would be considered sufficient justification for Mr A's detention nor at what point in time the detention of Mr A became arbitrary.
>
> In the view of the Australian Government, Australia's obligation under Article 9.4 of the ICCPR is to provide for review of the lawfulness of detention in the Australian domestic legal context. The Government took the view that:

The obligation on State parties is, in accordance with the actual words of Article 9.4, to provide for review of the lawfulness of detention. In the view of the Australian government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. Elsewhere in the Covenant where the term 'law' is used, it clearly refers to domestic law ... Furthermore, the use of 'unlawful' in Article 9.4 contrasts with the meaning and use of 'arbitrary' in other provisions of the Covenant ... nor is there anything in the *travaux préparatoires*, the General Comments of the Committee ... or the works of the commentators to support the Committee's view that 'lawfulness' in Article 9.4 is not limited to mere compliance with domestic law.

> In regard specifically to the Refugees Convention, in the Government's view the public policy grounds for detaining illegal entrants, when considered in combination and against Australia's particular circumstances, are sufficiently compelling to be considered 'necessary' for the purposes of Article 31(2).
>
> The objectives which underlie the policy of detaining illegal entrants, including those who subsequently apply for asylum, are to:
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> - ensure that illegal entrants do not enter the Australian community except in specified circumstances, until any claims for asylum have been properly assessed and found to justify entry;

- ensure detainees' availability for removal should they have no right to be granted a visa to stay in Australia; and
- thus contribute to maintaining the integrity of Australia's migration and humanitarian programs.

The policy ensures the effective management of illegal entrants while identity, health character, national security and any protection issues are explored, and their availability for removal from Australia if they have no grounds to stay. If a person is determined to be a refugee and owed protection by Australia, and the person and any accompanying family members fulfil the conditions for grant of a visa, they are immediately released.

Deterrence is not the central or dominant objective or reason for the mandatory detention provisions. However, to the extent that mandatory detention is perceived internationally to indicate Australia's determined and effective pursuit of the above objectives, some level of deterrence would be an understandable outcome among potential illegal entrants who lack bona fide claims to asylum, and those engaged in secondary movement for non-protection related motives.

As far as the potential refoulement of asylum seekers is concerned, the Australian government's position is that "while the Refugees Convention provides a definition of the term 'refugee', it does not give to a person who falls within the definition any right to enter or remain in the territory of a Contracting State".[131]

VII THE FAILURE OF AUSTRALIAN COURTS DEALING WITH DETENTION CASES TO TAKE INTO ACCOUNT INTERNATIONAL HUMAN RIGHTS LAW AND THE REASON FOR THIS APPROACH

In the last sentence of the passage from Professor Hathaway extracted at 5.5, he refers to the failure of the Court in the *Tampa* litigation to address the limitation of detention imposed by Article 31 paragraph 2 of the Refugees Convention. Against the background of these views that the mandatory detention regime in Australia contravenes international law, the question arises why the Australian courts have not considered the impact of international law in cases concerning mandatory detention.

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131 Ibid 46.

In the *Tampa* litigation, Amnesty and HREOC were both granted leave to intervene. Both filed written submissions which detailed allegations of a number of violations of the ICCPR, the CROC, and the Refugees Convention. For instance, in relation to the detention of the rescuees, both Amnesty and HREOC contended that such detention was in breach of international law. Both argued, *inter alia*, that the detention was arbitrary and violated Article 9 paragraph 1 of the ICCPR.

At first instance it was unnecessary to determine these issues because the court held that an order for release should be made in any event.

In the Full Court, the central issue determined by the majority was the power of the Executive to refuse entry to the rescuees outside the provisions of the Migration Act. French J referred briefly to the role of the Refugees Convention on this issue.[132] But, on the legality of the detention, Professor Hathaway's observation is pertinent. Developments in the law are, of course, incremental. At the conclusion of each stage of development, further issues are revealed for consideration at the next stage. It may be that Professor Hathaway's observation points to another question. Is the executive power which was recognised by the majority affected by the Executive act of entering into treaties alleged to have been violated? If there is inconsistency in the acts of the Executive, is the matter justiciable?

The fact that these questions remain unaddressed perhaps reflects something of the role of international law in the present Australian legal system. As to the effect of treaties, Mason CJ and Deanne J said in *Minister for Immigration and Ethnic Affairs v Teoh*:[133]

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.

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132 See paragraph VC above.

133 (1995) 183 CLR 273 at 286-7.

In 1999, in *Nulyarimma v Thompson*[134] (*Nulyarimma*) a majority[135] held that genocide was not a crime in domestic law in Australia in the absence of legislation passed by the Australian Parliament. This is so even though, as Wilcox J said:[136]

> I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogable obligation by each nation State to the entire international community. This is an obligation independent of the Genocide Convention. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also that the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law.

And his Honour continued:[137]

> However, it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to the effect, such a person may be put on trial for genocide before an Australian court.

Merkel J held that the offence of genocide was an offence under domestic law without the need for domestic legislation.

VIII CONCLUSION

What then is the picture revealed of the way courts have dealt with mandatory detention in Australia.

Returning to the question posed at the commencement of this paper, namely, whether Australian courts have dealt with immigration detention issues in isolation from the 'main stream', we see that the 'main stream' is the body of

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134 (1999) 96 FCR 153.

135 Wilcox and Whitlam JJ.

136 *Nulyarimma* (Wilcox J), above n134, 18.

137 Ibid 20.

international human rights law contained in the Refugees Convention, ICCPR, and CROC. These norms are the 'main stream' because they carry the assent of most of the nations of the world, and they embody standards of acceptable civilised conduct. In the case of detention, importantly, they directly address the issues which should determine the legitimacy of detention. If those standards are litigated the courts will address whether the detention is appropriate or not according to the standards prescribed, rather than with seemingly tangential questions such as whether the detention is properly the function of the Executive or the Judiciary.

In Australia, the 'main stream' has not yet reached the billabong. The billabong is filled with local debates about the meaning of legislation or of the precise ambit of the constitutional separation of powers. In a good year, it may be that the 'main stream' will flood and fill the billabong.

In the meantime, the Australian legal system lacks entrenched protections against arbitrary detention and other violations of fundamental human rights. So far the debate in Australia over a bill of rights has not produced any results. It may be that the onward march of globalisation will engulf the Australian legal system and cause movement towards a direct acceptance of international human rights standards into Australian law. In due course, the Australian legal system will no doubt recognise that sovereignty is a changing concept, and that the mature exercise of sovereign power involves the acceptance of international human rights norms as a part of the domestic law of Australia.

THE COURTS AND DETENTION – THE UNITED KINGDOM EXPERIENCE

Justice Collins*

The Refugee Convention contains no provision which governs the methods whereby a State is to determine whether a person seeking asylum is a refugee. In particular, there is no indication of the circumstances in which detention can be justified. The closest that it comes to guidance is Article 31 this requires that any restrictions on the movement of refugees must be 'necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country' (Article 31.2). Article 31.1 prohibits the imposition of penalties on refugees "on account of their illegal entry or presence ... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

Although the Article refers to refugees, it must include presumptive refugees: otherwise, Article 31.2 makes no sense. Such a construction has been applied by a court in the United Kingdom.[1] Thus, provided the asylum seeker has complied with the requirements of Article 31.1, he should not be penalised for any unlawful entry. In *Adimi's* case the court considered that the requirement that he should have come directly from the territory where his life or freedom was threatened could not be considered literally because to do so "would contravene the clear purpose of the Article". Accordingly, it accepted that an asylum seeker who had passed through intermediate countries on his way to the State in which he claimed asylum would be entitled to the protection of Article 31. An asylum seeker was entitled, it was said, to an element of choice and, provided that his stay in an intermediate country was not such as showed that he would and should have

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* Judge of the Royal Courts of Justice, London.

1 See *R v Uxbridge JJ ex p Adimi* [2000] 3 WLR 434.

claimed asylum there, he would not lose the protection. As a result of *Adimi* (which was not appealed by the government), the practice of prosecuting asylum seekers who entered the United Kingdom by means, for example, of false documents and sending them to prison on conviction has ceased.

The United Kingdom is facing an increasing number of people from various parts of the world who are seeking to enter the country. Many, perhaps most, are economic migrants. Many enter illegally with the help of people smugglers and will stop at nothing to get into the country. The United Kingdom is not unique in facing this problem, but it has meant that the government has introduced measures to try to stem the tide. In order to discourage would be entrants, steps have been taken to reduce as far as possible benefits available to asylum seekers. It has, in my view correctly, been recognised that quick decision-making is very important and steps are being taken to try to speed up the process, not only by the administrators but also by the appellate bodies. In the United Kingdom, as many of you will be aware, there is a two stage appeal. An adverse decision can be appealed to an independent judge known as an adjudicator, who normally hears evidence, finds facts and reaches his conclusion. Either party may appeal the decision to the Immigration Appeal Tribunal, of which I am President, but only if the Tribunal gives leave to appeal. When I tell you that the tribunal is receiving about 600 applications for leave to appeal each week and that the numbers are increasing you will have some idea of the extent of the problem.

One of the ways to discourage is to detain. International law has always recognised that a State may refuse to permit an alien to enter and may impose such conditions as it pleases upon an alien if he is permitted to enter. Aliens may be deported and their reception is a matter of discretion.[2] Most (probably all) States have specific laws which control the entry of aliens and most of those will include a power to detain.

So it is in the United Kingdom. The Immigration Act 1971 gives to an immigration officer, where an individual is seeking to enter or has entered unlawfully, the power to authorise detention. This power is exercisable pending a decision to give or refuse leave to enter or whether or not to direct removal of an illegal entrant. It can be exercised whether or not there is any perceived risk that the person in question is likely to abscond, although it had been the practice until March 2000 only to detain in accordance with a policy set out in a document of

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2 See *Oppenheim's International Law* (1955) 675-676.

1998 entitled *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* in these terms:[3]

> The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances:
>
> - Where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release:
> - Initially, to clarify a person's identity and the basis of their claim; or
> - Where removal is imminent. In particular where there is a systematic attempt to breach the immigration control, detention is justified whenever one or more of those criteria is satisfied."

Thus detention was regarded as a last resort. For a genuine asylum seeker who has been persecuted or who fears persecution which may include imprisonment, detention will be a dreadful thing, even if the conditions are as pleasant as possible. But, whatever the conditions, detention involves loss of liberty, itself a fundamental human right, and so must in my view be justified. English law recognises one fetter on the power to detain. It must only be for such time as is reasonable to reach the decision in question or to remove.[4]

I regard this limitation as most important. Keeping people in custody for weeks on end while their applications are being considered cannot in my view be justified. That is particularly so if the conditions of detention are harsh, as sometimes they may perforce be. Deliberate imposition of harsh conditions seems to me equally to be unjustified but I suspect it would be difficult for an applicant to persuade a court to intervene on that ground alone unless the conditions are so harsh as to amount to "cruel, degrading, or disproportionately severe treatment", to quote section 9 of the New Zealand Bill of Rights which, in slightly varying terms, is to be found in the constitution or laws of most civilised countries.

It is also worth quoting from *A v Australia*[5] which concerned detention of boat people. The UN Human Rights Committee considered that detention was

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3 Cm 4018, Paragraph 12.3.

4 See *R v Governor of Durham Prison ex p. Singh* [1984] 1 WLR 704.

5 (1997) 4 BHRC, 229.

arbitrary within the terms of Article 5(4) of the Optional Protocol of the International Covenant on Civil and Political Rights if it was not necessary in all the circumstances of the case to detain. It said:

> ... the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

The issue of detention of asylum seekers is before the courts in the United Kingdom at present. It arose because of a new policy in March 2000 to detain at a centre called Oakington in order to achieve speedy decisions in particular cases. The detention was to be for no more than 7 – 10 days and was for those from particular countries whose claims were considered to be likely to be straightforward and so to be dealt with quickly. Not only was a danger of absconding not a ground for such a regime, it was a positive indication against it since such persons were likely to be disruptive. Four of those subjected to the regime challenged its lawfulness and their claims came before me in June last year. One claimant had arrived at London Airport and immediately claimed asylum. There was then no room at Oakington and so he was given temporary admission for two days and then detained for a week while his claim was considered. It was refused, whereupon he was granted temporary admission until he could be removed.

I decided the regime was unlawful because it was disproportionate, and so arbitrary and contravened Article 5 of the European Convention on Human Rights.

Unfortunately, the Court of Appeal disagreed. Both my and the Court of Appeal's judgments are reported as *R(Saadi) v Home Secretary.*[6] The Court of Appeal thought that the decision of the European Court of Human Rights in *Amuur v France*[7] recognised that there was a distinction drawn between 'the restriction on liberty' which did not and 'deprivation of liberty' which did come within Article 5. Thus it was able to say that the ECtHR seemed to recognise that to confine aliens in a detention centre was lawful provided that it was accompanied by suitable safeguards (ie the conditions were not too unpleasant) and was only for a reasonable time to enable the application for admission to be

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6 [2002] 1 WLR 356.

7 (1996) 22 EHRR 533.

considered. Thus the question whether such detention is proportionate only arises in relation to its duration.

The House of Lords has heard an appeal in the case. I had hoped that it would have reached its decision[8] by the time I came to write this, but it has not and its decision will not be given until October at the earliest. Perhaps I shall know by the time this paper is delivered. However, I am, unsurprisingly, wholly unpersuaded that there exists the distinction between detention and restriction on liberty where the individual is locked up in a particular place and unable to leave it. However pleasant the conditions may be said to be, to lock someone up is to deprive him of his liberty. A requirement that a person remains in a particular place which is reinforced by locked doors preventing him from leaving is detention and in my opinion is clearly covered by Article 5. But the Court of Appeal recognises that to keep someone for an unreasonable time or in unpleasant conditions is not permissible.

Another problem has become more acute since the events of 11 September 2001. Article 1F of the Refugee Convention provides that the Convention is not to apply to 'any person with respect to whom there are serious reasons for considering that' he has committed various serious crimes or acts 'contrary to the purposes and principles of the United Nations'. Those reasonably suspected of having committed acts of terrorism would be likely to come within Article 1F. Conspiracy to commit such an act would normally be included. It would normally be lawful to detain such a person pending his removal.

However, English domestic law (*Ex p Singh)* and the ECtHR in *Chahal v United Kingdom*[9] have made it clear that such detention can only be for a reasonable time pending removal. The Refugee Convention quite clearly recognises that such persons may be returned to the country of their nationality notwithstanding that they may be persecuted there. There is no similar provision in the European Convention on Human Rights. Thus the Court at Strasbourg has decided that to return a person when there is a real risk that he may suffer torture or inhuman or degrading treatment or punishment would be to breach Article 3 (and the same principle would apply to the other articles of the European Convention on Human Rights). Thus those who are within Article 1F of the

8 *R v Home Secretary, Ex p Saadi* (31 October 2002) [2002] UKHL 41.

9 (1996) 23 EHRR 413.

Refugee Convention cannot be returned if they would suffer in a way which breached their human rights, and that will often be the case.

It seems to me to be apparent that those who originally drew up the European Convention on Human Rights did not contemplate that it would apply to aliens who were to be removed from the country but only to those who were within and entitled to the protection of the State. But, as the European Convention on Human Rights has said, the Convention is a living instrument and the jurisprudence that extends it to removal is too well established to be changed.

The United Kingdom government's solution was to derogate from the European Convention on Human Rights and to pass an Act enabling detention of such supposedly irremovable aliens on reasonable suspicion that they were involved in international terrorism. Derogation under Article 15 of the European Convention on Human Rights is only permissible if there exists a state of war, or a public emergency threatening the life of the nation. The decision to derogate has been declared to be incompatible with the European Convention on Human Rights by a court (which was chaired by me), not because there was not a relevant public emergency but because the Act was discriminatory in that it targeted only aliens and not British citizens although the evidence showed that there were British citizens who were just as likely to be dangerous as the aliens. That is going to the Court of Appeal.

I am satisfied that the power to detain either on entry while a claim is being investigated or with a view to removal should not be used as a general deterrent to try to discourage entrants. And it should be for no longer than is reasonably necessary to examine the claim and reach a decision. There is no reason why someone who is not likely to abscond or otherwise misbehave should be detained for longer than is absolutely necessary. Further, since asylum seekers may have a genuine claim, it is wrong to keep them in deliberately harsh conditions.

ASYLUM: CAN THE JUDICIARY MAINTAIN ITS INDEPENDENCE?

Sir Stephen Sedley[*]

Although judicial structures and cultures take as many different forms as there are states in the world, the two things they either have or ought to have in common are independence and impartiality. No international human rights instrument, and no written constitution I know of, settles for less. The two things are of course linked: a judiciary which is not independent is not likely to be impartial, at least vis-à-vis the state. But impartiality is a state of mind. Independence is a state of being, and in that sense is prior even to impartiality. It is independence which is the primary focus of this paper; but any such focus has logically to include in the ways in which pressures on the structural independence of judges are capable of affecting the impartiality of their decision-making.

Asylum law ought not in principle to be any different from the law of tenancy or insolvency or anything else. Such bodies of law affect hundreds of thousands of people in any average-sized country every year; yet it is the asylum law decisions which reach the news and become subjects of political debate – or, worse than debate, abuse. Everybody knows what the issue is: the perception of tidal flows of individuals seeking a safer or a better life in states which either have undertaken international obligations of protection or simply happen to be the nearest place of comparative safety. The reason why it is this issue, rather than, say, the effects of widespread homelessness or bankruptcy, which allows public passions to be so readily ignited has probably less to do with social economics than with atavistic fear of the outsider – once the stranger within the gates to whom all settled societies gave hospitality, now the feared "other" of postmodern discourse.

But that is not to say for a moment that the issue is unreal. The moment you begin to unpack my casual description of the tidal flow, you start to see the problems. The nearest place of relative safety should be, in practice and in law,

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* Lord Justice of Appeal, England and Wales.

where all asylum-seekers go; but many make prolonged and circuitous journeys to reach a haven of choice, and by doing so attract the suspicion that they are in search not simply of a safer life but of a better one. Who can blame them? Yet between a safer life and a better one the twentieth century has brought down a steel curtain. The signatories of the refugee conventions have had of necessity to reserve emergency protection to those in well-founded fear of their lives or personal safety. Economic migrants have to stand in a different, a long and slow-moving, queue of which they may never reach the head. We do not, because we believe we cannot, allow the search for a safer life to become the search for a better one.

Judges know as well as politicians do that the consequence has become a worldwide industry of transporting or smuggling people, often at the cost of their own and their entire families' assets, and equipping them with invented stories to exploit the asylum laws of sought-after host states. I say deliberately that judges are as aware of it as politicians are because a significant part of the pressure on judges comes from people – politicians, journalists and through them large tranches of the public – who from time to time find it convenient to blame refugee law judges for the perceived influx of undeserving aliens. But while this is the most direct and crude form of pressure on judges, I am going to suggest that it is probably not the most potent or the most important.

First, nevertheless, one needs to look at these direct political pressures. They may be insidious – as in those countries, including the United States, where asylum judges are part of the executive and are therefore dependent in some measure on the approval of their political superiors; or overt – as in the United Kingdom and Australia, where in recent years ministers and editors have denounced not only decisions of which they disapprove but the judges who have made them.

It is chastening that as recently as 1996 the Special Rapporteur of the UN Commission on Human Rights noted "with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary." The illustrations which the report went on to give omitted some of the abusive prose directed in the mid-1990s at individual judges by more than one journalist. The report concluded: "That such a controversy could arise over this very issue in a country which cradled the

common law and judicial independence is hard to believe."[1] But a former permanent secretary at the Lord Chancellor's Department had written not long before: "One of the most dramatic changes that has taken place over the past thirty years or so has been the increasing freedom felt by newspapers, in particular, to attack judges with a vigour (and one could use a much stronger expression) that was formerly quite unknown."

To be sure, no-one wants a return to the 1930s, when a Lord Chief Justice of England and Wales could solemnly tell the guests at the Lord Mayor's Dinner that His Majesty's judges were content with the almost universal esteem in which they were held; and without doubt the greater readiness of judges in recent years to speak in public on issues of legal policy makes it impossible for them to object if their views on policy are criticised. But every judge at every level is limited to defending his or her judicial decisions by the single set of reasons publicly pronounced for them. If the reasons do not speak for themselves, the judge cannot thereafter do it for them; and they are of course in the public domain and as open as everything else in that domain to criticism. Lord Cockburn in the 1880s got himself into deep water by trying publicly to defend his judgment in the still celebrated case of *R v Bedingfield*[2]. Even so, it continues to be dispiriting when a decision is attacked by a journalist who has either not read the judgment or, if he has read it, has manifestly not understood it.

Political attacks recycled and amplified by the press in turn provoke a phenomenon which is peculiarly nasty: hate-mail. Those judges who have been on the receiving end of a hate-mail campaign will know how unnerving it can be, and how difficult to hold steady from day to day in the face of it. The potential effect of such attacks is not – for it cannot be – to alter the decision which has already been taken; it is on the next decision and the one after that. The near-certainty that doing what you believe to be the right thing is going to bring another storm of public abuse on your head can be a potent incentive to kick for touch, to fudge the issue, to find a less contentious solution. It is the ability not to let it happen which marks out judicial quality.

Asylum law, however, has an aspect which I think makes it unique: the need for it to deal in outcomes which are publicly perceived as having a direct and often unwelcome effect on the lives of the settled population. Asylum judges

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1 Cited in T Bingham, *The Business of Judging*, (2000) 55.

2 (1879) 14 Cox CC 341.

consequently handle facts and topics which, unlike those addressed by any other branch of the law except crime, are a matter of often passionate daily debate. You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it's unusual to be in any gathering where immigration does not sooner or later come up, and with it the view that asylum is a tolerated gateway for illegal economic migrants.

Now the assault in these dialogues may well not generally be on the judges who adjudicate in contentious cases. In the United Kingdom, for example, journalists know relatively little about the Immigration Appellate Authority. They know a great deal more about the inefficiencies of executive government, largely because executive government is a rich source of leaked information, but also because the government's own figures have been showing a very slow initial turnround of asylum applications and a large-scale failure to remove asylum-seekers whose claims have been rejected. It is known that individuals, especially those with the help of determined and sometimes unscrupulous advisers, can spend many years unsuccessfully claiming refugee status; and if by the time of the final refusal they have found a partner and started a family, removal may become impossible for reasons arising not any longer from the Refugee Convention but (in the UK's case) from the European Convention on Human Rights. I would be surprised if this situation were not replicated in a good many other countries.

What affects judges in such a situation is not a targeted critique of their own role but an ambient pressure to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home. At times this becomes nationality- or ethnicity-specific. We have been going through it in the United Kingdom in relation to east European Roma. Here the range of pressures is very marked: there is both the overt press hostility to gipsies who are awaiting decisions and who can be seen begging in the streets with children in their arms, and the unspoken awareness of judicial decision-makers that a decision in favour of one may be a decision in favour of thousands of Roma in the identical situation. Not to sweat under such atmospheric pressure is a near-impossibility. It does not mean that adjudicators will all lurch in one direction. There is just as much risk that conscientious judges will over-compensate for the pressures they sense around them as that they will succumb to the noise. But the hothouse itself is, I think, peculiar to asylum law adjudication. Probably the nearest we come to it in other fields is in criminal law, where from time to the societal pressure to secure a conviction can distort the process of justice; but there it is at least episodic, not a constant daily phenomenon.

Yet this is still not the high point of the problem. I have not reached the critical function of first-instance asylum judges in the majority of the world's developed jurisdictions: the function of fact-finding. It is in the atmosphere I have been describing that many, perhaps most, decisions have to be arrived at as to whether an asylum-seeker is telling the truth and, if not, what the truth is. I have described this function elsewhere as "not a conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."[3]

The procedures by which asylum law judges of first instance undertake this complicated task are as numerous as the states to which asylum-seekers come. But they all, I believe, have one thing in common: the critical issues are only rarely capable of determination by an adversarial contest as to where the truth lies. Such issues do of course arise – for example as to whether an arrest warrant is a genuine document or whether scars are the product of torture; but even they are likely to be only a part of a bigger picture, and the bigger picture, although its background may come from common funds of information, is something to which only the applicant can give definition and content. In the result asylum law judges, whatever the legal tradition or culture they inhabit and whatever the procedures governing their work, are all to one degree or another inquisitors rather than umpires. Those of you to whom cricket is simply an incomprehensible way of wasting of a sunny afternoon will have to overlook the remark that in a common law criminal trial the court's only function is to answer the question "Howzat?"; whereas the asylum law judge, starting from a bare claim to his or her country's protection, has typically to examine a mass of particular and general testimony, much of it inadmissible in a court of law, and to decide what it adds up to.

But all tribunals, the adversarial and the inquisitorial, the administrative and the penal, face the same core question in case after case: how do we know whether we are being told the truth? This is not the place for a disquisition on lie-detection, nor for a much-needed debunking of the fiction that a few years of legal or judicial experience are all that it takes to look a witness in the eye and see an honest person or a liar. Any illusions of that kind which I might have harboured were dispelled in my early days as a judge by a highly regarded judicial veteran who said to me: "The longer I sat on the bench, the less certain I became that I

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3 Approved on appeal in *Shah and Islam v Home Secretary* [1999] 2 AC 629.

could tell truth from falsehood." Doing one's honest best to discern the truth without objective aids in a jurisdiction on which people's lives and safety may depend is a grim and exhausting business; and it is not helped by the pressure of time under which the work is mostly done. The availability of a single unassailable piece of evidence – a plainly authentic document, perhaps, or agreed medical evidence – acquires in such circumstances the disproportionate value of a plank in a shipwreck.

For the rest, we know on the one hand that there are junk sciences in the field of truth-evaluation, a number of them flying the flag of behavioural psychology. We know on the other hand that there are true culturally determined behavioural differences, for instance about the politeness or unacceptability of looking an interlocutor directly in the eye, which asylum law judges need to be alive to. Impartiality here does not mean assessing everybody by the same criteria: on the contrary, as discrimination law has painfully established over recent decades, it may well mean assessing different people by different criteria in order to be able to judge them on an equal footing. Judicial training can do much in such respects to enhance the quality and reliability of adjudication.

But beyond these reaches lies a much darker hinterland, in which judges still have to do their unaided best to decide whether an account is credible or not. The common resort is to consistency or inconsistency, either intrinsic to the applicant's account or extrinsic by relation to in-country reports and the like. Even this is something of a counsel of despair, for we know from an infinity of human experience that it is the competent liar who tells the most internally consistent and externally convincing story, and that honest people may be so traumatised or fearful that nothing they say makes sense. We know too that in-country reports can do only so much to focus the general on to the particular.

It is in such a situation, where there is frequently so little firm or objective help to be gained from materials before the judge and where so much depends on personal impression and visceral reaction, that the demands of independence and impartiality become acute. I suspect that a truly impartial outcome in a high proportion of asylum cases would be a draw. But that is the one luxury denied to judges. Setting the standard for a successful claim well below proof beyond reasonable doubt and even below a preponderance of probability, and limiting it to the establishment of a real risk, may help the asylum-seeker but does not ultimately help the asylum judge. A possible life-and-death decision extracted from shreds of evidence and subjective impressions still has to be made.

Not only for these substantive reasons but for procedural reasons too, asylum adjudication calls up a very particular version of impartiality. In ordinary civil and criminal contests, impartiality implies no more than not taking sides, at least until one has heard the evidence and the argument. In asylum law, except to the extent that the state takes on itself the role of the asylum-seeker's adversary, there are no such sides. In an exercise which is typically one of testing assertions, not of choosing between two stories, the form which impartiality most typically takes for the judge is abstention from pre-ordained or conditioned reactions to what one is being told. It means not so much knowing others as knowing oneself – perhaps the hardest form of knowledge for anyone to acquire.

I have no simple solutions to offer. Asylum judges are going to have to go on doing the best they can in a jurisdiction which has neither the falsifiability of a science nor the completeness of an art. My single conclusion is to return to what I began by discussing: the kinds of articulated and inarticulate pressures, most of them indirect and impersonal but all of them potent, which in the societies to which most asylum-seekers come are part of the air which asylum judges breathe. They are capable of exercising a considerable influence, all the greater for operating unconsciously, on the conclusions which judges arrive at upon materials which are themselves inconclusive. They are pressures which are not ordinarily identifiable, except in the long perspective, and so are rarely appealable. But they are in my view the most troubling aspect of adjudication in open societies in which justice no longer pretends to be a cloistered virtue.

We are probably not going to be able to do much better in the twenty-first century than Sir Matthew Hale, a great chief justice of England and Wales, did in the mid-seventeenth. In a memorandum to himself he insisted: "That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions."

The judicial oath in the United Kingdom, replicated – I am certain – in one form or another throughout the world, is to do justice without fear or favour, affection or ill-will. Every one of those nouns is set in high relief by the asylum judge's functions. The fear of public abuse or political displeasure, even if neither can result in dismissal; the risk of unwittingly favouring individuals who fit stereotypes with which the judge feels an affinity; the risk that affection – sympathy - will skew judgment; the risk that ill-will – prejudice - may do the same: the judicial oath calls out by name these demons which lurk in all systems of adjudication, asylum prominent among them.

I do not suggest that there is any nostrum against these things, though being aware that they exist is an important start. But I believe that the overt and covert pressures on judges which are present in any modern open society are probably heavier and more damaging in the area of asylum adjudication than anywhere else, because asylum judges tend, in the nature of their jurisdiction, to have comparably fewer anchorages in hard fact or rigorous procedure to hold them steady against the tides of public opinion and the winds of hostile comment. Their independence is correspondingly fragile, and politicians and journalists who set out to undermine it may be doing their own societies greater damage than they realise.

JUDICIAL INDEPENDENCE AND ASYLUM LAW

Judge Stephen Reinhardt*

I am delighted to be attending this exciting conference and honoured that you have given me an opportunity to speak to you. Before I discuss the subject of judicial independence in asylum cases from the American standpoint, it may be helpful if I spend a few moments discussing more generally the workings of our judicial system. Also, although it may be obvious, I am obligated to state that I speak for myself alone and not for my court or my government.

The system with which most of you are undoubtedly familiar is our federal court system. Federal judges are appointed for life by the President, subject to confirmation by the United States Senate. The appointment process is highly political, particularly for appellate court judges and Supreme Court justices. Ideology plays a considerable role in both the selection and confirmation aspects of that process. Confirmation battles may be extremely bitter and protracted. One member of my court waited approximately four years for a vote by the Senate on his nomination.

For the past twenty to thirty years, during our presidential campaigns conservatives have made a political issue over liberal judges – a very small group indeed these days. Conservative Presidents have made certain that those they appoint will be representative of the narrow judicial philosophy conservatives espouse. While the public has shown little interest in the issue, conservatives have for other reasons won a series of critical presidential elections and as a result the face and the philosophy of the federal judiciary has been drastically changed from what it was during the preceding 40 or 50 years. Regardless, once a judge is appointed to the federal courts he is essentially free from political pressure. If he wishes to change his judicial philosophy or to decide a controversial case in an unpopular way, he can and will do so without fear of retribution. No federal judge has ever been

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* Federal Court of Appeal, 9th Circuit, USA.

removed from office because of his ideology, his philosophy, or his decisions or opinions. In fact, only a handful of federal judges have ever been impeached, and then only on the ground of financial corruption. As a result, federal judges are generally free to decide matters as they see them and to make the decisions they believe the law requires them to make. A few, of course, may be influenced on occasion by a desire to do what they believe may best improve their chances to be promoted to the Supreme Court – a post for which most American judges consider themselves eminently qualified – and some may be influenced occasionally by public sentiment or outrage. Still, the tradition of judicial independence is extremely strong in the federal system. Protection against retribution by Congress is ironclad. Not only are our positions guaranteed for life, so is our salary; we receive it until we die and the amount cannot be decreased even after we have retired.

The worst that can ordinarily happen to a federal judge when he issues an opinion that politicians do not like happened to me recently. I was one of two appellate judges who decided that the insertion of the phrase "under God" in the pledge of allegiance to the flag, which most American public school children recite every morning, violates our First Amendment, in that it constitutes an intrusion of religion into matters conducted by the state. The next day both Houses of Congress, by near-unanimous votes, condemned our decision. President Bush expressed his outrage. Right-wing TV commentators urged my impeachment and inspired a nation-wide letter-writing campaign. Some Christian ministers organized a demonstration at my home. They advertised the time and place over a religious radio station. On the appointed date, a crowd assembled outside my condominium, prayed over microphones, sang hymns, and did whatever religious pickets do, including flying a plane with a large banner attacking the decision over the nearby beach. Although no politicians were willing to come forward and defend us or our court, neither I nor my colleague who actually authored the opinion gave any serious thought to the personal consequences of our decision, either before or after we made it. To those who tell us it was courageous, I say, not so. It does not take a lot of courage to do what is right when one's independence is guaranteed by the Constitution.

In our country, it is the federal courts that play a role in refugee and immigration matters, and not the state courts. That role is, however, in many respects quite limited. Before I describe the structure of our asylum and refugee cases, I want to add two significant facts to what I have said about the federal judicial system. First, unlike in some countries, our judges are not professionals in the sense that they have trained their entire lives for a judicial career or have worked their way up through the judicial ranks. We have no special schools or special academic training for judges.

We all become lawyers and begin practising law in one field or another, either public or private. Some of us give little if any thought to becoming jurists until we are approached in mid-career and asked if we would be willing to do so. Others have aspirations starting in their childhood, but there is not much planning they can do to bring about the realisation of their ambitions. Judges are appointed to the federal courts from various career paths: law professors, elected public officials, state court judges, prosecutors, and private practitioners. Supreme Court and appellate judges need not have had prior judicial experience. One of our greatest Chief Justices, for example, Earl Warren, was the Governor of California prior to his appointment; the current Chief Justice, whose judicial philosophy is precisely the opposite, was a lawyer in the Justice Department when he was appointed to the Court. Neither had spent a day as a judge before ascending to the United States Supreme Court.

Second, federal judges are generalists. We all handle the whole variety of cases that fall within the jurisdiction of the federal courts. We do not specialize in particular areas of the law. We may handle an asylum appeal one day and a bankruptcy, tax, or criminal appeal the next.

I should also mention the obvious fact that federal judges, despite their lifetime appointments, are ordinary human beings with ordinary views, passions, and prejudices. They do their jobs within the context of the times. Their decisions in wartime or times of national emergency may be different from those they would have made a few years or a few months earlier. The events of September 11th have necessarily affected the judgments that many federal judges make. We can only hope that to the extent possible all of us will try, at all times — in times of crisis as well as in ordinary times — to bear in mind the fundamental principles of our Constitution and the necessity of maintaining the integrity of our Bill of Rights.

That being said, however, I must emphasize that while the composition of the American federal judiciary is not only influenced but determined by the philosophy of the appointing President, once an individual becomes a federal judge his actions are as independent of outside pressure as is reasonably possible. That does not mean that a judge is not influenced by his own personal philosophy of life and the law, but it does mean that generally federal judges cannot be pressured by the Executive Branch or by the Congress to do their bidding.

Having described so glowing a picture of the independence of federal jurists, I must now report that for a number of reasons our independence often provides little comfort to those concerned about the implementation of asylum law. The fact is that our authority over asylum cases is quite limited. The limitations result from actions

on the part of all three branches of our government. First, the Executive Branch is charged with the administration of the asylum process. It also performs, however, the principal functions which would ordinarily be considered judicial in nature, and it does so in a manner that is contrary to the concept of judicial independence. Second, the Congress has passed a number of laws that limit the ability of the federal courts fully and fairly to review asylum decisions. Third, our Supreme Court has adopted doctrines that require federal judges to give almost unbounded deference to the actions of the Executive Branch in asylum cases. Essentially, asylum cases are handled administratively rather than judicially, consistent with the general trend towards an administrative society that began with the election of President Franklin Roosevelt and the birth of the New Deal in 1932 and that continues to the present day. Still, in asylum cases and others there remains a significant role for the federal courts; so it is probably now time for me to explain how our system operates practically.

Individual asylum cases are adjudicated by individuals we call immigration judges. Their decisions are reviewable by a Board of Immigration Appeals. The Board's decision may in turn be reviewed on a limited basis by federal judges sitting on federal courts of appeals. In only the rarest of instances will the United States Supreme Court grant further review to the case, and then, invariably, only when it is the government that is dissatisfied with the decision.

Although the immigration judges are probably the most important decision-makers in our asylum process, they are in fact and in law not independent. The immigration judges are employees of the Department of Justice, the executive agency that both administers the asylum laws and prosecutes deportation cases. The immigration judge takes the evidence, makes the record, frequently questions the asylum seeker and then makes the critical initial decision. He will determine, for example, whether the government of a particular country has the ability and willingness to control persecution by a rebel group, or whether when the government actors in a particular case beat the asylum-seeker they were motivated by the applicant's political views, or the all-important question of the applicant's credibility – the question, in short, whether or not the claim of persecution is truthful. The immigration judge's decisions on these critical questions, especially credibility, are difficult to overturn. Frequently, the immigration judge makes his decisions in cases in which the asylum seeker is not represented by counsel. In fact, in approximately two-thirds of our deportation cases, the deportee is unrepresented.

The immigration judge is responsible for applying the law fairly and determining the merits of the case. Some are indeed not only good lawyers, but fair-minded

individuals who take their title of judge literally – more literally in fact than the Executive Branch would like. None, however, is protected by the constitutional guarantees necessary to ensure independent decision-making. Immigration judges are in fact administrative decision-makers employed by an administrative agency to implement the law according to the agency's policies. I say this not in criticism of immigration judges, but simply to explain that the critical decision-maker in asylum cases is not a member of an independent judiciary. That is simply not the statutory scheme under which they are appointed. Needless to say, immigration judges, unlike federal judges, do not have life tenure, nor do they have fixed terms of office. Instead, they are employees of the nation's chief law enforcement officer, the Attorney-General. Moreover, immigration judges know that their decisions will be directly reviewed not by independent appellate jurists, but by the Board of Immigration Appeals, a group I will discuss shortly, and that even if that higher echelon of their administrative agency upholds their decisions, the Board in turn can be overruled by the Attorney-General.

On the other hand, the minimal good news is that immigration judges' decisions are not controversial in the United States, unlike in Great Britain or Australia — the case of a young Cuban boy, Elian Gonzalez, being almost the only instance that ever drew the attention of the American public. Our immigration judges are faceless, anonymous government officials as far as the public and press are concerned, and therefore rarely, if ever, do they have reason to worry about pressure from the public. The pressure from the Attorney-General inherent in the nature of their position is more than enough.

I should add, in fairness, that recently the organization that represents immigration judges sought to make its members independent of the Department of Justice. It requested that immigration judges be placed in a separate department, as are all other Administrative Law Judges. The request was met with a total lack of enthusiasm by the present administration, and the prospects for immigration judges obtaining this desired status in the foreseeable future appear to be nil.

Apart from the effect of the institutional arrangements I have described on substantive decision-making, the independence of American immigration judges is compromised in very practical ways. Policy decisions concerning how to run immigration hearings, at the most basic procedural level, are ultimately subject to the control of the Attorney-General. To give you a sense of the importance of these kinds of procedural decisions by the nation's chief law enforcement officer, I want to mention briefly a recent example that illustrates this point. As many of you already know, over the course of several months after the attacks of September 11, the FBI

and Immigration and Naturalization Service, apparently under orders from the Attorney-General's office, arrested and detained approximately 1,000 non-citizen men of Middle Eastern, South Asian, and North African origin, mostly on immigration charges. The Justice Department adopted a policy under which none of these men could be released from detention until the FBI had determined that they were not involved in any way with the terrorism investigation. However, this policy presented significant legal problems; because most of the men were charged only with routine immigration violations, they were generally entitled to be released on bond absent some evidence that they presented a danger to the community or a risk of flight. Nonetheless, the government instituted a strict policy of incarcerating all of the detainees until they were affirmatively "cleared" of any involvement. Although in many cases the immigration judges had no evidence to justify holding the individuals, and therefore could only deny release by refusing to apply the ordinary standards governing bail, they complied with the Justice Department's directive. In some cases the judges stated explicitly that they were denying release because they had been instructed by their superiors to hold the men in question until the FBI had "cleared" them.

Although these events were unusual and resulted from the unprecedented nature of the September 11 attacks, they nonetheless illustrate the key problem in terms of judicial independence. In immigration cases, the enforcement wing of the government can dictate the policies that bind the immigration judges. It goes without saying that an independent judiciary does not function in this manner.

The next set of judges I would like to discuss consists of the individuals who sit on the Board of Immigration Appeals (BIA). The Board is also composed of administrative judges. They are appointed and may be removed by the Attorney-General. The Board plays a fundamentally different institutional role because it is an appellate body and has a higher public profile. Its basic purpose is, officially, to correct errors made by the immigration judges and to resolve complex legal questions concerning the administration of the immigration and refugee laws.

Like the immigration judges, the judges on the Board of Immigration Appeals have far more influence on the outcome of refugee cases than do the lifetime federal judges who ultimately review some of their decisions. A large number of refugees do not have the resources or the will to appeal beyond the decision of the immigration judge; and, in the case of many others, for similar reasons the Board is the last stop before deportation.

Apart from the fact that the Board is effectively the body of last resort in many cases, its decisions are of particular importance because its resolution of a number of

critical questions, not only factual but legal, is for practical purposes immune from further review. Under a doctrine known as *Chevron* – the federal courts must give special deference to the legal conclusions of an administrative agency interpreting the statute it is charged with implementing. Basically, this means that if the federal court finds that the agency's interpretation is one that any reasonable person could arrive at, then it must uphold that interpretation, even if the court itself would have decided the question differently.

Because the Board is treated as the administrative agency charged with interpreting the refugee statutes, the federal courts will generally give great deference to its decisions on key questions of refugee law. For example, most federal courts are unlikely to overturn the Board's resolution of questions such as whether or not domestic violence constitutes persecution under the Convention, or even such questions as whether or not the burning of buses in protest against government policies can constitute a political offence.

Unfortunately, despite its importance, the Board, like the immigration judges, is sorely lacking in independence from the political branches. Because Board members serve at the pleasure of the Attorney-General, they do not have life tenure or even a fixed term of office. As the Attorney-General has stated:

> [T]he Board acts on the Attorney-General's behalf rather than as an independent body. The relationship between the Board and the Attorney-General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.

The glaring absence of independence on the part of Board members has become particularly clear in the last several months. Recently, the Attorney-General announced (and has now begun to implement) a plan that drastically changes the way the Board handles the vast majority of its cases. Remarkably, in order to speed up proceedings and reduce the backlog, the Attorney-General adopted the rather odd solution of eliminating twelve of the twenty-three judicial positions on the Board. Although I will not describe the plan in detail, among its most controversial features are a change requiring that the vast majority of cases be decided by a single judge rather than a panel of three, a provision codifying and expanding upon the practice of issuing decisions without any written opinion, and the institution of a clear error doctrine designed to limit reversals of immigration judges' decisions. Although it remains to be seen how the Attorney-General will select which of the current judges are to be discharged, many observers fear that judges who have been most sympathetic to the plight of refugees and immigrants will be targeted for dismissal.

Recent months have also seen other evidence of the Board's lack of independence. Because the BIA is the creature of the Attorney-General, the Attorney-General may review its rulings in any given case, in a process known as certification. While Attorneys-General have exercised this power on occasion in the past, the present Attorney-General has been unusually active in this regard. I am limited by the rules governing my office from commenting on the substance of these recent cases, but I think it is appropriate to mention that in one of them the Attorney-General adopted an extremely narrow interpretation of the Convention Against Torture, thereby undermining the claims of many asylum seekers from Haiti and elsewhere.

After asylum cases are decided by the BIA, the asylum seeker may appeal to the United States Court of Appeals. There are twelve regular courts of appeals nationally, each of which covers a particular geographic area. I sit on the largest, which covers the western United States. Asylum cases come to us rather than to the federal trial court because, in our legal system, courts of appeals review the decisions of administrative agencies directly. Only a few cases go to the trial courts first, essentially those in which a person about to be deported seeks a writ of habeas corpus. Leaving that small group of cases aside for the moment, courts of appeals generally perform the limited type of review of asylum cases to which I alluded earlier.

Essentially, we can reverse only those administrative decisions that we can hold to be objectively unreasonable. It may be worth my quoting the language of the rule that governs our standard of review. We may reverse the decision of the Board only if "the evidence [that the asylum seeker] presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Note that this mode of constraint operates with respect to both factual and legal findings, and the we owe deference to the legal conclusions of the Board under the *Chevron* doctrine, which I described earlier. As a result, federal judges are frequently required to affirm decisions denying refugee status even though we believe that the individual in question is entitled to protection under the Refugee Convention and Protocol.

The power of federal judges to ensure that the law is enforced fairly is also subject to limitations on the courts imposed by Congress. Congress's substantial power over our ability to shape the law in the refugee field is a product of two basic features of American law, one having to do with the relationship between international law and our domestic law, and the other with Congress' constitutional authority over the jurisdiction of federal courts.

As you all know, American domestic refugee law derives from the Refugee Convention. Under the United States Constitution, however, treaties do not obtain independent legal force under American law until they are ratified by the Senate, even if they have been signed by the President. Thus, the Convention could not be enforced in the United States' courts prior to its ratification. In addition, under a somewhat more peculiar body of doctrine, Congress typically passes legislation implementing a treaty at or after the time the treaty is ratified. In some cases, the implementing legislation may be narrower than the treaty itself. Under our domestic law, however, that legislation constitutes the authoritative interpretation of the treaty, and the courts cannot set it aside on the ground that it is overly restrictive. Thus, if the Congress adopts legislation that fails to protect refugees in a manner consistent with the Convention, courts must accept and enforce that legislation. To round out the picture, subsequent legislation enacted by the Congress, by a majority vote, overrides any relevant treaty provision, even though the treaty has previously been approved by a two-thirds vote of the United States Senate.

Here, I want to provide an example which puts into context an issue that has been discussed at some length at this conference. As you know, the Refugee Convention proscribes the detention of asylum seekers except under certain fairly limited circumstances. Although the standard may be somewhat difficult to discern, it is clear that detention should be the exception rather than the norm. However, under the Immigration and Nationality Act, which contains the legislation implementing the Refugee Convention in the United States, Congress has authorized the detention of asylum seekers under far broader circumstances, and in fact has given immense discretionary power to immigration officials to detain such individuals. Under our legal system, an asylum seeker may not argue that the legislation governing his detention should be struck down because it is inconsistent with the Convention. Courts may resolve ambiguities in legislation in light of the purposes of a treaty, but if the language of the statute is clear, we must apply it, even if it is contrary to the treaty.

The second feature of our legal system that serves to limit the ability of the federal courts to ensure that asylum cases are appropriately resolved stems from the powers of Congress with respect to our jurisdiction. With some narrow exceptions, the legislative branch has the authority to determine the scope of federal court jurisdiction. As a result, Congress can for the most part control both the types of cases we may hear and the standards we must apply in evaluating those cases. In 1996, at a time when President Clinton was in office, Congress with the President's approval and encouragement adopted a number of new rules limiting the ability of

federal courts to deal with asylum, deportation, and other immigration issues. The limitations ranged from the institution of an effectively unreviewable new procedure for turning away persons at the border, to strengthening the rules against judicial review of discretionary actions, to prohibiting review of all asylum cases in which the individual has committed "a particularly serious crime" – the rub being that "particularly serious crime" is, in some aspects of the 1996 legislation, defined so as to include almost any criminal offence.

There are, as I indicated earlier, certain limited exceptions to Congress's power over the jurisdiction of the federal courts. Most American legal scholars believe that a critical exception concerns the authority of the federal courts to grant writs of habeas corpus. This view gained substantial support in the refugee context in the early summer of 2001, shortly before September 11, when the Supreme Court held that habeas corpus is available as a remedy for at least some classes of detained non-citizens seeking to challenge their removal orders, although the Court was careful to say that it was not commenting on what the rule might be in times of national emergency. In any event, it may well be that Congress cannot take away the power of the courts to review asylum petitions altogether, at least in cases in which the asylum seeker is detained in some manner. To be clear, I am not saying that the law on this point is settled, but rather that it presents an interesting and to some a difficult question whether the Constitution ensures the jurisdiction of the federal courts over certain aspects of asylum law.

Whatever the limits on Congress's power to strip the courts of authority to hear particular types of actions, it is probably that Congressional power that poses the greatest threat to judicial independence – and perhaps partly for that reason, judges tend to become even more deferential to the views of the Executive and Legislative branches in times of national crisis.

George Washington, our first President, said that ours is a land whose "bosom is open to receive the persecuted and oppressed of all nations". To a greater extent than I believe to be desirable, American law today leaves critical decisions as to the granting of refugee status within the unreviewable discretion of the Executive branch. The limitations on judicial authority conflict in my opinion with a fundamental principle of our system of governance: that a regime of laws must be subject to judicial review and control. Carried to its extreme, such limitations serve neither the interests of refugees, whom we are bound to protect by international law and common decency, nor, ultimately, the interests of the society of laws we have striven to create.

It may seem to you from what I have said thus far that it does not matter much whether we federal judges are independent because we have so little opportunity to review asylum decisions effectively or at all. To some degree, this is unfortunately true. For example, federal judges can offer little solace to aliens who attempt to gain refugee status from abroad, or who are intercepted before they reach American shores. As you know by now, our Supreme Court has held that asylum seekers who are intercepted before they enter our territorial waters have no rights at all under our Constitution, and may be turned away by United States personnel notwithstanding any provisions of the Refugee Convention and Protocol. Those who arrive *at* our borders by plane, car, boat or otherwise, but who have not entered the United States, have a little more protection; they may assert an asylum claim, but the determination by the immigration officer or sometimes an immigration judge, is in almost all instances unreviewable by our courts.

But to leave the picture this bleak would be to give you a false impression. Aliens who succeed in coming within our borders, whether they enter illegally or overstay their visas, are afforded a substantial measure, though not all, of the legal rights granted Americans by our Constitution. Our courts retain the fundamental obligation to ensure that these constitutional protections and procedures are met and that due process rights are complied with. While our authority to review individual cases and reverse administrative decisions where an injustice has occurred is indeed limited, some of the courts of appeals, including mine, have taken a fairly broad view of our authority and continue to find legal grounds for overturning Board decisions that conflict with what we believe to be the governing principles of law. In addition, we sometimes succeed in finding ways to construe the law so as to avoid gross injustices, although our Supreme Court, being a rather conservative institution these days, does not look with favour on demonstrations of what it believes to be judicial creativity, and indeed sometimes reverses us summarily.

It is, nevertheless, with respect to the overall application of basic constitutional principles that the independence of the judiciary is most important. Federal judges continue to resolve controversial and highly disputed issues involving the constitutional rights of non-citizens, including asylum seekers, often to the displeasure of the Executive branch. For example, federal judges have imposed strict limitations on the time potential deportees may be detained, even after a final decision to deport them has been made. We have regulated procedures governing the manner in which asylum and deportation hearings must be conducted, and have decided when additional hearings must be held for persons previously ordered

removed. We have also limited the evidentiary burdens that may be imposed on asylum seekers so as to ensure that they will receive due process of law.

Now, however, we have moved to a new era – an era of overwhelming concern in the United States regarding terrorist attacks. Post-September 11, our federal courts have had a mixed record. Some have reined in what they believe to be the excesses of the Executive branch; others have found the exceptional steps taken by the Attorney-General to be warranted by exceptional circumstances. Judges both trial and appellate in various parts of the country have issued orders both prohibiting and permitting secret detentions, secret trials, and secret deportations, and have disagreed on the extent of the right to counsel to be afforded individuals the government has sought to hold incommunicado. These decisions have made clear generally that the Constitution applies in times of crisis as well as in all others, but have come to different conclusions regarding the strength of our constitutional guarantees in such times. The ultimate question is to what extent our courts will hold that liberty should yield to national security during periods of national emergency.

Our Supreme Court has not yet considered any case involving asylum or deportation, let alone terrorism, since the September 11 attack. However, in times of national crisis the Court has tended to view the rights of all people more narrowly and to afford the government greater flexibility to act; and the current Court has made it plain that even in ordinary times the Executive branch enjoys extremely wide discretion to adopt policies affecting asylum seekers and other aliens. In sum, were one to predict how the Supreme Court will respond in future refugee cases, particularly in those in which terrorism may be a stated or unstated factor, one could not be optimistic that liberty interests will trump security concerns.

Still, in the long run, Americans must continue to look to the federal judiciary to protect the fundamental rights of all within our borders. We must do so because only the federal judiciary is truly independent; and because even when the federal courts have gone astray in periods of crisis, we have always ultimately returned to our true values – although often with a fair degree of embarrassment and shame: to wit, the Japanese-American detention cases.

We would clearly fare better if our federal courts were afforded a greater degree of authority over asylum and immigration matters. We would also certainly fare better if the various branches of government developed a greater sensitivity and understanding of the problems of refugees. And, surely, justice would be better served if some of our judges at all levels of our judicial system exhibited greater compassion and a better understanding of human rights in general. Nevertheless, I take comfort in the fact that our judiciary is truly independent, and I believe that, in

the long run, that independence is our nation's best guarantee of fair treatment and due process of law, not only for asylum seekers, but for all within our borders.

Now, a word about the state of asylum and refugee law generally. The problems of refugees as defined in the Convention, and the problems of others who flee intolerable economic or political conditions, or simply want to obtain a better life for themselves and their children, are not neatly separated into different compartments in the minds of the public, or of governmental officials. Moreover, heretical as it may sound, there may be valid reasons for the public's inability or unwillingness to pigeon-hole the two sets of problems.

In the United States, for example, the principal problem these days is not persons who might qualify as refugees. Because of our long border with Mexico, there is a constant flood of immigrants -- from that country and the other Central American nations – who seek a better life for themselves and their families. When they succeed in gaining entry, often by incredible feats of physical endurance — and hundreds a year lose their lives in the effort — they frequently become productive workers who transmit a portion of their earnings to those family members they left behind. Often, after what may be a considerable period of time, they send for their wives and children, who themselves enter illegally by one means or another and then also become productive members of society. Because the problems of such immigrants are not generally within the scope of this conference, I will say only that we have recently adopted harsh, punitive laws that result in the expulsion of non-citizens who have obtained legal status as long-term permanent residents, for comparatively minor offences committed long in the past — offences as minor as marijuana possession or even petty theft. Some of the cases are heartbreaking, and many result either in the tearing apart of families or the involuntary transfer of children born and raised in the United States to countries they have never previously seen. Federal courts have little ability to ameliorate the cruelty of such laws, although some of us who hold judicial office try to do the best we can within the limits of the law.

Despite the Convention, the lines between asylum cases and those involving other would-be immigrants are not clearly drawn in practice, and the policies justifying opening a nation's borders to the various groups of individuals who flee their native lands not only overlap, but are sometimes quite similar. Indeed, the broader the definition the courts give to the five categories of persecution covered by the Convention, the fairer the treatment that will be afforded large numbers of oppressed people. On the other hand, the negative consequence of an expansive judicial reading of the Convention is that the growing anti-immigrant sentiment in

many countries, including mine, may ultimately have a substantial adverse effect upon traditional asylum seekers as well as on others seeking entry. Expansive court decisions can lead to restrictive, mean-spirited retaliatory actions by the political branches of government – retaliatory actions that can make it more difficult for persons to enter our country in the future and easier for the government to deport those who are already here.

Thus, while we federal judges need not be concerned about threats to our independence, or about the ability of the government to dictate our decisions, we might legitimately pause to consider the law of unintended consequences. Will our decisions that are favorable to those seeking refuge on our shores evoke responses that will be harmful to those to follow, and to the principles that underlie immigration and refugee laws generally? And should that affect how we decide cases?

One closing thought. Our system of handling asylum cases has some serious and obvious flaws. However, in my opinion, far more important than the particular procedures a nation adopts for its treatment of Convention claims is the national spirit and will that underlies those procedures. A generous, open-hearted country with an informed and enlightened citizenry is the best hope for those who would see the Convention fully and fairly enforced. A frightened, threatened nation whose people are worried about their personal security and economic well-being is unlikely to provide a welcoming home for refugees, regardless of the procedures it enacts.

There is little that we here today can do to affect the underlying problems that concern our fellow countrymen. We can hope, however, that by the time we assemble again, the world will be a better place, not just for asylum seekers and other would-be immigrants but for all people. These are indeed troubling times. None of us can predict the events of the coming months with any certainty. We can only act as citizens to try to influence our governments to conduct themselves with common sense and wisdom, as well as with respect for the rights of others. The history of the world shows that such efforts are not always successful, but the cost of not trying is simply too great. Again, thank you for inviting me, and congratulations on a most successful conference. Peace.

CAN THE JUDICIARY MAINTAIN ITS INDEPENDENCE?

A COMMENT ON THE ADDRESS OF SIR STEPHEN SEDLEY

Justice David Baragwanath*

Sir Stephen's remarks are the mature reflection by a master of his craft on the very essence of what it is to be a judge, bringing home both the weight of responsibility of refugee work, and the comfort of companionship with others who share that task. They echo those of another Englishman to a colleague when each faced a reality even starker than that of refugee adjudication:

> Be of good comfort Master Ridley, and play the man. We shall this day light such a candle by God's grace in England, as (I trust) shall never be put out.

The pressures of which he speaks are very real. It is worth considering what has caused them and what can be done about it.

Challenge to judicial independence is a reality of every generation and every society. There is always resentment of authority; as memory of the reasons for judicial independence recedes and the lessons of the past are forgotten there is fresh need to justify it in each generation. Justice Kirby's plea to restore the teaching of civics is worth repeating.

Our generation of judges has experienced in addition the general questioning of authority. In the present context it has become acute as the English tradition of welcoming refugees, to which so many jurisdictions of the Common Law fell heir, was challenged by the emergence of xenophobia that is such a paradox in immigrant societies like ours. All too frequently the fear of the unknown that is

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* Justice of the High Court of New Zealand.

immanent in all of us is relied on by the unscrupulous for personal advancement. Sir Stephen describes the result - of refugee bashing becoming an election issue and of refugee judges coming under personal attack, sometimes by those who should know better.

The generation before ours, including its judges, needed no education about its responsibility to refugees. They had faced personally in many cases the fact and certainly the prospect of invasion and death. Their experience, of which Sir Stephen has spoken so movingly in his Pilgrim Fathers lecture delivered at Plymouth last month, *The Long Arm and the Mailed Fist*, led to the Universal Declaration of Human Rights, the 1951 Convention and subsequent Protocol as well as international accession to each.

The vision of international responsibility for refugees tended to dim as our generation found ourselves with the time and means to shift focus from the brute necessities of defence and nutrition. Few nowadays have heard of the Battle of the Coral Sea that kept New Zealand from invasion; or the regular food parcels from here that helped keep England from starvation. So-called "economic theorists", in the name of Adam Smith who would have been outraged by their misuse of a small part of his writing, have elevated selfishness to a political philosophy. And so the scene was set for the problems Sir Stephen describes.

What is to be done? Candour requires acknowledgement that we are engaged in a competing battle of ideologies. Judicial independence ultimately stands upon its acceptance by the community. The first requirement is performance. To achieve that requires two things. One is obvious enough - judges with the intelligence, sensitivity, competence and good sense to deal with cases efficiently and well.

There are already in place the sharp spurs to optimum performance provided by appellate review and by peer pressure. As to the former, judges of first instance find that appellate courts are rightly uncompromising in keeping them up to scratch; something appreciated, if sometimes ruefully, as the role of the "three fullbacks" in the late Paul Temm's description of them. And as to the latter, the developing international jurisprudence, to which a number in this room have contributed notably, provides an invaluable source not only of legitimacy for refugee jurisprudence but of guidance to what is right. A truly transnational jurisprudence is well developed. And modern communications mean not only that fellow judges from other jurisdictions will be looking at what we have written, but even worse, we are likely to have to look them in the eye.

Earlier this year Sir Stephen commented to me on the outstanding quality of the New Zealand Refugee Status Appeals Authority. We are proud to possess a tribunal that has twice been preferred by the House of Lords to the distinguished court of which Sir Stephen is a member, and on a notable occasion has declined to follow the Lords in a decision that has been acknowledged as correct. The jurisprudence of the New Zealand RSAA, with its meticulous analysis of the precedents and academic writings as well as the painstaking care with which facts are established and evaluated, provides an exemplary response to the human tendency to xenophobia.

The second element of judicial independence is security of tenure. In his classic *The Nature of the Judicial Process* (1921) Cardozo observed:

> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.

The use of the male gender does not detract from the force of the argument; rather, ironically, it makes Cardozo's point. Basic among the "other forces" is one's personal need for security; and lack of security of tenure can, consciously or unconsciously, bear upon performance of any judge, not least those carrying the heavy responsibility of refugee determination. In New Zealand the 1999 amendment to the Immigration Act filled an unhappy systemic gap in our arrangements, by providing statutory protection from dismissal of members of the RSAA. The measure is imperfect; while permitting appointment for a term not exceeding 4 years, there is no lower limit on the term. Selection of an insufficient term could put at risk the decisions of a Tribunal on the principles stated by the Privy Council in *Millar v Dickson*.[1]

Performance apart, what can the Judges do? Certainly they must not infringe the vital convention that members of each of the three limbs of government - Judges, Parliament and the Executive - will treat the others with respect. If in their judgments they do make findings adverse to other parts of the fabric of government they must do so responsibly and proportionately; they may not engage in public discussion of their decisions or upon issues on which they adjudicate. And indeed the judges can claim no monopoly of virtue in relation to refugee issues. In this country it was the politicians who put right the unfortunate

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1 *Millar v Dickson* [2002] 3 All ER 1041.

breach by our judiciary of the non-refoulement obligation,[2] responding to the problem by legislating against it; and then legislating the Convention into domestic law. In England also the Executive are entitled to due credit. Sir Stephen's appointment to the High Court on 1 October 1992 occurred less than a year after his win in the Court of Appeal in *M v Home Office*[3] and while the Crown was preparing for its subsequent unsuccessful appeal. Only a cynic would suggest that the appointment was made to take him out.

But this international group does not need examples of simply outrageous behaviour, in many States, by the rougher elements of the media and by aspirants to, and sometimes holders of, public office. Even in better behaved societies xenophobia is a tempting political ploy that can be very successful in fanning the insecurities that can motivate rash unthinking responses.

In my view the judges have a vital role to play, not only to adjudicate justly in a given case, but to inform the wider community, including the responsible media and their readers, viewers and hearers, as to what is going on and why.

Dr Warren Young's research into the jury system[4] was greatly comforting, evidencing the respect of the ordinary juror for the law and for common fairness. The current generation of Common Law judges has belatedly recognised that respect for the rule of law in society is sustained rather than damaged by total candour in adjudication. Each judgment in a significant case is written for the benefit not only of the losing party but of the wider community including voters and politicians. With the exceptions already mentioned most of us have the privilege of tenure that secures against dismissal for an unpopular decision. Sometimes such decisions are unavoidable; Sir Stephen has written about the mail that tends to follow them.

The judges of each generation must in my view work to preserve and strengthen public confidence in them and their work by taking the trouble to explain the total picture which includes the sacrifices made by others in time of war of which we have the advantage. As former advocates for the most part, judges are able to communicate to leader writers the 22 million statistic which New Zealand politicians have taken firmly on board. Perhaps as an island people,

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2 See *D v Minister of Immigration* [1991] 2 NZLR 673.

3 *M v Home Office* [1992] QB 270.

4 See New Zealand Law Commission Preliminary Papers 32 and 37 and Report 69 *Juries in Criminal Trials* (1998-2001).

all of us immigrants, it is easier for us than most to imagine what drives people to gamble on the hard decision and difficult route that may lead to a refugee status application. The fact that refugee judges must distinguish between honest claimants and the even greater number of fraudsters requires careful exposition in addition to sound judgement to ensure that they are treated decently. Those like Sir Stephen, who can communicate to a wider audience than readers of the law reports, contribute notably to the essential process of public education and public confidence that is ultimately essential to judicial independence.

There is some evidence that things are improving. Leaders of public opinion are, in more and more places, calming down. The German weekly, *Die Zeit*, has remarked on change of attitudes in that great State, where appreciation is dawning that the very Gastarbeiter and other foreigners whose presence has been a cause of concern are the key to the problems of an ageing society. In Oxford I met a young Australian who has published a very effective critique of the *Tampa* affair. In New Zealand leader writers are, on the whole, avoiding the nonsense of the London tabloids.

In his Pilgrim Lecture Sir Stephen applauds the development of the International Criminal Court and deplores the current constraints upon it. His plea is for a seamless application of the principle aut cedere aut judicari. His present address contributes mightily to the development of a seamless refugee jurisprudence throughout the free world. In considering whether one's performance is up to the mark, refugee judges now have the Sedley standard to measure themselves against.

The place of Latimer's agony was where the Sedleys picked me up to join them for a memorable weekend in the country. Underlying the solemnity of his address is the camaraderie of the international legal community. This has been a memorable event in which it is a privilege and also a delight to take part. It will be a source of courage and inspiration to many judges and through them to the people whose future they determine.

GENDER PERSECUTION: A RESPONSE TO THE UNHCR GUIDELINES

Sharon Pickering*

With the production of the UNHCR Guidelines on International Protection: Gender-Related Persecution, Australia now has an additional set of guidelines to set beside our very own, internationally well received, Guidelines on Gender Issues for Decision-makers. Despite both sets of Guidelines, the latter being far more developed than the former, I predict we will continue to rely on a bifurcated system of recognising gender persecution: sophisticated court-based decisions and under-scrutinised primary decisions.

Decision-makers at the primary or first stage merits review level have rarely the time, the capacity or the will to engage with the many contradictions such Guidelines present for their daily business of determining refugee status. A commitment to protecting women from gender persecution that accurately fits the Convention definition requires effective procedural realisation at the initial interview stage if it is to protect any woman. My initial concern is, how can the UNHCR Guidelines be implemented at this initial decision-making stage? However this concern is coupled with another: what role do these Guidelines play in preventing governments from legislating away, or preventing policy and practice from realising gender persecution within the current Convention definition? It is clear we must seize the intent and spirit of recognising gender persecution raised by the development of these Guidelines, but in turn we must acknowledge and address their flawed assumptions, omissions and their potential marginalisation if we are to reach a position where we can establish effective protection from gender-based persecution under the Refugee Convention.

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* BA (Melb) MA (Soton), PhD (Melb) is a Senior Lecturer in Justice Studies, Monash University.

I contend that the punitive turn in refugee protection within developed nations has been marked by watershed moments in relation to issues raised by, or in direct response to, cases of gender-based persecution. If you like, gender-based persecution has often acted as the moment to usher in more restrictive refugee protection policies for all those seeking asylum in the developed world. Therefore, my concern is how can we consider these Guidelines as a buffer to the many issues raised by gender-based persecution for refugee determination procedures in general, but also whether these Guidelines sufficiently take account of the ways that the recognition of gender persecution is often used by developed nations to signal that the system is out of control, that refugee protection is in need of containment and the international refugee regime, in the words of the Australian government, needs to be reformed.

Before I go any further I want to offer two general observations.

First, while I am not going to offer a discourse analysis of the Gender Guidelines, I would like to note that the use of language in the document should alert us to what seems to be its ongoing discomfort with gender. The document repeatedly talks about a 'gender sensitive interpretation' of the Convention. Sensitivity suggests a need for compassion, for kindliness. I would argue that cases of gender persecution require complex and detailed knowledge of the ways human rights must apply to the multifaceted and diverse lives of women in a non-discriminatory way. While sensitivity is to be commended, perhaps even encouraged, women are not being turned away at borders, or having their cases rejected by primary decision-makers because decision-makers are simply insensitive. They are turned away because, in particular, initial decision-makers have been inaccurate and discriminatory in their decisions and have located themselves, their government and the woman applicant at a far distance from human rights.

Second, the Guidelines make clear that not all the women of the world will be able to claim protection under the Convention. In this moment of rejection, the spectre of hordes of women is still raised similar to the well-worn 'threat' of 'hordes of Asians' or 'entire middle eastern villages' being ready to claim asylum. I am unaware of any statements on race or nationality or religion that similarly require decision-makers, governments and the public to be placated by the

comment that indeed not all people of religion or having a nationality are automatically entitled to protection under the Convention. The Guidelines read:[1]

> Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The unbounded potential of what comes hereafter in the Guidelines needs to be tempered by acknowledging this always threatening influx. Gender is not something to strap down or to contain. Seriously redressing gender-based persecution is about living up to the principles of non-discrimination and should not be intimidated by the spectre of unproven numbers.[2]

I now return to my specific task. In responding to the background paper[3] on gender persecution for the Global Consultations I found little to take issue with and much to reinforce. Suffice to say that if decision-makers at all levels in Australia took a similarly informed, complex and rights-based approach, women seeking asylum in Australia would be more able to predict the outcome of their applications. The UNHCR *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, released in May 2002, may in some part capture the depth of issues outlined in the Background Paper, however, I have a number of reservations about the Guidelines - most specifically in relation to what I consider to be the three most serious omissions. The Guidelines omit clear and compelling statements locating refugee law within international human rights law, they do not significantly address cultural relativism in decision making, and they do not tackle the site where gender persecution sustains heavy attack: and that is the issue of credibility. I would argue that these three areas are consistently at the core of cases of gender persecution, and considering the discussion of the first two in the Background

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1 UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002, para 4.

2 See concluding comments of Penelope Mathew, "Conformity or Persecution: China's One Child Policy and Refugee Status" (2000) 23 UNSW Law Journal 103.

3 R Haines, Gender Related Persecution, Background Paper commissioned by the UNHCR Global Consultations on International Protection, 2001.

Paper, they are notable by their absence in the Guidelines. These three omissions signal that the Guidelines do not seriously contribute to advancing critical understanding and practice in refugee determination and sit comfortably within frameworks which consider protection an act of gratuitous humanity and do not challenge the assumptions and practices of primary decision-makers within this punitive environment.

I will engage with each of these three omissions in turn and suggest why, within the Australian context, their absence will continue to endorse current practice rather than transform that practice. Taken together, these three omissions suggest that the lack of clear ideological intent of the Guidelines makes them susceptible to co-option into the discriminatory delimitation of refugee protection.

I THREE SERIOUS OMISSIONS OF THE GUIDELINES

A The Absence of a Human Rights Framework

The Guidelines struggle to locate gender persecution and the Refugee Convention within the broader field of human rights law. The Guidelines use the term human rights in five places, with no articulation of a human rights framework for gender persecution claims specifically, or refugee law generally (with the exception of footnote 2). There are two basic points I want to make here. First, failing to locate gender persecution and refugee law within international human rights law goes against the burgeoning scholarly literature on gender persecution and refugee law.[4] Second, the Guidelines need to locate gender persecution within international human rights if they are to offer any resistance to the legislative wiping away of gains made in this area.

We know that claims for gender-based persecution, and decisions that have upheld those claims have consistently relied on integrating gender persecution and the Convention with other international treaties.[5] Moreover, feminist scholars working to raise understanding of gender persecution have argued for what Penny Mathew has called a synergy between the Refugee Convention and general human rights law.[6] The Refugee Convention as a stand-alone document is rarely enough

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4 See for example, H Crawley *Refugees and Gender: Law and Process* (Jordans, London, 2001).

5 N Kelley "The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress" (2002) 13 International Journal of Refugee Law No 4, 559-568.

6 Mathew, above n 2, 105

to realise women's claims for refugee status. Guidelines on gender persecution need to compel decision-makers to read the Convention within a body of human rights law and acknowledge refugee law as a form of individualised and practical application of human rights norms.[7] This can help dislodge readings of refugee law that are immovably imbedded in domestic immigration law and engage a dialogue between refugee law and human rights law that can sustain what Anker has called a rich body of "trans-nationalised international law".[8]

Through the rapidly evolving field of women's human rights, a consideration of gender persecution has helped drive refugee law and human rights law together, with benefits for more than cases of gender persecution. It is also from international human rights that we strongly argue for locating gender persecution within a sophisticated reading of the current Convention and argue against an additional ground of gender. The normative potential of the Guidelines has been avoided by the absence of clear and detailed statements on the relationship of refugee law to human rights law. Keeping gender persecution precariously poised, conditional and delicate means both gender and asylum law are left to move at best in parallel to, but certainly apart from, human rights. Moreover, this state of play offers receiving states in the developed world another moment of refugee guidance largely unstained by international human rights.

It has been acknowledged that the 'legal wrangling' that has surrounded the acknowledgement of gender-based persecution as being adequately covered within the existing definition has been 'dominated by Western developed countries seeking to demark the limits of refugee protection".[9] The tension between immigration control and the application of refugee law in accordance with standards of international human rights has been played out in some cases in the shadow that is the postured millions of refugee women now seeking protection. This is despite the fact that any right to Convention protection has never meant that protection has been readily or predictably accorded to women. It also means that when decision-makers have accorded women protection, often governments

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7 D Anker "Refrugee Law, Gender and the Human Rights Paradigm" (2002) 15 Harvard Human Rights Journal 133-154. At p 138 "Refugee law provides an enforceable remedy – available under specified circumstances – for an individual facing human rights abuses. Determinations of refuge status entail contextualised, practical applications of human rights norms."

8 Anker, above n 7, 135-136.

9 Kelley above n 5, 560.

have sought to legislate away the connection of gender persecution, refugee protection and international human rights.

The case of *Khawar*,[10] and the legislative response of the Australian Parliament, is an example of how embracing the synergy between gender persecution, refugee law and international human rights law, has been considered by developed nations as going beyond the 'proper interpretation' of the Convention. In working to narrow the application of refugee protection, the Immigration Minister used the case of *Khawar* as evidence that the Australian courts and tribunals had been interpreting the Refugee Convention too broadly and in a way that went beyond its intended application. The Migration Amendment Bill (No 6) 2001 was therefore introduced to "'restore the application of the Convention... in Australia to its proper interpretation' (Ruddock 2001: 1)".[11] The legislation introduced a much more narrow and rigid interpretation of the Convention that is at odds with the kind of sophisticated and complex reasoning given in the *Khawar* decision and which now has a disproportionate impact on women applicants.[12] Most of all, the legislative response to the *Khawar* case provided a moment to restrict the application of human rights norms and the Refugee Convention to cases of gender-based persecution as well as extending restrictive determination to all asylum applicants. Locating gender-based persecution within international human rights law, and hence recognising the changing nature of the traditional subjects of international law, as the *Khawar* decision did, came to represent the troublesome nature of the judiciary and the repugnance of human rights for the realisation of domestic refugee policy. The Guidelines do not go forward into an environment that looks to embracing gender persecution, they go forward into an environment that is rapidly moving away from a human rights framework. As such the Guidelines need to clearly stake their claim on human rights and compel States to consider gender-based persecution and refugee law within international human rights. The Guidelines, as they stand, would not be considered by the Australian Minister as at odds with his intention in the legislation that has now made decisions similar to that of *Khawar* impossible.

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10 *MIMA v Khawar*, HCA, 11 April, 2002.

11 C Hunter "Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims," (2002) 8 Australian Journal of Human Rights 1, 107.

12 Hunter, above n 11, 107.

B Ignoring the Role of Cultural Relativism

The absence of a clear and sophisticated human rights framework also leads me to my second major concern with the Guidelines. The Guidelines have missed the opportunity to resuscitate refugee determination from the paralysis that is cultural relativism. While some commentators have noted that the trouble with cultural relativism comes from an unresolved theoretical standoff[13], I would suggest that the causes are far more ordinary and everyday. In reaching for simplistic cultural explanations of gender persecution devoid of any developed understanding of violence against women, does see some women gain asylum. However both sexist and cultural stereotypes rely on essentialist understandings of both gender and the Global South.

There is now a growing body of research that points to how refugee decision-makers depend on linking gender-based persecution to practices attributable to "non-Western 'foreign' cultures"[14]. In short, without the clear 'foreignness' of cultural practice, gender persecution has often been dismissed or overlooked by decision-makers. The search by decision-makers for what Sinha has called 'cultural culpability' in cases of gender persecution has marked key US cases.[15] Such 'cultural culpability' is rooted in stereotypes about the helpless third world woman, the wickedness of the third world man, and the backwardness of State protection. This produces refugee discourses notable by positioning the cultural, political and legal superiority of western life.[16] Some commentators have noted, for example, that writings on refugee law leave the impression that social mores only exist in third world countries generally and Muslim countries specifically.[17]

I do acknowledge that the issue of culture is raised in paragraphs 5 and 10:

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13 Anker, above n 7.

14 A Sinha "Domestic Violence and US Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution" (2001) 76 New York University L Rev, 1562.

15 *In re Kasinga*, and *In re R-A*.

16 Crawley, above, n 4, 10.

17 T Spijkerboer *Women and Refugee Law: Beyond the Public/Private Domain* (The Hague: The Emancipation Council, 1994).

> ...harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.

And in paragraph 10:

> ...relevant laws may emanate from traditional or cultural norms and practice not necessarily in conformity with international human rights standards.

I would argue, however, that the Guidelines needed to make a stronger statement regarding the prevalence of misplaced cultural relativism in the decision-making process. My research on the operation of the Refugee Review Tribunal in Australia has shown heavy reliance on the use of cultural stereotypes in cases where women are granted and denied status alike.[18] Decision-makers have relied heavily on what I have previously argued is the ideal gendered victim of international refugee law[19] and the Guidelines do not help decision-makers in addressing what are the many sexist, racist and cultural assumptions surrounding gender-based persecution that sustain this 'ideal victimhood'. The Guidelines do not significantly lead nor encourage decision-makers away from both the blatant and the subtle explanations of 'gender oppression...as symptomatic of an essential, non-western barbarism".[20] Using such frames of reference Crawley argues the dehumanising structures from which women may have fled are reproduced in ways that infer women are alien from their own culture as well as alien from the culture of the refugee receiving country.[21]

In more practical terms, throughout the 1980s and 1990s various procedural and evidentiary barriers for the just application of refugee law to cases of gender related persecution were raised by advocates and scholars alike.[22] These often revolved around the inadequate and damaging questioning of female applicants with little or no understanding of the various ways torture and trauma are

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18 S Pickering "Narrating Gender and Particular Social Group: The Case of the RRT in Australia" Proceedings of the Conference Women Fleeing Gender-based Persecution, May 2001, Montreal: Canadian Council for Refugees, see also forthcoming, S Pickering *Criminology and the Refugee* (Sydney, Institute of Criminology Monograph Series).

19 Pickering (2001), above n 18.

20 Crawley, above n 4, 10.

21 Crawley, above n 4, 10-11.

22 Kelley, above n 5, 567.

experienced let alone the development of skills to work with survivors of sexual violence. When women applicants continue to be treated similarly to the rape victims in the developed world of the 1950s – we are not just dealing with a need for female interviewers and sensitive interview techniques, we are dealing with the intersection of cultural and racial stereotypes regarding appropriate sexualised victimhood. Compounding the role of cultural relativism in the decision making process has been the introduction of a series of policies and practices that exacerbate the role of cultural relativism.

In Australia primary decision-makers have been, in many ways, recast as agents of fraud detection. If you ask onshore protection officers what would be the most valuable skill in the interview environment they most likely will say: to be able to detect if someone is lying or to be able to know exactly how a particular person from a particular culture or region or religion will respond if they are lying or how they will respond if they have experienced torture and trauma. Importantly, these two concerns are raised in an environment where onshore protection officers have been cast as the last line of 'defence' in deterring refugees. They also introduce into the interview environment a concern with what can only be described as racial profiling. In short, how will an Afghan woman respond to direct questions about her claimed persecution that I can recognise as being a) truthful or b) a lie? Profiling and fraud detection is all about essentialist understandings of the human condition which has specific consequences for those claiming gender persecution.

The refugee determination system has coerced particular performances of gender persecution whereby women's experiences have been forced into a few options readily consumable by the determination system. The Guidelines do not seriously address how cultural essentialism has been the easiest way for decision-makers to redress gender persecution and the consequences this has for the system regardless of whether an individual woman gains asylum.

C Failure to Address Credibility Issues

The Guidelines also have not directly addressed the issue of credibility. This in some way reflects the absence of credibility issues in the Background Paper. I just want to make a short note that when decision-makers have not grappled with the complexity that a rights based approach requires, they have often returned to the issue of a woman's credibility.

Credibility is of course at the heart of refugee decision making, particularly in cases of gender persecution where detailed and trustworthy independent accounts

of the role and position of women in the country of origin are lacking. The issue of credibility is often raised in relation to whether the woman failed to engage state protection or whether her account of the failure of state protection is adequate. There is a long and disturbing history of women around the world being rendered child-like, manipulative, or just generally unbelievable in their demeanour, their altered story, and when they 'chose' to take part in legal systems. The Guidelines needed, I believe, to offer decision-makers greater guidance as to what is a serious credibility issue and what is not. A clear articulation of credibility issues would therefore directly tackle the struggle over the standard of proof in asylum applications relating to gender persecution.

There is considerable evidence in psychological literature that in recounting traumatic stories many people who are trying to accurately recount experiences that have occurred over a period of weeks, months and even years, often amend, introduce new elements and delete others over a series of interviews. This is not an attempt to sustain a lie, but to ensure that the story they tell is as true as they possibly can remember. However, too often, such amendment is considered to be evidence of a lack of credibility. This situation is compounded by women recounting stories of rape and sexual violence that they may be reluctant, for many reasons, to reveal as part of their narrative in initial interviews.

Crawley has noted that many women face additional problems in demonstrating that their claims are credible. The most significant issue re credibility has been the timing of women's claims of gender persecution. Often women have been considered lacking credibility for only disclosing their experiences in the second interview or after their case has gone to appeal. The non-disclosure of sexual violence, while well understood by many decision-makers, has seen many women's claims disregarded primarily because of their timing.

The issue of timing also raises the concern that the restriction of independent review of decisions will significantly impact on gender persecution cases where the full details of persecution regularly only emerge after a series of interviews. Moreover, credibility issues raise the specific problems with the highly stressed environment of initial interviewing. In Australia interviews are often conducted inside some form of detention, by those who have been flown hundreds of kilometres to conduct the interviews and who are encouraged to process the maximum number of claims in a day and who are very much a part of, and not apart from, the systematic demonisation of refugees. The procedural recommendations in the Guidelines do not adequately take account of the

environment in which the credibility of applicants is being questioned and the particular consequences this has for cases of gender persecution.

II INSIDE THE PUNITIVE TURN: THE PROBLEMATIC APPLICATION OF THE GUIDELINES

We live in a moment where the developed world's response to refugees can be understood, at best as an act of gratuitous humanity, and at worst, particularly in the case of Australia, one of punitive deterrence.[23] My question of the Guidelines is how can they be effectively realised amidst the punitive turn in refugee protection? For applicants who have suffered gender persecution how do the Guidelines assist their case in the present moment? This is not to suggest for a moment that gender is too hard in the current climate, but to argue that punitive refugee policies make the realisation of protection, that should well be covered by the Convention, increasingly difficult to realise. The punitive turn has two parts – one that restricts access to determination and the other that restricts the applicability of the Convention. Both parts affect the ways the UNHCR Guidelines will be implemented, in the same way they effect the operation of the current Australian Gender Guidelines for Decision-makers.

The development of these Guidelines is yet another signal to those working in the area that the interpretation of the Convention definition is increasingly bifurcated in the developed world. On one track, we have a relatively sophisticated and complex articulation of gender-based persecution by High Courts and in academic scholarship, and on another track we have the incessant hum of the rejection, marginalisation and general mishandling of gender persecution by primary decision-makers and even first stage review decision-makers. These Guidelines play to the first track with seeming little consequence for the second track. We must bring these two tracks together to realise effective protection.

Macho-militarism continually seeks to focus our attention on the mythical certainty of the homogenous bordered state and its unrelenting use of force to realise the ideologically and pragmatically flawed project of deterring refugees. This does not stand apart from the armour of developed nations that repels sophisticated understandings of the Convention and human rights and rejects

23 S Pickering and C Lambert "Deterrence: Australia's Refugee Policy" (2002) 14 Current Issues in Criminal Justice, 65-86.

changes in processes that would enact protection in cases of gender persecution. These Guidelines offer little challenge to that armour.

"FROM NOWHERE TO SOMEWHERE": AN EVALUATION OF THE UNHCR 2ND TRACK GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION: SAN REMO 8-10 SEPTEMBER 2001 EXPERTS ROUNDTABLE ON THE IPA/IRA/IFA ALTERNATIVE

*Hugo Storey**

If ever a topic was prime material for UNHCR's 2001 Global Consultation exercise, the IPA/IRA/IFA[1] was it. As an identifiable body of refugee law, IFA analysis had really got nowhere. Major variations between national case laws on the subject abounded. As Judge Gaeten de Moffarts identified in his 1997 paper

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* Vice President, Immigration Appeal Tribunal (UK); Council member, IARLJ. The views expressed here are my own and do not necessarily reflect those of the UKIAT. Lack of time has prevented giving detailed citations of cases.

1 "IFA" (Internal Flight Alternative) is used elsewhere in this paper only because it is the best-known name for the test. I consider both "IRA" (Internal Relocation Alternative) and "IPA" (Internal Protection Alternative") less misleading descriptions.

for the IARLJ on this topic,[2] international jurisprudence was characterised by eclectic, ad hoc decision-making. The NGO lobby had identified increased use of the IFA as a symptom of "restrictionism" in the interpretation of the 1951 Convention.[3] The UNHCR's 1999 Note on the topic[4] had been one of the least coherent of its position papers. In April 1999 under the leadership of James Hathaway, the Michigan Guidelines on the Internal Protection Alternative were published. Highly critical of the UNHCR Note, these called for a new, more structured, approach.[5] A proposed EU Refugee Qualifications Directive followed Hathaway's lead, entitling its provisions on the subject, "Internal Protection".[6]

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2 Gaetan de Moffarts, "Refugee Status and the Internal Flight or Protection Alternative", published in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, Nijmegen 9-11 June 1997 (hereafter "de Moffarts"). A revised but unpublished version of this paper was produced in June 2001.

3 European Legal Network on Asylum (ELENA), "Research Paper on the Application of the Concept of Internal Protection Alternative", 1998 (updated 2000).

4 UNHCR, "Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called "Internal Flight Alternative" or "Relocation Principle" (hereafter "UNHCR Note").

5 (1999) 21(1) Michigan Journal of International Law 131, also published as an annex to the New Zealand case, *Refugee Appeal No. 71684/99* reported in [2000] INLR 165.

6 Proposal for a Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM (2001) 510 final). Article 10 headed: "Internal protection" stated:

> 1. Once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded, Member States may examine whether this fear is clearly confined to a specific part of the territory of the country of origin and, if so, whether the applicant could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or of otherwise suffering serious and unjustified harm.
>
> 2. In carrying out this examination there shall be a strong presumption against finding internal protection to be a viable alternative to international protection if the agent of persecution is, or is associated with the national government.
>
> 3. In examining whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1, Member States shall have regard to the security, political and social circumstances prevailing in that part of the country, including respect for human rights,

But, apart from New Zealand,[7] no country embraced the Michigan Guidelines immediately, thus leaving jurisprudence on the issue still in a no man's land waiting for deliverance.

In short the subject bristled with controversy and the stage was set for an eventful Roundtable.

The San Remo Experts Roundtable of 6-8 September 2001 did not disappoint. The main discussion paper, written by James Hathaway and Michelle Foster,[8] provided an incisive and comprehensive analysis of theories about the IFA, past and present, reconfirming adherence to the Michigan Guidelines. The IARLJ Working Party on IFA had circulated to its membership beforehand an "IFA Questionnaire" designed to obtain responses from as many countries as possible on key issues which could then be fed in to the IARLJ contribution to the Round Table. There were several excellent papers submitted by other San Remo participants. The Round Table session itself was extremely animated. Even more animated was the e-mail debate which then ensued about the draft Summary Conclusions.

The Summary of Conclusions (SCs) which was eventually agreed read as follows:

> San Remo Expert Roundtable 6-8 September 2001 Organised by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law

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> and to the personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links.

Under the July 2002 Danish Presidency's proposed amendments, Member States can look for a portion of the country of origin which is safe, rather than assess whether the persecution is confined to a specific area; the test is whether return to that area would be "unduly harsh", rather than whether "the applicant could reasonably be returned"; the provision setting out a "strong presumption against" the internal protection alternative where the agent of persecution was the state (or associated with it) is deleted; the principle can apply in spite of "technical obstacles to return"; and the list of circumstances Member States must consider before applying the principle is greatly shortened.

7 *Refugee Appeal No. 71684/99* reported in [2000] INLR 165.

8 James Hathaway and Michelle Foster, "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination", September 2001 (hereafter "Roundtable paper").

Summary Conclusions – Internal Protection/Relocation/Flight Alternative

The San Remo Expert Roundtable addressed the question of the internal protection/relocation/flight alternative as it relates to the 1951 Convention relating to the Status of Refugees. The discussion was based on a background paper by James C Hathaway and Michelle Foster, University of Michigan, entitled *Internal Protection/Relocation/ Flight Alternative as an Aspect of Refugee Status Determination.* In addition, Roundtable participants were provided with written contributions including from Justice Baragwanath, High Court of New Zealand, Hugh Massey, United Kingdom, Marc Vincent, Norwegian Refugee Council, Reinhard Marx, Practitioner, Germany, and the Medical Foundation for the Care of Victims of Torture. Participants included 33 experts from 23 countries, drawn from governments, NGOs, academia, the judiciary and the legal profession. Hugo Storey, from the International Association of Refugee Law Judges (IARLJ), moderated the discussion.

There has been no consistent approach taken to the notion of IPA/IRA/IFA by States parties: a number of States apply a reasonableness test, others apply varying criteria, including in one jurisdiction, the "internal protection alternative" approach as defined in the background paper. UNHCR has expressed its concern over recent years that some states have resorted to IPA/IRA/IFA as a procedural short-cut for deciding the admissibility of claims. Given the varying approaches, it was considered timely to take stock of the different international practices with a view to offering decision-makers a more structured analysis to this aspect of refugee status determination. These summary conclusions do not finally settle that structure, but may be useful in informing the application, and further developing the parameters, of this notion.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

(1) IPA/IRA/IFA can sometimes be a relevant consideration in the analysis of whether an asylum-seeker's claim to refugee status is valid, in line with the object and purpose of the Refugee Convention. The relevance of considering IPA/IRA/IFA will depend on the particular factual circumstances of an individual case.

(2) Where the risk of being persecuted emanates from the State (including the national government and its agents), IPA/IRA/IFA is not normally a relevant consideration as it can be presumed that the state is entitled to act throughout

the country of origin. Where the risk of being persecuted emanates from local or regional governments within that State, IPA/IRA/IFA may only be relevant in some cases, as it can generally be presumed that local or regional governments derive their authority from the national government. Where the risk of being persecuted emanates from a non-state actor, IPA/IRA/IFA may more often be a relevant consideration which has though to be determined on the particular circumstances of each individual case.

(3) The individual whose claim to refugee status is under consideration must be able – practically, safely, and legally – to access the proposed IPA/IRA/IFA. This requires consideration of physical and other barriers to access, such as risks that may accrue in the process of travel or entry; and any legal barriers to travel, enter or remain in the proposed IPA/IRA/IFA.

(4) If the asylum-seeker would be exposed to a risk of a well-founded fear of being persecuted, including being persecuted inside the proposed IPA/IRA/IFA or being forced back to and persecuted in another part of the country, an IPA/IRA/IFA does not exist.

(5) The mere absence of a risk of a well-founded fear of being persecuted is not sufficient in itself to establish that an IPA/IRA/IFA exists. Factors that may be relevant to an assessment of the availability of an IPA/IRA/IFA include the level of respect for human rights in the proposed IPA/IRA/IFA, the asylum-seeker's personal circumstances, and/or conditions in the country at large (including risks to life, limb or freedom).

(6) Given its complexity, the examination of IPA/IRA/IFA is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure.

(7) More generally, basic rules of procedural fairness must be respected, including giving the asylum-seeker clear and adequate notice that an IPA/IRA/IFA is under consideration.

(8) Caution is necessary to ensure that return of an individual to an IPA/IRA/IFA does not arbitrarily create, or exacerbate, situations of internal displacement.

I ADVANCES

How much of an advance do these Summary Conclusions represent?

On the plus side, they represent a breakthrough so far as the name of the test is concerned. The reference throughout to "IPA/IRA/IRA" reflects that, whilst

participants accepted drawbacks with the IFA and (to a lesser extent) the IRA terminology, neither was there full support for the Michigan Guidelines term "IPA". But putting "IPA" first subtly hints that this is a term fitting better with emerging refugee jurisprudence. There was broad agreement that in the end what mattered was the substance of the test, not its specific name.

Perhaps the most important advance is the endorsement of the need for a structured approach. All were agreed that the highly variable, ad hoc approaches in vogue hitherto made for unacceptable inconsistency and had to give way to an approach which gave clearer parameters to decision-makers.

On the other hand there is a clear rejection of any approach that seeks to apply the IFA concept in a mechanistic fashion, one declaring that for all persons in a particular category, for example, Sikhs in the Punjab in the 1990s, there was a viable IFA elsewhere in the country. The Summary Conclusions achieve this by reaffirming the need for an individual examination of the claim, in the light of the particular circumstances of the case. Part of what was intended here was to scotch any notion that the IFA test is a matter of law rather than a matter of fact, reminding everyone that, after all, no reference to terms like "IFA/IRA/IPA" is made in the text of Article 1A(2).

Albeit drawing short of fixing any formula, another advance was that the Summary Conclusions do identify tentatively several analytical steps essential to any proper use of the IFA. Thus at paragraph 3 it identifies the requirement of access. This requirement is identified by almost all countries as an essential prerequisite if the test is not to be unrealistic: for an IFA/IRA/IPA to be viable, a claimant has got to be able to get there.

Paragraph 4 likewise identifies the next logical step, that of requiring that the IFA/IRA/IPA obviates the risk of being persecuted. In part this reflects the common-sense notion that, if to move from one's own area to an alternative place is just to go from the frying pan into the fire, there is no viable IFA/IRA/IPA. But it also reflects the important principle of equivalence. If the conditions in the alternative site of protection are not in some way as bad as those in the area of persecution, internal protection is available. This principle enables one to say that, even if in the alternative site there is no well-founded fear of persecution directly, there will be indirectly if conditions are such as might force someone back to his home area.

Paragraph 5 identifies a further logical step, the requirement that in the alternative site the claimant is not just free of fear of persecution but will receive

adequate protection. Mere absence of a well-founded fear is not enough. As Hathaway and Foster state at page 42 of their paper, "The notion of protection clearly implies the existence of some affirmative defence or safeguard". Beyond this, however, the wording of the Summary Conclusions does no more than insist on this test being kept a multidimensional one, looking at the level of respect for human rights, the asylum-seeker's personal circumstances and/or conditions in the country at large (including risks to life, limb or freedom).

The Summary Conclusions also identify two important procedural requirements. One is that, in view of its complexity, the examination of IFA/IRA/IPA is not appropriate in accelerated or admissibility procedures. The other is that if a decision-maker intends to rely on IFA/IRA/IPA he must give the asylum-seeker adequate notice.

II FAILINGS

So much for the plus side. What about the debit side?

Here one hits the difficulty that depending from which corner of the debate one comes, everyone's "debit side" list will differ to a greater or lesser degree. However, having digested the feedback from members to our IARLJ Questionnaire, I do think it is possible to make criticisms of particular concern from a judicial point of view.[9]

A first criticism is that although the Summary Conclusions mark a move away from fixed nomenclatures, they fail to reflect the strong consensus (which was also evident at San Remo) that there are serious drawbacks to the "IFA" label. If we continue to find countries treating the test as one of whether someone availed himself of internal flight prior to leaving his country of origin, for example, we cannot pretend the Summary Conclusions do anything to disabuse them of such an error. There should in this regard have been a clear statement that, as with the test of fear in the home area, the IFA is a prospective test, concerned with whether upon return, a person would have an available IFA. It is not an historic test.

My second criticism is that the Summary Conclusions fail to condemn what was the main deficiency in IFA case law during the 1980s and 1990s, namely use of the test as a "free-floating" one capable of rendering someone a refugee on compassionate and discretionary grounds rather than on the basis of objective

9 I do not mean here to suggest there is some uniform judicial approach, only to identify a range of judicial (as opposed to executive) concerns.

legal criteria. I find this failure bitterly disappointing because I thought we had consensus on it at San Remo as well as during the post-San Remo e-mail discussion of the draft. What had been proposed as a short paragraph just before the numbering began was:

> IPA/IRA/IFA considerations may validly inform analysis of whether the asylum-seeker's claim to refugee protection should be recognised, but only to the extent that they are firmly grounded in application of the Convention refugee definition. No IPA/IRA/IFA rule may be justified other than on the basis of standards derived from, and fully consistent with, the Refugee Convention. Thus IPA/IRA/IFA inquiry is part of the holistic analysis of whether an asylum-seeker's claim to refugee protection is made out...

From the point of view of refugee jurisprudence this approach had been firmly established by such cases as *Butler*[10] (in the New Zealand Court of Appeal) and *Robinson*[11] (in the English Court of Appeal) and affirmed by almost all commentators. Perhaps one might say the SC's phrase "in line with the object and purpose of the Refugee Convention" was meant to affirm this approach, but the way the passage containing this phrase is worded leaves this quite unclear.

A third criticism is that the Summary Conclusions, by using words importing discretion, fail to clarify that a structured analytical framework is a prerequisite of any valid IFA assessment. Thus the first sentence of paragraph 1 ("IPA/IRA/IFA *can sometimes be* a relevant consideration..." (emphasis added)) could well be read by some States to mean that the test is not in fact an integral part of the refugee definition. Whereas, so far as refugee jurisprudence is concerned, it is long-settled that it is an integral part. If someone has a viable IFA, he is not a refugee. Similarly, the wording of paragraph 5 second sentence ("Factors that *may be relevant* to an assessment of the availability of IPA/IRA/IPA include...(emphasis added)) is a cop-out. One of the main purposes of the Roundtable was to move beyond reliance on indeterminate or overly subjective tests of "reasonableness" which have beset IFA jurisprudence for so long.[12] This

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10 *Butler v Attorney-General* [1999] 114 ILR 568.

11 *Robinson* [1997] Imm AR 568.

12 De Moffarts contended that analysis in terms of "reasonableness" lent itself too easily to assessment by reference to subjective rather than objective fear. His article stated that: "[t]he reasonableness approach tends to an eclectic or ad hoc jurisprudence...". In recent New Zealand cases, eg *Butler v Attorney-General* [1999] NZAR 205 (CA) and *Refugee Appeal No 71684/99* it has been pointed out that the reasonableness test is not a

paragraph could be prayed in aid by countries intent on maintaining highly subjective and idiosyncratic tests or on devising ad hoc permutations. The paragraph did not even make clear that, as with assessment of risk in a person's home area, the examination of an IFA must always take account of both general country conditions and individual circumstances.

Allied to this failing, the Summary Conclusions fail to indicate clearly any ordering of the analytical steps involved. Whilst I have previously tried to show that paragraphs 3-5 follow a logical order, to the reader it might appear they are a la carte and that there is nothing wrong with jumping from one to the other at random. What was needed, in my view, was a set of conclusions that enjoined a step-by-step framework. Thus paragraph 3, which deals with access, should have begun "The first step in any IFA inquiry must be to ask whether an individual would be able to ...access..." etc. Then paragraph 4 should have begun with an additional sentence. "The second step in any IFA analysis should be to examine whether the proposed IFA would in fact obviate the risk of persecution. Paragraph 5 could then have begun with an additional sentence, "The final step in any IFA analysis should be to establish whether it will secure adequate protection".[13]

A fourth criticism, already intimated in my remarks on lack of guidance on structure, is that there is no real attempt to overcome the eclecticism of criteria relating to the adequacy of protection in the IFA. Most San Remo participants recognised different countries were firmly wedded to different legal vocabularies developed to address this issue: "reasonableness", " undue hardship", "safety", "meaningful protection" etc. But we did, I think, expect firstly that the SCs would identify approaches that were plainly wrong (in particular those relying on a very subjective rendering of the notion of reasonableness") and secondly that they would at least go some way to identifying an underlying human rights-based set of criteria by reference to which these different terms were to be interpreted.

"stand-alone test authorising an unconfined inquiry into all the social, economic and political circumstances of the application, including the circumstances of members of the family". The latter decision criticised the February 1999 UNHCR Position Paper for "failing to explicitly curtail the reasonableness element by requiring it to be tied back to the purpose of protection".

13 I recognise my reference to a three step analysis differs slightly from the Michigan Guidelines reference to a four-step inquiry, but in effect my second step formulation combines with more economy and greater simplicity what those guidelines refer to as stage 2 (the "antidote" test) and stage 3 (the "indirect refoulement" test).

That the underlying set of criteria should be human rights based is a widely shared view. Whilst the UNHCR Note is not entirely consistent about this, in another publication UNHCR has said that for an IFA to exist this would require, "...in addition to security aspects,...that basic civil, political and socio-economic human rights of the individual would be accepted...".[14] It is also the view expressed in the Michigan Guidelines and in Hathaway and Foster's Roundtable Paper. However, it is worth reminding ourselves why this view should be taken.

Refugee jurisprudence has now fully accepted as a fundamental principle that the key terms of the Refugee Convention, such as persecution and protection, should be given a human rights interpretation. Thus persecution is to be analysed in terms of basic attacks on core human rights. Even if some countries still do not embrace this principle, UNHCR, the IARLJ and leading commentators have been very forthright in doing so.[15] Thus in my view it is simply illogical not to apply this fundamental principle to IFA analysis. If as everyone agrees the IFA analysis is integral to the refugee definition, how can it be right to apply a human rights approach to all other aspects of the definition but not to the IFA element? It is like trying, inside a global village, to keep one small field that is forever England. Yet, with respect, this is what continues to happen even within Canadian and European jurisprudence which operates the notion of "undue hardship".[16] If the "undue hardship" notion is not in turn underpinned by human rights norms, then it can mean all things to all men. One's man's hardship is another man's haven. What is undue to one decision-maker is not to another. And the same could be said of most other formulations including "safety" and "reasonableness". In an article I

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14 "An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR", September 1995.

15 For example see the IARLJ's Human Rights Nexus Working Party: "The Application of Human Rights Standards to the 1951 Refugee Convention – the Definition of Persecution".

16 See eg *Thirunavukkarasu v Canada*, 45 ACWS 3d 141 (1993, Canadian Federal Court of Appeal). In one of the leading UK cases on IFA/IPA, *Robinson* [1997] Imm AR 182, the English Court of Appeal accepted that a human rights analysis was valid but nevertheless preferred to adopt the test of undue hardship, thereby implying the two approaches were not identical. As regards European jurisprudence, it is intriguing that in the latest Danish Presidency proposed amendments to the Proposed Refugee Qualifications Directive's provision on "Internal Protection" the test has become whether return to the IPA would be "unduly harsh", rather than whether "the applicant could reasonably be returned".

wrote in 1998 in the IJRJ,[17] I voiced this criticism. I note that Ninette Kelly's recent article on IFA, which discusses the San Remo Summary Conclusions[18] emphasises much the same point.

A fifth criticism is that despite at other points failing to make essential points, the Summary Conclusions at some points opt for overdogmatic formulations. Thus in paragraph 2, they set out a presumption that when the risk of being persecuted emanates from the state (at whatever level), "IPA/IRA/IFA is not normally a relevant consideration as it can be presumed the state is entitled to act throughout the country of origin". In favour of this approach, it can be argued that adoption of a presumption acts as a useful rule to ensure the decision-maker does not deny IFA to persons threatened by State authorities unless there are exceptional circumstances. However, against this presumptive approach, it can forcibly be argued that it is simply a question of fact in each case as to whether risk in one part will create risk countrywide. Even in centralised States there may sometimes be no political will or apparatus for pursuing or detecting political opponents countrywide. This formulation prompts the question, that is to say, why presume something that may not be so in fact? Whilst it may be that such presumptions can be helpful tools, choice of such legal concepts is bound to raise difficulties for countries which prefer not to import into refugee law special rules governing the status of evidence.[19]

A final criticism is that the Summary Conclusions do not take the opportunity to identify areas of continuing debate. In some of the other sets of Summary Conclusions, for example, those on the Exclusion Clauses, more was done by way of sign-posting other major issues.

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17 H Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined" (1998) IJRL 499.

18 Ninette Kelly, "Internal Flight/Relocation/Protection Alternative: Is It Reasonable?" (I am grateful to the author for sending me a draft of this article).

19 Interestingly, the Danish Presidency's latest (July 2002) proposed amendments to the EU Draft Refugee Qualifications Directive deletes the provision setting out "a strong presumption against" the internal protection alternative where the agent of persecution is the State (or associated with it).

III CONTINUING ISSUES

I do not propose to list here all other major issues (even if that were possible). But, on the basis of the responses to the IFA Questionnaire, it may be useful to identify a few, just to demonstrate how incomplete the Summary Conclusions are.

A The Access Issue

Whilst there is a broad consensus on the need for access to any alternative site of protection to be realistic, there are sharp divisions about from where accessibility should be assessed: from the country of asylum or from the point of return inside the country of origin. I deliberately avoid covering this issue here because it seems to me to hinge to a very considerable extent on different and sometimes technical national law provisions concerning enforcement of decisions to return.[20]

B The "Short-Cut" Issue

One of the continuing areas of dispute concerns whether before embarking on any IFA analysis it is first necessary to make a finding on well-founded fear in a person's home area. Leading cases and academic authorities (for example, Michigan Guidelines paragraph 12) have stressed that it is erroneous for a decision-maker to address whether there is an IFA/IPA, unless he has first made a finding that there is a well-founded fear of persecution in at least one part of the country. Echoing a similar point, Hathaway,[21] UNHCR and others have warned against using the IFA as a "short-cut" to refugee determination.

However, there remain critics of this view, particularly persons within the Australian government. They assert that there is nothing wrong with a decision-maker going straight to the IFA issue and deciding whether one exists or not. Proponents of this approach argue that it makes for more economic decision-making since, if an IFA is identified, there is no need to go through an examination of persecution in a person's home area. My own view of debate over this issue is that it is largely based on a misunderstanding. Insofar as the Australian approach has any rationale, it can only be because the decision-maker is essentially approaching the case on the assumption that the claimant has established a well founded fear of persecution in his home area. So long as that is what is involved, I see nothing wrong with this type of "even if" analysis. It could

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20 For a fuller discussion, see article by Ninette Kelly, above n 18.

21 This type of short-cut it is strongly attacked in Hathaway and Foster's paper.

be described as a "short-cut" but it is not one which omits an essential step, rather it is one which simply takes the claimant's ability to satisfy the earlier essential step(s) for granted.

C The Convention Ground Issue

It is a basic axiom of refugee law that, in order to show he or she is a refugee, a claimant must establish not only a well-founded fear or persecution but also that this fear is on account of one of only five enumerated grounds: race, religion, political opinion, etc. On one view, it would appear that establishing both of these things has to be done at the first stage of inquiry into whether there is a well-founded fear of persecution in at least one part of the country. It would seem to follow that, if there is no Convention ground, a claim should never progress to the stage of being considered under the IFA/IPA test.

Conversely, if that is right, then once a claimant stands to be considered under the IFA/IPA test, he no longer needs to show a Convention ground or a causal nexus inside the IFA area.

However, another possible view might be that, even if a claimant has not been able to show a Convention ground for his or her well-founded fear of persecution in at least one part of his or her country, he might be able to show it by reference to his situation elsewhere, for example, if in his own area he faces persecution from a criminal gang yet elsewhere would face serious racial discrimination. But the question then arises, how could there be a causal nexus between the well-founded fear and that Convention ground.

D The Conceptual Basis Issue

Hathaway and Foster in their Roundtable paper argue that a proper analysis of the IPA/IRA/IFA requires basing it directly on the concept of protection. This entails, they say, rejecting all approaches that analyse IFA in terms of whether or not an applicant's fear is well-founded. The distinction arises from the fact that Article 1A(2) includes two key clauses: the well-founded fear clause ("owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion") and the protection clause ("is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country"). In the course of criticising several formulations that locate the IFA test within the well-founded fear clause or a mixture of the two, Hathaway and Foster at pages 8-9 note:

> However, it is crucial to understand that the analysis shifts significantly once it has already been established that a person has a well-founded fear of being persecuted in a particular region in the country (region "A") which of course implies that the state is unable or unwilling to protect the person in that region. Once this is established, it is neither logical nor realistic to find that the fact that the state can protect the person in some *other* region of the country (region "B") means that she no longer has a well-founded fear of being persecuted in region A. The well-founded fear of being persecuted in region A has not been negated or removed by the provision of national protection in region B, just as the risk would not be removed or negated by the availability of protection in a country of second nationality or in an asylum state. In all these cases, the refugee continues to face a well-founded fear of being persecuted in region A of her country of origin, but is able to avail herself of countervailing national protection. To hold otherwise is to construct a legal fiction fundamentally at odds with common sense.

Hathaway and Foster see approaches that tie the IFA/IPA to the fear element as prone to a number of errors, including asserting a requirement that the applicant must establish persecution countrywide or opting for a short-cut analysis which omits the first stage of establishing whether there is a well-founded fear in the first region and instead starts with the question of IFA/IPA. They warn that "to collapse protection considerations into the well-founded fear element makes the protection aspect of the definition largely superfluous".

Whilst Hathaway and Foster's analysis fits best with recent trends in international decisions on IFA/IPA, it is not clear to what extent it is compatible with a "holistic" approach to interpretation of Article 1A(2). Under the influence of certain individuals who believe the refugee definition consists in a "fear" test only and not in a twofold "fear" and "protection" test, UNHCR appears to think that accepting the Michigan Guidelines criteria commit it to abandoning its ideological commitment to a single "fear" test.

In my view, some way must be found to bring these two seemingly irreconcilable viewpoints into some kind of synthesis, at least in respect of the IFA issue. At present it threatens to stall progress on more than one front.

E The Level of Harm Issue

This can be subdivided into three issues:

1 The "generalised danger" issue

Generally speaking, in order to establish a well-founded fear of persecution, it is not sufficient to show a "generalised danger": some type of personal risk or specific targeting must be shown.

However, it is arguable that, read in full, paragraph 91 of the UNHCR Handbook implies that for persons in special situations, for example, civil war or ethnic clashes, it is enough, for the claimant to succeed, once one has moved on to consider his or her claim by reference to the IFA/IPA test, merely by showing a "generalised danger". A contrary view would be that to make mere "generalised danger" an IFA/IPA criterion would be to open the flood-gates and allow even de facto refugees to qualify under the 1951 Convention.

A possible way of resolving this difference would be for the "generalised danger" approach to accept that it is only when that danger personally threatens citizens generally and for the "personal risk" approach to accept that, where the level of generalised danger is so pervasive it affects all individuals, an IFA is unavailable even if they have not been/will not be singled out.

2 The equivalence issue

As explained earlier, the Summary Conclusions did endorse at paragraph 4 what I term a "principle of equivalence".

Whether by use of the terminology of "undue hardship", "reasonableness", safety" or "lack of meaningful protection", there is broad agreement that a person will have an IFA unless he can show some level of harm [difficulty, danger, hardship] there. The question then arises, does that mean that in the IFA/IPA there must be harms [difficulties, dangers, hardships] of at least equal seriousness to the harms [difficulties, dangers, hardships] which comprise the persecution in the claimant's home area? This notion of equivalence is used expressly in the German jurisprudence[22] and seems to be implicit in the Michigan Guidelines (see paragraph 19's reference to the "intensity of harms...rises to a particularly high level...").

In my view this is a valid criterion, because it is the only one which ensures that the IFA is tied back to the overall question of well-founded fear of persecution [ie serious harm against which the state cannot protect]. However, it is

22 See H Storey, IJRL, above n 17.

far from clear that in practice judges and others are prepared to adhere to what in many ways is a tough criterion. For example, under it a person who has been moderately traumatised as a result of persecution in her home area (which remains a current risk), may not qualify as a refugee in an IFA where the normal machinery of protection is available.

A related question here is, does showing their equivalent seriousness mean that the harm(s) in the IFA/IPA must amount to serious harm? Or can harms of a lesser kind, ie ones that fall below the high threshold of serious harm, qualify? My own view is that the principle of equivalence dictates that they must be as serious, individually or cumulatively.

3 The relevant human rights framework issue

Assuming that the criteria should be human rights-based, what should be the relevant framework? There are two competing approaches.

On one approach (UNHCR, also Hathaway in his book, *Law of Refugee Status* and seemingly also in his recent article published by Kluwer Law International[23]), it should be the international human rights system.

On the other approach the criteria should be those rights set out in Articles 2-33 of the Refugee Convention.

IV REFUGEE CONVENTION'S ARTICLES 2-33 FRAMEWORK

This is the approach recently adopted by Hathaway and others in the Michigan Guidelines and approved further in New Zealand: see *Refugee Appeal No 71684/99* reported in [2000] INLR 165 at 177. Hathaway and Foster in their Roundtable paper reconfirm it. In championing the Michigan Guidelines approach, the New Zealand decision (Chairman Rodger Haines) argues that it overcomes two main drawbacks to the international human rights approach. The MGs/NZ decision sees these drawbacks as being:

(1) the failure of the major international human rights instruments (which at least include the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)) to yield a "... uniform and ascertainable standard of rights for refugees...." The New Zealand decision states that

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23 "The International Refugee Rights Regime" in (2000) 8(2) Collected Courses of the Academy of European Law 91-139.

"[there is an] absence of an agreed standard of minimum rights for refugees";

(2) "[i]nsistence on these human rights instruments would also potentially involve measuring the proposed site of internal protection against a standard which is possibly unobtainable in many States party to the Refugee Convention".

The New Zealand decision then sets out the preferred alternative as follows:

> Until a greater consensus has emerged as to the integration of refugee rights with international human rights law, we prefer to adopt the already established refugee-specific statement of rights found in the Refugee Convention itself. It contains express, binding obligations, including duties owed in relation to employment (Articles 17 and 18) and welfare (Articles 20, 21, 22, 23 and 24)...

The New Zealand decision goes on to comment:

> The added attraction of this approach is that it provides a decision-maker with an identified, quantified and standard set of rights common to all State parties, thereby facilitating consistent and fair decision-making.

V DIFFICULTIES WITH USE OF THE ARTICLES 2-33 FRAMEWORK FOR ASSESSING IFA/IPA CONDITIONS

Whilst broadly speaking I consider the Michigan Guidelines to represent a great leap forward, I am not persuaded that this aspect of the MGs is at all sound. In my view, the MGs' critique of the international human rights approach, at least as elaborated in the New Zealand decision, is largely misconceived. And there are difficulties with the MGs' own Articles 2-33 approach.

The first main New Zealand objection to the international human rights approach is that there is "no uniform and ascertainable standard"...to which State Parties to the Refugee Convention are agreed. However, lack of uniformity is not a problem peculiar to elaboration of IFA/IPA criteria; it is equally a problem which afflicts attempts to define the concepts of persecution and protection, for example. Yet lack of uniformity has not stopped the authors of the MGs from striving to establish an agreed international meaning in relation to these other elements of the refugee definition. Hence it is not clear why lack of uniformity should be seen as fatal to formulation of the IFA/IPA test, but not to a human rights approach in respect of other essential tests used to determine refugee status.

As for lack of ascertainability, it is not entirely clear what is meant here. If the New Zealand decision simply means that the rights are not identifiable, that is incorrect. Whether taken as the "International Bill of Rights" or as a broader list, the human rights approach consists not of *de lege ferenda* but of *lex lata* human rights contained in international treaties or accepted as part of customary international law. Rights which are on the list can be identified at any particular time, although the list is added to as new human rights treaties are ratified. If on the other hand what the MGs mean by ascertainable standards is not so much the list or catalogue of rights involved but their scope and meaning, then their argument is on stronger ground. But even here, the same difficulty afflicts the ascertainability of those rights contained in Articles 2-33: for example, what precisely are the components of the Article 16 right to access to courts? Indeed, given that in contrast to the ICCPR in respect of which there is a rich body of (Human Rights Committee) case law, there is virtually none covering Articles 2-33 of the Refugee Convention, the MGs' approach also deprives decision-makers of a valuable source for helping them apply human rights standard to particular IFA situations.

Much of the New Zealand argument centres on the inadequacies of the rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR) many of which are in programmatic rather than strict legal form. However, insofar as such rights are of relevance to refugee determination, the question of how enforceable such rights are is irrelevant. All that is relevant (so as to assess whether the refugee claimant is at risk in his country of origin) is evaluation of to what extent that country of origin respects such rights. What matters is human rights performance, not enforceability.

The New Zealand decision's other main criticism is that: "Insistence on these human rights instruments would also potentially involve measuring the proposed site of internal protection against a standard which is possibly unobtainable in many States party to the Refugee Convention". With respect, that observation overlooks the fact that the human rights approach to refugee determination has always based itself upon a notion of a hierarchy of rights. Only in respect of nonderogable rights will a real risk of their violation give rise to persecution ipso facto. In relation to the derogable rights, their violation will only give rise to persecution if sufficiently severe. The human rights approach does not require that a State must protect against all harms or that it must provide its citizens with an absolute guarantee to uphold their human rights; the standard is a practical one. A human rights approach is not, therefore, to be equated with the view that violation of any fundamental human right amounts to persecution. (Under the Refugee

Convention, of course, even when persecution in terms of basic attacks on a person's human rights is established, a claimant cannot succeed unless he can further show that his well-founded fear of persecution is on account of a Convention reason). So the international human rights standard is a workable as well as an objective one. It is not necessarily a threat to Realpolitik.

Reference to obtainability is also apt to mislead. The test is not one of what is obtainable in the country of origin but is rather one of the extent to which the authorities in the country of origin are able to effectively secure the human rights of its citizens against serious harm. If they do not secure or "obtain" them, there is a need for surrogate international protection. If they do secure or "obtain" them, there is no such need.

Furthermore, and this brings us back to an earlier point of criticism, the MGs' and New Zealand decision's logic would appear to undermine a human rights approach to refugee determination in its entirety. If the relevant IFA/IPA human rights standard is to be rejected because it is unobtainable in many countries of origin, then the same could be said of the relevant human rights standards applied when assessing other key elements of the refugee definition: for example, persecution or membership of a particular social group. The MGs seriously risk throwing the human rights baby out with the bathwater.

There are also difficulties with the MGs'/New Zealand decision's proposed alternative approach.

One is their relativity. Certainly the MGs' approach does result in a finite and identifiable set of rights. However, almost all of the rights set out at Articles 2-33 are inherently defined in comparative terms, mandating a general duty of non-discrimination between refugees and host country residents (resident nationals or resident aliens). With slight variations, the standard is set as either treatment at least as favourable to that accorded to their nationals (for example, Article 6, Article 14, Article 15, Article 16, Article 17, 20, etc) or the same treatment as is accorded to aliens generally (Article 7, Article 13, Article 18, etc). Being inherently comparative, they do not and cannot set an objective international minimum standard.

Whilst some of the rights set forth in major international instruments also express relative standards, especially those contained in the ICESCR, the standard is for the most part set in non-comparative terms. The right to freedom of expression, for example, is not conditioned by reference to any concepts of

national treatment.[24] Ironically the modern international human rights system was predicated on a rejection of relativist and comparative theories cast in terms of equal treatment with nationals or renvoi to national law standards etc. The MGs in this respect would have us turn back the clock.

Another difficulty is that the Article 2-33 framework overall sets a lower standard, for example, whereas international human rights provisions guarantee the right to a fair hearing, the only procedural justice guarantee in the Refugee Convention is confined to a right of free access to the courts. It would be odd indeed if what the Michigan Guidelines calls a "minimalist" human rights standard were tantamount to one which even fell below internationally accepted minimum standards.[25]

A further difficulty is that the rights set out at Articles 2-33 of the Refugee Convention are clearly designed to address the needs of refugees in the host country: for example, Articles 27-28 on the right to identity papers and travel documents.[26] It would seem extremely inverted logic to say that host country – specific rights should form the template for guarantees for persons facing country of origin - specific problems. As a further illustration of this mismatch, one of the Refugee Convention rights - Article 26 on freedom of movement – is patently inapplicable to an assessment of an IFA/IPA candidate, since by definition there is

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24 Although being a qualified right it is nevertheless subject to specified restrictions on its scope which allow for some degree of national variation.

25 I agree with Ninette Kelly's assessment that the Arts 2-33 standard is necessarily harder for a claimant to satisfy than the international human rights standard. (She writes: "The effect is then to use the narrow standards of protection contained in the Convention as a substitute for the more extensive ones contained within subsequent human rights treaties. The guarantees in the Convention become the ceiling rather than the floor upon which guarantees found in subsequent human rights treaties build").

26 In his recent article, "The International Refugee Rights Regime", in *Collected Courses of the Academy of European Law*, Volume VIII, Book 2, 91-139 at 115 Hathaway himself analyses Arts 2-33 as follows: "The rights established by the Convention may be grouped under three categories: *rights of primary protection*, which constitute a basic response to the immediate and sometimes unique vulnerabilities faced by refugees; *rights of surrogate protection*, including key civil and socio-economic rights that ensure fair and decent treatment of refugees in an asylum state; *and rights of solution*, intended to facilitate the acquisition by refugees of a more permanent status that would bring the need for refugee protection to an end". This characterisation co-exists uneasily with his endorsement of an Arts 2-33 as a benchmark for assessing country of origin conditions in the Michigan Guidelines.

already one part of his country where he has no freedom of movement – the part of his country where he faces persecution.

Furthermore, although there is a superficial attraction to a closed list, any use of such a list would appear to freeze the relevant standard in time. It is not easy to see how such a closed list is compatible with a consistently dynamic approach to human rights. Essentially for Refugee Convention protection against persecution to comply with international law standards it must be protection which reflects developments in international law (one example would be the emergence of the principle that states have positive as well as negative obligations to protect their citizens). Although the international human rights approach to refugee determination dictates primary reference to the finite list of rights contained in the "International Bill of Rights" (for example, the UDHR, ICCPR and ICESCR), it also allows for recourse to other international human rights instruments.[27] Whereas the list of rights accorded to refugees in the host country is fixed by the Convention itself, the human rights approach to protection is able to take account of developments since 1950 – for example, the 1989 Convention on the Rights of the Child.

The New Zealand decision seems at one point to virtually recognise that its own account is discordant with the purpose of the Refugee Convention itself, when it states:

> Good reasons may be advanced to refer to a range of widely recognised international human rights in defining the irreducible core content of affirmative protection in the proposed site of internal protection. In particular, one might rely on the reference in the Refugee Convention's Preamble to the importance of "...the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".

In contrast to the MGs' closed list approach, the international human rights approach, like the 1951 Convention's Preamble, does not limit itself to a closed number of fundamental rights and freedoms.

In response to criticisms of this kind, Hathaway and Foster seek to describe them as difficulties that only arise if a "literal application" is taken to Articles 2-33:

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27 See IARLJ Human Rights Nexus paper, above n 15.

> However, it is important to understand that the IPA approach does not suggest a literal application of Articles 2-33 in considering internal protection, but rather that decision-makers seek inspiration from the kind of interest protected by these articles as a way of defining an endogenous notion of affirmative protection in the refugee context.

However, if all that is sought from Articles 2-33 is inspiration, then it may be thought hard to see how proponents of an Articles 2-33 approach can maintain that these offer a concrete and quantifiable framework. A rights-based approach must be based on rights, not on inspirations.

VI BURDEN AND STANDARD OF PROOF

In general refugee law, subject always to the 1979 Handbook's reference to a "shared burden", sees the onus of proof as resting on the claimant, albeit there remains controversy over whether in this field of law it assists to demarcate burdens and standards at all.[28] In the view of some, the IFA/IPA calls for at least one qualification to this rule, namely that it requires the burden to shift to the decision-taker. That is the position asserted in the Michigan Guidelines:

> 14. Because this inquiry into the existence of an "internal protection alternative" is predicated on the existence of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker's state of origin, and hence on a presumptive entitlement to Convention refugee status, the burden of proof to establish the existence of countervailing internal protection as described in para 13 should in all cases be on the government of the putative Asylum State.

Hathaway and Foster's Roundtable contains a spirited reassertion of this position:

> A protection-based understanding of IFA reinforces the fact that once the applicant has established a well-founded fear in one location, she is entitled to the full weight of the establishment of a prima facie case. In this way, the IFA analysis is understood as akin to an exclusion inquiry such that the onus is then on the party asserting an IFA to establish that it exists. (p 12)

Against this perspective it can be asked: why should fear in one part of the country give rise to "presumptive entitlement to Convention refugee status"? The principle of surrogacy requires in all cases surely that the claimant show that he

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28 A leading UK case disapproving of reference to burden and standards is *Karanakaran* [2000] Imm AR 271.

cannot obtain protection in his country of origin, for example, his country as a whole, not part of his country.

VII THE PARTICULAR AREA ISSUE

There is a broad consensus that it would impose too heavy a burden on the claimant to have to show a real risk of persecution in every unspecified part of his country. However, some have gone to the other extreme and argued that, as part of the requirement of procedural fairness and having to give notice of an IFA, the onus is on the decision-taker to specify a particular geographical area where he considers the claimant would be safe.[29] I must confess to finding the reasoning behind this latter view hard to follow. Once a claimant has been put on notice that IFA is an issue, he knows he has to answer the question, "Why can't you secure protection elsewhere within your own country?". On what basis can this be narrowed down to a question just about place X, for example, just about one part of his country?[30] To so narrow the question does not accord with the principle of surrogacy.

VIII THE ISSUE OF THE HOME AREA CONCEPT

Is it sufficient for the IFA to come into play that there be a part of the country where the claimant faces a real risk of persecution; or must that part be the claimant's home area?

On one viewpoint refugee law has always taken care to avoid any reference to a "home area test". Paragraph 91 of the 1979 Handbook, for example, is non-committal and refers to "*one part* of the country...another part of the same country". Similarly the Michigan Guidelines state at paragraph 12:

> The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least *some part* of his or her country of origin.

On another viewpoint, a home area test is an integral part of any credible IFA/IPA theory. This viewpoint has been most forcibly expressed in recent UK

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29 This is the view taken by Ninette Kelly in her recent article, above n 18 (which also includes an analysis of cases which take positions for and against this view).

30 For leading cases rejecting the argument that a specific place must be identified, see the Australian case, *Randhawa v Minister for Immigration* (1994) 12 ALR 265 and the Canadian case, *Gosal v Canada MEI* [1998] FCJ No 346.

decisions, that of *Dyli*[31] (an Immigration Appeal Tribunal decision) and *Canaj and Vallaj* (a Court of Appeal judgment). In both the issue was whether the return of Kosovans to Kosovo should be considered with or without reference to the IFA/IPA test. In both cases it was an agreed fact that in at least one part of the Federal Republic of Yugoslavia (their country of nationality), namely Belgrade, they would face a real risk of persecution.

In *Dyli* the Tribunal wrote:

> 34. Thus the expectation of internal flight is transformed into a rule of internal protection: on return to his own country a person may have to live in an area that is different from his own home area. It is, however, important to remember the origins of the rule. The question of internal flight only arises when a claimant has a well-founded fear of persecution in his own home area. If he has no such fear there, the possibility of his own movement elsewhere simply does not arise. He is not a refugee. If, on the other hand, he has such a fear in his own home area, he may be a refugee: but only if he can show that there is no other part of his own country where he would be safe, which he can reach in safety and where it would be reasonable (that is to say not unduly harsh) to expect him to live.
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> 35...No questions of unreasonableness or undue harshness arise if the claimant has no well-founded fear of persecution in his home area. That is so even if there are other areas of his country where he might have such a fear.

In *Canaj and Vallaj*,[32] a judgment of 24 May 2001, the Court of Appeal endorsed the position taken in *Dyli*. Rejecting counter-arguments, Simon Brown, LJ wrote:

> ...Paragraph 91 of the UNHCR handbook in terms postulates that the fear of persecution is in the claimant's part of the country and that the contemplated "refuge" is in "*another* part of the same country". Paragraph 8 of the Joint Position [of the Council of the European Union] ...expressly raises the question of whether a claimant can find "effective protection in another part of his own country, to which he may reasonably be expected to *move*" (emphasis added). The Federal Court of Australia in *Randhawa* (1994) 124 ALR 265...expressly considers whether it is reasonable "to expect a person who has a well-founded fear of persecution in relation to the part of the country from which he or she has fled to relocate to

31 *Dyli* [2000] INLR 372.

32 *Canaj and Vallaj* [2001] INLR 342.

another part of the country of nationality". Similarly the Federal Court of Canada in *Thirunavakkarasu* 109 DLR (4th) 682 asked whether it would be "unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country". Even in Refugee Appeal No 71684/99...one of the specific questions to be asked in an internal protection case in determining whether meaningful question can be accessed is:

Is the proposed site of internal protection one in which there is no real chance of persecution, or of other particularly serious harms of the mind that might give rise to the risk of return to the place of origin?

It is, of course, implicit in that question that the "place of origin" is somewhere different to "the proposed site of internal protection"....

32. None of this, moreover, is to my mind in the least surprising. As a matter of principle it would be remarkable were it necessary to ask in every case: is there a part of the claimant's home country in which he would be unsafe? That would be an entirely hypothetical and academic question if in fact the claimant had never been there and was never going to be returned there. If it is plain that the claimant can safely be returned to his own home area, and so is not being required to uproot himself and move to a different area, there is simply no reason to temper the strict interpretation of words in article 1A(2) "is unable to avail himself of the protection of that country" by "a small amount of humanity", as Brooks LJ put it in *Karanakaran*[33]... Why ever should it be "unduly harsh" to expect a claimant to return to live in his own home area once it is accepted that is safe for him to do so?

IX CRITIQUE OF THE HOME TEST

Seen from the opposing viewpoint, the answer to this last question is quite simple: "because within his own country of nationality there is a place where he has been found to face persecution and in certain circumstances having to relocate can give rise to undue hardship/a lack of meaningful protection". Not to accord the existence of a place of persecution within the country of origin any weight as a relevant factor would effectively be to equate such a claimant's position with that of a person who faces no real risk of persecution anywhere.

Furthermore, the home area test/approach would seem to have the following unacceptable consequence. If a claimant's home area, albeit free from a risk of persecution, has become uninhabitable or cannot be lived in (for example,

33 [2000] Imm AR 271.

because it is a nuclear wasteland or permanently flooded) he would not be able to succeed under the IFA/IPA even though (let us assume) the only other area in which he could live would be one where he faced a real risk of persecution.

It is also highly questionable to treat the home area concept as being implicit in previous formulations. That approach overlooks that such formulations have for the most part expressly eschewed reference to a "one's home area" test. They have employed the indefinite article, making reference to "a place" or "one place" advisedly. Therefore to interpolate a "home area" test into refugee law appears to add an additional or super-added restriction not found in the text of the Convention itself.

There are also complex problems associated with the operation of the home area test as such. What about claimants who have never lived in their country of nationality, because for example their parents had previously moved outside its borders due to civil war? What about cases where a claimant sometimes lives in his home area (for example, south-eastern Turkey) but sometimes in an area where he would not be at risk (for example, Istanbul): How does one establish which area is his true domicile?

Proponents of the home area test maintain that if a claimant is to be returned to his home area without risk of persecution it is "academic" whether in another part of the country he faces persecution. Against this it could be argued, using Belgrade (Baghdad) in relation to Albanian Kosovans (Iraqi Kurds) as a recent example, that it is never possible to say that the risk posed to a claimant by the existence of a part of his country where he would face persecution is purely "academic", since in the real world what happens in one part always interconnects with what happens in another. Risk of this kind may be more or less real or more or less remote, but never purely academic. In all cases assessment will be a question of fact. The difference in the degree of relevance goes to the issue of how unduly harsh relocation would be or how unmeaningful protection would be in an alternative site.

X THE CONCEPT OF PROTECTION

There is an issue here as to whether protection in an IFA can only be afforded by entities which are proper states. What about de facto state entities? The issue here is sometimes posed as "Protection by Whom?".

Refugee case law in most countries adopts a factual or functional approach which accepts that, in exceptional situations where State authorities are absent or

ineffective, other entities may afford meaningful protection (or be assessed as to whether they do). These situations include:

- (In an armed conflict situation) other organised entities possessing control over territory and resources;
- De facto State authorities executing State-like functions;
- Private persons or non-governmental organisations;[34]
- Any entity in fact providing such protection with or without a duty under international law to do so and with or without the consent of the country of nationality (see *Canaj and Vallaj* on KFOR and UNMIK as protective entities in current-day Kosovo).

Some of these sub-categories overlap. However, in relation to all of them, there are differences over the significance of international law recognition and over the need or lack of need for consent of any legitimate government that exists.

In their Roundtable paper at page 46, Hathaway and Foster strongly attack a factual approach and argue for a strictly formal approach:

> The fundamental problem with such decisions is that none of the proposed protectors – whether it is ethnic leaders in Liberia, clans in Somalia, or embryonic local authorities in portions of northern Iraq – is positioned to deliver what Article1(A)(2) of the Refugee Convention requires, namely the protection of a state accountable under international law. The protective obligations of the Convention require that protection will be provided not by some legally unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions. In practical terms, the rights enumerated in the Convention similarly envisage that protection will be provided by an entity that has established, inter alia, a formal system for regulating aliens' social and economic rights, a legal and judicial system, and a mechanism for issuing identity and travel documents. Indeed, the fundamental premise that refugee protection is an inter-state system intended to deliver surrogate or substitute protection assumes the right of at-risk persons to access a legally accountable state – not just some (hopefully) sympathetic or friendly group – if and when the individual's own state fails fundamentally to protect his or her basic rights. There is

34 De Moffarts, above n 2.

simply no basis in law or principle to deviate from this foundation principle in the internal protection context.

Arguably, however, this call for a formal approach rests on at least three serious misconceptions.

First, it wrongly overlooks that the responsibilities assumed by States party to the Refugee Convention are for them to afford surrogate protection, not to ensure that countries of origin are accountable or capable of being held responsible under international law for their actions. Refugee determination is not an exercise in imputing (country of origin) State responsibility for wrongdoing States commit against their own citizenry.[35]

Second, from the point of view of international law principles, the concept of the state which underlies the notion of "State protection" is not to be equated with the current government of a country. If the practical effect of the actions of de facto entities within a State is to discharge or perform international obligations placed upon that State (for example, to prevent piracy), then from the point of international law the "State" has discharged its international responsibilities. Conversely, just because a State has no effective government does not exempt it from a wide range of international responsibilities.[36]

Thirdly, the formal approach conflates the notion of a (de jure or de facto) State with that of a good ("legally accountable", "democratic") State. The

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35 Nor is there any real question of asylum States (in Hathaway and Foster's words) "legally requiring" at-risk persons to ally themselves with a clan or faction in order to receive protection. A decision to return amounts to no more than an assessment that within the asylum-seeker's own country a source of protection is available.

36 "It is true that the existence of a country of origin (or of former habitual residence in the case of stateless persons) is a necessary element of the notion of refugee. However, a collapse of governmental power does not terminate the existence of a State. Failed States remain subjects of international law even if they no longer have any functioning authorities: they usually do not terminate their membership of international organisations; their territory cannot be annexed by another state as stateless land, and an invasion of this territory still constitutes, according to the UN Charter, a violation of the prohibition of the use of force and it leads to an interstate armed conflict in the sense of 1949 Geneva Conventions on humanitarian law." (Walter Kalin, "Persecution by non-state agents" in *The Changing Nature of Persecution*, papers for IARLJ Conference Bern Oct 2000, published Institute of Public Law, Bern, Switzerland 2001). See also M Ruffert "The Administration of Kosovo and East-Timor by The International Community" (2001) 50 ICLQ 613-631.

underlying thinking behind it appears to be that adequate protection can only be afforded by entities capable of entering into international obligations, especially international treaties guaranteeing human rights. However, whilst the extent to which States sign up to and conform to international human rights obligations is important evidence of their ability to protect, it is not what defines whether a State can afford adequate protection (otherwise, bearing in mind that China during the latter half of the 20th century signed up to virtually no international human rights treaties, every Chinese claimant asylum-seeker able to satisfy the fear test and alleging inadequate protection would have succeeded in his refugee claim as a matter of course). The test is not whether the de jure or de facto State is democratic, but whether it can deliver protection against persecutory harm.

The trouble with the formal approach is that it prevents pragmatic and common sense analysis of just what range of protective functions are performed by particular de facto entities. It may well be that some leading cases have been too ready to accept ad hoc de facto groups as protective entities, but that is scarcely a reason for discarding a factual or functional approach. It is also odd that in order to shore up the argument in favour of the formal approach, Hathaway and Foster fall back on reliance on Article 2-33 norms, some of which (as already explained) are host-country specific. Under the alternative international human rights system, issues such as whether de facto entities can guarantee juridical status or access to courts are dealt with by reference to the notion of a hierarchy of rights examined on a purely factual basis.

Certainly I do not think this debate will be settled by reference to the text of the Refugee Convention which neither specifies that protection must be by a State (the phrase is "protection of that country") nor that protection can be by de facto State entities. In my view an object and purposes approach to interpretation should yield a conclusion that the reference to "country" is merely geographical.[37] Commentators should let contemporary interpretation of the Refugee Convention evolve to reflect the reality of de facto protection and get on with setting out criteria which de facto entities need to meet in order to be capable of affording protection (being "durable, organised, effective, stable etc.").

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37 Also the conclusion reached in *Dyli* [2000] INLR 372. More recently in an English Court of Appeal case, *Gardi* [2002] EWCA Civ 759 (UKCA, May 24, 2002) Keene, LJ in obiter remarks endorsed the views expressed in Hathaway and Foster's article. It does not appear that authorities in support of the opposite viewpoint were put to him. It is therefore somewhat circular to find Hathaway now citing *Gardi* in support of his approach.

XI INTERRELATIONSHIP BETWEEN REFUGEE CONVENTION AND HUMAN RIGHTS CONVENTIONS' CONCEPT OF IFA/IPA

Are the Refugee Convention criteria governing the use of the IFA/IPA test different from those used in human rights jurisprudence: see recent European Court of Human Rights judgment in the case of *Hilal v UK*? Arguably, from a public international law perspective, there should be no significant difference, except that the person's situation in the country of asylum may be a more directly relevant factor under human rights criteria than under 1951 Convention criteria (for example, in another Strasbourg case, *D v UK*, albeit not an IFA case, it was highly material to the issue of whether the claimant, an AIDS sufferer, would be exposed to a real risk of torture or inhuman or degrading treatment upon return to St Kitts that he had become dependent on a certain level of medical assistance in the UK).

XII PROCEDURAL ISSUES

Frequent concern has been expressed about the validity of deciding cases in which IFA/IPA issues are involved within accelerated or manifestly unfounded procedures. The Michigan Guidelines express this concern as follows:

> 25. Because the viability of an "internal protection alternative" can only be assessed with full knowledge of the risk in other regions of the state of origin (see paras 15-16), internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure.
>
> 26. To ensure that assessment of the viability of an "internal protection alternative" meets the standards set by international refugee law, it is important that the putative asylum state clearly discloses to the asylum-seeker that internal protection is under consideration, as well as the information upon which it relies to advance this contention. The decision-maker must in all cases act fairly, and in particular ensure that no information regarding the availability of an "internal protection alternative" is considered unless the asylum-seeker has an opportunity to respond to that information, and to present other relevant information to the decision-maker.

It is questionable whether paragraph 26 should be taken as an absolute rule. Even the New Zealand decision which endorses the Michigan Guidelines – Refugee Appeal No 71684/99 - recognises at 46(c) that:

> This obligation, however, must be tempered with common-sense. There are certain categories of cases where it is self-evident that internal protection is an issue either

because of the nature of the case (particularly if it involves a non-State agent of persecution) or because of the country of origin (for example, the Republic of India) or both.

As regards paragraph 25, it is not entirely clear why the need to take account of risks in other regions of the State of origin should prevent consideration within accelerated procedures. If it is well-established by objective country materials, for example, that save for special cases, the risk of persecution in one part of the country does not prevent claimants from relocating safely in another part of the country, then (it can be argued) why should accelerated or manifestly unfounded procedures be avoided?

Hathaway and Foster in their Roundtable paper at pages 47-48 consider that such an approach is tantamount to a denial of individualised assessment of risk. However arguably that would only be the case if generalisations based on case experience and objective country materials were seen as a substitute for rather than as an aid to individual examination.

XIII CONCLUSIONS

It is manifest I think that the Summary Conclusions, galvanised by the Michigan Guidelines, have moved the prospects of achieving a global consensus on IFA from virtually nowhere to somewhere. But plainly they did not get us far enough.

Rather than repeat any of the points I have made about content, I want to end with a number of process points.

A The Need for Further International Collaboration in a Judicial Forum

Although the Summary Conclusions did not take matters as far as they could and should have, enough progress was made to suggest that more could be achieved by further international collaboration.

But should it be in the same form: a sort of San Remo Part Two? I think not. In my view the Global Consultation exercise has highlighted the need for any further initiative to be a specifically judicial one.

Ideally any further initiative should be under UNHCR auspices, issues of interpretation being part of its mandate. But I doubt that any further or revised set of UNHCR guidelines will be any less problematic than the last. For certain leading figures within UNHCR it would appear that issues relating to IFA can only be resolved by rejection of any approach which anchors the IFA in a separate

"protection test". But such an approach is at odds not just with that set out in the Michigan Guidelines but with jurisprudential trends in several countries. Proceeding under UNHCR auspices is desirable, but not if the price is UNHCR editorial control.

The Michigan Guidelines on IFA were a welcome addition, but being just a product of a small group of academics (two or three of whom double as judges) they have too much of a special interest group appearance. In addition I think they lose much of their credence by insistence on the Articles 2-31 human rights framework. There was a feeling amongst the more diverse participants at the San Remo Roundtable that if we had a further "second half" we could have thrashed out more issues. But I doubt, given the draft discussion phase, that so diverse a group of people, which included those from governments, NGOs, academia etc, is the best choice for careful drafting of guidelines designed in part for judicial decision-makers. At least in that respect the Michigan Guidelines offer a better model: a group of people with a close grasp of refugee jurisprudence but without a political agenda.

Of course it would be no less "elitist" if a small group of judges tried something similar to the Michigan Guidelines. Hence any judicial initiative must seek to draw on, or result from consultation with, diverse sources in some structured way. To my mind the Global Consultations model could be preserved for the first stage of any fresh attempt. But it would need to have a new final stage added. The drafting of Summary Conclusions should be done by a panel of expert refugee law judges who have listened to all the Roundtable arguments. One can understand UNHCR wanting to draft the Global Consultation conclusions themselves: after all, it was their initiative. But if ever there is to be a next time something more independent is necessary and judges would not have a fixed philosophical viewpoint concerning the "fear" and "protection" tests.

I should add that in my view recent European developments give added urgency to the need for further judicial collaboration (ideally conducted under UNHCR auspices). As we speak the EU is taking steps to finalise a draft of a proposed Refugee Qualifications Directive aimed at furnishing an EU-wide definition of basic IFA principles. Although the drafters have consulted with many sources, including UNHCR and the IARLJ, the eventual decision as to the final text rests with national governments and their representatives. Unless as an alternative there is a visible and authoritative set of guidelines and principles, this EU text is likely to be seized on by many non-EU States as a global reference-

point, irrespective of the fact that it does not necessarily reflect informed jurisprudence.

B The Need for a Short Summary of Basic Principles and Analytical Steps for use by Decision-Makers

If there are to be IFA guidelines then they need to set out in a clear step-by-step and brief form the basic principles that should govern IFA analysis and the basic analytical steps to be used when examining IFA. One of the reasons why the Michigan Guidelines have failed to take hold in more countries is that its basic principles and its 4-step analytical framework is not set out anywhere in a clear summary form. If they are to be easily accessible, there is an argument for reducing them to a summary of basic propositions. Albeit these could be amplified through footnotes or the like, this line of argument urges that the guidelines be capable of brief recital. Both the UNHCR Position Paper and the Michigan Guidelines lack a condensed summary. Hathaway and Foster in their Roundtable paper identify a 4-stage inquiry, but do not set out all the relevant criteria in summary

C Many Vocabularies, one Set of Underlying Standards

Given that national case laws have built up distinct IFA vocabularies (ranging from the name of the test through to distinct terms for identifying underlying criteria "reasonableness", "safety", "undue hardship", "meaningful protection" etc), it is doubtful that any step short of a new Refugee Convention could impose a uniform vocabulary.

However, a more realistic route to take internationally is, I think, not to urge different countries - or blocs of countries - to adopt a specific vocabulary, but rather to make each of the existing formulations subject to the same underlying criteria. Then there would be nothing wrong with talk of "safety" or "undue hardship" or even "reasonableness", since each would be defined by reference to core human rights norms. Such an approach would achieve greater consistency, avoid discontinuity but at the same time ensure that existing formulations had to place themselves consciously on a more objective footing.

WHO SHOULD WATCH OVER REFUGEE LAW?

*James C Hathaway**

On 13 December 2001, states committed themselves "...to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol".[1] It is wonderful that after half a century we may finally be on the verge of taking oversight of the treaty seriously.

I am concerned, however, that having watched this matter languish for 50 years, activists may now feel the need immediately to build on this new commitment by endorsing some kind of a mechanism – even if only a minimally effective one – for overseeing the Refugee Convention. I worry that we may allow ourselves to be rushed into embracing a particular model for oversight of refugee rights in order to lock in at least some progress on this issue, only to find that we have committed ourselves to an approach that, in the long run, really is inadequate.[2] While there is of course the possibility that a minimalist project may provide the experience and confidence needed to move in a more ambitious direction in the future, there is also the possibility that states will take the view that, having established a minimalist mechanism, they have 'dealt with the

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* Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan, and Senior Visiting Research Associate, Refugee Studies Centre, Oxford University.

This paper was first published in FMR 14 at pages 23 to 26.

1 Declaration adopted in Geneva at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, at para 9.

2 A Proposal for an 'advisory group' of experts reporting to the High Commissioner was circulated by several Geneva-based NGOs in late 2001. NGOs meeting during the ICVA-sponsored consultation in December 2001 welcomed the proposal as a boost to the Office's efforts but adjudged it an insufficient mechanism to oversee the Convention: <http://www.icva.ch/cgi-bin/browse.pl?doc=doc 00000503.

supervision question'. Thus, they might argue, there is no need to revisit the issue, at least in the foreseeable future.

We simply cannot afford to sell out the future of refugee protection in a hasty bid to establish something that looks, more or less, like an oversight mechanism for the Refugee Convention.

To be clear, this debate is not about how to stay on top of UNHCR as an agency. UNHCR has a mandate that is much broader than supervising the Refugee Convention. In recent years, its work as a humanitarian relief agency, has in fact, come to overshadow its core protection functions. Its work on behalf of the internally displaced has in many instances eclipsed its primary duty to protect refugees. It has often taken on roles that put it into the realm of the political, notwithstanding its explicitly non-political mandate. While there can and should be initiatives more effectively to supervise UNHCR as an agency, these are matters which, to my mind, are logically entrusted to UNHCR's executive committee (EXCOM) or indeed to the UN Economic and Social Council (ECOSOC). We should not allow the question of how best to oversee the Refugee Convention to be redirected towards difficult but distinct questions of supervising UNHCR's compliance with its broader statutory mandate, much less of how to monitor the various jobs it has taken on outside its mandate.

On the other hand, it is equally wrong for UNHCR to attempt artificially to cut off debate on the appropriate range of potential mechanisms to oversee the Refugee Convention by reliance on its institutional authority under Article 35 of the Refugee Convention.[3] As we all know, UNHCR has a special responsibility under Article 35 to "supervise the implementation" of the Refugee Convention. But this provision does not create a monopoly on treaty oversight in favour of UNHCR. To the contrary, the Convention, as an international pact, is the responsibility of the states that signed it.

As the mechanisms for enforcement of the Convention itself make clear. It is states that have the fundamental right and duty to ensure that other states actually live up to their obligations under the Refugee Convention. There is nothing in

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3 UNHCR took the position at the Global Consultation roundtable convened at Cambridge in July 2001 that no new supervisory body or mechanism should be created. The resultant conclusion was that "... identification of appropriate mechanisms should seek to preserve, even strengthen, the pre-eminence and authority of the voice of the High Commissioner. Anything that could undermine UNHCR's current Article 35 supervisory authority should be avoided."

Article 35 which precludes the states that are both the objects and the trustees of the refugee protection system from deciding to establish an arms-length mechanism to provide general guidance on, and oversight of, the Refugee Convention. Indeed, a move in this direction is precisely what I believe is required now.

I ESTABLISHING AN OVERSIGHT MECHANISM

In considering this task, a first question must surely be: why is it that the Refugee Convention, virtually alone among major human rights treaties, still has no free-standing mechanism to promote interstate accountability?

In part, it is a question of history. The Refugee Convention was the second major human rights treaty adopted by the UN, having been preceded only by the Genocide Convention. It is noteworthy that the Genocide Convention, like the Refugee Convention, is not externally supervised. In part, then, the absence of an external supervisory mechanism for the Refugee Convention is simply a reflection of the historical reality that, in the late 1940s and early 1950s, the entire idea of interstate supervision of human rights was new, potentially threatening and not truly accepted by states. Yet with the adoption of the human rights covenants and more specialised treaties beginning in the mid-1960s, the establishment of an independent mechanism for interstate oversight of the human rights treaties has become routine. Unless there is some good principled reason why refugee law should be immune from this general commitment, it is high time to reverse the historical aberration by bringing the commitment to oversight of refugee law into line with the practice in human rights law more generally.

II THE ROLE OF UNHCR

It might be suggested, however, that it was – and is – the existence of a UN High Commissioner for Refugees that distinguishes refugee law from every other UN human rights project. Only in refugee law is there an international organisation assigned exclusively to supervise implementation of the treaty. At best, other UN human rights treaties can rely on the recently established, generic authority of a (grossly under-funded) UN High Commissioner for Human Rights to support the efforts of part-time supervisory bodies. Because refugee law has its own institutional guardian in the person of the High Commissioner, it might be thought that any additional mechanism for oversight would be superfluous.

I believe that this would be a tragic error of judgment. UNHCR clearly makes some essential contributions to oversight of the Convention via its supervisory authority codified in Article 35. In particular, the Department of International

Protection (DIP) has real expertise in assisting governments to draft policy and legislation, in engaging directly and indirectly in defensive case interventions, and in organising and conducting refugee law outreach and training. DIP's role is complemented by the critical function of UNHCR's Executive Committee, which symbolically reaffirms the commitment of states to refugee law and provides democratic legitimacy to the agency's work. There is therefore no need for a mechanism of international oversight to take on any of these roles.

But there are also some things that are usually understood to be central to a meaningful project of international oversight that UNHCR does less well and is perhaps not ideally positioned to take on. In practice, neither DIP nor EXCOM has done enough to provide systematic, non-crisis policy guidance on the substance of refugee law, carefully anchored in the real context of protection challenges. There has been a lack of leadership in the design of mechanisms to implement burden and responsibility sharing so as to enable the imperatives of refugee law duties to be reconciled to the political and social realities of asylum states. There has not really been a genuinely inclusive range of voices, including those of refugees themselves, brought into the supervisory process. And not enough efforts have been made to empower local institutions to make enforcement of refugee rights meaningful in a way that no international institution can ever aspire to do. These are all examples of the kinds of work which, in most other contexts, are entrusted to an autonomous supervisory body. Beyond the importance of setting reasonable expectations for the sorts of supervisory tasks that UNHCR should itself be expected to take on, there are two more fundamental reasons why vesting UNHCR with sole responsibility to oversee the Refugee Convention is not a credible proposition.

First, UNHCR has been fundamentally transformed during the 1990s from an agency whose job was, in large measure, to serve as trustee or guardian of refugee rights as implemented by states to an agency that is now primarily focused on direct service delivery.[4] Simply put, UNHCR is no longer at arms length from the implementation of refugee protection. In most big refugee crises around the world today, UNHCR is — in law or in fact — the means by which refugee protection is delivered on the ground. UNHCR therefore faces a dilemma. Either it must return to concentrating on the implementation of its core supervisory responsibilities (leaving to others what has become the majority of its operational

4 James Hathaway "New Directions to Avoid? Problems: The distortion of the Palliative Role of Refugee Protection" *Journal of Refugee Studies* 1995 8(3) 288-294.

mandate) or it must concede that it cannot ethically supervise itself and endorse the establishment of a genuinely arms-length body to ensure the oversight of the Refugee Convention.

Second, the difficulty with relying solely on UNHCR to oversee the Refugee Convention is that it encourages states to avoid the meaningful accountability between and among themselves that is at the root of the entire international human rights project. Because states presently take little if any direct responsibility for ensuring that their fellow states live up to international refugee law obligations, the dynamic of persuading, cajoling and indeed shaming of partner states — so critical to the success of the international human rights project in general — is largely absent in refugee law. It is simply too easy to leave the task to UNHCR.

Yet, as we all know, UNHCR is not really in a position to apply meaningful forms of pressure on states. UNHCR is, after all, an entity with a tiny core budget and is effectively dependent on the annual voluntary contributions of a very small number of powerful states, virtually none of which has been predisposed to empower UNHCR to act autonomously to advance a strong regime of international refugee relief and for humanitarian assistance. Too often, however, they have either avoided or, on occasion, evaded UNHCR's insistence on the importance of protection principles. Recent tragic events off the coast of Australia and the legally defensible domestic reaction to the attempt to bring international law to bear on Australia are more than adequate testimony to this problem.

Moreover, because UNHCR is, and will remain, politically and fiscally constrained by design, it cannot reasonably be expected to provide the sort of strong voice in favour of unflinching attention to refugee protection that is now required. There may also be no good reason to compromise UNHCR's on-the-ground efforts to promote implementation of the Refugee Convention - which do frequently require compromise and even expediency in the interest of saving lives — by forcing that same organisation to be the source of critique and broad guidance on acceptable international practice under the Refugee Convention. Nor may it be reasonable to expect UNHCR, as an interstate organisation, to devise the sorts of complex political mechanisms — involving international burden and responsibility sharing — that are critical to the continued effectiveness of refugee law in the modern world.

In short, those of us concerned to advance refugee protection would be ill-advised to limit the scope of our thinking to models that are housed within, or functionally intertwined with, the work of UNHCR as an international

organisation. By the same token, UNHCR as an organisation would be ill-advised to insist that any mechanism to reinforce oversight of the Refugee Convention be situated within its walls. To do so may simply constrain its operational effectiveness in protection and other fields, and reinforce the current sense of despair among many UNHCR staff whose expectations are not matched by either political independence or fiscal autonomy.

III THE WAY FORWARD

In light of these realities, we should not rush from celebration of the critical commitment to enhanced oversight of the Refugee Convention secured in Geneva to embrace any particular model for oversight of the treaty. It is critical that we take the time to learn the lessons of treaty oversight in other parts of the UN system.[5] In particular, the successes and failures of the six major UN treaty bodies provide a wealth of information, both for and against particular modes of oversight, which we ignore at our peril. At a time when the chairpersons of all of the UN human rights treaty bodies insist on regular coordination and mutual learning, it would be sadly ironic for those of us in the refugee protection community to rush forward to embrace any model not predicated on an intimate knowledge of the range of potential protection options (see Annex).

Nor should we allow ourselves to be intimidated by institutional insistence that oversight of the Refugee Convention be a function exclusively of UNHCR. The High Commissioner's duty to supervise implementation of the Convention and the more general obligation of State Parties to take collective responsibility to oversee their treaty obligations are, in fact, compatible — not mutually exclusive — responsibilities.

As no precise model of oversight for the Refugee Convention will be adopted imminently, there is no need to rush to embrace any particular approach. Having waited 50 years it is better to take the time to engage in a solid, broadly-based initiative to build a mechanism of oversight that will withstand the test of time. We must commit ourselves to a process of learning the lessons of human rights history and thinking hard and creatively about the context-specific goals of overseeing refugee law. Only on the basis of such a process will we be able to put

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5 See Philip Alston and James Crawford eds *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000). Professor Walter Kalin's study of supervisory options for the Refugee Convention (prepared for the Global consultation process) helpfully applies some of these lessons to the refugee context.

forward a model for serious, genuinely responsive oversight of the Refugee Convention.

ANNEX

To advance this critical inquiry, ICVA and the University of Michigan's Program in Refugee and Asylum Law have established a collaborative project and prepared seven discussion papers that draw together some of the history of oversight of human rights treaties.

Working Paper No 1 takes up the question of state reporting requirements, regularly reviewed through a 'dialogue of justification' between the supervisory body and states, supported by strong non-governmental input. It emphasises the value of carefully targeted, thematic reporting, rather than routine, generic reports; and outlines a well-prepared and forward-looking process of review.

Working Paper No 2 looks at the possibility of a complaints mechanism under the Refugee Convention, and recommends a selective, group-based petition system as a means of injecting the voices of refugees directly into the supervisory process.

Working Paper No 3 takes up the often-overlooked value of 'general comments' issued by human rights treaty bodies to codify their work on particular legal issues, which have had extraordinary value in influencing the work of domestic courts and tribunals. It recommends a staged process to conceive and review general comments, including an open debate in which NGOs and IGOs would participate actively.

Working Paper No 4 proposes that the supervisory body have an auxiliary investigate capacity to supplement its reporting, complaints and general comments functions. It stresses the importance of direct access to evidence on the ground as critical to the credibility and effectiveness of the supervisory body.

The final three papers speak to the process of overseeing the Refugee Convention:

Working Paper No 5 draws the lessons from other treaty bodies' experience in involving both national and international NGOs in their work, and of linking the work of a supervisory body to the possibility of direct enforcement by judges and human rights commissions in state parties.

Working Paper No 6 recognises the importance of avoiding overlap between the work of a supervisory body for the Refugee Convention and that of other UN human rights treaty bodies, and proposes careful mechanisms of both close and diffuse cooperation with these and other oversight bodies to inspire them more effectively to take up the cause of refugee protection in their own work.

Working Paper No 7 makes the case for differentiating the protection work of UNHCR from that of an independent supervisory body for the Refugee Convention, and explains why it is in the best interests of both UNHCR and of states to commit themselves to an arms-length mechanism to oversee the Refugee Convention.

All of these papers may be accessed via www.icva.ch/cgi-bin/browse.pl?doc=doc00000505.

REPORT BY THE PRESIDENT 5TH WORLD CONFERENCE OF THE INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES, WELLINGTON 23 OCTOBER 2002

*Geoffrey Care**

This will be my last Report. I want to revisit the vision of the Association, for the benefit of those who may read of it here for the first time to give a short description of it, and to explain some of the methods which we have adopted, in the seven years we have been operating, to realise that vision.

It is a temptation to address future programmes. It is a temptation I shall resist: The members with their new President, Executive and Council must decide for themselves which of the aims of the Association should receive the most attention given how deep our pocket is. There are times to surge ahead and times to pause and reflect a little. What I shall do however is take a critical look at the climate in which we operate and will in my view continue to operate in the foreseeable future.

The vision, which the Association has, is to achieve a consistent and coherent application of international norms in the realm of asylum and refugee matters. It is committed to promoting a world-wide understanding of refugee law principles: Encourage countries and courts and tribunals to adopt the best practices - not just minimum standards on a local stage - in the determination process and in appeals

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* President of the IARLJ.

from earlier decisions and do what it can to ensure that all claims to refugee status or analogous protection are governed by the Rule of Law.

The Association is a voluntary and non-profit-making organisation of some 450 judges and quasi-decision-makers and academics from over 70 countries who have joined together in a global network to provide a forum which can assist and support those who are called upon to interpret issues of refugee and asylum law and procedure.

Our members come from half the countries that have signed the 1951 Refugee Convention and from at least two-thirds of the signatories to the 1969 OAU Convention Governing the specific Aspects of Refugee Problems in Africa.

In Annex II I have set out what the Association has done since it first gathered in London in November 1995 - the events held since we last met in Bern in October 2000 are set out in more detail than the earlier ones which are there for ease of reference.

We have been listed as a consultant body to the OAU and the EC and the Council of Europe and other international organisations and NGOs regularly consult us as an Association or our individual members. Frequently we are asked to participate in colloquia and at conferences by speaking or preparing papers or simply supplying advice in various parts of the world.

In particular we were invited to, and were able to, contribute through our members to the UNHCR Global Consultations. These Consultations aimed at strengthening the 1951 Convention, providing better protection within broader migration movements share burdens and responsibilities handle security-related concerns more effectively and redouble durable solutions. Our ability to make such a contribution was in large measure made more effective by the studies carried out in the Working Group system hitherto co-ordinated with much enthusiasm and effort by Hugo Storey.

In Africa the long-term co-operation between the UNHCR and the OAU on the 1969 Convention led, in November 2000 to a Round Table of Regional Judges from the Great Lakes and the Horn at which I gave the keynote speech.[1] This followed a joint meeting of Government and Non Government Technical Experts at Conakry. Of the 25 practical recommendations one related to a Comprehensive Implementation Plan which called on both UNHCR and OAU to "study the

1 See Report on "The Role of Judiciary and Refugee Protection".

manner in which judicial and administrative systems function ...in relation to refugees" (Action 12). Judges, including some of our members, participated and IARLJ was specifically mentioned. Both Sam Ibok OAU Director of Political Affairs and Koluide Doherty UNHCR Director Africa Bureau at the time saw this as a start to a new process. It has not been followed up. This is to be regretted. That initiative for real progress toward reducing reasons to fly a country; assisting countries adopt harmonised and effective procedures and developing the jurisprudence world-wide was lost.

We cannot set up such meetings ourselves; we can only be the catalyst when given the opportunity. With respect it is up to the OAU and UNHCR to continue to provide such opportunities. That is one of the practical improvements to be made in an effective teamwork between us and in the spirit of our Memorandum of Understanding.

So far the Association has held five world conferences including this one: The first in 1995 in the UK, two on the continent of Europe (in the West), and one in North America. There are proposals on the table for the next conference to be held in Africa.

The Working Groups are the research engine of an association such as ours. They provide the ongoing contacts between conferences; they enable any number of brains to be brought to focus on topical issues and they are as it were the cement which binds the members together over long periods of absence. I refer to this aspect of our work again later, but Jim Simeon has set it all out with admirable clarity and I hope he will forgive me for putting what he has to say in Annex 1 to this Report.

A Workshop Manual was prepared in Ottawa and has now served as a basis for helping over 300 judges and others toward a better understanding of the Convention and its application to decisions mainly, though not exclusively on review. Those who have attended these courses are judges from all parts of Europe, some from The Philippines; some in Africa Asia and Latin America. Another will be held in January in Cairo for some 60 Judges and others from most countries in the Middle East.

We are presently updating the Manual and with a deeper insight from having heard of the problems facing our colleagues elsewhere will be able to make it even more effective. We will add a section on the OAU Convention. We are hoping this will be ready in the New Year and we have sought funding to pay for

its production and translation. The current edition has been already been translated into Arabic.

I think that the Manual can be a relatively cheap course -which we can readily take on the road to all tribunals and judges in any country whether at basic or advanced level - a viable alternative to much expensive local training - and one which would bring true harmonisation closer and in a far more durable and globally acceptable form than any directives made by regional bodies.

But having listed an impressive number of events we have been unable to make a real impact in those parts of the world where conflicts begin, flight is first planned and the majority of refugees are warehoused. In Addis we agreed, but as I said the opportunity then to take it further with the workshop system perhaps was lost.

Such countries are in many cases the very countries also in which the judges need the moral support, the resources that we are in a good position to make available and the knowledge and expertise acquired by judges in other parts of the world - had we the financial means and the manpower to do so.

Even in countries in which we have a strong presence the basic principles for which we stand are being questioned and even, often very obliquely, eroded. I do not speak of policy but simply of fulfilling international obligations: In both letter and spirit. Accelerated procedures; illusory rights and foreshortened periods within which to make claims are, as Courtney Mireille O'Connor of Washington observed, frequently focussed on ways to speed up rejection and we must be ever watchful for this. A Canadian judge said recently

> My vague general impression is that governments with a geographic base are weakening in the face of global commerce and domestic political leaders are drawing strength from the lack of a combined judicial voice with the result being an increasing tendency in "the civilised world" for the manipulation of judicial decisions being attempted.

However I have encountered much support by the governments of many countries for what we are doing, even if politicians still see the judiciary as an un-elected opposition - and this even after centuries of struggle to establish a democratic form of government in which some form of separation of powers is recognised as the best road to progress. Simon Bolivar saw the future clearly when he warned that it is one thing to win democracy but a far harder battle to keep it.

It is thus not only in countries where tyrants rule that the judiciary are 'lonely long distance runners' requiring courage as well as wisdom. In the countries which we like to think of as established democracies constant vigilance as well as courage is called for. A gullible and often ill - informed public are used as tools to attack the judiciary. Complacency and a false sense of security - the "it can't happen here" syndrome - are the first enemies: Well it can happen here, can it not?

Judges in those areas of the world most at risk know only too well how to value the IARLJ's existence. The gap, in which we all say that the judiciary stands between the people and the executive, varies from a yawning chasm to a concealed pit - but what lies at the bottom is ultimately the same today as it has always been. Both Professor Duguid and Judge Albie Sachs reiterated this very point not so long ago in South Africa and the sequel from events in Zimbabwe is yet to unfold.

To underscore my point may I refer you to the International Commission of Jurists' website (http://www.icj.org). They evaluate the state of the law and its practice in relation to the independence of judges and lawyers in 47 countries. It catalogues today 315 judges who have suffered reprisals for carrying out their professional duties. Of these 38 have been killed, 5 have disappeared, 44 have been prosecuted, and some 23 have been attacked, 67 threatened verbally and 109 professionally obstructed or sanctioned.

It is however not enough always to look outside ourselves to complain at the erosion of rights. Frequently it is our own lack of vigilance and complacency where the rot starts. Every time we cut a corner to get a case finished more quickly, every time we allow justice to be compromised or sacrificed to speed the production line syndrome, where overlisting can be a serious inroad into both independence and that anxious scrutiny of Lord Bridge of Harwich spoke in the House of Lords in *Musisi* in 1987;[2] every time we fail to denounce "floodgates" thinking - we open the door a little wider to someone's rights being respected somewhere a little less.

Of course we read the newspapers and hear the views of those around us. The media are however frequently a willing tool used to attack the judiciary distort the facts and encourage politicians to blame their own errors on the judges - but the hordes of Genghis Khan or Attila the Hun are still nightmares from the past and will only jump out of the history books if we let them. A Canadian Judge of

2 Reported in [1987] Imm AR 250.

Armenian ancestry recently told me of the horror of the slaughter of the Armenian races in Turkey. That was 90 years ago. Kosovo less than three and omnipresent is the situation in the Great Lakes or Indonesia. They have a reality in those same countries where the IARLJ could help most. The Balkans, Africa, on the Indian Subcontinent in South East Asia, in the Middle East, South America China – anywhere where the numbers are large or the host is poor and unstable. The threat to stability of the host there is not just a party political worry about votes - it is the very survival on a shaky stage of law and order.

I repeat, in the long run we can make more a lasting contribution than all the international institutions to avert these horrors. We can make sure our states abide by their obligations - indeed if the judges will not stand up who will?

I am not blind to how we ourselves sometimes can contribute to government frustration. There are undoubted delays in our systems, which could be avoided by more effective and less long-drawn out review procedures. Individually we can often minimise causes for complaint in this area and where we can we should do so. The IARLJ has had a working party functioning to look deeply into this issue for over six years. We have produced two publications and several chapters in books[3] on this topic but the most comprehensive review so far, started when Jacek Chlebny chaired this Working Party has been taking place since Bern in a Working Group under the chairmanship of Michael Creppy, Chief Immigration Judge in the US. He will tell you I am sure how his efforts are frustrated by the inability to reach the very people he needs to reach. We simply do not have the resources.

We can often give help in a low key cheap but most effective way as consultants assisting with the determination processes in countries such as Moldova. I think that what was done in the Republic of South Africa last year was valuable but whether it was the best use of resources and money still awaits evaluation. But at least I think the Association and the consultants themselves were greatly appreciated.

All I have said has been said many times before and it applies to the judiciary as a whole everywhere. But at this time that part of the judiciary concerned with the fulfillment of the obligations undertaken by the original signatories 50 years ago are the most vulnerable to attack.

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3 *Asylum Practice and Procedure Country by Country Handbook*; UK Asylum Law in its European Context Chapter 3.

Let me analyse some specific ways in which the IARLJ can and does assist; some I have already mentioned:

(1) We can encourage an understanding of refugee law principles in the context of international human rights.

(2) We can share our knowledge and expertise in both law and practice.

(3) We can man watchtowers to keep the jurisprudence under constant review.

Encouraging understanding

We need every member to be an ambassador in this respect. We have held a seminar on terrorism, another on complementary protection and yet another on other aspects of human rights standards in persecution. We have acted as consultants in other countries.

We are offered and often can accept opportunities offered to participate in regional and international forums in many countries in western and Eastern Europe, on the Indian sub-continent in the Middle East and Far East.

Sharing knowledge

The Workshop Manual on Refugee Law is an excellent tool. I am happy to note that the International Bar Association is following suit with what they call a *Training Manual for Judges and Lawyers*. Apart from the basic courses we have held many of you will by now have attended Professor James Hathaway's Advanced Course this week.

The Iustitiae Programme, which followed an earlier and successful Asylum Judges Support Programme (both funded by UNHCR and the EU) brings together judges from all the countries aspiring immediately to join the EU to exchange knowledge and experience of this area of jurisprudence. The IARLJ is in partnership with Judges and Judges Associations in the Netherlands, Germany, Austria and Belgium, Sweden, Finland and France, all of whom supply their expertise free - but the funds must come from the institutions we assist. This was the impetus to the creation of the European Chapter of the IARLJ last year. Now under the Convenorship of Judge Jacek Chlebny of Poland.

Regional Chapters are I am sure valuable but they are there to monitor and help with more localised issues and are subordinate to the Association.

Efforts are being made to co-ordinate and improve the quality of background material and its accessibility, especially in countries with little access to this crucial part of any worthwhile decision. We have agreed with EIN for access to their database to be free to a number of countries at least to start with and I chair a committee of Eurasylum (comprising a number of well known academics and other members) a body concerned with the collection and evaluation of data.

Jurisprudence

There are six ongoing Working Groups. I want more people to participate; more people to see they have the ability to make a contribution globally to the issues which we face daily. Your executive has budgeted for money to be made available to these groups to pay for telephone (or video) conferences to assist with their deliberations.

Such is the benefit of this part of our work to the global development of refugee related law that I would urge the next Council to make it a priority to persuade their countries to set aside both the time and the funds to enable the workshops to function more effectively. Canada has done this and their reports confirm it. The USA would I think have been able to do more had it not been for the tragedy they suffered on 11 September 2001.

On this I wish here and now to repeat the Association's sentiments of sympathy and most importantly respect, which we all have for the American people for how they have conducted themselves on that day and since.

We have tried to co-operate with James Hathaway on his database of 8 major countries producing reasoned decisions on refugee law marshal correspondents in as many other countries as possible to provide a broader base to the jurisprudence. I started a pilot scheme with Sweden, Poland, Uganda and India.

Progress in this, as in most fields is hampered in several ways. The lack of funds is an obvious impediment, but it is the areas in which the funds are required which raise the other obstacles. Clearly if we had the money to have a fulltime secretariat and suitably qualified Director/Secretary the planning organising and follow-up would make it easier for busy judges to make their contributions. But even with this I think there needs to be close liaison with other Institutions such as National Judges Associations, the Commonwealth Magistrates and Judges Association, the International Bar Association, The Commonwealth Secretariat and so on and above all we need a structured planning with UNHCR. We have contacts with the UN and the UNDP but it must be to the UNHCR that we look primarily.

The co-operative opportunities created by Regional Chapters is another way forward, and this has been manifested in the European Chapter. I look at the other Regional Chapter – the first one between two countries – that of Australia and New Zealand. Many may be despondent – after all events in Australia seem to have led to the situation where only very few have been able to attend this Conference.

I said earlier that one of our restrictions is a lack of manpower. But there is a wealth of experience among adjudicators in Australia and judges who have made significant contributions to the development of the jurisprudence. It does not go away though and we can harness it. But we need the money and the vision and support of some of our supporting institutions to help.

I think this is well illustrated by Paul Whites' consultancy (out of a personal commitment) in South Africa, along with others from NZ and the UK last year and his present detachment in Afghanistan. I hope he will report on his experiences on his return. He represents the storehouse of expertise on which we can draw world-wide for help, when perhaps such services are (temporarily I hope) not required at home.

On a one-to-one basis what some members of the Immigration Appellate Authority have been doing in Moldova for several years is a small example.

It is in the realm of organising teams of judges to help in appeals and bodies in such ways and advising on effective procedures that the OAU and EU could do much more. I do not much like committees but a small one on this with representation from UNHCR, UNDP, UNO, UNHRC and IARLJ meeting once a quarter could make sure we know where we are needed and who is available.

Turning to money. Your executive has prepared budgets for the next three years within the funds we have. But those funds are not enough to enable your executive, each one a judge up to his or her eyes in day to day work and pressure, to keep the Association moving forward.

We are therefore presently looking at additional funding from two aspects. Firstly Project Funding. By this we mean trying to identify funders for specific projects which we want to engage for the development of an effective Association.

Such projects fall into two categories. Those which are central to our aims keep the Association moving forward. They will tend to be ones which bring together the maximum number of our members. Activities which make

membership attractive and worthwhile in a very basic sense. And then there are the projects which will broaden the reach of the Association for the benefit those coming new to this jurisdiction or involve aspects of development in this jurisdiction.

Secondly is funding of the Association as a whole. Between a membership of 500 as it is now and 3000 which I think is the maximum we can ever reasonably expect in this jurisdiction a realistic aim could be about 750 members. If we try to maintain a membership fee at the present level, eschew self-financing conferences and give courses based on the Workshop Manual free — making allowances for inflation — this gives us an income of around from $25,000 (if every member paid up on time). To assist payment we are hoping to implement a credit card payment facility this coming year.

But even with that number of members we would still need at least $200,000 to run the administration effectively without overloading the judges. To have enough in hand simply to be able to have enough in hand to carry on our projects — Conferences, seminars, research with the working groups and training the dissemination of material and so on without having to wait for the funds — which may or may not come in - we need $1,000,000.

I must confess that I would like to see a substantially larger amount which we could invest to produce an income which frees us completely from any outside influences and enables us to reach all our members and for our members to access whatever information which we are able to make available for them. For this we certainly will have to create a charitable trust.

We have not only budgeted over the next three years but we have put up specific and targeted budgets to UNHCR, Council of Europe, Ford Foundation, the UK Foreign and Commonwealth Office and the Lord Chancellor's Department and others.

Membership

Unless we can offer potential members something tangible and useful to their work they will not join or if they do they will not make any active input. They need to be able to gather information, they need to meet others, they need to attend meetings and conference seminars and they need to be involved. In short they must feel they are wanted and belong to a body which helps them in their very onerous job.

As said earlier we formed a European Chapter of the IARLJ to deal with specifically local issues and to assist in holding regional events, which are accessible to members in the region. So far we have no members from Portugal, Spain or Italy. I hope that will be remedied at the European Congress of Jurists in Lisbon to which we have been invited to participate and to which judges from the area have also been invited with a view to having a meeting.

The same went for the Australia NZ Region and I had hoped that they would reach out to other countries in the region such as Japan, China, Malaysia, Singapore and Indonesia and we would have seen one or two Chinese judges this time - there are contacts in place but the time in the end was too short to make arrangements.

The need and desire to establish an African Chapter, or several Regional African Chapters, is being explored. Communications there are the most immediate problem. No Region has any funds of its own and many members do not have ready access to working emails. One of the greatest services which would benefit not only the judges and their courts as well as the decisions themselves would be a reliable means of communication available directly to our members and through them to their colleagues - and others. The central body is the only route through which such a project could be run. When you see the somewhat startling figures I mention in fund raising they were with such a vision in mind. It is not in my view appropriate for a region to seek separate funds for its running. I believe that it is the intention of the few delegates from Africa here at this Conference to get such a Regional Chapter up and running to help realise the aim to have the next Conference in Africa.

At the moment we divide fee structure into above and below a country's GNP - with low fees for countries, where incomes are lower relatively than in many other countries and hard currency is not easy to come by either to pay the fee or attend a conference. I would like to suggest that the incoming executive be mandated to review this fee structure. Those of us in the wealthier countries may view a subsidisation of our less fortunate colleagues by paying a somewhat higher fee is more satisfying and a more effective and also more acceptable to everyone. It would certainly in my view make funding our association more attractive to donors to see we are doing what we can to fund ourselves.

Once again I take great pleasure in recording our gratitude to the Netherlands for its generosity in funding our secretariat and allowing us the use of personnel. You may have noticed new names there. Liesbeth van de Meeberg, who used to be Sebastiaan de Groot's Secretary gives every morning to the business of the

Association and seems to manage a full day's work. We are very grateful to her industry, and cheerfulness.

Then there is Eva Kuipéri. She is legally trained and works the rest of her time with the Asylum and Immigration Division of the Court in The Hague. She came with the Iustitia Project but is able to assist with many aspects of our work. UNHCR has generously agreed to fund her to stay with us for an extra six months and we are trying to persuade it and/or some other donor to extend that facility indefinitely and on a full time basis week.

I now come to the nostalgia! It is just 10 years ago that a discussion in Glasgow provided the springboard for what is now the IARLJ. It became a reality because the then Lord President Lord Hope, Lord Kenneth Cameron, Lords Justice John Laws and Stephen Sedley, Hugo Storey, the late and much missed Shun Chetty, Walter Stoeckli, Nurjehan Mawani Joachim Henkel, Sebastiaan de Groot, Michael Creppy, Allan Mackey, Gaëtan de Moffarts, Jacek Chlebny and his President Professor Hauser, Roger Errera, Johan Fischerstrom and others from Norway and Italy and elsewhere were thinking along the same lines. We had visionaries in UNHCR like Rick Towle and indeed Victor Callender who contributed so much to the success of the first Conference and silent support from Lord Mackay, the then Lord Chancellor in UK. We were soon joined by others.

There is much goodwill elsewhere in higher Courts in Canada, the UK, India, Australia, Poland and the Netherlands and New Zealand at least. We need to draw from this well of wisdom and support. We need to encourage the fainthearted and convert the doubtful to our confidence that there is nothing but positive assistance to be drawn from IARLJ – but as usual you get out what you put in – with interest I think.

I hand over to Allan Mackey, in his own home, confident that under his guidance the Association will extend its influence and consolidate its foundations. I, like others who are to take a back seat, give our unquestioned support to you all. Thank you for your friendship your wisdom and comradeship. I value all of it and shall do always.

ANNEX 1

IARLJ INTER-CONFERENCE WORKING PARTIES PROCESS

The IARLJ has defined itself in the following way:

The Association is an independent body of individual judges whose aims are broadly to encourage standardisation of practice procedure and interpretation of refugee law and practice throughout the world.

The Inter-Conference Working Parties process, first established at the second IARLJ Conference in Nijmegen in January 1997, has as its objective to assist in the development of a coherent body of international refugee jurisprudence.

Clearly, this Inter-Conference Working Parties process is central to the very purpose of the Association. Indeed, the Constitution of the Association requires that we commit ourselves to promoting "within the judiciary and quasi-judicial decision makers world-wide a common understanding of refugee law principles and to encourage the use of fair practices and procedures to determine refugee law issues." (IARLJ Constitution, Part 1: Objects of the Association, Section 2(1)).

The Constitution also calls upon its members "to promote or undertake research initiatives, publications, and projects that further the attainment of the objects of the Association." (Section 2(5)). The Inter-Conference Working Parties process has been one of the principal vehicles for promoting these central objectives of the Association.

There are currently six active Inter-Conference Working Parties:

Membership in a Particular Social Group, Rapporteur, Lory Rosenberg (USA);

Non-State Agents of Persecution, Rapporteur, Roland Bruin (The Netherlands);

Asylum Procedures, Rapporteur, Michael Creppy (USA);

Internal Flight Alternative, Rapporteur, Kim Rosser (Australia);

Human Rights Nexus, Rapporteur, James C Simeon (Canada);

Vulnerable Categories, Rapporteur, Edward Grant (USA).

They are examining a number of critically important issues of refugee law within their specific issue area. Each Working Party has prepared an in-depth report that has been included in the delegate Conference materials. I am sure that you will find this material extremely valuable. I should like to encourage all of you to read and to consider the contribution of each of the Working Parties for the Conference. I should also like to encourage you to consider engaging actively in the debates and discussion that is ongoing in each of the Working Parties.

An active and energised Inter-Conference Working Party process is absolutely essential to the purpose and objects of our Association, and I encourage all members to participate actively in the Working Party of their choice. All of us have the ability to make a contribution globally to the issues that we face in the hearing rooms on a daily basis.

To this end, the IARLJ Executive has budgeted monies to be made available to the Inter-Conference Working Parties process to ensure that their vitally important work on behalf of the Association gets completed from one Conference to the next.

I should also like to give my special thanks to Dr Hugo Storey, the Co-ordinator of the Inter-Conference Working Party process, for his outstanding efforts in directing and supervising the work of our Working Parties since their inception. Without his determined and visionary efforts the Working Parties would not have made the outstanding contribution that they have over the years.

ANNEX 2

LIST OF PROJECTS

Conferences

World

London November/December 1995, 53 delegates from 21 countries

Nijmegen January 1997, 69 delegates from 18 countries

Ottawa October 1998, 169 delegates from 70 countries

Bern October 2000, 200 delegates from 71 countries

Regional

Asylum Judges Support Programme (meetings in Slovakia in 1999 and Austria)

Iustitiae met in Dublin in March 2002

South Africa June 2001 *"The Convention at 50 - The Way Ahead"*

Professional Development (Training Workshops)

Individual

Many of us have attended training and other seminars and conferences over 8 years in Russia, Ukraine, Belarus, Estonia November 2001 which was a joint effort Denmark Switzerland involving 50 judges and others from CIS and Baltic States, Bulgaria, Romania, Hungary, New Delhi, Calcutta, Cairo, Anaheim and Washington. Edinburgh and Capetown in co-operation with the Commonwealth Judges and Magistrates Association.

Group

The Philippines

Dublin in March 2002 under the Iustitiae Programme when a small Conference was also held

Netherlands with the Council of Immigration judges and the Immigration Appeal Tribunal

Kampala April 2000

Tanzania November 2001

And also at each of the Conferences in Ottawa and Bern, and now New Zealand, Workshops were held which drew in all some 200 judges and others. At each of these a new dimension has been added - Training For Trainers in Bern and an advanced course in Auckland.

Seminars and Colloquia

Human Rights Paradigm London 2000

Complementary Protection London 2001

Terrorism 2002. In co-operation with UNHCR and the Immigration Law Practitioners Association

Working Groups

There are 5 as follows

Human Rights Nexus - James Simeon

Asylum Procedures - Michael Creppy

Membership of a Particular Social Group - Lory Rosenberg

Non-State Agents of Persecution - Roland Bruin

Internal Flight Alternative - Kim Rosser

Vulnerable Categories - Edward Grant

Research

This was carried out for the Country by Country Handbook funded by Rowntrees Charitable Trust, the Law Department of Napier University, Edinburgh and UNHCR

Publications

Country by Country Handbook Conference Books: London, Nijmegen and Ottawa and Bern.

The main papers from Bern were published in the Georgetown University Law Review.

Website activity

This has been totally revamped this year and is run from Haarlem by Liesbeth

Executive Meetings

These have been held regularly roughly every quarter and the venue rotates generally between Netherlands, Belgium, France, Switzerland and London

Council Liaison

This is presently only possible by email, fax or post.

INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES CONFERENCE PARTICIPANTS WELLINGTON, NEW ZEALAND, OCTOBER 2002

Delegates and email addresses

Ema Aitken, Chairperson, Refugee Status Appeals Authority, New Zealand; Ema.Aitken@nzis.dol.govt.nz

Osamu Arakaki, Associate Professor, Shigakukan University, Japan; osamuara@kwc-u.ac.jp

Ahmed Arbee, Chairperson, Refugee Appeal Board, South Africa; ARBEE@dbs1.pwv.gov.za

Dr Jo Baddeley, Member, Refugee Status Appeals Authority, New Zealand; Jo.Baddeley@nzis.dol.govt.nz

Justice David Baragwanath, High Court of New Zealand; c/- alexandra.mabin@courts.govt.nz

Eamonn Barnes, Ireland; c/- Lisa_M._Crowley@refappeal.ie

John Barnes, Vice President, Immigration Appeal Tribunal, United Kingdom; barnesf@ic24.net

Justice Roland Bruin, The Netherlands; bruinvissen@hetnet.nl

Ruth Buddicom, Member, Refugee Status Appeals Authority, New Zealand; ruthbud@paradise.net.nz

Eamonn Cahill, Ireland; eacahill@refappeal.ie

Geoffrey Care, England; g.care@btinternet.com; or geoffrey.care@courtservice.gsi.gov.uk

Judge Jacek Chlebny, Lodz Section of the Supreme Administrative Court, Poland; chlebny@bluenet.pl

Sir Andrew Collins, High Court Judge, President, Immigration Appeal Tribunal, UK; Andrew.Collins@courtservice.gsi.gov.uk

Gaetan Cousineau, Deputy Chairperson, Immigration & Refugee Board, Canada; gaetan.cousineau@irb.gc.ca

Michael J Creppy, Chief Immigration Judge, United States Department of Justice; michael.creppy@usdoj.gov

Amanda Cross de Chavannes, Member, Immigration Appeals Tribunal, UK; c/- mainrum@waitrose.com

Joan Cunningham, Board Member, Immigration Refugee Board, Canada; joan.cunningham@irb.gc.ca

Tjerk Damstra, Member, Refugee Appeal Board, South Africa; c/-ARBEE@dbs1.pwv.gov.za

Paulah Dauns, Member, Immigration and Refugee Board, Canada; paulah.dauns@irb.gc.ca

Judge Sebastiaan de Groot, Vice President, Court of First Instance, Netherlands; iarljhlm@tip.nl

Judge Gaetan de Moffarts, President, Vaste Beroepscommissie Voor Vluchtelingen, Belgium; gaetan.demoffarts@mibz.fgov.be

Judge Katelijne Declerck, Vaste Beroepscommissie Voor Vluchtelingen, Belgium; Katelijne.Declerck@MiBz.FGov.be

Justice Douglas Drummond, Federal Court of Australia; pa.drummondj@fedcourt.gov.au

Cyril Edinboro, Member, Immigration Appellate Authority, England; jayne@edinboro.fsnet.co.uk

Kate Eshun, Member, Immigration Appeals Tribunal, UK; ceshun@compuserve.com

Lois Figg, Member, Immigration Refugee Board, Canada; lois.figg@irb.gc.ca

Eli Fisknes, Norway; eli.fisknes@une.no

Norma Ford, Member, Refugee Review Tribunal, Australia; Norma.Ford@rrt.gov.au

John Freeman, Vice President, Immigration Appeals Tribunal, England; John.Freeman@courtservice.gsi.gov.uk

The Hon Justice Tony Gates, High Court of Fiji; gatland@connect.com.fj

Justice Susan Glazebrook, High Court of New Zealand; Justice.Glazebrook@courts.govt.nz

Rodger Haines, QC, Deputy Chairperson, Refugee Status Appeals Authority, NZ; rhaines@clear.net.nz

Justice Goran Hakansson, Sweden; goran.hakansson@un.se

The Hon Justice Grant Hammond, Acting Chief Justice, High Court of New Zealand; G.Hammond@courts.govt.nz

Dr Stefan Harabin, Slovak Republic; machalova@supcourt.gov.sk

Judge Henry Hodge, Member, Immigration Appellate Authority, UK; Henry.Hodge@courtservice.gsi.gov.uk

Michael Hodgen, Member, Refugee Status Appeals Authority, New Zealand; michael.hodgen@xtra.co.nz

Rod Inder, Member, Refugee Review Tribunal, Australia; Rodney.Inder@rrt.gov.au

Anver Jeevanjee, Immigration Appeals Tribunal, UK; anver.jeevanjee@virgin.net

Justice Bent Jespersen, Denmark; FLN@INM.DK

Sharyn Joe, Senior Member, Refugee Status Appeals Authority, New Zealand; Sharyn.Joe@nzis.dol.govt.nz

Siri Johnsen, Norway; siri.johnsen@une.no

Adolfo Justino, Mozambique; email address: saim@zebra.uem.mz

Sir Mari Kapi, Deputy Chief Justice, Supreme Court of Papua New Guinea; (no email address received)

Lorenz Kneubuehler, Switzerland; Lorenz.Kneubuehler@ark.admin.ch

Dr Sergej Kohut, Slovak Republic; machalova@supcourt.gov.sk

James Latter, UK; Latterjim@aol.com

Judge Paula Machatine, Maputo City Court, Mozambique; p.machatine@teledata.mz

Justice Andrew MacKay, Federal Court, Canada; andrew.mackay@fct-cf.gc.ca

Allan Mackey, Vice President, Immigration Appeals Tribunal, UK; Allan.Mackey@courtservice.gsi.gov.uk

Justice Rod Madgwick, Federal Court of Australia; pa.madgwickj@fedcourt.gov.au

Justice Mario Mangaze, Chief Justice, Supreme Court of Mozambique; mangaze@teledata.mz

M. Jean Massot, President, Commission des Recours des Réfugiés, France; jean.massot@conseil-etat.fr

Hon Justice Amraphael Mbogholi Msagha, High Court, Kenya, East Africa; jmbogholi@hotmail.com

Judge Sharon McAuslan, Manukau District Court, New Zealand; McAusls@courts.govt.nz

Barbara Mensah, UK; Barbara.Mensah@courtservice.gsi.gov.uk

Paul Millar, Senior Member, Refugee Status Appeals Authority, New Zealand;

Paul.Millar@nzis.dol.govt.nz

Patricia Milligan-Baldwin, Immigration Adjudicator, Immigration Appellate Authority, UK; Pabaldwinmackay@aol.com

Andrew Molloy, Member, Refugee Status Appeals Authority, New Zealand; Andrew.Molloy@nzis.dol.govt.nz

Peter Moulden, Immigration Appeal Tribunal, UK; pmoulden@compuserve.com

Florian Newald, Member, Independent Federal Asylum Board, Austria; florian.newald@ubas.bka.gv.at

Judge Bernard Ngoepe, South Africa; c/- ARBEE@dbs1.pwv.gov.za

Justice Tony North, Federal Court of Australia; amnorth@fedcourt.gov.au or pa.northj@fedcourt.gov.au

Alan Olson, Member, Immigration Appellate Authority, UK; Alan.Olson@courtservice.gsi.gov.uk

Verma Omprakash, Fmr Chief Justice, Lokayukta (Ombudsman) Himachal Pradesh, India; om_prakashv@hotmail.com

Justice Peter Onega, Uganda; amnestycom@africaonline.co.ug

Antonio Pale, Mozambique; saim@zebra.uem.mz

Joulekhan Pirbay, Member, Immigration Refugee Board, Canada; joulekhan.pirbay@irb.gc.ca

David Plunkett, Senior Member, Refugee Status Appeals Authority, New Zealand; David.Plunkett@nzis.dol.govt.nz

Puttaveeraiah Prabhakara, Member, Immigration Refugee Board, Canada; Puttaveeraiah.Prabhakara@irb.gc.ca

Justice Juha Rautiainen, Chairman of a Section, Helsinki Administrative Court, Finland; juha.rautiainen@om.fi

Petrus Retief, Member, Refugee Appeal Board, South Africa; retiefph@freemail.absa.co.za

Lory Rosenberg, Director, Defending Immigrants Partnership, USA; loryrosenberg@cs.com

Kim Rosser, Member, Refugee Review Tribunal, Australia; Kim.Rosser@rrt.gov.au

Lori Scialabba, Chairman, Board of Immigration Appeals, USA; Lori.Scialabba@usdoj.gov

Virginia Shaw, Senior Member, Refugee Status Appeals Authority, New Zealand; Virginia.Shaw@nzis.dol.govt.nz

Peter Showler, President, Immigration Refugee Board, Canada; peter.showler@irb.gc.ca

James Simeon, Co-ordinating Member, Immigration Refugee Board, Canada; Jim.Simeon@irb.gc.ca

Walter Stöckli, President of Chamber, Swiss Asylum Appeal Commission, Switzerland; walter.stoeckli@ark.admin.ch

Dr Hugo Storey, Member, Immigration Appeal Tribunal, UK; hugohs30@aol.com

Sehba Storey, Chief Asylum Support Adjudicator, UK; Sehba.Storey@aspaj.gsi.gov.uk

Martin Treadwell, Senior Member, Refugee Status Appeals Authority, New Zealand; Martin.Treadwell@nzis.dol.govt.nz

Lisa Tremewan, Senior Member, Refugee Status Appeals Authority, New Zealand; Lisa.Tremewan@nzis.dol.govt.nz

Brock Trethowan, Immigration Adjudicator, Immigration Appellate Authority, UK; brock.trethowan@virgin.net

Paul White, Member, Refugee Review Tribunal, Australia; paul.white@rrt.gov.au

Sue Zelinka, Member, Refugee Review Tribunal, Australia; sue.zelinka@RRT.gov.au

Speakers - (not included in the above)

Jenny Bedlington, Senior Adviser, Department of Immigration and Multicultural and Indigenous Affairs [DIMIA], Australia; jenny.bedlington@immi.gov.au

Dr Radhika Coomaraswamy, United Nations Special Rapporteur on Violence; rcoomaraswamy@yahoo.com

Dr Mary Crock, Senior Lecturer in Law, University of Sydney, Australia; maryc@law.usyd.edu.au

Erika Feller, Director, Department of International Protection, UNHCR, Geneva; feller@unhcr.ch

Michel Gabaudan, UNHCR, Canberra, Australia; gabaudan@unhcr.ch

Professor James Hathaway, Professor of Law and Director of the Program in Refugee and Asylum Law, University of Michigan Law School, USA; jch@umich.edu

Sir Kenneth Keith, Judge of the Court of Appeal, New Zealand; k.keith@courts.govt.nz

Dr Penelope Mathew, Lecturer in International Law, International Law of Human Rights, and Feminist and Critical Legal Theory, Australian National University (ANU) Faculty of Law, Australia; MathewP@law.anu.edu.au

Dr Sharon Pickering, Senior Lecturer in Justice Studies, Social Sciences and Liberal Studies School, Charles Sturt University, Bathurst, Australia; Spickering@csu.edu.au

Judge Stephen Reinhardt, Court of Appeals for the Ninth Circuit, Judge_reinhardt@ca9.uscourts.gov

Philip Rudge, former General Secretary of the European Council on Refugees and Exiles (ECRE), now independent consultant on refugee issues; England; philiprudge@refu.demon.co.uk

Sir Stephen Sedley, Lord Justice of Appeal, England; Dawn.o'brien@courtservice.gsi.gov.uk

Professor Saskia Sassen, Ralph Lewis Professor of Sociology, University of Chicago, USA; s-sassen@uchicago.edu

REPORT OF INTER-CONFERENCE ACTIVITIES OCTOBER 2000-OCTOBER 2002

*Lory Diana Rosenberg**

I OVERVIEW

This report covers the activities of the IARLJ Membership of a Particular Social Group (MPSG) working party between October 2000 and October 2002. Internet citations are provided, where available, for documents and authorities referred to in the report. A series of appendices containing materials produced by the working party members and other documents referenced in the report is included as an e-file attachment.

II MPSG WORKING PARTY BACKGROUND

The working party on Membership of a Particular Social Group was formed by the IARLJ executive leadership in 1997, with approximately 10 IARLJ members representing various countries and the United Nations High Commissioner on Refugees named to participate in the working party. In its first season, under the leadership of Rodger Haines, Deputy Chairperson of the New Zealand Refugee Status Appeals Authority (RSAA), the working party members exchanged information concerning their countries' interpretation and application of the MPSG category and produced a paper entitled *Interim Report of IARLJ Inter-Conference Working Party: Membership of a Particular Social Group* (1998) ("Interim Report").

The *Interim Report* was presented by Rodger Haines at the IARLJ 1998 World Conference held in October 1998 in Ottawa, Canada. The working party members and other interested in participating in the working party met in an organized session

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* Rapporteur (Nov 2000-Oct 2002).

at the 1998 Ottawa conference and discussed gender-related claims and their relationship to MPSG and the scope of the MPSG working party.

The members of the MPSG working party and other interested IARLJ members next met briefly as a group during the 2000 conference in Berne, where member Paul Tiedemann discussed his paper on *Protection Against Persecution Because of "Membership of a Social Group" in German Law*. In addition, the group addressed the points included in a brief paper distributed by member Lory Diana Rosenberg, which articulated many of the factors relevant to individual adjudications of refugee claims based on membership of a particular social group. *See Examination of Current Country Interpretations of Membership of a Particular Social Group Under the United Nations Convention Relating to the Status of Refugees.*

The group in attendance agreed that MPSG continued to be a developing category under the refugee definition and noted that there had been some significant developments in the application of the category to gender related claims, particularly in the New Zealand, Australia , the UK and the US. As these applications were by no means uniform or consistent with one another in either approach or result, the group agreed that it would be valuable to proceed with the comparative work that had begun two or three years before. Following the 2000 Bern Conference, I assumed the position of rapporteur for the group.

III PARTICIPATION IN 2001 UNHCR GLOBAL CONSULTATIONS

In 2001, shortly after the Bern Conference, the UNHCR convened a process of Global Consultations on International Protection, designed to address and clarify certain interpretive issues arising in various provisions of the Refugee Convention. In furtherance of this objective, the UNHCR commissioned written papers and commentary focusing on membership of a particular social group, followed by an expert roundtable conducted at San Remo, Italy in August 2001.

The principal paper for the MPSG roundtable was prepared by Professor T Alexander Aleinikoff and included a comprehensive section addressing the particular interpretations and applications of the MPSG category adopted by individual countries. See TA Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the meaning of "Membership Of A Particular Social Group,"* available at http://www.unhcr.ch/cgi-bin/texis/vtx/protect (click Global Consultations, Second Track). As part of the process, IARLJ was invited to submit a commentary on Professor Aleinikoff's paper on MPSG, which I prepared at the request of now-President Allan Mackey. See UNHCR Global Consultations 2001: Second track

-Membership of a Particular Social Group, Rosenberg, *Commentary and Critique on Membership of a Particular Social Group,* at E-Appendix C.

Subsequently, on May 7, 2002, the UNHCR issued Guidelines on international protection No 2: Membership of a Particular Social Group within the context of article 1A(2) of the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees. (HCR/GIP/02/02), available at http://www.unhcr.ch/cgi-bin/texis/vtx/protect (click Global Consultations, Second Track, New Guidelines). See also Gender related Persecution, by Rodger Haines, Deputy Chairperson., RSAA, available at http://www.unhcr.ch/cgi-bin/texis/vtx/protect (click Global Consultations, Second Track), and Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) available at http://www.unhcr.ch/cgi-bin/texis/vtx/protect (click Global Consultations, Second Track, New Guidelines).

IV RECONVENING OF THE WORKING PARTY

In a January 2002 letter to working party members, prior to issuance of the UNHCR's new MPSG guidelines, I reported that since the Bern conference, the UNHCR had conducted a series of Global Consultations on the Refugee Convention, producing two papers specifically addressing both MPSG and gender-related asylum claims. I recommended reviewing both papers as relevant to our own comparative examination of the features of MPSG that have been identified and implemented in the adjudications made by various countries' tribunals.

Specifically, I suggested that it might be useful for each working party member to (1) identify which points in the summary conclusions are consistent with the practices in the jurisprudence of that member's country and which points are not; and (2) note any points that are particularly controversial, explaining the aspects of the country's jurisprudence or the member's concerns that would preclude agreement with any particular point. Each member was encouraged to offer his or her impressions of the differences between the positions taken in the papers and the conclusions reached by the UNHCR roundtables, particular with respect to his or her country's practices.

V QUESTIONNAIRE

To make this endeavour more concrete, I developed a questionnaire geared to elicit responses to common questions relating to the interpretation and application of the MPSG category in each country. On April 1, 2002, I circulated the questionnaire

to the working party and the entire IARLJ membership in the hope that we might collect members' comments on the law and practice in each individual country to further our discussion of the state of MPSG practice and jurisprudence.

The questionnaire circulated sought responses on

- The extent to which the social group ground is invoked, and if it is not routinely invoked, how relevant claims are characterized and adjudicated;
- The formulation, ie, the elements and factors, according to which refugee claims based on social group are construed;
- How overlapping Convention grounds are treated;
- Whether cohesion or association is required to find the existence of a social group;
- Whether a shared characteristic must set the group apart from others, and whether that characteristic must be innate, unchangeable or fundamental to human dignity;
- The extent to which a shared risk of persecution may serve as the unifying characteristic;
- The degree to which the group must be cognizable, ie, whether social perception of the group and its members is essential;
- Whether every member of the group must be at risk of persecution, and whether the persecutor must target other members of the group as well as the applicant;
- The way in which any nexus requirement, ie, that the fact or risk of persecution is for reasons of MPSG may be satisfied; and
- The weight given to evidence of cultural, social, political and legal factors in determining persecution based on this Convention ground.

The questionnaire also sought responses relating to state interpretation and practices on gender-related persecution, including:

- Whether the state views the Convention as requiring a gender inclusive interpretation and recognizes gender-related claims;
- Whether the state makes a distinction between gender, as an expression of power relations between men and women, and sex, as a characteristic that is biologically determined;

- Whether gender-related grounds are more readily adjudicated under the grounds of race, religion, nationality or political opinion;
- Whether the state observes a gender-sensitive interpretation in adjudicating all Convention grounds and what steps are taken, if any, to take into account social, cultural or religious mores, or the effect of rape trauma and other persecution-related trauma on women in adjudicating gender-related claims;
- Whether women, as a group, may be considered a social subset defined by innate and immutable characteristics, and if not, what additional factors are required to establish a social group;
- Whether protection from Convention ground based persecution inflicted by a non-state actor is recognized, and whether failure of state protection for reason of a Convention ground triggers protection from harm imposed or feared for reasons unrelated to any Convention ground; and
- Whether there are alternate bases prohibiting expulsion of women where the applicant does not meet the requirements of the Convention.

VI RESPONSES TO QUESTIONNAIRE

The responses to this voluntary survey, while anecdotal, yield interesting information. The reporting members provided information on the following countries: Australia, Austria, Canada, Finland, Norway, and Sweden. In addition, the working party had received prior information on Germany's treatment of the MPSG ground through the paper of Dr Paul Tiedemann, and members provided recent jurisprudence from New Zealand, the United Kingdom and the United States providing insight into the positions of those countries with respect to the topics covered in the questionnaire. Additional information concerning the views of other countries is contained in TA Aleinikoff, *Protected Characteristics and Social Perceptions.*

The prepared responses received from working party members and the selected relevant decisional authority are summarized below and/or attached as appendices, or cited, respectively. I apologize in advance if I have neglected to mention the contributions of any working party member or other contributor.

Australia – Australia's interpretation and practice was provided in the form of relevant sections of Australia's Refugee Review Tribunal ("RTT") "Guide" forwarded by Dr Ron Witton, rwitton@uow.edu.au. (Please contact Dr Witton for

further information). See also the seminal case on which Australia's MPSG jurisprudence is based, *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225, 142 ALR 331, and Minister for Immigration and *Multicultural Affairs v Khawar*, (2000) FCA 1130.

Austria – Florian Newald of the Federal Asylum Agency of Austria responded by fax (43 1 60149 4450, also: 60149/4310,11), indicating that the MPSG ground had been invoked very rarely, although that changes have been seen in recent cases. In a recent Sudanese asylum claim the court had ruled that the child of an incestuous relationship belonged to a particular social group. Subsequently, the court ruled that asylum seekers who are persecuted instead of their relatives are convention refugees regardless of whether they share corresponding political beliefs and whether the authorities impute such beliefs to them. In general, there appears to be reliance on definitions of the EU and Canada in the *Ward* case.

Gender-based claims are recognized under the MPSG category, as well as political, religious, or a mixture of grounds. Until recently persecution by non-state agents was not covered; however, in its last decision, the court indicated that it is decisive that the state denies protection on a Convention ground without regard to the reason for persecution by a non-state agent.

Canada – An extremely comprehensive discussion of Canada's interpretation and practice on both MPSG and gender-related persecution cases is provided in the extensive and detailed responses prepared by Michael Ross of the Immigration Review Board. Mr Ross discusses the leading cases and the interpretation followed in Canadian decision making in MPSG and gender-related persecution cases. The seminal decision from which Canadian MPSG law has developed is *Canada (Attorney General) v Ward* (1993) 2 SCR 689.

Finland – Ilkka Pere replied by email indicating that Finland's approach to international protection has relied primarily on a "special de-facto-humanitarian status" that covers the grounds warranting protection.

Germany – See discussion in Tiedemann paper.

New Zealand – The considerations pertinent to the MPSG category are extensively developed by Deputy Chairperson Rodger Haines of the RSAA in Refugee Appeal No 71427/99 (2000), available at www.nzrefugeeappeals.govt.nz.

Norway – Responses to the questionnaire from Norway indicated that MPSG as a Convention ground has limited applicability in Norwegian practice. Under Article 15 of the Norwegian Immigration Act protection is extended to any foreign national

in considerable danger of losing his life or being made to suffer inhuman treatment. In addition, Article 8 provides that even when the requirements are not satisfied, a work or residence permit may be issued for humanitarian reasons.

Gender-related persecution has not been squarely addressed. Although gender and sex are covered by the same word, discrimination is not sufficient to trigger protection, but the power relations between women and men are likely to be considered.

Sweden – The response from Sweden explains that the MPSG Refugee Convention ground has never been put into practice in Sweden, as Sweden is not a common law country and introduced another approach to gender-related persecution cases in 1997. This separate provision was aimed to increase protection for individuals who feared gender-related persecution. At the same time the Swedish Parliament rejected a proposal that MPSG, including all women, should be applied in this situation, as most of the EU member states did not support such a development. The response indicates that Swedish legislation also contains a provision founded on the UN Convention Against Torture, according to which an individual must not be expelled if he or she has a well-founded fear of being subject to torture or other cruel, inhuman or degrading treatment or punishment. This provision has been applied, eg, when there has been a well-founded fear of Female Genital Mutilation.

In March 2001, the Migration Board of Sweden issued gender guidelines for investigation and evaluation of the needs of women for protection.

United Kingdom – The prevailing interpretation of the MPSG ground of persecution in the United Kingdom is contained Dr. Hugo Storey's decision in *Sec'y of State for the Home Dep't and Montoya,* Appeal No CC/15806/2000) (27 Apr 2001). *See also Islam v Sec'y of State for the Home Dept and R v Immigration Appeal Tribunal and Sec'y of State for the Home Dept ex parte Shah,* [1999] 2 WLR 1015; [1999] INLR 144. Also reprinted in 11 *International Journal of Refugee Law* 496, 1999.

United States – One of the first interpretations of the MPSG category was articulated in *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). See also, *Matter of Kasinga*, 21 I & N Dec 357 (BIA 1996), and *Matter of S-A-*, 22 I&N 1328 (BIA 2000). *Cf Matter of R-A-*, 22 I&N 906, Interim Dec 3403 (BIA 1999) (vacated and remanded for reconsideration, Attorney General 2001).

The foregoing reflects the contributions made in response to the working party's questionnaire and is by no means an exhaustive discussion or analysis of the many resources providing insight into the MPSG category that have come into being in the past several years. The responses and the recent jurisprudence confirm the direction in which MPSG analysis and practice has been moving over the past several years, while reflecting the continuing tension between expanding and restricting the category. The country-by-country discussion of MPSG in the paper prepared by Professor TA Aleinikoff for the 2001 Global Consultation should be consulted for a comprehensive overview that echoes some of the working party responses received and rounds out the picture of various country practices.

VII PRESENTATION AT THE 2002 IARLJ WORLD CONFERENCE

As noted above, in May 2002, the UNHCR issued new guidelines covering the MPSG category and gender-related persecution. I participated in a panel on the Global Consultations process at the 2002 IARLJ Biannual World Conference in New Zealand, where I discussed the findings of our working party and the new MPSG guidelines set forth by UNHCR.

VIII CLOSING COMMENTS

My resignation from the United States Board of Immigration Appeals on October 1 2002 necessitates my turning over the rapporteur responsibilities for the MPSG working party to another IARLJ member. In closing this report, I wish to thank those who have given me the opportunity to participate in the IARLJ while I sat on the Board of Immigration Appeals. I also thank each of the IARLJ members and others who have generously shared their thoughts and ideas with me, and contributed to the projects in which I have been involved. I continue to support the ongoing activities, collegiality, and growth of the IARLJ, and hope to remain involved with the working party and other endeavours of the organization as an associate member of the IARLJ.

HUMAN RIGHTS NEXUS WORKING PARTY BACKGROUND PAPER FOR THE WELLINGTON CONFERENCE ON SUBSIDIARY/ COMPLEMENTARY PROTECTION

*James C Simeon**

This background paper examines the application of subsidiary/complementary protection, in a number of jurisdictions, to those who would face serious harm should they return to their country of nationality or former habitual residence. It focuses, in particular, on the European Union (EU) Council Directive on International Protection and subsidiary/complementary protection in the United States, United Kingdom, Canada and Sweden. The background paper notes a number of perceived disadvantages in the application of subsidiary/

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* James C Simeon is a Coordinating Member of the Refugee Protection Division of the Immigration and Refugee Board of Canada (IRB). He is also the Assistant Coordinator of the Inter-Conference Working Parties Process of the International Association of Refugee Law Judges (IARLJ). The analysis and opinions in this paper are solely those of the author and do not represent the position of the IRB. This paper, however, was a collaborative effort prepared with the contribution and assistance of the participants of the Human Rights Nexus Working Party (HRNWP) of the International Association of Refugee Law Judges (IARLJ). A number of HRNWP participants should be acknowledged for their substantial contribution to this paper: Dr Hugo Storey, Goran Hakansson, and Paulah Dauns. I should also like to thank Paula Thompson, Special Advisor to the Chairperson of the IRB, and Patricia Auron, Legal Advisor at the IRB, Vancouver Regional Office, for their comments on earlier drafts of this paper.

complementary protection among States in the world today and suggests four areas that need to be resolved and explored in order to address these perceived disadvantages. The background paper concludes with a brief analytical summary that suggests that although there are distinct trends toward the harmonization of international protection standards there are still, presently, considerable and significant variations among States in the application subsidiary/complementary protection.

I TOWARD A COMMON EUROPEAN ASYLUM SYSTEM

It has been noted that most States extend some form of protection to persons who are not covered by the 1951 Geneva Convention. These persons are protected against refoulement because there are valid and compelling reasons for not returning them to their countries of origin, even though they do not fall strictly within the definition of Article 1A(2) of the 1951 Geneva Convention.[1]

In his closing remarks, at the seminar held in Norrkoping, Sweden, in April 2001, on "International Protection Within One Single Asylum Procedure," Guus Borchardt, Director, Directorate-General Justice and Home Affairs, European Commission, stated:[2]

> In assessing claims for international protection, it should first and foremost be assessed whether or not the person in question is covered by the Convention, before assessing if any other protection system is appropriate in that particular case. This approach reflects well the primacy of the Convention. In that sense the term "subsidiary protection" clearly and accurately reflects that any such regime is subsidiary to the protection regime offered by the Geneva Convention.
>
> This Seminar used another term indicating the regime of subsidiary protection, namely "complementary protection". It is not worthwhile fighting too long over the use of the exact terminology. This particular term, we feel, reflects equally clearly and accurately the relationship between the Refugee Convention and other

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1 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, p. 1.

2 Guus Borchardt, Director, Directorate-General Justice & Home Affairs, European Commission, *Report from the Seminar, "International Protection within One Single Asylum Procedure."* 23-24 April 2001, in Norrkoping, Sweden, Migrationsverket, 2001-06-15.

protection regimes, in that any other regime offering international protection to those in need of it and not covered by the Refugee Convention, should be seen as complementary to the regime offered by the Convention.

This seminar, organized during the Swedish Presidency of the EU, was part of the ongoing negotiations leading to the harmonization of asylum policy within the EU.

In October 1999, the Tampere European Council reaffirmed the importance that the EU and member States absolutely respect the right to seek asylum.[3] The Tampere European Council further agreed to work towards establishing a Common European Asylum System based on the "full and inclusive application of the Geneva Convention".[4] It is worth noting that in 1994 the EU Committee on Civil Liberties and Internal Affairs of the European Parliament proposed a draft resolution calling on member states to "adopt a common approach to providing protection to the many refugees who are not covered by the 1951 Geneva Convention".[5] This is recognized in some EU member states by distinguishing between 'A status' and 'B status'. The 'A status' constitutes Convention refugee status, while the 'B status' includes victims of war, violence, and violations of human rights.[6] Those who fall under the 'B status' have been referred to as "de facto refugees" or "refugees for humanitarian reasons."

In an effort to move to a Common European Asylum System the Council of the European Union has issued a proposed Council Directive, (2001) 510 final,[7]

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3 Jens Vedsted-Hansen, University of Aarhus Law School, Denmark, "Complementary or Subsidiary Protection? Offering an Appropriate Status without Undermining Refugee Protection" Report from the Seminar, "International Protection within One Single Asylum Procedure" 23-24 April 2001, in Norrkoping, Sweden, Migrationsverket, 2001-06-15, (p 2).

4 Above n 3.

5 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, p 1, n 2.

6 Above n 5.

7 It is important to note that this proposed EU Council Directive is still in draft form. There have been a number of "readings" by the EU Council working group and proposed amendments to the draft examined here. For the complete text see http://www.ecre.org/eu_developments/qual.shtml.

that seeks to establish minimum standards on the qualification and status of applicants for international protection as refugees or beneficiaries of subsidiary protection. This effort is a constituent part of the EU's objective of progressively establishing an area of freedom, security and justice open to all.

II THE PROPOSED EU COUNCIL DIRECTIVE FOR INTERNATIONAL PROTECTION

The proposed EU Council Directive attempts to ensure that a minimum level of protection is available in all EU member States for those genuinely in need of international protection. The proposal is intended to respect fundamental rights and observe the principles recognized by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The EU Council proposal seeks to ensure the applicant's right to asylum and protection in the event of removal, expulsion, or extradition. The proposed EU Council Directive also is intended to ensure that member States fully respect the human dignity of all asylum applicants.

The proposed EU Council Directive seeks to introduce common concepts for terms such as persecution, including the reasons for persecution, the sources of harm and the availability of protection; internal protection/relocation/flight alternative; and, *sur place* claims. In addition, it seeks to introduce a common concept for the persecution ground of "membership in a particular social group". For example, EU member states are expected to be sensitive to child-specific forms of persecution, such as the recruitment of children into armies, trafficking for sex work, and forced labour.

Minimum standards for the definition and content of subsidiary protection status are outlined. For instance, criteria will be introduced for determining which applicants for international protection will be recognized as eligible for subsidiary protection status. The criteria will be drawn from international obligations under human rights instruments and practices existing in EU member states.

Subsidiary protection is defined, in the proposed EU Council Directive, as "any third country national or stateless person who does not qualify as a refugee, according to the criteria set out in Chapter III of this directive, or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention, and who, owing to a well-founded fear of suffering serious and unjustified harm as described in Article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to

such fear, is unwilling to avail himself of the protection of that country." (Chapter II, Article 5, Paragraph 2).

Chapter IV, Qualification for subsidiary protection status, Article 15, the grounds of subsidiary protection, states that EU member States shall "grant subsidiary protection status to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:

(1) torture or inhuman or degrading treatment or punishment; or

(2) violation of a human right, sufficiently severe to engage the Member State's international obligations or;

(3) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights. (Chapter IV, Article 15)

III ASSESSING THE EU COUNCIL DIRECTIVE ON INTERNATIONAL PROTECTION

Dr Hugo Storey's detailed commentary on this proposed EU Council Directive is instructive.[8] He notes that this proposed EU Council Directive is the last of a set of four proposed directives that are currently under discussion. The others are:

- the proposed directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (2000/C/311/E18);
- the proposed directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2002) 326 final);
- the proposed directive on minimum standards on the reception of applicants for asylum in Member States.[9]

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8 Dr Hugo Storey, "The New EU Directive – An Evaluation," May 2002, A paper presented at the IARLJ European Chapter Conference, Dublin, Ireland, May 2002.

9 Above n 8, 2. The proposed directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on a balanced effort

He further notes that there is a proposed EU Council Regulation that would establish the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.[10] He argues that the instant proposed EU Council Directive should have been debated and finalised first, since agreement on who is a refugee and who qualifies for subsidiary protection precedes addressing issues dealing with procedures and reception conditions.[11]

He also notes that the "minimum level of protection" standards offered by the proposed EU Council Directive are neither the lowest nor the highest "common denominator amalgam"[12] in Europe.

With respect to positive comments, he asserts: [13]

> Overall the proposed directive represents a major advance in the legal protection of persons in need of international protection.

He further notes that the proposed EU Council Directive is the "first major attempt to furnish a clear set of criteria governing both protection under the Refugee Convention and other forms of protection due under international human rights law."[14] It also establishes a single concept of "international protection" comprised of both refugee protection and subsidiary protection.[15]

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among member states in receiving such persons has been adopted and shall be implemented by the member states no later than December 31, 2002. (Council Directive 2001/55/EC) This is the second proposed directive on minimum standards on procedures in member states for granting and withdrawing refugee status. The proposed directive on the minimum standards for the reception of applicants for asylum in member states has been adopted informally and is pending the opinion of the European Parliament and the withdrawal of reservations for decisions by national parliaments.

10 Above n 8. See the EU Council Regulation on Criteria and Mechanisms COM (2001) 447 final.

11 Above n 8.

12 Above n 8.

13 Above n 8, 3.

14 Above n 8, 4.

15 Above n 8.

With respect to negative comments, he makes the point that the proposed EU Council Directive lacks integration with the other proposed Council Directives and Regulation noted above. He states that it is imperative that each of the proposed Council Directives and Regulation should cross-reference each other.[16] It is further noted that there is a risk that this proposed EU Council Directive on international protection will "replace an international with a regional European jurisprudence".[17]

The argument has also been made that the proposed EU Council Directive's refugee definition diverges from the Geneva Convention definition of refugee in a number of limited respects. For instance, in the use of the phrase "unjustified harm" that is not found in either the Refugee Convention or the ECHR. Furthermore, it is argued, that "the language of justifiability, insofar as it should come into play at all, should be left to be determined, as now, in accordance with international human rights law principles. To insert it into the very definition of persecution and serious harm only confuses matters".[18] The use of the phrase "unjustified harm" could lead to an "unduly restrictive interpretation and application of the directive".[19]

The proposed EU Council Directive provides a coherent definition of subsidiary protection.[20] It is reasonable to assume that once the proposed Council Directive comes into force, member states will review their own criteria for subsidiary protection to ensure that they are consistent with the definition and requirements for subsidiary protection under the terms of this Council Directive.

It is also important to note that those applicants who are excluded under the terms of this proposed EU Council Directive but are, nevertheless, found to have a risk of a danger of torture and inhuman and degrading treatment or punishment in their countries of nationality or former habitual residences and, therefore, are not removable, will not have the same rights as those who are found to be in need of international protection. Hence, the proposed EU Council Directive provides a

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16 Above n 8, 7.

17 Above n 8.

18 Above n 8, 8.

19 Above n 8.

20 Proposed EU Council Directive, COM(2001) 510 final, 2001/0207 (CNS), Chap II, Art 5, Para 2.

rational basis on which to deny those applicants who are excluded under the terms of this proposed EU Council Directive from gaining equivalent status from those who are not excluded and deemed to be need of international protection.

He further notes that there is a glaring omission that there is no subparagraph in the proposed EU Council Directive that identifies "serious harm arising from exposure to the death penalty."[21] He points out that the Sixth Protocol of the ECHR prohibits this in absolute terms, with the exception in times of war, and that Strasbourg jurisprudence has established that exposing a person to the death penalty is a violation of this protocol of the ECHR.[22] Indeed, a thirteenth protocol of the ECHR has been decided, although it is not yet in force, that prohibits the death penalty, even in times of war.

While the proposed EU Council Directive gives the first legal expression at the EU level of the principle of family unity, it does not extend to the refugee's dependants. It is argued that there is a wide divergence of practice on this among the member states of the EU. He further notes that the proposed EU Council Directive's definition of family member in Article 2 (j) fails to identify lesbian, gay and transgender persons.[23]

It is also noted that Article 13 of the proposed EU Council Directive states that in considering cessation, member States "shall have regard to whether the change of circumstances is of such a profound and durable nature that the refugee's fear of persecution can no longer be regarded as well-founded".[24] He further argues that the "profound and durable" test is too demanding. He notes that "'profound' is a very strong word, for judges and goes well beyond the language found in the Refugee Convention and paragraph 112 of the 1979 *UNHCR Handbook* that refers, rather, to a "fundamental change of circumstances".[25]

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21 Above n 8.

22 Above n 8.

23 Above n 8, 9.

24 Above n 8.

25 Above n 8.

IV SUBSIDIARY/COMPLEMENTARY PROTECTION IN THE US, UK, CANADA, AND SWEDEN

The proposed EU Council Directive is only one example of a number of significant efforts, in recent years, by states and supranational bodies to integrate the 1951 Geneva Convention with subsidiary/complementary protection measures. Asylum judges in the United States, for instance, have acquired jurisdiction in relation to claims based on Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[26] In the United Kingdom, Adjudicators decide claims based on the argument that refoulement would be contrary to the Article 3 of the ECHR. In Canada, Immigration and Refugee Board (IRB) decision-makers, are now required to assess whether a claimant would be subjected to a danger of torture, within the meaning of Article 1 of CAT, and/or a risk to their life or to a risk of cruel and unusual treatment or punishment.[27] The Swedish Migration Board (SMB), previously known as Swedish Immigration Board (SIB), determines applications for asylum, residence permits, and Swedish citizenship. The decisions of the SMB can be appealed to the Aliens Appeals Board (AAB). The decisions of the AAB cannot be appealed.[28] Both Boards examine all grounds for residence permits, including, Convention grounds, affiliation and humanitarian grounds.[29]

As noted, United States Immigration Judges now have jurisdiction over non-refoulement claims based on Article 3 of the CAT. In a recent decision of the Board of Immigration Appeals (BIA) in *J-E, Respondent*, decided on March 22, 2002, the majority upheld an Immigration Judge's ruling that denied the respondent's application for asylum, withholding of a removal order, and protection under Article 3 of the CAT.[30] The issue before the BIA was whether

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26 Deborah E Anker *The Law of Asylum in the United States* 465-552.

27 An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced or in danger. SC 2001, c 27. Immigration and Refugee Protection Act (IRPA), s 97 (1)(a)(b).

28 Aliens Appeals Board – a presentation, 1998, Background, 1.

29 Goran Hakansson, Aliens Appeal Board, Sweden, "Complementary Protection".

30 *In re J-E-, Respondent*, Decided March 22, 2002, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals. See the United States Department of Justice website for the complete decision at http://www.usdoj.gov/eoir/vll/intdec/lib_vol23idxnet.html.

the respondent was eligible for protection under Article 3 of the CAT. The respondent was a citizen of Haiti who was convicted of selling cocaine, a second degree felony under Florida law. The majority ruling in this decision saw two pertinent questions: "first, whether any actions by the Haitian authorities – indefinite detention, inhuman prison conditions, and police mistreatment – constitute torturous acts within the definition of torture at 8 C.F.R. 208.18(a) (2001); and, if so, whether the respondent has established that it is more likely than not that he will be tortured if removed to Haiti".[31] On the first question, the majority found that Haiti's detention policy is a lawful enforcement sanction and, therefore, does not constitute torture. The majority also did not find any evidence that the Haitian authorities were detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering.[32] Rather, the appalling prison conditions in Haiti were due to the country's budgetary and management problems as well as its severe economic difficulties.[33] The majority did acknowledge, however, that "isolated acts of torture occur in Haitian detention facilities".[34] Nonetheless, this evidence was insufficient for the majority to accept that "it is more likely than not" that the respondent would be subject to torture if he were removed to Haiti. The majority, thus, concluded that although the Haitian prison conditions fall squarely within Article 16 of the CAT, that the treatment of prisoners in Haiti amounted to cruel, inhuman, or degrading punishment or treatment, it did not amount to torture.[35] The majority state that, "although these prison conditions do not rise to the level of torture, every effort must be made to improve such conditions."[36] It is important to note that the obligations undertaken by a State Party regarding acts of torture, Article 1 of the Convention, are far more comprehensive than those for "other acts of cruel, inhuman or degrading treatment or punishment, Article 16 of the Convention. Moreover, the obligation of non-refoulement applies to Article 3 of the CAT, where the basis of the fear is torture, and not Article 16, when the fear is of cruel, inhuman, or degrading punishment or treatment.

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31 Above n 30, 292.

32 Above n 30, 300.

33 Above n 30, 301.

34 Above n 30, 303.

35 Above n 30, 304.

36 Above n 35.

V *THE US BOARD OF IMMIGRATION APPEAL DECISION IN* J-E, RESPONDENT

The minority, in the *J-E-, Respondent* judgement, take the position that the "majority errs in concluding that because the Haitian authorities do not have a specific intent to subject returnees to severe physical or mental pain or suffering, the treatment does not rise to the level of torture".[37] The minority further takes the position that this is not an instance of the Haitian authorities merely being negligent but rather "a government deliberately continuing a policy that leads directly to torturous acts".[38] Furthermore, the documentary evidence presented, in the opinion of the minority, indicates "the torture of detainees in Haiti is routine, widespread, horrific, and officially tolerated"[39] that "satisfies a reasonable, common-sense application of the 'more likely than not' standard of protection under the Convention".[40]

The minority opinion, as expressed by Madame Justice Rosenberg, notes that the majority's restrictive definition of torture "is contrary to both international and domestic interpretations of the term".[41] She also disagrees with the majority's interpretation of the specific intent requirements as "proof of an intent to accomplish a precise criminal act".[42] A plain language reading of the text, she opines, "reflects only that something more than an accidental consequence is necessary to establish the probability of torture".[43] She further notes that the regulations point out that "all evidence relevant to the possibility of future torture shall be considered".[44] This clearly denotes that evidence should not be limited to past torture that may have been inflicted on an applicant. She makes the point that even though "past circumstances may be considered, the determination is a prospective one".[45] Accordingly, she concludes that even though it may be that

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37 Above n 30, 307.

38 Above n 37.

39 Above n 30, 308.

40 Above n 39.

41 Above n 30, 315.

42 Above n 30, 316.

43 Above n 42.

44 Above n 30, 317.

45 Above n 30, 318.

"prison conditions alone will not meet the definition of torture", the totality of the relevant evidence, including, "reports of other forms of torture, all committed by Haitian Government officials with impunity, establish that it is more likely than not the respondent will be tortured if returned to Haiti".[46]

The standard of proof for the application of the CAT in the United States is a "balance of probabilities." This test is not found in the CAT case law, where the standard of proof is "substantial grounds for believing". In the United Kingdom the standard of proof in the application of the CAT is equivalent to the lower standard of proof used in asylum cases of a "reasonable degree of likelihood". In Canada, the standard of proof for conferral of refugee protection whether under Sections 96 or 97 of the Immigration and Refugee Protection Act (IRPA) is "serious possibility", "reasonable chance", "good grounds" or "more than a mere possibility". It would appear then that the standard of proof applied in the United States is higher than in either the United Kingdom or Canada.

VI TEMPORARY PROTECTED STATUS IN THE US

The most prominent form of complementary protection in the United States is Temporary Protected Status (TPS).[47] Section 302(a) of the Immigration Act of 1990 allows the United States Attorney General to designate the nationals of a foreign state, already present in the United States, as eligible for TPS, if in the foreign state: there is an ongoing armed conflict that would pose a serious threat of safety to returnees; if there has been an earthquake, flood, drought, or environmental disaster in the state; if the state is unable temporarily to handle the return of its nationals; or if the State has requested such protection. TPS is purely an executive matter and has been based on country-specific concessions introduced over a number of years. Edward Grant has listed the nationals of the countries that are eligible to apply for TPS, if present in the United States as of the date of the designation, as follows: Bosnia/Hercegovina; Burundi; Guinea-Bissau; Honduras and Nicaragua; Montserrat; Kosovo; Sierra Leone; Somalia; Sudan; El Salvador; Liberia; Rwanda; Haiti; Cuba; Ethiopia/Eritrea.[48] The United States

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46 Above n 30, 318.

47 As enacted by Congress under s 302(a) of the Immigration Act of 1990 (s 244A of the Immigration and Nationality Act).

48 Edward Grant, Research Paper Presented at the "Perspectives on Complementary Protection: Colloquy," International Association of Refugee Law Judges & Immigration Law Practitioners Association," London, December 6, 1999, 15-19.

Immigration and Naturalization Service (INS) website lists the following countries as currently designated for TPS: Angola, Burundi, El Salvador, Honduras, Nicaragua, Sierra Leone, Somalia, Sudan, Montserrat.[49]

VII EXCEPTIONAL LEAVE TO REMAIN IN THE UK

The United Kingdom has Exceptional Leave to Remain (ELR) status that allows a claimant to stay in the UK when there are "substantial grounds for believing that a person would be tortured or otherwise subjected to inhuman or degrading treatment, even though this would not amount to persecution within the terms of the 1951 Convention".[50] The persecution, in these instances, would not be for a Convention ground. ELR is also granted when there are substantial grounds to believing that someone will suffer a serious and disproportionate punishment for a criminal offence, such as execution for draft evasion, or when there is medical evidence that the claimant's return would result in substantial damage to the physical or psychological health of the applicant or his dependants. Applications for family reunion are only retained after the applicant has been in the UK for four years.

VIII THE IMMIGRATION AND REFUGEE PROTECTION ACT (IRPA) IN CANADA

The IRPA came into force in Canada June 28, 2002. This new Act expands the jurisdiction of the IRB beyond the determination of Convention refugee status to include conferral of refugee protection based on two additional grounds. Those claimants who fall outside the 1951 Geneva Convention and face a personal danger of being tortured, as defined by Article 1 of the CAT, will be granted refugee protection. The definition of torture does not include, of course, pain or suffering arising only from, inherent in or incidental to lawful sanctions. Further, the harm must be inflicted or instigated, or consented or acquiesced to, by a public official or a person acting in an official capacity. Hence, if the state is not involved, the harm does not fall within the definition of torture.[51] Likewise, those claimants who fall outside the 1951 Geneva Convention and face a personal risk to life or a risk of cruel and unusual treatment or punishment, that is not inherent

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49 See <http://www.ins.usdoj.gov/graphics/howdoi/tps.htm>.

50 Asylum Directorate Instructions (March 1998) Exceptional Leave to Remain.

51 Legal Services, "Consolidated Grounds in the Immigration and Refugee Protection Act, Persons in Need of Protection, Danger of Torture" Immigration and Refugee Board, January 23, 2002.

or incidental to lawful sanctions, will be granted refugee protection. The death row phenomenon is an example frequently cited of torture inherent or incidental to lawful sanctions. If the risk to life and cruel and unusual treatment or punishment is caused by the claimant's country of reference's inability to provide adequate health or medical care then the claimant will not be granted refugee protection. Thus, persons seeking refugee protection in Canada will not only include Convention refugees but those who fall outside the 1951 Geneva Convention and face a personal risk of torture, or a risk to their life or of cruel and unusual treatment or punishment. In all instances, the protection conferred will be "refugee protection". In Canada, the conferral of refugee protection on these additional grounds is referred to as the "consolidated grounds".

IX THE SUPREME COURT OF CANADA DECISION IN SURESH

The Supreme Court of Canada (SCC), in its recent ruling in *Suresh*,[52] addressed a series of questions on the constitutional permissibility of deporting a person to torture and whether the terms "danger to the security of Canada" and "terrorism" were unconstitutionally vague. Section 53 of the former Immigration Act, in Canada, permitted deportation "to a country where the person's life or freedom would be threatened". The question that the SCC had to address was whether such deportation violates Section 7 of the Canadian Charter of Rights and Freedoms. Section 7 of the Charter guarantees "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The SCC ruled that section 53, as such, did not violate section 7 of the Charter. On this point, the SCC states, at paragraph 78:

> We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1 [Section 1 states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."] (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see Re BC Motor Vehicle Act, supra, at p 518; and New Brunswick (Minister of Health and Community Services) v G (J),

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52 *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC, January 11, 2002 <http://www.lexum.unmontreal.ca/csc-scc/en/rec/html/suresh.en.html>.

> [1999] 3 SCR 46, para. 9). Insofar as Canada is unable to deport a person where there are substantial grounds to believe that he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if a possibility, must await future cases.

On the question, "Is the term 'danger to the security of Canada' found in section 53(1)(b) of the Immigration Act and/or the term 'terrorism' found in section 19(1)(e) and (f) of the Immigration Act void for vagueness and therefore contrary to the principles of fundamental justice under section 7 of the Charter?" the SCC answered "No". At paragraph 99, the SCC ruled:

> We conclude that the terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. Applying them to the facts found in this case, they would prima facie permit deportation of Suresh provided the Minister certifies him to be a substantial danger to Canada or provided he is found to be engaged in terrorism or a member of a terrorist organization as set out in section 19(1)(e) and (f) of the Immigration Act.

X THE ALIENS ACT IN GERMANY

In Germany, section 51 of the Aliens Act recognizes recipients of protection against refoulement as refugees within the meaning of the Geneva Convention, but their status is less secure and the benefits they receive less generous than for persons granted asylum. Those granted refugee status under section 16(A) of the Constitution received unlimited residence permits. Temporary residence permits are granted to failed refugee claimants whose lives would be endangered if they were to return to their home country, such as those fleeing civil war.

XI SUBSIDIARY/COMPLEMENTARY PROTECTION IN SWEDEN

In Sweden, residence permits are granted to those recognized as Convention refugees or who fall in one of the following three other categories: those who have a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment; those who cannot return to their country of origin because of external or internal armed conflict or environmental disaster; and, those who because of their sex or

homosexuality have a well-founded fear of persecution. The agents of persecution need not be the state for either the Convention refugee grounds or subsidiary protection. Residence permits may also be granted on purely humanitarian grounds, such as family reunion, but only in exceptional situations.[53]

Temporary residence permits are issued to persons who are excluded from being considered refugees but cannot be returned to their country of nationality or former habitual residence because of a genuine fear of torture. EU member states adhere to the principle of the absolute right to protection against torture.[54]

The jurisprudence in Sweden makes a distinction between protection, on the basis of the 1951 Geneva Convention, and other grounds for the issuance of a residence permit, such as affiliation and humanitarian grounds. Family reunion is, in most cases, dealt with as an affiliation ground and not as a humanitarian ground. For persons who face life threatening illnesses and where there is no cure available in the country of origin or in claims involving minor claimants, where the principle of "the best interest of the child" weighs heavily, are examples of applications made under humanitarian grounds in Sweden.

XII THE CURRENT SITUATION OF SUBSIDIARY/ COMPLEMENTARY PROTECTION

There are a number of inherent disadvantages in the current status quo pertaining to subsidiary/complementary protection in the world today. Dr Hugo Storey outlines a number of these perceived disadvantages below.[55]

(1) The significant variation in the forms of complementary protection from country to country makes it appear that each state is "doing its own thing" rather than responding to international standards.

(2) More asylum seekers may choose their countries of asylum by reference to which one affords the widest overall system of protection. Economic

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53 Goran Hakansson, Aliens Appeal Board, Sweden, "Complementary Protection," p 2.

54 Article 3, Prohibition of Torture, in the ECHR states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

55 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, C Disadvantages of the Present Situation. 1999.

migrants seeking only a better life in countries less torn by poverty, instability or inequality may be tempted more than previously to join the ranks of asylum-seekers.

(3) Officials in countries experiencing a high level of asylum-seekers may face pressures to divert asylum-seekers to other countries where the complementary protection system is more liberal.

(4) Because the scope and substance of each other's complementary protection is not always clearly known, states are less able to assess each other's capability and commitment to deliver effective burden-sharing and fair allocation of responsibilities according to the principle of international solidarity. This threatens to undermine the vital objective of international refugee law itself – the prevention of refugee problems from becoming a cause of tension between states.

It is important to note that some form of subsidiary/complementary protection is, in fact, necessary for states to fulfil their international obligations, whether it is a consequence of international human rights treaty obligations or customary international law. For instance, returning a person to their country of reference where there is a real risk of torture, cruel and inhuman and degrading treatment or punishment is contrary to the International Bill of Rights, Article 7 of the ICCPR (International Covenant on Civil and Political Rights) and Article 3 of the CAT.[56] This also applies to persons whose lives are placed at risk if they are sent back to their countries of reference because of internal or external wars whose conduct violates basic rules of human conduct.[57]

The foregoing suggests that a number of questions need to be resolved and explored from a comparative refugee law perspective:

(1) What should be included in subsidiary/complementary protection?

(2) Should there be a single asylum procedure, and, if so, how should the protection grounds be sequenced?

Clearly, it would appear that the first determination would pertain to whether the claimant is a Convention refugee. This would be followed by

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56 For EU member states, this also includes Art 3 of the European Convention on Human Rights.

57 Above n 1, D Underlying Principles and some Tentative Suggestions.

whether the claimant is determined to be in need of protection because he/she faced a personal risk of torture, as defined under the CAT, or a risk to life or inhuman and degrading treatment or punishment.

(3) What should the international meaning be for such key terms as: (1) torture; (2) inhuman and degrading treatment or punishment, and so on?

(4) What should the standard of proof be in a single international protection claim?

It is suggested that as the Human Rights Nexus Working Party continues its research on subsidiary/complementary protection, it may wish to concentrate its examination of this area of comparative refugee law by concentrating on the above list of questions.

XIII PRELIMINARY ANALYSIS AND CONCLUSIONS

A preliminary analysis of the brief summary of developments in subsidiary/ complementary protection in the various jurisdictions indicates that Sweden and the proposed EU Council Directive would appear to have the most comprehensive coverage in terms of subsidiary/complementary protection. As noted above, in Sweden, residence permits are issued not only to Convention refugees but those who fall in three categories: (1) those who have a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment; (2) those who cannot return to their country of origin because of external or internal armed conflict or environmental disaster; (3) those who have a well-founded fear of persecution because of their sex or homosexuality. The proposed EU Council Direct explicitly defines subsidiary protection in the following terms: applicants for international protection who have a well-founded fear of being subjected to the following serious and unjustified harm: (a) torture or inhuman or degrading treatment or punishment; (b) violation of a human right, sufficiently severe to engage the member state's international obligations; (c) a threat to life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights. The United Kingdom perhaps comes next with its ELR status that is granted to applicants for international protection when there are substantial grounds for believing that a person would be tortured or otherwise subjected to inhuman or degrading treatment; that a person will suffer a serious and disproportionate punishment for a criminal offence; when there is medical evidence that the applicant's return would result in substantial damages to the

physical or psychological health of the applicant or his dependents. In the United States, Immigration Judges have jurisdiction over non-refoulement claims based on Article 3 of the CAT. In addition, the United States has TPS, although this is entirely a matter for the US Attorney General to grant. In Canada, applicants for international protection who are found to face a personal danger of being tortured, as defined by Article 1 of the CAT, and those applicants who face a personal risk to life or a risk of cruel and unusual treatment or punishment will be granted refugee protection. As previously noted, EU member states adhere to the principle of the absolute right to protection against torture. In Canada, the Supreme Court has ruled, in its recent decision in *Suresh*,[58] that this is not an absolute right but a matter of balance under section 7 of the Charter.

It is worth reiterating that some analysts perceive the proposed EU Council Directive as "a major advance in the legal protection of persons in need of international protection."[59] In addition, the salient point has been made that the proposed EU Council Directive is the "first major attempt to furnish a clear set of criteria governing both protection under the Refugee Convention and other forms of protection due under international human rights law".[60]

Sweden appears to follow more closely the "single asylum procedure" approach to conferring international protection than other jurisdictions. The SMB not only determines applications for asylum but also residence permits and Swedish citizenship. SMB decisions can be appealed to the AAB. But the decisions of the AAB cannot be appealed. In the United States, Immigration Judges and members of the BIA deal with asylum claims and claims based on Article 3 of the CAT. However, TPS is entirely an Executive Branch matter. In Canada, IRPA has given the IRB the additional responsibility to decide claims involving a personal danger of being tortured, as defined by Article 1 of the CAT, and claims involving a personal risk to life or a risk of cruel and unusual treatment or punishment. The Canadian "consolidated grounds" approach moves Canada closer to a single asylum procedure but not to the degree extant in either Sweden or what is contemplated in the proposed EU Council Directives.

It is also worth pointing out that the standard of proof for the application of the CAT varies from jurisdiction to jurisdiction. As noted previously, the

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58 Above n 50.

59 Above n 12.

60 Above n 14.

standard of proof applied in the United States is higher than in either that of the United Kingdom or Canada.

This brief analytical summary suggests that although there appears to be a distinct trend toward the harmonization of international protection standards, as perhaps best exemplified by the proposed EU Council Directive, there is still a significant and considerable way to go toward harmonization of standards among states in the area of subsidiary/complementary protection.

WORKING PARTY ON NON-STATE AGENTS OF PERSECUTION: 2002 REPORT

Roland HM Bruin*

This short paper is a brief update of the subject of our working party. There has, to my knowledge, in most countries not been very much development in the approach of our subject.

There seems to be a large mainstream approach worldwide with a more extensive interpretation. But there still is a minority of countries, where a more narrow explanation is in use of the relevant part of the refugee definition in the 1951/1967 Geneva Convention relating to the Status of Refugees (Refugee Convention). Maybe the minority of European countries that follow this interpretation, will be changing their approach. The Immigration Ministers of the European Union seem committed to an agreement on a uniform interpretation of this matter. In a meeting in Copenhagen on 13 September 2002 they have sought further to agree on new European rules of interpretation on this part of the refugee definition.

The Rapporteur thanks the members of the Working Party who sent in their comments for this brief update.

I OUTLINE OF SUBJECT

According to the definition in Article 1 of the Geneva Convention, refugee status is granted when one cannot get protection of the State of origin. A central question of interpretation is which source of persecution is included in the definition. Of course, persecution carried out by or instigated by authorities of the State of origin is included in the definition. But under which circumstances can

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* Rapporteur, Roland H M Bruin, is Judge/Vice President in the District Court of The Hague, subdistrict Haarlem, the Netherlands.

threats of persecution by non-State agents[1] be included or excluded from the definition? Explicit limitation of the definition seems to be limited especially to parts of Western Europe practice.

Two situations give rise to discussion:

(1) Persecution is carried out by non-state agents of persecution, against which the state is willing but unable to provide protection. In general there are two main streams of interpretation:

   (a) accountability view: only when persecution emanates from the state someone can be seen as refugee;

   (b) protection view: this extends the definition to cover situations where the state of origin is incapable to provide necessary protection for persecutory acts by non-state agents.

(2) Persecution is carried out by non-state agents of persecution in situations of total collapse of governmental power where there are no (State) authorities left that could provide protection against persecution: some countries argue that there cannot be persecution without a functioning State, whereas in other countries refugee status can be granted also in these situations.

II EXAMPLES OF DIFFERENT APPROACHES

A Australia

The State need not itself be the agent of harm. Also persecution by private individuals or groups is taken into account. It is enough that the State of origin is unable or unwilling to provide effective protection. But persecution must have an official quality, in the sense that it is official or is officially tolerated or uncontrollable by the authorities of the country of origin/nationality. On the other hand protection does not need entirely to be provided by government forces. Also in the situation where a combination of government forces and other – eg foreign or UN of even private – forces, can provide protection, there is not a wellfounded fear within the scope of the definition.

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1 Non-State agents is commonly used, but maybe "non-State actors" is more accurate.

B Canada

In June 2002 a new law was implemented: The Immigration and Refugee Protection Act. The jurisdiction of the Immigration and Refugee Board is expanded by this law. Although the Minister has residual discretion to confer humanitarian and compassionate grounds, under this law the IRB can grant protection on three different bases: 1. as Convention refugee; 2. in case of danger of torture; 3. when the asylum seeker seeks protection because of a risk to life or a risk of cruel and unusual treatment or punishment. Under the Refugee Convention only must the refugee's fear relate to one of the grounds political opinion, race, etc. Under the first and third bases the risk need not to be at the hands of a State agent. But under the second basis, it must.

C United Kingdom

In the interpretation of the Refugee Convention the definition of refugee includes persons who fear persecution of non-State agents where the State is unwilling of unable to provide a sufficiency of protection. No State can, however, be required to be able to offer absolute protection to its citizens.

D Germany

Under current German law within the definition there is only political persecution where it is a matter of deliberate State measures, or when such measures are to be imputed to the state. Acts of persecution perpetrated by non-state agents are to be imputed to the state if the state encourages the perpetration of such acts, supports them, approves of, or acquiesces in them without taking any action, thus omitting to afford the necessary protection. Asylum law offers no protection against a general criminal threat to legal interests and personal attributes protected under asylum law or against the consequences of anarchic conditions or of the dissolution of State power. On the contrary, in such cases the necessary humanitarian protection is afforded by the provisions of the general law relating to aliens. From January 2003 this legal practice will change as a result of a new Residence Act. In application the Refugee Convention this legislation makes provision to the effect that it will no longer depend on whether persecution is imputable to the country of origin.

E France

Refugee status will not be recognized where the State authorities are willing, but simply are unable to offer protection against persecution by non-State agents. This must be seen in relation to the concept of de facto authority. When a power

with a minimum of organization and stability can be found in a certain territory, persecution that this power exercises or tolerates will be taken into account. But when no de facto authority exists no refugee status can be granted.

F The Netherlands

In the Netherlands in 2001 a completely new immigration law has been implemented. Part of this law consists of new rules about shorter asylum procedures and different asylum grounds. One of these grounds is granting Convention refugee status. This law in principle does not change interpretation of the Refugee Convention, but a new appeal body is established. There is no jurisprudence of the new appeal court on this subject. According to standard jurisprudence of the District Court of the Hague, discriminatory or violent acts not committed by or on behalf of State authorities are considered as persecution, if these acts are supported or tolerated by the authorities and also if the authorities cannot offer sufficient protection against these acts. When State authorities are not capable or prepared to offer effective protection, there is a state of persecution. Whether there is or is not protection will also be investigated. A state of dissolution of State power does not mean that refugee status cannot be granted. On the other hand, subsidiary protection is in principle possible under domestic Dutch law and is especially at hand in cases of total civil war or very oppressive regimes like the Taliban in Afghanistan, but its scope has been reduced by the new Dutch Immigration Minister. He proposed not to grant anymore – or hardly ever grant – subsidiary protection to persons that flee from such countries, who cannot prove personally that they face persecution.

G Belgium

Not only victims of State persecution, but also persecution by non-state agents can result in refugee status according to the definition. Also in case of civil war, where central government no longer exists, refugee status can be granted, although a state of civil war is not enough. The asylum seeker must be singled out. Prosecution must be related to this individual.

H European Union

The EU aims to establish a common approach to asylum cases. For that purpose a so-called new EU Directive is proposed. In this Directive the following rule on this matter is proposed.

Article 9 - Sources of harm and protection

Member States shall consider that the fear of being persecuted or of otherwise suffering unjustified harm is well-founded whether the threat of persecution or other serious unjustified harm emanates from:

a) the State;

b) parties or organisations controlling the State;

c) non-State actors where the State is unable or unwilling to provide effective protection.

In evaluating the effectiveness of State protection where the threat of persecution or other serious unjustified harm emanates from non-State actors, Member States shall consider whether the State takes reasonable steps to prevent the persecution or inflicting harm, and whether the applicant has reasonable access to such protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious and unjustified harm. Where effective State protection is available, fear of being persecuted or otherwise suffering serious unjustified harm shall not be considered to be well founded, in which case Member States shall not recognise the need for protection.

For the purpose of this Directive, "State" protection may also be provided by international organisations and stable quasi-State authorities who control a clearly defined territory of significant size and stability, and who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.

If this approach is followed in the European Union, it seems the traditional gap between the two different approaches in Europe will mostly be abated. The recent meeting of Ministers of Immigration in Copenhagen indicated that there is unity in the EU on this matter.

III FURTHER DISCUSSION?

The recent development in the EU seems to resolve a great deal of the divergence in our subject. The majority approach, shortly defined as the protection view, seems to be the widely accepted explanation of the relevant part of the definition. But still minor differences can be seen in State practice. Our working party will be studying these differences in more detail. Maybe part of the divergence can be explained by subsidiary protection measures in different

countries that might result in less need for granting refugee status in cases where asylum seekers fearing aggression by non-state actors without proper protection of the State, are given rights to stay on subsidiary or human rights grounds (eg Convention Against Torture).

Some recent literature/research papers

Research paper on non-state agents of persecution, European Legal Network on Asylum/ELENA; European Council on Refugees and Exiles/ECRE, updated version Autumn 2000

"The new EU Directive – An Evaluation", paper by Hugo Storey for Dublin IARLJ Conference, May 2002

Papers to the informal meeting of CIREA representatives from courts and other review bodies dealing with asylum, Madrid, 9 May 2002.

VULNERABLE CATEGORIES AND SUBSIDIARY PROTECTION: THE TRENDS TOWARD HARMONIZATION AND CONSOLIDATION

*Edward R Grant**

Among the most significant current trends in the law of international protection is the proposal and adoption of schemes of "subsidiary protection" for claimants who lie outside the scope of the 1951 Refugee Convention. The proposed "Council Directive" of the European Union, which seeks to establish a common asylum system throughout the EU by April 2004, includes prominent reference to subsidiary protection. Canada, through its recently effective Immigration and Refugee Protection Act, has adopted "consolidated grounds" of protection in which claims for protection from torture and from cruel and unusual punishment or treatment share near-equal status with claims under the Refugee Convention. The United States includes claims under the Convention against Torture in its scheme of asylum adjudication, but does not recognize claims for non-refoulement based on cruel, inhuman, and degrading treatment.

These developments, especially when considered with current efforts to give, in the words of the UNHCR, a "full and inclusive" application to the 1951 Convention, portend a period of continued ferment in the law of international

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* Member, Board of Immigration Appeals, United States Department of Justice, and Rapporteur, Working Party on Vulnerable Categories, International Association of Refugee Law Judges. The analysis and opinions herein are solely those of the author and do not represent the position of the BIA, the Department of Justice, or the IARLJ. This paper summarises a more extensive Outline Paper prepared for the 2002 IARLJ Conference. For purposes of simplicity, citations are limited to the Outline Paper.

protection. While much progress has been made, substantial differences of interpretation still exist regarding issues such as non-state agents as persecutors, and the scope of the "particular social group" ground for recognizing refugee status. Introducing grounds outside the 1951 Convention to refugee adjudication procedures raises several pertinent questions:

(1) How will the scope of subsidiary protection be defined? (This can be considered both in terms of who should receive protection, and whether the protection afforded should be equivalent to, or distinct from, that awarded to successful claimants under the Refugee Convention.)

(2) Will the primacy of the Convention be preserved?

(3) Will adjudicators decline further expansion of protection under the Convention (or, put another way, "full application" of the Convention) if near-equivalent relief is available on non-Convention grounds?

(4) Should such claims be adjudicated in pari materia with claims under the 1951 Convention?

(5) In the absence of universal human rights instruments bearing specific non-refoulement obligations, can subsidiary protection be harmonized? In the long term, will such harmonization require the establishment of a new "constitution" for international protection that effectively replaces the 1951 Convention?

The foregoing questions can serve as the basis for discussion when the "Vulnerable Categories/Subsidiary Protection" Working Party meets in Wellington. They are more extensively analyzed in the outline paper. This summary paper will highlight some key issues to be considered during the Wellington conference and beyond.

I SCOPE OF SUBSIDIARY PROTECTION

"Subsidiary protection" may be defined broadly as a form of enduring protection against expulsion to one's country of nationality (or last habitual residence) that is based on a fear of harm in that country, but which lies outside the scope of grounds stated in the 1951 Refugee Convention. While such protection may include ad hoc, nationality-based restrictions on deportation (such as to areas of severe civil conflict), the trend is to distinguish and classify such forms of protection as "temporary humanitarian protection". The class of "subsidiary" protection is thereby limited to duly-constituted obligations of non-

refoulement, whether based on international or domestic law, that are justiciable on an individual basis. Thus, the description of such protection as "enduring."

The most universally-adopted potential source of such protection is the Convention against Torture, particularly the non-refoulement obligation of Article 3. Otherwise, sources chiefly lie in regional instruments, such as the European Convention on Human Rights (EU), the Cartagena Declaration (Latin America), and the 1975 Convention of the Organization of African Unity.

A key question in defining the future scope of subsidiary protection is whether obligations of non-refoulement can be inferred from certain human rights instruments. The argument in favor of such an approach is that, in order for the most fundamental human rights enshrined in such instruments to be protected, no State should be able to expel a person (recognized exclusion clauses as an exception) to a country where the person would face a clear danger of infringement of such rights. A countervailing argument may be illustrated by the "hierarchy" of protections in the Convention against Torture: the non-refoulement obligation of Article 3 attaches only to a threat of likely "torture" as defined in Article 1 of the CAT; that obligation expressly does not extend to threats of "cruel, inhuman, and degrading" treatment as defined in Article 16. To later "infer" an international obligation of non-refoulement based on Article 16 would seem to amend the CAT in ways expressly excluded by the drafters and ratifying nations.

Turning to specific current trends, the following can be noted. There is a clear trend in the EU and elsewhere to develop objective standards for subsidiary protection that can be adjudicated in para materia with claims under the 1951 Convention. The most clearly-defined, and narrowest, scope of such protection is in the United States, where subsidiary protection is limited to claims under the CAT. Canada's new immigration legislation provides for a somewhat broader scope of claims, but is also drafted so as to be strictly construed. However, benefits for those granted subsidiary protection are equivalent to those recognized as refugees, in contrast to both US law and the proposed EU Directive. The proposed EU Directive extends subsidiary protection to potentially broader classes, including those at risk of generalised violence in areas of civil conflict, or of regimes in which there exists systematic and generalised violations of human rights.

Despite these differences in scope, all of these developments share certain common characteristics: The scope of subsidiary protection is to be tied to objective, existing norms in international and domestic law. As such, subsidiary

protection does not extend to purely "compassionate" or "humanitarian" grounds for protection against removal, although such avenues for relief may exist in domestic law (such as Extended Leave to Remain in the UK). Subsidiary protection also is clearly distinguished from "temporary protection," which would remain a tool for executive and political branches of government to respond to humanitarian migration emergencies. A chief example of this is Temporary Protected Status in the United States. In the systems discussed here, those granted such temporary protection within the borders of a receiving state would remain eligible to apply for refugee status and available forms of subsidiary protection.

Among the unresolved questions regarding the scope of subsidiary protection is whether it will be recognized in cases of specific violation of international humanitarian law as well as international human rights law. A chief example of the former is the Geneva Convention Relating to the Protection of Civilians in Time of War. The relation of the Refugee Convention to international humanitarian law was a topic at the 2000 convention of the IARLJ.

II LEVEL OF PROTECTION AFFORDED

The decision regarding the level of protection afforded to those granted subsidiary protection is among the most difficult that will face the European Union and other jurisdictions. Canada's decision to consolidate grounds of protection represents a choice to place its narrow subsidiary grounds of subsidiary protection on a par with claims under the 1951 Convention. Under this scheme, the Convention is not necessarily "primary," and those who gain relief based on fear of torture or of cruel and unusual punishment or treatment are accorded the same level of protection, leading to permanent residency, as those recognized as Convention refugees. In the US, relief granted under the Convention against Torture is more limited in scope, and does lead to permanent residency. The Proposed EU Directive seems to take a position in the middle: Protection outside the Convention is not equivalent to that granted "refugees," but the differences are those of degree, not kind. Clearly, to the extent that subsidiary protection mimics that offered to Convention refugees, the differences between these forms of protection cease to have any practical basis. For this reason, some commentators insist that clear distinctions be maintained between the immigration benefits granted to refugees and those granted under subsidiary protection. This may not be sufficient reason, however, to overcome the practical difficulties of maintaining such a clear distinction.

Consider, for example, the cases of two claimants, one a victim of targeted violence on account of political opinion, and the other, a victim of gross violations of the Geneva Convention reference above. If the latter claim is recognized as a claim for subsidiary protection, how likely is it that such protection will be lifted, even if country conditions change? Any more likely than the lifting of refugee protection in light of changed country conditions?

III PRIMACY OF THE CONVENTION

Both the UNHCR, and commentators on the proposed EU directive, have expressed concern that the formalization of standards for subsidiary protection not lead to either of two potential developments: (1) A diminution of the primacy of the Refugee Convention; or (2) A distraction from efforts to give "full and inclusive application" of the Convention on a more uniform basis. At this point, no one suggests anything less than a primary role for the Convention; the sheer weight of history, coupled with the near-universal recognition of the Convention, at least in theory, are tough hurdles for any argument to the contrary.

Yet, these concerns are realistic, particularly for nations and regions that are more aggressive in pursuing the expansion, codification, and harmonization of standards for subsidiary protection. An example is Europe, which, in the pursuit of a common asylum system, is undertaking both to expand common interpretation of the Convention, and to establish common grounds for subsidiary protection. All agree that the agenda is ambitious; not all agree that, despite assurances stated in the draft EU directive, this trio of objectives (common adjudication standards, common Convention interpretation, common scope of subsidiary protection) can be attained. In defence of the project, one can note that Europe's own particular obligations and approaches to human rights protection have already determined the agenda, making the attempted task of implementation somewhat inevitable.

IV WILL THE AVAILABILITY OF SUBSIDIARY PROTECTION RESTRICT EXPANSIVE INTERPRETATIONS OF THE CONVENTION?

Related to these "wholesale" questions of relating subsidiary protection to the Refugee Convention, there is the "retail" question: Adjudicators may genuinely be faced with the dilemma whether to grant protection based on an "extended" (or "fuller") interpretation of the Convention advanced in a particular case, or to resort to a grant under "subsidiary" grounds if eligibility thereunder is more clearly available. In countries such as the United States, where justiciable

subsidiary protection is limited to the Convention against Torture, and even Canada, where grounds based on "cruel and unusual treatment" are clearly and narrowly defined, the Refugee Convention will, merely due to the lack of viable alternatives, retain its primacy. (Also a factor is that Canada, and to a somewhat lesser degree, the United States, are recognized for fairly expansive administrative and judicial interpretations of the Refugee Convention.) In the proposed common asylum system in the EU, this may be more of a dilemma.

Looking to the future for all countries, however, a "correct" answer to this dilemma is not clear. In one sense, seeking "full and inclusive" application of the Convention, while simultaneously advocating a scheme of subsidiary protection who fall outside even a generous interpretation of the Convention, could be seen as wanting to "have it both ways." More importantly, such a programme may brush up against political realities, chiefly the understanding in individual countries that the scope of protection agreed upon when acceding to the Refugee Convention is being bent beyond recognition. On the other hand, this dilemma may be said to merely reflect the changing nature of persecution throughout the world. An international protection scheme premised on a matrix of global ideological and political conflict may not be sufficient to meet contemporary needs for protection arising out of protracted civil conflicts and other circumstances that give rise to profound violations of international human rights (and humanitarian) law. Perhaps the better way to address these realities is through schemes of subsidiary protection. Perhaps, eventually, they will need to be addressed by re-considering the entire foundation of the law of international protection, including the 1951 Convention.

V JUSTICIABILITY OF SUBSIDIARY PROTECTION CLAIMS

One clear measure of whether subsidiary protection is granted according to duly-constituted, country-neutral standards of non-refoulement is whether claims for such protection are determined on an individual basis, akin to that accorded claims for status under the Refugee Convention. The clear trend, discussed in greater detail in the Outline Paper, is for such claims not only to be given such procedural status, but to be heard in concert with Convention-based claims.

Substantial procedural advantages attend the creation of a single procedure for protection claims, including maintaining the integrity of the system, preventing seriatim claims by those applicants seeking delay for improper purposes, and enhancing both the stature and uniformity in application of subsidiary protection. Concerns regarding the continued primacy of the Refugee Convention in a "single" system may be addressed by directives requiring Convention-based

claims to be taken first in sequence, and to be given full consideration (including to novel interpretations of the Convention) before proceeding to consideration of subsidiary protection. However, it is impractical, and undesirable, to attempt to "micro-manage," through the imposition of international standards, the way in which different legal cultures address these issues. Part of the price both expanding grounds for protection to include those outside the Convention, and of ensuring "judicial independence" in joint consideration of claims under the Convention along with claims based on instruments such as the CAT and the ECHR, will be some variance in the relative priority given to such claims.

VI HARMONIZATION OF SUBSIDIARY PROTECTION STANDARDS

The IARLJ and others have traditionally advocated the interpretation of the Refugee Convention through the lens of international human rights law. The emergence of standards for subsidiary protection, however, is predicated upon many of the same human rights instruments, such as the Universal Declaration of Human Rights, the European Convention, and others.

Part of the problem for international, or universal, harmonization, of subsidiary protection standards is that the newly-adopted sources of non-refoulement obligations are themselves regional in nature. This raises the spectre, specific to the proposed EU Directive, of a "Euro-Centric" approach. (This point attributed to Dr Hugo Storey). Europe seems close to an approach that will infer non-refoulement from human rights instruments that contain no positive obligations in this regard. The United States and, to a lesser extent, Canada, have not adopted such an approach; nor does this approach seem likely to emerge at this point in New Zealand and Australia.

Two questions can be posed, therefore: Is it a bad thing for harmonization on these issues to take place primarily at the regional level? Many would strongly argue that it is, because despite the existence of regional human rights instruments as sources of law, primacy remains with the Refugee Convention and other such universal instruments as the Convention against Torture, the UN Declaration of Human Rights, and the various Geneva Conventions (international humanitarian law). A counter-argument might be that, at this point, this is the best that we can do. Practically speaking, there exist no mechanisms that can enforce common understandings and interpretations of even the most universal human rights instruments. The "Committee Against Torture" could be seen as one example of such a body, but not all countries accede to its jurisdiction, and its decisions are not issued in a "precedent" or "rule-making" format.

Which leads to the second question: Will the ferment described herein eventually lead to consideration of a new foundation or "constitution" for the law of international protection? As venerable a document as the 1951 Convention has become, will it eventually require amendment or re-drafting to meet contemporary protection needs? Part of the answer to this question may lie in world events and what forms persecution, assuming its persistence, shall take in the future. Part of the answer may also lie in how successful – substantively, politically, and practically – the emerging schemes of subsidiary protection are in addressing compelling claims for international protection that lie outside the scope of the Refugee Convention. However, it seems clear that any serious international effort to create binding and harmonized standards for protection outside the scope of the 1951 Convention will require a process of discussion and negotiation that at least leaves open the possibility of substantive amendment to, or replacement of, the Convention.