YOU HAVE TO BE STRONGER THAN RAZOR WIRE: LEGAL ISSUES RELATING TO THE DETENTION OF REFUGEES AND ASYLUM SEEKERS

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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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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 The discourse on "protection", "resettlement" and "durable solutions" has been replaced by a mantra of containment and control.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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> ...
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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

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

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

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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

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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.
>
> 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*

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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

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.

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.