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Detaining the Displaced

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Introduction

Detaining the Displaced

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Over the last few years, the public has become increasingly aware of the fact that many asylum seekers are imprisoned by the very states they flee to in search of protection. In February 2002, Australian citizens, including members of church and community groups, organized demonstrations to protest the Australian government's policy of mandatory detention.[1] Earlier this year about 240 mostly Afghan asylum seekers at Australia's infamous Woomera detention centre staged a two-week hunger-strike to protest their treatment and a group of Iraqi asylum seekers reportedly dug their own graves to protest their imprisonment in Woomera.[2] In the U.S., religious leaders publicly criticized the U.S.'s mandatory detention of arriving asylum seekers, and the press and human rights groups have criticized the U.S.'s detention of children – citing, most recently, the detention of a disabled teenage asylum seeker from Guinea in adult criminal jails for over a year.[3]

In the wake of the September 11 attacks in New York and Washington, D.C., some countries have proposed or passed harsh new laws that call for the increased detention of non-citizens. The anti-immigrant rhetoric in many countries has escalated, at times targeting individuals of Arab or Muslim background. Asylum seekers, often the victims of human rights abuses themselves, are more vulnerable than ever in the current climate.

The Executive Committee of UNHCR, in Conclusion 44, has denounced the arbitrary detention of asylum seekers, stressing that detention should normally be avoided and should only be resorted to when necessary and on grounds prescribed by law. This is hardly a surprise given the Refugee Convention's prohibitions against restricting refugees' movements and the prohibitions against arbitrary detention under the International Covenant on Civil and Political Rights (the ICCPR).

In February 1999, the UNHCR issued its Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (the UNHCR Detention Guidelines). The UNHCR Detention Guidelines affirm that "[a]s a general rule, asylum seekers should not be detained," and that "the use of detention is, in many instances, contrary to the norms and principles of international law."[4] Urging a "presumption against detention," the UNHCR Detention Guidelines state that "viable alternatives to detention . . . should be applied first unless there is evidence to suggest that such an alternative would not be effective in an individual case." When a decision to detain is made, the Detention Guidelines recommend that such a decision "only be imposed in a non-discriminatory manner for a minimal period" and that procedural guarantees be provided for, including "automatic review before a judicial or administrative body independent of the detaining authorities" and subsequent "regular periodic reviews of the necessity for the continuance of detention."[5]

Some states aspire to meet their obligations under international law and standards. Others do not. The articles in this volume of *Refuge*, as well as one article to follow in Volume 20.4, examine the detention practices of a number of different states – closely examining the mandatory detention regimes of Australia and the United States, as well as the detention practices of Canada, Mexico, and South Africa. Some of these articles address the impact of detention on vulnerable populations, including children and survivors of torture. The articles also highlight the impact of post-September 11 security concerns on the debate over detention of asylum seekers and on the detention of individual asylum seekers.

As detailed in Jaya Ramji's article on South Africa's detention system, South African law relating to the detention of asylum seekers strives to meet that state's obligations under international law. But the law's high aspirations "on paper" are not met "in practice." One striking example concerns South African law's provision of automatic review of detention of asylum seekers by a judge of its High Court.

As Ramji describes, "this review provision is rarely followed in practice" and this safeguard is further undermined by the failure of South African officials to provide notice of judicial review to detainees.

A survey that is being conducted on behalf of the Lawyers Committee for Human Rights by attorneys at a pro bono law firm has revealed that some states – and indeed most European states – do provide for, at least on paper, judicial review of detention decisions or other checks on arbitrary detention such as limits on the length of detention or periodic review of detention determinations.[6] In Germany, for instance, detention determinations are made by the courts, and are subject to judicial review; there is no provision, however, for periodic review of detention determinations. In the Netherlands, the law provides for automatic review of decisions to detain asylum seekers by a district court, though it also does not provide for periodic review of detention determinations. Yet in the wake of September 11, even limited safeguards against arbitrary detention may be at risk, a concern raised by the United Kingdom's proposal to repeal automatic bail hearings for asylum seekers.

The detention practices of other states, including Australia and the United States, fall significantly short of international law and standards. In "'Between a Rock and a Hard Place': – Australia's Mandatory Detention of Asylum Seekers," Francesco P. Motta provides a comprehensive examination of Australia's mandatory detention policy and concludes that the policy puts Australia in breach of it obligations under international law. As Motta explains, "[t]he fact that Australia's detention policy is mandatory with no discretion not to apply it to an individual, irrespective of the circumstances, and given there is no recourse by a detained individual to judicial review of that detention, means *ipso facto* that it result in arbitrary detention." Australia, Motta concludes, has no intention of changing its mandatory detention policy – even though the justification for the policy is flawed and the costs of the policy are too high, leaving asylum seekers literally and figuratively "between a rock and a hard place."

The U.S. detention system for asylum seekers also falls far short of the requirements of international law and standards. As detailed in "Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers," decisions to detain asylum seekers who arrive without proper documentation are automatic under U.S. law. These detention determinations are made by the U.S. Immigration and Naturalization Service, rather than an independent entity, and the law does not provide for review of these determinations by an independent or judicial authority. In the wake of September 11, asylum seekers in the U.S. have faced additional hurdles, including reports of discriminatory parole denials. The U.S. detention system can be reformed, the author concludes in "Living up to America's Values." The article details the reforms that can be instituted – including the passage of legislation that would provide significant safeguards for asylum seekers – to ensure that U.S. detention procedures are consistent with international law and U.S. values of fairness.

The United States, in contrast to Australia, has at least begun to examine the use of alternatives to detention. In fact, the U.S. government tested a supervised release project, run by the Vera Institute of Justice, which achieved very successful results in terms of high appearance rates and cost savings. (This project is described in "Living up to America's Values.") The U.S., however, despite this successful pilot project, has not instituted nationwide alternatives to detention. And the Australian government, as Motta notes in his article, has rejected proposals advancing the use of alternatives to detention.

As new states ratify the Refugee Convention and struggle to create fair asylum systems, they will have the opportunity to reject practices that are inconsistent with international law and instead embrace "best practices" that are consistent with their international obligations. Mexico is one state that stands at a critical crossroads, as pointed out by Gretchen Kuhner, in her article "Detention of Asylum-seekers in Mexico." Mexico ratified the Refugee Convention and the Protocol in April 2000, and in March 2002 began implementing its own adjudication system for asylum claims rather than relying on UNHCR to make eligibility determinations. In Mexico, asylum seekers who were detained by Mexican authorities and had not yet submitted applications to UNHCR were regularly transferred to a detention center in Mexico City where they typically remained for months, held in conditions that have been criticized by local advocates. Kuhner points out that the Mexican government will now have an opportunity to create a new detention policy.

Unfortunately, it is often the most vulnerable who suffer most from the trauma of detention. This fact is increasingly difficult for states to ignore as medical professionals around the world are documenting the impact of detention on survivors of torture, rape, and the other traumatic experiences that refugees typically suffer.[7] The detention of children is particularly problematic, and the effect of detention on a child is acute. In his piece, "Seeking Freedom, a Child Finds Himself behind Bars," Leonard S. Glickman profiles the story of a teenage asylum seeker who has been detained in the U.S. for over a year and a half. Through the story of this young Algerian asylum seeker, who was detained when he arrived in the U.S. at the age of sixteen to seek protection, Glickman identifies a number of serious problems in U.S. practices relating to children. The true tragedy though is the

impact of detention on this child – a child who, Glickman reports, lives in detention with a sense of isolation and growing desolation.

The societal factors that contribute to negative stereotypes of asylum seekers are closely examined in Simon Philpott's article, "Protecting the Borderline and Minding the Bottom Line: Asylum Seekers and Politics in Contemporary Australia," to be published in the next issue of *Refuge*, Philpott traces Australian fears of "invasion" from colonial Australia, and details the ways in which current political leaders have advanced images of asylum seekers as "queue jumpers, illegals, [and] bogus refugees." This denigration of asylum seekers has fostered public hostility towards them, alleviating the government of responsibility toward asylum seekers and facilitating the privatization of detention in which "bottom-line considerations take precedence over concerns such as justice, dignity or rights." As Philpott emphasizes, "[s]uccessful denigration of asylum seekers as criminals and cheats not only enables the government to distance itself from their claims for consideration for residency in and citizenship of Australia, it brings the UN and the Refugee Convention into disrepute."

Even Canada, which, as Glynis Williams describes in her article "Detention in Canada: Are we on the Slippery Slope," often looks "good by comparison," may be on the "slippery slope" as it has recently adopted new legislation that may be used to detain more asylum seekers who arrive without identification – a situation facing many genuine refugees. Although the new law was proposed before September 11, Williams notes that "there is no doubt that anxiety regarding security has influenced the public debate." Williams underscores the impact of detention on the human rights of those detained in Canada and provides a vivid picture of the impact of detention through several short profiles of individual detainees, including a thirteen-year-old Congolese girl.

There is certainly a need to advance some solutions to this multi-faceted and complex problem. UNHCR, in the context of the global consultations, organized an expert roundtable to examine issues relating to Article 31 of the Refugee Convention, including detention. The expert roundtable, which met in November 2001, issued some summary conclusions, which included a recommendation that national legislation incorporate Article 31's standards and provide for judicial review of decisions to detain asylum seekers and urged that alternatives to detention should always be considered in individual cases. The experts recommended follow-up including "the preparation and dissemination of instructions to relevant levels of government and administration on the implementation of Article 31 …."

The World Council of Churches, in co-operation with a wide range of non-governmental organizations, is planning to organize an International Consultation on Detention of Asylum Seekers in 2003. A detailed announcement relating to that Consultation is included in this volume. The Consultation will seek to bring together NGO representatives from all regions to take stock of current practices of detention and NGO strategies, and to develop and agree on a elements for a global strategy against detention.

In the end, however, it is states that must decide to respect their obligations under international refugee and human rights law. Only then will refugees find the protection that they have fled their homes to find. While it may be tempting for some states to sacrifice the human rights of refugees, whether in the name of "security," "national identity," or other national concerns, ignoring international law obligations seldom proves a constructive or effective response – let alone a response that is credible or legally appropriate.

Notes

1. John Shaw, "Australians Rally for Largest Protest Yet Over Refugee Policy," *New York Times*, 13 February 2002; "Australian Police Hunt Camp Escapees," BBC News, 30 March 2002.
2. Emma Tinkler, "Hunger Strike Ends at Camp," *Montreal Gazette*, 30 January 2002; Lindsey Arkley, "Afghan Asylum-seekers End Hunger Strike," *USA Today*, 31 January 2002; Patrick Barkham, "Refugees Dig Their Own Graves in Australian Detention," *Guardian* (London), 8 March 2002.
3. Esther Ibrahimian, Lutheran Immigration and Refugee Service, "Religious Leaders Decry Detention Conditions and Call for Changes," Detention Watch Network Newsletter, Summer 2001; Bishop Nicholas DiMarzio, Chairman of the U.S. Catholic Bishops' Committee on Migration, "Liberty (But Not) For All," *Star Ledger*, 24 May 2001; Leonard S. Glickman, President of the Hebrew Immigrant Aid Society, *The Bergen County Record*, 10 July 2001; Alan Elsner, "INS Removes Disabled Guinea Youth from Adult Jail," Reuters, 10 April 2002; "U.S Weighs Fate of Children Immigrants," *New York Times*, 27 March 2002.
4. United Nations High Commissioner for Refugees, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999. The Guidelines urge that exceptions to this general rule (protection of national security and public order, verification of identity, identification of basis of claim in a preliminary interview, destruction of documents/use of fraudulent documents to mislead) be clearly prescribed by national law in conformity with principles of international law.
5. *Ibid.*
6. The survey is being conducted by pro bono attorneys at the law firm of Debevoise & Plimpton.

7. See D. Silove, Z. Steel, and R. Mollica, "Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development," *Lancet* 357 (2001); see also Michele R. Pistone and Philip G. Schrag, "The New Asylum Rule: Improved but Still Unfair," *Georgetown Immigration Law Journal* 16 (Fall 2001): 49, n. 272 & n. 273 [citing numerous medical reports documenting that refugees often suffer from post-traumatic stress disorder, major depression, or other illnesses, including: Neal R. Holtan, "Survivors of Torture," *Pub. Health Rep*. 114 (1999): 489; Derrick Silove *et al.,* "Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors," *British J. Psychiatry* 170 (1997): 351, 351–57; Hans Thulesium and Anders Hakansson, "Brief Report: Screening for Posstraumatic Stress Disorder Symptoms among Bosnian Refugees," *J. Traumatic Stress* 12 (1999): 167, 171–73]. A team of medical experts working with Physician for Human Rights is currently conducting a study of the impact of detention on asylum seekers who have been detained in the U.S. detention facilities.

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Interpretation Consistent with International Law? The Detention of Asylum Seekers in South Africa

Jaya Ramji

Abstract

On paper, South African law concerning detention of asylum seekers appears consistent with international standards.However, the text of the Act is vague and overly broad, permitting interpretations inconsistent with international human rights standards. Further, in practice, officials often fail to uphold even the lowest standards of the Act, in violation of South African law. In order to protect the rights of asylum seekers, the South African government should institute formal guidelines and training programs, as well as a system of strong supervision and accountability, to ensure that the Act and Regulations are interpreted in a manner consistent with international law. Such a step will enable South Africa to live up to its noble post-apartheid human rights ideals.

Résumé

Sur du papier, la loi sud-africaine sur la détention des demandeurs d'asile semble conforme aux normes internationales. Cependant le libellé de cette Loi est vague et par trop étendue, permettant ainsi des interprétations qui sont incompatibles avec les normes internationales en matière des droits de la personne. En outre, dans la pratique, bien souvent les officiels ne respectent même pas les normes minimales prévues par la Loi – en soi une violation des lois sud-africaines. S'il veut vraiment protéger les droits des demandeurs d'asile, le gouvernement sud-africain devra instaurer des directives formelles et des programmes de formation, doublés d'un système de supervision renforcée et de reddition de comptes, afin de garantir que la Loi et les Règlements soient interprétés de manière conforme au droit international. Une telle mesure permettra à l'Afrique du Sud d'honorer ses nobles idéaux de l'après-apartheid en matière des droits de la personne.

On paper, South African law relating to detention of asylum seekers generally conforms to international human rights law. Like other areas of law in this young democracy, the acts and regulations were written with high ideals. However, the legacy of apartheid, both economic and institutional, presents serious obstacles to efforts to transform these visions into a functioning human rights culture. Government officials often fail to implement the safeguards written in the law, thereby abrogating both international and domestic obligations. South African efforts to meet and surpass international human rights standards with regards to the detention of asylum seekers should be applauded and supported, but the government department responsible for refugee protection and processing, the Department of Home Affairs (DHA), should also be closely monitored to ensure that it lives up to these principles in practice.

International Standards

International human rights treaties ratified by South Africa provide broad prohibitions on arbitrary detention and restriction of freedom of movement of refugees.[1] Under the South African Constitution, "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation

of the legislation that is consistent with international law over any interpretation that is inconsistent with international law."[2] The United Nations High Commissioner for Refugees provides guidance in interpreting international law relating to detention of asylum seekers, finding "[a]s a general principle, asylum seekers should not be detained."[3] According to the Executive Committee of the UNHCR, "[d]etention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they claim asylum; or to protect national security or public order."[4] Further, detention of refugees and asylum seekers should be subject to judicial or administrative review.5 The United Nations Human Rights Commission and the European Court of Human Rights have found that, in order to comport with international human rights law, detention should be subject to periodic review as to its legality and necessity.[6]

Grounds for Detention

The South African Refugees Act of 1998 and accompanying Refugee Regulations 2000 envision a system in which the majority of asylum seekers are not detained and are allowed to move freely around the country.[7] This scheme is in theory consistent with international standards, as asylum seekers may be detained under the Act only for exceptional reasons. The Department of Home Affairs can withdraw an asylum seeker's permit and thereby subject her to detention if: the asylum application is held to be "manifestly unfounded," fraudulent, or abusive; the asylum seeker contravenes a condition of the permit; the asylum seeker re-enters after the application is rejected; if the asylum seeker allows her permit to lapse when leaving the country without the consent of the Minister of Home Affairs; or if the asylum seeker is ineligible for asylum due to an exclusion or cessation clause. Failure to appear for a hearing on the asylum claim may also constitute grounds for detention.[8] While these reasons appear at first glance to conform to international human rights standards, the text is vague and overly broad, leaving ample space for misinterpretation and other mischief.

A closer examination of the Act reveals the nature of these problems. First, detention is used as a deterrent, to prevent and punish failure to comply with administrative requirements. While in some cases it may be consistent with international law to detain asylum seekers who contravene a condition of their permit (for reasons of national security or public order), the wording of this clause is far too broad to meet international standards. In practice, an asylum seeker can be detained for being one day late to renew her permit, an absurd result that is inconsistent with international law. Detention for re-entry after rejection is also a blunt tool that derogates international standards, unless it is used for the narrow purpose of an individualized determination whether the elements of the claim have changed since the asylum seeker's departure. Again, a lapsed permit after unauthorized departure is not in and of itself a valid reason for detention, but must meet one of the grounds laid out by the UNHCR, such as protection of public order. Finally, while failure to appear for a hearing may in some cases be a ground for detention, it cannot be a sufficient basis for detention in all cases. While the text of these clauses could be interpreted consistently with international law, the law would benefit greatly from more definite and narrower regulations or guidelines. This is true in any legal regime, but particularly so in a fledgling democracy such as South Africa, where the consistent historical practice has been denigration of rather than respect for the rights of the disempowered.

Other clauses of the Act are used to detain asylum seekers to facilitate deportation, despite the fact that deportability alone is not a valid basis for detention. For example, detention of asylum seekers whose claims are "manifestly unfounded," fraudulent, or abusive might fall under the rubric of determining the elements on which the asylum seeker's claim is based. However, the "determination" language used by the UNHCR implies at least a quasi-judicial process and presupposes that the person making the determination be versed in asylum law. In practice, it is often South African police, who have no background or training in refugee law, who are responsible for detaining asylum seekers. Moreover, even refugee officials who are ostensibly trained to make such decisions repeatedly apply asylum standards incorrectly, particularly when interpreting the vague "manifestly unfounded" standard.[9] Ineligibility for refugee status due to the applicability of a cessation or exclusion clause may again be a valid ground for detention; one can imagine a situation where an asylum seeker subject to one of these clauses could be detained for national security reasons.[10] However, the narrower reason for detention must be determined on a case-by-case basis; ineligibility standing alone cannot justify detention. The fact that an asylum seeker might not ultimately obtain a grant of asylum is not a sufficient ground for detention under international law. Again, the text of the Act allows room for the current practice of detention and deportation without individual examination of asylum claims through a fair and impartial process. Thus, even where the text appears superficially similar to the standards laid out by the UNHCR, the Act and Regulations are vague and overly broad, and open to interpretations inconsistent with international law.

The problem of the vague and overly broad text is compounded by practice on the ground that departs from any reading of the Act. A pervasive lack of respect for the rights of asylum seekers combined with the absence of any accountability mechanism have resulted in frequent violations of even the lowest standards required by the Act. For example, individuals who are arrested and detained before they have been able to access the asylum application process are generally not provided with the opportunity to apply for asylum, in violation of South African law. The Regulations require that detained individuals who affirmatively claim refugee status must be issued with a permit valid for fourteen days in order to file an asylum application at a Refugee Reception Office.[11] However, this directive is seldom followed at the Lindela Detention Centre, as the staff does not have sufficient training to process asylum applications, and detainees are rarely allowed to apply at the nearest Refugee Reception Office in Braamfontein. Further, the DHA does not routinely ask persons who have been arrested under the Aliens Control Act whether they intend to apply for asylum.[12]

A rights-respecting interpretation of the law is further stymied by the obstacles of xenophobia and corruption. There have been claims that the police arrest asylum seekers indiscriminately and without regard to their right to remain in South Africa. Asylum seekers are reportedly arrested and detained for failure to carry identity documents, on the basis of a particular physical appearance, for inability to speak any of the main national languages, or for fitting a "profile" of an undocumented migrant.[13] Asylum seekers are regularly arrested by the Department of Home Affairs while applying for asylum or renewing asylum permits, for applying or renewing too late or at the wrong office, or under the charges that documents have been forged.[14] Further, there have been numerous claims that police demand bribes from apprehended persons (documented and undocumented) in exchange for freedom.[15] Asylum seekers who refuse to or are unable to pay such bribes remain in detention while the legality of such detention remains unexamined.

In practice, these problems with the text and the implementation of the Act interact and combine to produce pernicious results. For example, in violation of South African law, the South African Police Services reportedly destroy valid asylum-seeker permits on the assumption that such documents are fraudulent.[16] Asylum seekers are then subject to detention as they have no evidence of their right to stay in the country. In practice, the burden of proof is on the arrested asylum seeker to establish her legal status in the country, in violation of the right to a presumption of innocence in international law.[17] It has been reported that neither the police nor the Department of Home Affairs allows persons to retrieve identification documents from their homes or allows free phone calls to contact friends or family from detention centres.[18] This makes it impossible for asylum seekers to prove their right to stay in South Africa and renders such detention arbitrary and therefore in violation of international law.[19] Furthermore, inefficient investigation methods and poor communication between different government departments result in lengthy delays in determination of an asylum seeker's right to stay. As a consequence, asylum seekers may be detained for days while their right to remain in the country is confirmed.[20] The vagueness and overbreadth of the text of the Act permit these violations of international law, and are exacerbated by the failure of officials to uphold the safeguards in the Act.

In a laudable effort to improve the interpretation of the Act and Regulations, the Department of Home Affairs issued guidelines, effective January 2002, to address the issue of arbitrary arrest and detention by police.[21] The directives require police officers to provide the Department of Home Affairs with documentary evidence of reasonable grounds for any arrest of individuals suspected of being in the country illegally. The requisite proof includes evidence that the arrested individual has been given an opportunity to prove her legal status in the country. The guidelines also provide for improved communication between the police and the DHA. These directives are an example of how the DHA can elucidate the text of the Act to ensure that it is implemented in a manner consistent with international law.

Judicial Review of Detention

The Act provides for the right to challenge the merits of the decision to detain, but again the international standards envisioned on paper are not met in practice.[22] The Act establishes two levels of review of detention, one immediate and one periodic. However, the inadequate implementation of these safeguards results in a failure to protect the rights of asylum seekers.

Within forty-eight hours of detention, the asylum seeker must be brought before an immigration officer for an investigation.[23] This appears at first to provide a proper safeguard, but the lack of elaboration on the process and subject matter of the investigation again leaves the door open to interpretations contrary to international standards. As discussed above, any detained individual claiming asylum should be provided with a temporary permit allowing her to report to a Refugee Reception Office and file an asylum claim within fourteen days.[24] Further, any individual who has already filed an asylum claim should be immediately freed from detention unless valid legal grounds for her detention have been established. Thus very few asylum

seekers should remain in detention after this first stage investigation. However, the procedure on the ground leaves the determination of due process and fairness to immigration officers unversed in legal standards, rather than to judges or other trained officials. Moreover, the asylum seeker is presumed to be a "prohibited person," and bears the burden of proof in establishing her eligibility to be freed from detention, again violating the international legal right to a presumption of innocence.[25] If the asylum seeker fails to produce a permit demonstrating her right to remain in the country, she will be declared a "prohibited person."[26] In cases of doubt, the asylum seeker may be granted a temporary permit to allow her time to provide necessary documents. The administrative nature of this process, as well as the presumption of guilt, have been criticized as contrary to the South African Constitution.[27]

Further, the limited rights that appear on paper are not meaningful in practice. The South African Human Rights Commission (SAHRC) has found the apprehension processes at Lindela both insufficient and arbitrary. At arrival, each person receives only a few minutes with the allocated immigration officer to present her case. Procedures have not been routinized, and it is unclear when the actual investigation is conducted and by whom.[28]

The next safeguard in the Act is automatic review of detention of asylum seekers after thirty days by a judge of the High Court.[29] In theory, the officials responsible for detention should present detained asylum seekers to the High Court every thirty days, and are not authorized to extend detention absent such review. However, this review provision is rarely followed in practice, despite a case won by the Law Clinic of the University of the Witwatersrand and the South African Human Rights Commission (SAHRC) in November 1999, challenging the Department's repeated failure to provide such review to detainees at the Lindela Detention Centre.[30] The court required that Lindela officials report the names of detainees to the SAHRC each month for compliance monitoring. These reports confirm that the DHA has continued to detain immigrants, including asylum seekers, without judicial review. According to the reports, the DHA held 752 individuals at Lindela for over thirty days between March and August 2001, and officials could not provide any evidence that these immigrants had access to the mandatory judicial review process.[31]

The due-process rights of asylum seekers are stymied not only by Lindela's failure to comply with the reporting requirements, but also by the officials' failure to provide notice of judicial review to detainees. In December 2000, the SAHRC reported that only one detainee with whom they met at Lindela had been informed of her right to judicial review of detention, and she was not given the opportunity to make a written submission to the court.[32] The Witwatersrand High Court division has found that failure to give effective notice of an application to extend detention rendered such application unlawful. Nonetheless, the court and the executive branch have yet to improve judicial oversight of detention of asylum seekers.[33]

Even when an asylum seeker is able to overcome these obstacles and challenge her detention through judicial review, such review is reportedly not effective or meaningful. One NGO reports that in the Cape of Good Hope High Court division, review under the Refugees Act is heard by a judge in chambers rather than in open court. No records of such review are kept, and detainees and their legal counsel are not provided with effective notice of the DHA's application to extend the detention. While the bench is displeased with this practice, which leads to rubber-stamping of the detention decision, they continue to extend detention.[34]

Recommendations

It is clear that the noble aims of the Refugees Act and Regulations are being thwarted, as countless obstacles to proper implementation present themselves. These roadblocks are surmountable, however, through detailed guidelines, training, supervision, and accountability. By making affirmative efforts to respect the rights of asylum seekers, the Department of Home Affairs can and should play a central role in South Africa's transformation into a climate protective of human rights.

First, the DHA should issue guidelines to government officials and police officers to inform their interpretation of the Act and Regulations. The January 2002 directives concerning the arrest and detention of undocumented migrants by the South African Police Services are a step in the right direction. However, this page-long list of missives should be followed up with a comprehensive framework of guidelines concerning detention of asylum seekers. These guidelines should follow the determinations of the Executive Committee of the UNHCR, and in this way direct immigration officials and police officers to interpret the Act and Regulations consistent with international standards. Possible topics include, but are not limited to, interpretation of grounds for withdrawal of asylum seeker permits; the definition of "manifestly unfounded," "fraudulent," or "abusive"; fairness, burdens of proof, and due process in determination of validity of asylum seeker documentation; detainee access to asylum application procedures; investigation of legality of detention; and notice of right to and access to judicial review of detention.

Second, Refugee Reception Officers, immigration officials, and police officers alike should be required to partici-

pate in comprehensive training courses on asylum law and refugee rights. The courses would outline refugee rights under international law as well as proper interpretation and implementation of the Act and Regulations, and would include a unit on detention of asylum seekers. The UNHCR has sponsored training sessions for Refugee Reception Officers which, while comprehensive and informative, have not been absorbed or internalized by the participants. This problem could be resolved by reinforcement from supervisors of the importance of the training, as well as rigorous written and oral examinations at the end of the course. For full impact, the results of such examinations should directly affect the placement and promotion of officials taking the course. Further, in order to fully protect the rights of asylum seekers, immigration officials generally as well as police officers must be required to participate in such courses and to garner high marks in the examinations.

Third, supervisors in the DHA and the South African Police Services (SAPS) must emphasize the importance of creating a climate protective of human rights. This includes praising and promoting officers and officials who take steps to protect the rights of detained asylum seekers as well as criticizing and sanctioning those who consistently violate the rights of detainees. Supervisors should also provide guidance to officers and officials in interpreting the Act and Regulations, and should point out incorrect understandings and commend proper interpretations of the law. Moreover, supervisors should be held responsible for the actions of officials and officers under their watch, and should be encouraged in their efforts to protect the rights of asylum seekers and punished for repeated and/or egregious rights violations. Effective supervision of this nature would not only help asylum seekers, but would benefit South African society generally in its transition to democracy by promoting the internalization of human-rights norms

Finally, immigration officials and police officers must be held accountable for violations of South African law and international human-rights standards. Complaints of mistreatment by asylum seekers should be taken seriously, and a formal procedure should be created to investigate and respond to such complaints. This is particularly important for detained asylum seekers, whose environment is entirely controlled by DHA officials. Officials and officers who are the subject of repeated verified complaints should undergo intensive rights training and face disciplinary charges if their behaviour does not improve. Further, officials should be held accountable for failures to comply with the Act, particularly with respect to judicial review provisions. Again, a formal mechanism to examine compliance with an international human rights interpretation of the Act should be created, and should permit asylum seekers and NGOs to lodge complaints against officials who have failed to uphold the rights of asylum seekers to be free from detention except under circumscribed and specifically enumerated conditions, and to obtain judicial review of such detention.

The implementation of the Refugees Act and Regulations has occurred in theory, but the Department of Home Affairs must work hard to ensure that the international human rights standards outlined in the law are met in practice. South Africa is finally on its way to becoming a respected member of the international community, committed to upholding international human rights law. While there will be obstacles along that road, the government should be encouraged to take the steps outlined above to ensure that the rights of detained asylum seekers are respected. NGOs play an important watchdog role in this process, but the judiciary and the DHA itself must also strive to meet international human rights standards with respect to every asylum seeker detained under the Act.

Notes

1. *African [Banjul] Charter on Human and Peoples' Rights*, 23 October 1986, art. 6, in *Twenty-four Human Rights* Documents (New York: Center for the Study of Human Rights, Columbia University, 1992) at 118; *Convention Relating to the Status of Refugees [Refugee Convention]*, 28 July 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 26 (entered into force 22 April 1954); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976), reprinted in 6 I.L.M. 368 (1967), at Art. 9(1) ("ICCPR"). It is important to note that an individual becomes a refugee as soon as she has been forced to flee her country of origin due to persecution; thus many asylum seekers may technically be classified as refugees. See Guy S. Goodwin-Gill, *The Refugee in International Law* (New York: Oxford University Press, 1998) at 32.
2. Constitution of the Republic of South Africa, 1996, art. 233.
3. Office of the United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, No. 2.
4. Executive Committee of the United Nations High Commissioner for Refugees, *Conclusions on the International Protection of Refugees*, No. 44: "Detention of Refugees and Asylum Seekers," 37th Sess. (1986).
5. *Ibid.*
6. See *A* v. *Australia*, United Nations Hum. Rts. Cttee., Communication No. 560/1993: Australia. 30/04/97, UN Doc. No. CCPR/C/59/D/560/1993 (30 April 1997); *Amuur* v. *France*, Eur. Ct. Hum. Rts., Case No. 17/1995/523/609 (20 May 1996).
7. While beyond the scope of this paper, it is important to note that asylum seekers' right to freedom of movement in South Africa

has been curtailed by renewal requirements for asylum-seeker permits that are excessively restrictive both temporally and geographically.

8. Refugees Act No. 130 of 1998, arts. 23, 22(5) (Republic of South Africa) ("Act"); Refugee Regulations No. 21075, §§ 8, 9 (6 April 2000) (Republic of South Africa) ("Regulations").
9. In the author's experience, the Braamfontein Refugee Reception Office in Johannesburg misapplied the "manifestly unfounded" definition more often than not. In one particularly egregious case, a Tamil asylum seeker from northern Sri Lanka was rejected as "manifestly unfounded" simply because the officials were unfamiliar with the political situation in Sri Lanka.
10. Article 1(C) of the Refugee Convention outlines the cessation clauses, which include: voluntary re-availment of the country of nationality; voluntary reacquisition of a lost nationality; acquisition of a new nationality and protection of the country of the new nationality; voluntary re-establishment in the country of persecution; and changed circumstances in the country of nationality or former nationality that terminate the conditions leading to her recognition as a refugee with a "compelling reasons" exception for victims of past persecution. Article 1(F) of the Refugee Convention outlines the exclusion clauses, which include serious reasons for considering that the refugee has committed: a crime against peace, a war crime, or a crime against humanity; a serious non-political crime outside the country of refuge prior to admission as a refugee; or acts contrary to the purposes and principles of the United Nations. The former clause can be used to terminate refugee status after it has been granted; the latter is a bar to the granting of refugee status.
11. See Refugee Regulations 2000 at § 2(2); Jonathan Klaaren, *A Guide to South African Refugee Law* (May 1999) at 26.
12. See Emma Algotsson, *Lindela: At the Crossroads for Detention and Repatriation* (Johannesburg: South African Human Rights Commission, December 2000) at 48–49.
13. *Ibid.* at 12.
14. See correspondence with Emma Algotsson, Lawyers for Human Rights, Pretoria, South Africa, July 24, 2001 [on file with author; obtained in connection with Lawyers' Committee for Human Rights report].
15. See *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act*, (South African Human Rights Commission (SAHRC"), March 1999) at 23–25.
16. *Ibid.*
17. *See* ICCPR at art. 14(2). While immigration offenses arguably may not be criminal offenses, the punishment of deportation is at least as severe as imprisonment, particularly for asylum seekers, and should therefore be held to the same due process standards as criminal law.
18. *Supra* note 15 at 23–25.
19. See ICCPR at Art. 9(1).
20. *Supra* note 12 at 12.
21. See Department of Home Affairs, Passport Control Instruction No. 77 of 2001: Arrest and Detention of Illegal Aliens by the SAPS [on file with author].
22. It is important to note that this article does not examine judicial review of the claim to asylum, but solely judicial review of the decision to detain.
23. See Aliens Control Act §55(1).
24. See Refugee Regulations 2000 § 2(2).
25. See ICCPR at art. 14(2); *supra* note 17.
26. Aliens Control Act, §§ 7, 9.
27. See Jonathan Klaaren, *The Detention and Repatriation of Undocumented Migrants*, Working Paper prepared for the South African Human Rights Commission (May 28, 1999) [unpublished, on file with author] at 4.
28. *Supra* note 12 at 13.
29. See Refugees Act of 1988 at art. 29(1).
30. See *The South African Human Rights Commission and Forty Others* v. *Minister of Home Affairs and Dyambu (Pty) Ltd.*, case no. 28367/99, Witwatersrand High Court (South Africa). The High Court is an independent and widely respected court. It is similar in function to a federal district court in the United States, as it largely hears first instance trials but also adjudicates some appeals.
31. See correspondence with Emma Algotsson, April 3, 2002 [on file with author].
32. *Supra* note 12 at 13.
33. See *Fei Lui v. Commanding Officer*, 1999 (3) SALR 996 (W); correspondence with Frankie Jenkins, Human Rights Committee, Cape Town, South Africa, August 21, 2001 [on file with author; obtained in connection with Lawyers' Committee for Human Rights report]. This case concerns §55(5) of the Aliens Control Act, the predecessor to §29(1) of the Refugees Act of 1998. In this case, the detainee received notice of the application to extend on the same day that the case was heard.
34. *Ibid.*

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"Between a Rock and a Hard Place": Australia's Mandatory Detention of Asylum Seekers

Francesco P. Motta

Abstract

For fourteen years Australia has detained asylum seekers arriving unlawfully in its territory. It also intercepts asylum seekers arriving in the territorial waters, detaining them in third countries and preventing them from seeking refugee status in Australia (the "Pacific Solution"). This paper traces the development of the policy, its current implementation, the justification employed by the government for maintaining it, and its legality under international law. On examination of these issues, it is evident that the justification for the mandatory policy is flawed; that the costs of the policy – in terms of the physical and mental well-being of asylum seekers themselves, and the social and financial impact on the Australian community – are too great, and it puts Australia in breach of its obligations under international law. However, the government has not canvassed alternatives to the mandatory detention policy and has no intention of changing it. This leaves asylum seekers who enter Australian territory unlawfully literally and figuratively between a "rock and hard place."

Résumé

Depuis 14 ans l'Australie a eu pour politique de détenir les demandeurs d'asile qui arrivent illégalement sur son territoire. Il intercepte aussi les demandeurs d'asile qui pénètrent dans ses eaux territoriales, les détenant dans des pays tiers et les empêchant de revendiquer le statut de réfugié en Australie (la « solution du Pacifique », comme on l'appelle). Cet article retrace le développement de cette politique, la manière dont elle est présentement mise en œuvre, les raisons évoquées par le gouvernement pour justifier son maintien, et sa légalité au regard du droit international. Lorsqu'on examine ces questions de près, il devient clair que la justification offerte pour cette politique obligatoire comporte des lacunes ; que les coûts de la politique – en terme du bien-être physique et mental des demandeurs d'asile, aussi bien qu'en terme de l'impact social et financier sur la société australienne – sont trop élevés, et qu'elle place l'Australie en position de violation de ses obligations vis-à-vis du droit international. Cependant, le gouvernement n'a pas exploré les alternatives possibles à la politique de détention obligatoire et n'a aucunement l'intention de la changer. Ainsi, les demandeurs d'asile qui entrent illégalement sur le territoire australien se retrouvent quasiment coincés.

Introduction

In Australia, freedom from arbitrary detention is a fundamental right derived from the common law.[1] Yet for fourteen years, Australia has enforced a policy that requires any person who arrives or remains in Australian territory unlawfully[2] to be detained until either any application for a visa is finalized[3] or they are removed from the country. Among those detained[4] are asylum seekers arriving unlawfully by boat and plane, and include many who have suffered torture and trauma, the elderly, the sick, pregnant women, and children.[5]

In recent months there have been press reports of detainees hunger striking, rioting, and committing acts

of self mutilation[6] from frustration at being detained for long periods in conditions that are increasingly recognized as substandard by the Australian community.[7] There has been strident criticism of the policy both nationally and internationally – from Australia's own Human Rights Commission, HREOC, and other human rights and international organizations – particularly concerning the detention of children.[8]

However, far from ameliorating the detention regime, the government has significantly strengthened it – making it almost impossible for asylum seekers to obtain information regarding their rights under Australian law so as to make Protection Visa applications,[9] to access legal advice, or to have their detention reviewed by the courts. Simultaneously, access to the detention centres by the media and members of the general public is strictly limited.[10]

Furthermore, the government has now implemented a policy of detaining vessels carrying asylum seekers[11] entering Australian territorial waters, arresting the asylum seekers, and deporting them to South Pacific nations (such as Nauru),[12] where they are detained pending processing (the so-called "Pacific Solution").[13] Since these places are outside Australia, persons detained there have no right to apply for refugee status under Australian law, no guarantee of proper processing, no access to advice, and no appeal rights against adverse decisions affecting them. These offshore detention centres are not easily accessible to the press nor are they subject to independent scrutiny by members of the Australian public.[14]

Currently, there is no other country which has such a strict policy of mandatory detention of all those who enter the country unlawfully regardless of their status or condition.

This paper shall examine the content of Australia's detention policy: how it developed, how it is currently implemented, its effects on asylum seekers, the justifications of government in support of the policy, and its legality. Finally, there is a discussion concerning the underlying rationale of the policy.

Mandatory Detention – Its Rise and Rise

The mandatory detention policy developed over twenty-five years in conjunction with Australia's policy towards onshore refugee applicants. Australia's migration laws are founded in the Australian Constitution, which empowers the Commonwealth Parliament to "make laws for the peace, order and good government of Australia" with respect to, *inter alia,* "immigration and emigration," "nationality and aliens," and "external affairs."[15] As interpreted by the High Court of Australia, this authorizes the Commonwealth Parliament to legislate regarding the treatment of "non-citizens," including their admission, stay, detention, and removal. Also relevant is the principle of common law that "aliens"[16] are not to be treated as "outlaws" and should not be detained without proper authority conferred by law.[17]

Australia's policy towards unauthorized arrivals immediately hardened when it became a country of first asylum in the mid-1970s. From initially tightening entry control and punishing those organizing the transport or unlawful entry of people into Australian territory, by the late 1980s the government began to direct its policy to penalizing asylum seekers themselves, both as a means of "deterrence" and for the protection of national security. Essentially, Australia does not want to be a country of first asylum but prefers to permit ingress to the country through an orderly system that it controls.[18] This blurring of policy imperatives between the need for national security on the one hand, and obligations owed under international law on the other, has seen the latter consistently subordinated to the former and has led to the current policy of mandatory detention of asylum seekers entering the country unlawfully.

Until the mid-1970s the arrival of asylum seekers was exceptionally rare in Australia. There was no formal system for assessing claims to refugee status at this time, the grant of an entry permit being solely at the discretion of the Minister under the then Section 6 of the Migration Act.[19] Resulting from the end of the Vietnam War and the enforced economic isolation of Communist countries in Southeast Asia, large numbers of people began to flee on boats to neighbouring countries. Australia suddenly found itself confronted by potential refugee applicants as a country of first asylum.[20] In response, Australia instituted a more regularized system for the processing of refugee claims,[21] although the grant of refugee status was still at the discretion of the Minister.[22] There was no "mandatory detention policy" as such for asylum seekers; applicants were held in processing centres until identification checks and final assessment of their claims. If granted refugee status, they would be given a temporary or a permanent entry permit. If refugee status was refused, they were removed.

After a further influx of ethnic Chinese being actively "forced" from Vietnam during the Sino-Vietnamese War in 1978–79, Australia instituted an organized migration scheme as part of an internationally agreed plan.[23] However, ongoing ethnic and economic problems in Vietnam and the Vietnamese invasion of Cambodia meant that the numbers fleeing quickly outstripped the numbers allocated. Some countries responded in the early 1980s by refusing entry to the "boat people."[24]

In response to the arrival of some two thousand people on boats in Australia in 1980, the government amended the Migration Act, formally providing a legal basis for the Minister's discretionary assessment of refu-

gee status according to the Refugees Convention and his power to grant an entry permit.[25] At the same time, the Immigration (Unauthorised Arrivals) Act 1980 (Cth) (hereinafter IUA Act)[26] vastly increased the powers of Commonwealth officials to board, search, and detain ships, and to arrest and detain masters, owners, agents, and charterers of vessels, etc., involved in the transportation of "unauthorized arrivals."[27] The IUA Act also granted to Commonwealth officials the authority either to grant a person who arrived in Australia aboard a vessel (ship or airplane) without an entry permit issued pursuant to the Migration Act 1958 a permit to disembark the boat or airplane on whatever conditions the officer determined,[28] or to arrest such a person without warrant.[29] The law required that such a person, if arrested, be taken before a "prescribed authority"[30] within forty-eight hours of the initial arrest, or within a period of time as was reasonably practicable thereafter.[31] The prescribed authority could formally order in writing the continued detention of that person where satisfied that the arrest and subsequent detention of the individual were pursuant to the IUA Act.[32] A person the subject of such an order was kept in detention until they were either conveyed from Australia;[33] or until they were granted an entry permit under the Migration Act 1958,[34] or until the Immigration Minister made a declaration under s.10(2) of the IUA Act in respect of the person that the Migration Act 1958 applied to them, in which case they were to be taken to have entered Australia and hence obtained the classification of "prohibited immigrant," enabling them to be deported from Australia.[35] The Migration Act authorized the removal of a detainee from Australia aboard the vessel on which they had arrived,[36] pursuant to which an authorized Commonwealth officer could place the person aboard the vessel and serve a direction on the Master or Captain of that vessel to remove the person from Australia. However, where the Minister had made a declaration under s.11(1) of the IUA Act, but the Minister was not satisfied that it would be practicable for the person to be removed from Australia in accordance with this direction, the Minister was required to order the release of the person.[37] If the Minister was satisfied that the "unauthorised arrival" in these circumstances was a refugee, the Minister could, via s.10(1) of the IUA Act, utilize his discretionary power under s.6A(1)(c) of the Migration Act 1958 to grant them an entry permit. Later, the Migration Amendment Act 1983 (Cth)[38] hardened penalties for forgery of documents and for orchestrating illegal entry to Australia, and facilitated the deportation of non-citizens from Australia if they made no claims to refugee status or their applications were rejected.[39]

After a lull in the number of asylum seekers arriving by boat in the mid 1980s, by 1988–89 the number again rose sharply, prompted by disturbances such as famine in Vietnam, the ending of the Cold War, and events in China.[40] ASEAN once more called for an international conference to assist in resolving the issue. The resulting International Conference on Indo-Chinese Refugees[41] approved the Comprehensive Plan of Action (CPA).[42] This required Vietnam to prevent "illegal" departures in return for financial aid and set out a time frame for the repatriation of those asylum seekers from the camps in Southeast Asia who were not positively assessed by the UNHCR for asylum. But this action did not prevent increased numbers of boats arriving in Australian waters – in some cases caused, ironically, by the secondary flight of many fearing the imminent closure of the camps and their forced repatriation to their homelands.

It was from this time that the Australian government manifested increasing hostility towards unauthorized arrivals, implementing a policy of direct deterrence based on mandatory detention.

The Migration Legislation Amendment Act 1989 (Cth)[43] strengthened border control[44] and introduced a form of *mandatory* detention as positive law.[45] Section 14 of the Migration Act[46] prescribed that a non-citizen became an "illegal entrant"[47] on entry to Australia *unless* they held a valid entry permit, or their continued stay was authorized under the Migration Act, or they had departed at the expiry of their entry permit. The same status was bestowed by s.20 of the Migration Act on any person who had obtained entry to Australia fraudulently or from false or forged documents. Under s.92 [s.38] of the Migration Act a Commonwealth Officer had the power to arrest an illegal entrant and to detain them in custody until they made arrangements to leave Australia voluntarily, or to detain them for a reasonable period to enable consideration for the grant of an entry permit. However, such detention was not to exceed seven days. The Minister could authorize the release of an illegal entrant from detention on whatever conditions he deemed appropriate. However, where a deportation order had been issued under the Migration Act, s.93(2) [s.39(2)] empowered the Minister to order the continued detention of the illegal entrant until such time as they were in fact deported.

More important to the development of the mandatory detention policy of asylum seekers was section 88 [s.36] of the Migration Act. This was intended to deal with the small numbers of "prohibited entrants" such as stowaways found aboard seaborne vessels or those who would become "illegal entrants" should they be allowed to enter the country. Soon the section became the main basis on which asylum seekers arriving by boat were detained, since it was in force in 1989 when Australia faced an increasing number of such boats which were

intercepted in the territorial waters. Under its provisions asylum seekers were detained until they were either granted an entry permit to enter Australia or were removed "expeditiously" on the ships on which they came.[48] A person detained under this provision was deemed not to have entered Australia for the purposes of the Migration Act. Increasingly, unlawful arrivals were detained and were denied the procedural safeguards granted to non-citizens arriving lawfully and whose entry permits later expired but who claimed protection. Asylum seekers were hence being divided into two groups depending on their status on arrival.[49]

Those who became illegal entrants after expiry or cancellation of a valid entry permit had a twenty-eight day "period of grace" during which time they had to leave Australia or apply for a further entry permit.[50] If they were detained as a result of being an illegal entrant, but then made arrangements to leave voluntarily from Australia or applied for an entry permit (including refugee status), they could be released from detention on conditions decided by the Minister until they departed or until their application was finalized. If the application was refused or they made no application to remain in Australia, they would be deported following the expiry of any of the "period of grace" that remained if they made no arrangements to leave voluntarily within this time. If a person was detained following the expiry of the "period of grace," they could still apply for refugee status (provided they had not been removed from Australia in the interim) and again could be released on whatever conditions the Minister saw fit until the application was finalized.

By contrast, those prohibited entrants detained pursuant to s.88 were kept in detention until they were either granted an entry permit under s.47 [s.11ZD] of the Migration Act or they were removed. As a result of this system, some asylum seekers remained in detention for four years and more.[51]

The need for a legislative basis for the detention policy was forced on the government in 1992 by an appeal to the High Court: *Chu Kheng Lim* v. *MILGEA* (1992) 110 ALR 97.[52] The applicants sought injunctive and declaratory relief against both the Minister and the Commonwealth of Australia on the basis that they had exceeded their power by detaining the applicants under s.88, and that a duty was owed to the applicants under the Refugees Convention and/or the ICCPR.[53]

On 5 May 1992, two days before the case was scheduled for hearing, the government pushed through Parliament the Migration Amendment Act 1992(Cth).[54] This legalized the applicants' detention retrospectively. Nevertheless, five of the judges observed in their decisions that were it not for the amendment, s.88 could not be relied upon to detain the applicants, especially since the Department's own evidence was that the boats on which the applicants arrived had in fact been burned and *ipso facto* it was impossible for the detainees to be *returned* on them as s.88 stipulated.[55]

The Migration Amendment Act 1992 inserted into the principle Act Division 6 [Division 4B] which created a new classification of "designated persons."[56] Sections 179, 181, and 183 [s.54L, 54N and 54P] required the detention of a "designated person." Under these provisions, detention was limited to a period of 273 days.[57] However, section 181 [s.54P] provided that the detainee could obtain release by writing to the Minister and asking to be removed from Australia. Contingent with the power to detain "designated persons," s.183 [s.54R] purported to deny the courts the power to order the release of a designated person from custody until their visa applications were finalized.[58]

The Court in *Lim* rejected the claim by the applicants that the amendment was introduced to prevent their release and so operated as an usurpation of the judicial power. The majority of the Court held that it completely precluded the courts from reviewing the detention of designated persons, but only where this detention was not unlawful, i.e., where the detention of the person concerned was not in accordance with the Migration Act.[59] The Court considered that the power to be released lay ultimately in the hands of the detainee if they should so wish under s.183 [s.54P]. In upholding these provisions the Court noted that: "[T]he citizens of this country, at least in times of peace, enjoy a Constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."[60]

Crucially for the detention legislation, the Court held that this privilege did *not* include "non-citizens" (i.e., aliens) and that their detention or expulsion was within the legislative competence of the Commonwealth. The Court accepted the government's contention that the detention of designated persons was not a punishment but was to protect the national interest.[61] This purpose was clearly stated in s.176 [s.54J].[62] The Court focused on the use of the term "non-citizens" (i.e., "aliens") in the legislation, and in this regard the power was specifically granted to the Commonwealth by section 51(xix) of the Constitution.[63] This meant incidentally that the Commonwealth also had the power to detain non-citizens.[64] Despite the fact that the Court stated it would review detention of an individual to ensure it was according to law, it was immediately apparent that, given the broad definition of "designated persons," it would be difficult to envisage when detention would be unlawful.[65]

The Court's decision in *Lim* essentially gave the green light to the detention policy, permitting it to become

entrenched as a tool of control and deterrence by successive Australian governments.[66]

Current Detention Policy

The Migration Reform Act 1992 (Cth) ("the Reform Act")[67] introduced s.36(1) [s.26B] into the Migration Act and legislated for the first time the Convention definition of a refugee into domestic law.[68] More importantly, the reforms removed the legal distinction between "unauthorized arrivals" and "illegal entrants" that had operated until then, replacing these with the distinction between "non-citizens" who were "lawful" or "unlawful"[69] but mandating the detention of all of the latter.[70]

According to the Migration Act, Division 7, s.189 an officer must detain a person in the "migration zone"[71] if the officer knows or reasonably suspects that the person is an "unlawful non-citizen." This extends to a person who is outside the migration zone and is seeking to enter it and would be an unlawful non-citizen if they did so.[72] Detention is also mandated for a person who is unable to supply proper documentation or tries to avoid showing proper documentation that they are a lawful non-citizen.[73] A person can only be released from detention under s.191 if they show evidence that they are an Australian citizen, or produce evidence of being a lawful non-citizen, or are granted a visa. A person whose visa has been cancelled or who does not produce evidence of being a lawful non-citizen will also be detained.[74]

Under the law, the period of detention is indeterminate. Section 196(1) prescribes that an unlawful non-citizen detained under s.189 must be kept in immigration detention until they are: removed from Australia under s.198 or s.199 (for instance, after requesting the Minister in writing to be removed or upon any outstanding visa applications being finalized and refused); or deported (under ss 200–6); or granted a visa. This is strengthened by s.196(3) which prohibits the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation or unless they are granted a visa). Likewise, an unlawful non-citizen who has not subsequently been immigration cleared must be detained and removed from Australia as soon as reasonably practicable where they have not applied for a substantive visa, or the visa applied for is not one that can be granted when the applicant is in the migration zone; or their application has been finally determined.[75] Removal also extends to the non-citizen dependents of detainees, including spouses.[76]

Between the passage of the Reform Act 1992 through Parliament and its coming into force on 1 September 1994, several recommendations were made to "ameliorate" the rigidity of the system.[77] The Minister was given the power to grant detainees a *bridging visa*, thus permitting them to be released pending a final decision on their Protection Visa application.[78] Migration Regulations 1994 (hereinafter 1994 Regulations), regulation 2.20 lists the prescribed classes of unlawful non-citizens eligible for release. These include: people detained under the law as it was before 1 September 1994;[79] minors;[80] the spouse of an Australian citizen or permanent resident or eligible New Zealand citizen or a member of that person's family unit;[81] elderly people, i.e., aged seventy-five years and over;[82] and people with special medical needs, as determined by a medical officer appointed by the Department.[83] A detainee who does not fit one of the prescribed classes may apply to the Minister to grant a bridging visa in their favour.[84] In reality, however, these bridging visas are rarely granted. HREOC reported in 1998 that only two children arriving as boat people or born in detention had been released out of a possible total of 581 since 1 September 1994.[85]

This system has undergone some modification in the eight years of its operation, the government seeking to make the detention regime as strict as possible. For instance, under s.209 detainees are held liable to the Commonwealth for the cost of their detention where any visa application is finalized and refused.[86] Under s.193,[87] there is no requirement for the Minister or any officer to provide a detained person with an application form for a visa; or to advise a person that they may apply for a visa; or to give them any opportunity to apply for a visa; or to allow a person access to advice (whether legal or otherwise) in connection with applications for visas, unless the detainee should specifically request it.[88]

The ramifications of this "cone of silence" built around asylum seekers in detention was almost instantly obvious. In 1993–94, 100 per cent of unauthorized arrivals by boat made refugee claims. In 1994–95 only 10.4 per cent did so. In 1996–97, 80 per cent of unauthorized boat entrants were removed without requesting legal assistance.[89] Later, as part of an even tighter restriction on information flowing to detainees, Migration Act s.193(3)[90] was amended to exclude HREOC and the Commonwealth Ombudsmen from initiating communication with applicants to inform them of their right to make complaints to those offices.[91]

In 1998 the Department absolved itself of responsibility for the day-to-day running of the detention centres by privatizing their management to a private company.[92] The deteriorating standards alleged inside the detention centres and the long periods during which some detainees found themselves incarcerated resulted in a large number of complaints to HREOC.[93] This led to an inquiry into the detention centres by HREOC, the result of which was handed down in 1999.[94] This report was highly critical of the management of the detention centres and also of the policy of mandatory detention, par-

ticularly for the vulnerable – the aged, sick, infirmed, victims of torture and trauma, children, etc.[95] In response the government improved the quality of the holding facilities, but acted on none of the suggested reforms, including a model for release of detainees on reporting conditions pending the finalization of their applications.[96]

Upon the arrival of a large increase in the number of boats in the second half of 1999, the government introduced the Migration Legislation Amendment Act *(No1)* 1999,[97] which further reduced the right of refugees to apply for judicial review of unfavourable decisions made on their Protection Visa claims.[98] In 2000 the government restricted asylum seekers in detention to applications for a Temporary Protection Visa,[99] unlike the permanent residency Protection Visas granted to those arriving in Australia lawfully and who make their applications while still lawful (and who are not taken into detention).[100] These Temporary Protection Visas are valid for three years, at the expiry of which they must reapply for a Protection Visa (and hence be reassessed against the Refugee Convention) or face removal from Australia.[101] A person granted a Temporary Protection Visa is not permitted to sponsor their partner, spouse, or children to Australia nor are they entitled to any form of social welfare.[102]

In 2001, following the MV *Tampa* and *Aceng* incidents,[103] which represented a graphic intervention to expel potential asylum seekers without entertaining claims to protection, the government greatly increased the powers of officials to detain and remove asylum seekers found on board boats or planes in Australian territory.[104] These are now arrested and detained and thence deported outside Australia to third counties under the "Pacific Solution."[105] The government claimed these laws were designed to discourage "illegal people smuggling" into Australia and to assert control over entry to the migration zone.[106] People detained and removed from Australia under these laws are prohibited from applying for a Protection Visa.[107] This was achieved by excising certain places inside Australian territory (and properly part of the "migration zone") from the "migration zone" for the purposes of making a Protection Visa application. A person who enters Australian territory and thence enters without authority an "excised offshore place" becomes now an "offshore entry person." The law empowers the arrest and detention of an offshore entry person (or those who would become so should they enter an excised offshore place or would become an unlawful non-citizen if they should enter the migration zone),[108] sanctions their restraint and removal from Australian territory to a designated place outside Australia, and excludes the arrest, detention, and transportation of such a person from the meaning of "immigration detention" under the Migration Act.[109] These laws grant powers to restrain or detain asylum seekers on a ship or aircraft in Australian territory, or forcibly remove such persons from a ship or aircraft,[110] as well as the power to search people so detained without warrant.[111]

Furthermore, the law prohibits judicial proceedings relating to offshore entry by an "offshore entry person," their status as an "offshore entry person,"[112] the lawfulness of their detention, the lawfulness of their deportation from Australia, and the prohibition on their right to apply for a visa. The exception relates to proceedings brought within the original jurisdiction of the High Court under s.75 of the Constitution, which of course cannot be utilized once the individual concerned has been removed from Australian territory.[113]

This represents a dramatic extension of the detention regime. Currently, the law now requires the detention of all those who manage to arrive on the mainland of Australia as unlawful non-citizens or are refused immigration clearance, restricts their rights to apply for a Protection Visa, and inhibits their access to assistance or information regarding their legal rights. If prospective asylum seekers are intercepted in the territorial waters or in an excised offshore place, the law sanctions their arrest and expulsion to a third country where they are detained, prohibited from applying for refugee status under Australian law, and denied access to representation and advice. Those who arrive in the migration zone with valid visas are permitted to enter and are not detained so long as they apply for Protection Visa while their visas remain valid. If their visa should expire or be cancelled before lodging an application for a Protection Visa, then they too are liable to be detained as unlawful non-citizens. This entire system is now almost entirely outside of the supervision of the courts.[114]

Implementation of Detention Policy

According to the government's information[115] between 1989 and November 2001, 13,489 people arrived unlawfully by boat while 109 children were born to these detainees. All were/are kept in detention until their visa applications or requests for protection are finalized and they were/are either released or removed from Australia.[116]

In 2000–2001, 4,141 people arrived without authority on fifty-four boats, compared with 4,175 on seventy-four boats in 1999–2000. Of these, the majority came from Iraq, Afghanistan, and Iran, and over 90 per cent were granted Protection Visas on review to the Refugee Review Tribunal. This compares with 1989–90 when there were 920 arrivals on forty-two boats.[117]

In 2000–2001, 1,508 people were refused entry at airports, compared with 1,695 in 1999–2000. In 1998–99, there were 3,032 unauthorized airport arrivals compared with 610 in 1991–92.[118] In recent years those

refused clearance at airports have arrived predominantly from Malaysia, South Korea, New Zealand, Thailand, Indonesia, the U.K., P.R.C, the United States, India, and Japan, while 628 came from other various countries.[119]

In 2000–2001, forty-two people arrived as "stowaways." These are not normally permitted to disembark and are detained on board until the ship departs. If they apply for a Protection Visa they are removed from the ship and taken to detention.[120]

The majority of boats carrying asylum seekers entered Australian territory via Ashmore Reef, Christmas Island, and Cocos and Keeling Islands; i.e., they were intercepted there by the Royal Australian Navy.[121]

During 2000-2001, there were 7,993 unlawful non-citizens admitted to Australia's immigration detention facilities.[122] This is slightly fewer than the 8,205 admitted in 1999–2000 but more than double the numbers of 3,574 in 1998–99 and 2,716 in 1997–98. DIMIA claims that this was due to the increase in numbers of unauthorized boats arriving in Australian territory at the time.[123] As at 1 November 2001, there were 2,736 people in IDCs on mainland Australia, the top five nationalities being Afghani, 27.3 per cent; Iraqi, 13.2 per cent; Iranian, 7.0 per cent; Chinese, 5.2 per cent; and Indonesian, 4.5 per cent.[124] As at 1 February 2002, there were 637 women and children detained in mainland IDCs; of these, 259 were adult women; 224, male children; and 141, female children. There were also thirteen unaccompanied minors in detention,[125] nine other children in detention but under the care of the South Australian Department of Human Services, and one child in foster care after having been granted a bridging visa.[126] The numbers detained in offshore detention centres, such as Christmas Island, Manus Island, and Nauru are difficult to ascertain, but they would number at least several hundred.[127]

The length of time of detention varies greatly, from several days to some reported cases of four or five years. The government claims that with improved processing systems, the length of time of detention is greatly decreased. Some 80 per cent of asylum seekers receive a primary decision on their asylum application within eighteen weeks and 10 per cent of cases are processed within seven weeks.[128] The average time spent by a person arriving unlawfully by boat until the time of their release or removal was 155 days.[129] If an asylum seeker "chooses" to pursue appeals for judicial review, or "obstructs or hinders" the processing of their claims, then the period of time passed in detention can be greatly prolonged.[130] In the year from 1 January 2001 to 31 December 2001, a total of 3,465 temporary Protection Visas were granted to detainees; 1,490 cases were refused at primary level and 1,381 persons applied for review of the refusals to the Refugee Review Tribunal. Of those cases that had been finalized, 495 were found by the Refugee Review Tribunal to engage Australia's protection obligations.[131]

DIMIA claims that its processes for assessing refugee claims are flexible and constantly reviewed for effectiveness. Detainees undergo health screening within twenty-four hours of their arrival at detention centres. If the detainee claims to be a refugee, they are interviewed to ascertain if, *prima facie*, they engage Australia's protection obligations. The report of the interview is considered by a senior DIMIA staff member as to whether the applicant *prima facie* engages Australia's protection obligations; whether the applicant may have effective protection in another country (i.e., is engaged in "forum shopping"); and whether they may meet "public interest criteria" (i.e., health and character checks). This stage may take several weeks. If the applicant satisfies all factors, they may then be granted a Temporary Protection Visa (TPV).[132] Those who are refused may apply for review of the decision to the RRT. Any unauthorized arrival who does not engage Australia's protection obligations and/or does not apply for a visa is subject to removal from Australia under the provisions of the Migration Act as soon as practicable.[133]

According to the Department, "emphasis is placed on the sensitive treatment of the detention population which may include torture and trauma sufferers, family groups, children, the elderly, people with a fear of authority, and those who are seeking to engage Australia's protection obligations under the Refugee Convention."[134]

The Detention Centres

There are three Immigration Detention Centres (IDCs) and three Immigration Reception and Processing Centres (IRPCs) maintained by DIMIA.[135] The IDCs are located in Melbourne (established in 1966), Sydney (established in 1976), and Perth (established in 1981), and are used to accommodate mainly "non-boat people."[136] The IRPCs are located at Port Hedland (established in 1991) and Curtin (established September 1999) in Western Australia, and at Woomera in South Australia (established November 1999), and are used to detain mainly boat people.[137] There are also detention centres on Christmas Island, Manus Island, and Nauru.

The government has also established three centres as contingency holding centres. These are located at HMAS Coonawarra in Darwin, NT; the Australian Army facility in Singleton, NSW; and El Alamein in Port Augusta, SA. The government has announced plans for a new detention centre to be established in Brisbane, but has not formally announced a site for it.[138]

The detention centres are not run directly by the government. In 1999 these were tendered to the Australasian Correctional Services Pty Ltd (hereinafter ACS), which now manages the detention facilities on behalf of the DIMIA. DIMIA claims it maintains an official presence at each immigration detention facility, continually monitoring ACS's performance against Immigration Detention Standards (hereinafter IDS), which were developed by DIMIA in consultation with the Commonwealth Ombudsman's office.

The IDS specify the standard of facilities, services, and programs expected in detention centres, including the requirement to provide safe and secure detention. The IDS outline the quality of life expected in the centres and take into consideration "individual needs such as the gender, culture and age of the detainees."[139] The government claims a full range of services is provided at each detention facility, including medical and dental services; education programs for children and adults, including English-language instruction; cultural activities; sporting activities; and religious services.[140] Detainees are also assisted to prepare and lodge Protection Visa applications (if they request to make an application) through the Immigration Advice and Application Assistance Scheme (IAAAS) if they specifically request such assistance.[141]

The government claims that detention services "are subject to both administrative and judicial review, and are subject to full parliamentary scrutiny and accountability."[142] While the government is at pains to point out that the HREOC and the Commonwealth Ombudsman regularly visit detention centres to investigate complaints and conduct their own enquiries, this ignores the fact that both these offices have been critical of the detention centres and the detention policy in general, and they are precluded by legislation from making initial contact with detainees.[143]

In February 2001, the Minister established the Immigration Detention Advisory Group (IDAG), which was designed to provide advice on the adequacy of services, accommodation, and facilities at the centres.[144] Members of the IDAG have also been critical of the standard of the detention centres and of the detention policy following repeated riots and disturbances that occurred towards the end of 2001 and the first few months of 2002.

The cost of the mainland detention centres for 2000–2001 was around of $104 million, a large proportion of which was paid under the contract for managing the detention centres. However, this figure does not include "departmental corporate costs, capital costs for the provision of detention facilities or costs for detainees located in State correctional facilities." The average daily cost of maintaining the mainland detention facilities is $120 per day per detainee.[145] The cost of the "Pacific Solution" is not included in this figure, but it is believed to be in the vicinity of several hundred million Australian dollars.[146]

The Effects of Detention

Space does not permit a full canvassing of this complex issue, and the writer is not expert in mental or general health issues; however, the effects of Australia's detention policy on the asylum seekers themselves are slowly making their way into the public's attention.[147] Among the claimed effects of detention are the dehumanization and objectivization of asylum seekers.[148] The process of detention deprives people of their identities, not only within the detention centres themselves but also in the minds of the general public. The plethora of terms used to denote asylum seekers, including "detainee," "unlawful non-citizen," "illegal immigrant," "boat person," etc., removes those individuals from being seen or heard as people legitimately seeking Australia's protection.[149] This is caused, and in turn enables, politicians and others to characterize the asylum seekers as criminals – people who wilfully breach Australia's immigration laws, enter the borders illegally, steal jobs, and drain resources, as well as present a threat to the national security and public health. These characterizations feed the perception that asylum seekers are undeserving of compassion.

Heightening the isolation of asylum seekers is the denial of access to the detention centres by members of the press and the general public,[150] but also the interdiction on providing information and advice as to their legal rights, access to the courts, and denial of basic fairness in the processes used to assess their claims to protection. Likewise, the fact that a detention centre is, for all intents and purposes, a prison, combined with the length of time that a person can be detained, compounds the detrimental impact, both psychological and physical, on the detainees.[151]

The impact on the health of an individual detained in remote places for lengthy periods of time is manifestly obvious. This is aggravated by the rhetoric of politicians particularly who enforce negative stereotyping in the public mind. Detention disrupts family relationships, creates stress and tension between individuals, and can lead to destructive impulses which the detainees inflict on themselves.[152]

HREOC, despite saying it is pleased with the government's recent improvements to the physical conditions in which detainees are kept, has been severely critical of the policy of detention itself. In its opinion the situation is particularly acute for the infirm, infants, the elderly, pregnant women, etc., there is overcrowding reported in some centres, lack of recreational facilities, and inadequate sanitary conditions.[153]

Justifications for Detention

The Australian government claims there are compelling reasons for the mandatory detention of people who arrive in Australia without authorization. These include:[154]

- conduct of essential identity and health checks;
- assessment of character and security issues, ensuring that people do not enter the community until their claims to do so have been properly assessed by internationally agreed standards;
- providing asylum seekers access to appropriate services for the processing of refugee applications, and helping them through the culture shock of coming to a new country;
- ensuring their availability for removal from Australia and maintaining the integrity of the migration program when claims to remain are unsuccessful.

Superficially, these sound reasonable, since they mix legitimate elements of public policy (such as the need to protect the national interest) with the obligation to protect people in need (the asylum seekers themselves). But uglier motivations belie the policy than these offered by DIMIA (and the Minister).

Australia Does Not Detain Asylum Seekers

Australia claims that it does *not* detain asylum seekers, based on the semantic argument that, until a person is granted refugee status under the Refugees Convention, they are *not* a refugee and therefore do not come under its provisions. If no claim is made for refugee status, then Australia's protection obligations are not invoked. Given the restrictions on information provided to "unlawful arrivals," the fact that a large proportion do not make claims, or fail to make adequate claims, should not be surprising. This in turn permits the government to claim that detainees are not "asylum seekers" but "unlawful arrivals" or "illegal immigrants":

> Australia does not have a policy of detaining asylum seekers, but does detain unauthorised arrivals. Some of these people subsequently apply for asylum. It is worth noting that the majority of asylum seekers have entered Australia with a valid visa and are free in the community while they pursue their claims. Those who are found to be refugees are released from detention immediately, subject to health and character requirements.[155]

Further, the government alleges that : "mandatory detention is the result of unlawful entry, not the seeking of asylum. People being held in immigration detention have broken Australian law, either by seeking to enter Australia without authority, or having entered legally, failing to comply with their visa conditions."[156]

This rhetoric shifts the onus (or blame) for detention onto the asylum seekers themselves. Because they are characterized as lawbreakers, public compassion for their plight is undermined.

Australia Is Not a Country of First Asylum

Due to Australia's geographical position and its relative "isolation," the government claims Australia is far from most refugee-producing countries, and therefore should not be a country of first asylum.[157] Resettlement in a third, more distant, and different country to which the asylum seeker has fled after leaving their home country is regarded as a last resort:[158] "As Australia has not been and clearly is not, in the majority of circumstances, a country of first flight/asylum, it has consistently over time sought to contribute to international responsibility sharing through its generous resettlement program."[159]

Australia subtracts the number of refugee visas granted onshore from the number it takes under its offshore humanitarian program. The argument runs that by accepting large numbers of unauthorized arrivals, Australia is compromised in its capacity to resettle refugees who may be forced to remain in refugee camps in third countries.[160] The number of unlawful asylum seekers requires countries to implement asylum processing schemes which are costly and time consuming. The government claims the system is complicated by "judicial interference" in administrative decision making regarding protection claims, which in turn adds to the costs, makes it more time consuming, and reduces the tolerance of receiving nations:

> [J]ust to find the relatively few refugees among those who seek asylum, western countries are spending over ten times UNHCR's budget. When are we going to address an overly legalistic system that uses up our capacity to help prevent refugee situations at source? Are we going to wait until the already too few resettlement countries no longer have any capacity or willingness to resettle the most vulnerable refugees?[161]

Public Interest/National Security

Considerations based on the "national interest" involve several discrete issues.

Domestic political interests. The public perception (created and fed by the government) is that by detaining asylum seekers, the government is seen to be tough in protecting Australia's territorial integrity and in punishing those who would wilfully enter the country unlawfully[162] "…asylum systems are beset with identity, nationality and claims fraud of such dimensions that the community's willingness to support refugees is being eroded. That community support is essential if states are

to be able to continue humanitarian action and resettlement."[163]

By statements such as these, the government has done much through distorting the facts regarding asylum seekers to make the issue a political one.[164] This was evident before the federal general election held in November 2001, when asylum seeker policy, including mandatory detention, became the cental policy debate between the various political parties.

Public interest. Detention is necessary to prevent the entry of people who may be unidentified and who may pose health or security risks to the Australian community.

> All applicants for Temporary Protection Visas must also meet health requirements. This is important to ensure that communicable diseases are not left undetected. …While many people who apply for asylum in Australia will meet the character requirements for Temporary Protection Visas, there are also in immigration detention former terrorists, former senior officers and military personnel of despotic regimes, people who are suspected of crimes against humanity and organisers of people smuggling rackets.[165]

The government states that many asylum seekers upon arrival have no forms of identification, having disposed of all their personal papers en route, and that "it is not uncommon for them to 'change identity' either during the journey or processing, in the hope that it may be easier to stay if they claim a different nationality."[166] The government requires some asylum seekers to obtain formal police clearances from countries of first asylum in which they have resided for at least twelve months, to confirm they are of good character. This may take several months and so lengthens the period in detention.

National security and border control. In order to protect Australia's borders and to maintain control of the entry of persons into the country, detention is seen as a necessary tool for ensuring these objectives.[167] In relation to this the government claims that detention: "…reflects Australia's sovereign right under international law to determine which non-citizens are admitted or permitted to remain and the conditions under which they may be removed."[168]

And again: "This practice is consistent with the fundamental legal principle, accepted in Australian and international law, that as a matter of national sovereignty, the State determines which non-citizens are either admitted or permitted to remain and the conditions under which they may be removed."[169]

Deterrence

In the government's view the need for deterrence covers several aspects.

Deters queue jumpers and forum shoppers. Mandatory detention is claimed to deter those who may wish to enter Australia illegally ("queue jump," "forum shop," etc.) and seeks to punish those who have already done so.[170]

Deters people smuggling in circumvention of Australia's migration laws. The government, concerned about the rise in illegal schemes involving people smugglers who circumvent national borders and entry requirements, has increased the penalties on those involved in people smuggling/trafficking,[171] but maintains mandatory detention for those who wish to use people smugglers. The government is using detention as a tool to deter and punish people smugglers as well as asylum seekers who should resort to them: "The Australian Government believes it is important to send a clear message that it will not tolerate the activities of people smugglers or the illegal entry of people in Australia."[172]

And again: "In recent times, people smugglers have attempted to control who enters Australia. These changes [to the law in November 2001] mean that Australia is once again able to control who enters our borders and who is allowed to stay here."[173]

The government's rhetoric in this regard also shifts the onus for people smuggling onto the asylum seekers themselves, often without cognizance of the issues that may drive or impel people to seek out people smugglers in order to enter the country unlawfully: "…people are forsaking opportunities for protection in neighbouring countries and are using people smugglers and the asylum system to seek access to western countries – and some are tragically dying in the attempt."[174]

In furthering its policy of deterrence, Australia's migration law now prevents those who arrive unlawfully in certain areas from being able to remain in Australia or apply for refugee status: "In the past people smugglers have sent boats to Ashmore, Cartier, Christmas, and Cocos Islands and the people have been brought to the mainland by the Australian government at great expense. The new laws mean that people who travel illegally to excised offshore places can no longer apply for any visa to Australia."[175]

Deters people from attempting to extend their time in Australia. Asylum seekers are exploiting appeals to the courts for administrative review of decisions refusing Protection Visas ("delaying tactics") to avoid removal from the country. This has been encouraged by "activist judges" who extend the scope of the Refugees Convention from that originally intended.[176] By insisting asylum seekers remain in detention, the government is "deterring" abuse of the system and encouraging them to accept repatriation. The government claims that, instead of accepting the "decision of the umpire,"[177] asylum seekers choose to exploit the legal system at great cost to

the Australian community and thus lengthen the period they will spend in detention. To further deter legal appeals, the government has introduced a "privative clause" which attempts to remove from judicial review all decisions refusing Protection Visas except on the basis of jurisdictional error.[178] Since it is the judiciary's role to ensure the legality of administrative decision making according to proper principles of law,[179] the policy of removing judicial supervision of administrative decisions regarding refugees, combined with the government's rhetoric in this regard, represents an attack on the independence of the judiciary itself and severely undermines the rule of law.

Asylum Seekers Are Responsible for Their Detention

A common theme of government rhetoric justifying the detention regime is to shift the blame for detention onto the asylum seekers themselves. Asylum seekers are portrayed as: "choosing" to come to Australia illegally, rather than patiently and properly applying for visas to come to Australia lawfully; choosing to use illegal means, such as people smugglers, to achieve this end; choosing to pay large sums of money in order to gain illegal entry to the country; choosing to destroy documentation such as passports, etc., in order to commit a fraud against the authorities by bolstering their claims to refugee status;[180] and, once in Australia, by choosing to use every available means to prevent their removal from Australia by electing to commence lengthy and costly legal proceedings in the Federal Court.[181]

> People who enter Australia illegally have chosen not to apply for a visa. There are Australian overseas missions in the countries through which unauthorised arrivals have travelled to reach Australia illegally and at which they could have lodged applications for consideration under Australia's humanitarian programs. Instead, they have contacted international criminal organisations involved in people smuggling. They have the resources to pay for their passage and should not be confused with popular images of refugees who flee civil disruption or war, on foot and with few belongings.[182]

And again:

> Not all who arrive in Australia as unauthorised arrivals seeking protection have genuine protection claims. Nor have they come to Australia illegally because they could not join a "queue". Some persons have left protection already available to them in a safe third country and are effectively seeking a migration outcome. Some have been rejected under the Humanitarian Program and have been led to believe that if they come to Australia illegally they may achieve a more favourable outcome. Others simply do not want to wait while their applications overseas are assessed.[183]

Such statements are clearly designed to undermine support for asylum seekers within the wider Australian community and to bolster support for the mandatory detention policy.

Detention Is Not Prolonged or Longer Than Necessary

The government claims that, since mandatory detention is implemented for reasons of national security, border control, and public interest and to uphold the integrity of the migration system (even facilitating applications for Protection Visas through maintaining order in the system), the policy is not in conflict with any of Australia's international obligations. Indeed, the government claims that applicants are not detained any longer than necessary.[184] Those that are found to be refugees are granted visas and released immediately, while those that are refused are removed from the country.[185] Where a prolonged stay in detention occurs, this is usually the fault of the asylum seeker themselves: "Once detained, the period of time it takes for applications to progress through the refugee determination process and, hence, the period of detention is minimised."[186]

The Legality of Detention

The legality of the detention of asylum seekers is highly contentious. However, there are several instruments, agreements, decisions, and recommendations made under international law which suggest that Australia's mandatory detention of asylum seekers breaches international law standards.[187]

The Universal Declaration of Human Rights (1948) (hereinafter UDHR)[188] at Article 9 states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Article 10 states, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 14(1) states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." While these may not give rise to enforceable rights,[189] other conventions which reflect these standards, and to which Australia is a party, are pertinent particularly the International Convention on Civil and Political Rights (hereinafter ICCPR),[190] the Convention on the Rights of the Child (hereinafter CROC),[191] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT).[192]

Article 31 of the Refugees Convention states that refugees should not be punished for entering the territory of

a signatory state unlawfully, where they come directly from a territory where their life or freedom was threatened in the sense of Article 1, provided they present themselves without delay to the authorities and show good cause for their illegal entry.[193] Australia argues that until it exercises its prerogative right to grant an asylum seeker the status of a refugee under the Refugees Convention, it is not in breach; detention is only necessary for the regularization of the status of the individual concerned, thus complying with Article 31(2). Once recognized as a refugee, a person is immediately released from detention.[194] Therefore, refugees are not detained or penalised *per se*.[195] Despite this Orwellian logic, Australia's mandatory detention of asylum seekers has been the subject of critical comment nationally and internationally.[196]

The Executive Commission of the UNHCR (ExComm) has examined the issue of detention of asylum seekers. In Conclusion No. 44 (XXXVII) – 1986: Detention of Refugees and Asylum Seekers, the ExComm expressed the opinion that "in view of the hardship which it involves, detention should normally be avoided."[197] It stated that detention may be resorted to:

> …only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.[198]

ExComm is thus clear that asylum seekers should be detained only as a last resort and only for exceptional reasons. If detention must be imposed, then it must be according to law and according to accepted standards of human rights law; and this includes access to representatives of the UNHCR.[199] In this respect, ExComm stresses that national legislation and/or administrative practice should make "the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens."[200]

The UNHCR in its Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999)[201] expanded upon what ExComm had stated. There, the UNHCR stated:[202] "The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs."

The UNHCR was of the view that this injunction against detaining asylum seekers is in conformity with Article 14 of the UDHR since the "right to seek asylum" expressed therein is considered a basic human right.

The UNHCR confirmed that "detention should only be resorted to in cases of necessity" and is only permissible for set exceptions.[203] However, even where an asylum seeker has used fraudulent documents or travelled with no documents at all, detention is only permissible when there is evident a manifest intention to mislead, or a refusal to co-operate with the authorities.[204] Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.[205] In such cases, detention should not be "automatic, or unduly prolonged." These principles should be applied not only to those declared to be refugees, but also to "asylum-seekers pending determination of their status." Given the nature of the circumstances surrounding asylum seekers, it is only to be expected that in attempting to exercise this right "asylum-seekers are often forced to arrive at, or enter, a territory illegally."[206]

Indeed, the UNHCR interprets the requirements of Article 31(1) as covering situations where an asylum seeker has not come "directly" from their country, but has come from another country where "protection, safety and security could not be assured." This implies that even where an asylum seeker has transited through a third country "for a short period of time without having applied for, or received, asylum there" they should not be penalized for having done so.[207] Each case must be judged on its merits.[208] Categorically the UNHCR holds the view that detention must not be used as a punitive or disciplinary measure for illegal entry or presence in the country.[209]

In a similar vein are the Principles enunciated by the UN Commission on Human Rights' Working Group on Arbitrary Detention (hereinafter "the Working Group"),[210] which was directed to examine the situation of immigrants and asylum seekers, "who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy."[211] In December 1998 the Working Group set out criteria for determining whether or not custody is "arbitrary"[212] and shortly thereafter adopted Deliberation No. 5.[213] This advises, *inter alia*, that: asylum seekers in detention must have the possibility of contact with lawyers and access to phones, faxes, and electronic mail (Principle 2); they must be brought promptly before a judicial or other authority (Principle 3); the decision to detain an asylum seeker must be made by a duly empowered authority and must be made according to law (Principle 6); a maximum length of custody should be set by law and in no case must it be of unlimited length or excessive (Principle 7); and the UNHCR, the International Committee of

the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody (Principle 10).

In relation to Australia's mandatory detention policy, HREOC advised the Parliament in November 1997, in May 1998, and again in November 1999[214] that the law requiring detention of almost all unauthorized arrivals[215] contravenes international law. Specifically, HREOC stated:

> Australia's policy of detention of asylum seekers is automatic and mandatory and applies to almost all unauthorised arrivals until their claim for protection is determined finally. It goes well beyond what ExComm Conclusion 44 deems 'necessary' for the purposes of compliance with the Refugee Convention, CROC and the ICCPR.[216]

Infringes Right against Arbitrary Detention

Perhaps the severest criticism of the legality of Australia's mandatory detention policy came from the UN Human Rights Committee in its decision in *A* v. *Australia* in 1997, when it was called upon to consider whether the policy infringed certain articles contained in the ICCPR which guarantee against arbitrary detention.[217] Article 9 of the ICCPR states, *inter alia*:

> 1.Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law….
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Furthermore, Article 10 of the ICCPR states "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The complaint concerned a Cambodian refugee who arrived in Australia on 13 December 1989, made a claim to refugee status, and was taken into detention on 21 December 1989. He remained there until his release in January 1994 when he was granted refugee status. The UN Human Rights Committee found that Australia was in breach of certain of its obligations under the ICCPR. In relation to this the UN Committee stated: "Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many instances, contrary to the norms and principles of international law."[218] More specifically, the Committee held:

> ... detention should not continue beyond the period for which the State can provide appropriate justification.… Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State Party has not advanced any grounds particular to the author's case, which would justify his continued detention .... The Committee therefore concludes that the author's detention ... was arbitrary within the meaning of Article 9, paragraph 1."

The Committee then advised that: "to avoid the taint of arbitrariness, detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights."[219]

As the UNHCR observed:[220]

> [f]or detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.

HREOC similarly noted, "[m]andatory minimum terms of imprisonment do not allow the judiciary to apply proper sentencing principles."[221]

Detainees should thus have the right to appear before properly constituted courts to ensure that their detention is according to law and either to determine the period of detention or to order their release. The fact that Australia's detention policy is mandatory with no discretion not to apply it to an individual, irrespective of the circumstances, and given there is no recourse by a detained individual to judicial review of that detention, means *ipso facto* that it results in arbitrary detention.[222] This is the more so since no appropriate justification for applying the policy has been properly advanced by Australia.

The indeterminate length of the detention which an asylum seeker faces under Australia's policy (in that, in order to substantiate their claim to protection, it may take months or even years to be processed through the system) means that there is a lack of proportionality between the act that leads to detention and the detention itself.[223] This is also contrary to the UNHCR Guidelines, which state that detention must be "reasonable" and "proportionate to meet the standard set out by ICCPR article 9.1."

Indeed, detention for any purpose outside those stated in ExComm Conclusions, the UNHCR Guidelines, and the decision of the UN Human Rights Committee, and contrary to international human rights norms, is in breach of international law.[224] Asylum seekers should have access to procedures for determining refugee status or granting asylum that are quick and fair, and they should not be detained through application of a mandatory policy. The distinction should always be drawn between the position of refugees and asylum seekers, and that of other aliens.[225] In this regard, UNHCR guidelines state that the detention of asylum seekers for any other purpose, "for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law."[226]

Australia's policy does not make such distinctions, but rather selects all unlawful non-citizens who arrive in Australia unlawfully, *including* prospective asylum seekers, for punishment for the expressed purpose of deterrence. The same conclusions can be made regarding the detention of asylum seekers on boats within territorial waters pursuant to s245F(9) of the Migration Act, their expulsion from Australia to third countries, and their detention there in centres run by the Australian authorities.[227]

Infringes Obligations Not to Discriminate

Article 7 of the UDHR states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." This is reflected in the ICCPR, Article 26, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*"[emphasis added].

Article 2 of the CROC makes similar guarantees in relation to children.

Australian policy clearly discriminates between those who claim asylum after arriving on valid visas and thence are immigration cleared, those who arrive in the migration zone without visas who are detained, and those who arrive in an "excised offshore place" and who are detained and expelled to third countries. This creates three classes of asylum seekers who are not treated equally by law or policy.[228] This includes the fact that asylum seekers who arrive in the migration zone unlawfully are restricted to Temporary Protection Visas, are not granted travel permits, and are prohibited from sponsoring members of their immediate families,[229] while those removed from Australia under the "Pacific Solution" are prohibited from applying for refugee status under Australian law. HREOC is of the view that this differentiation in policy application is discriminatory on the basis of the status of the asylum seekers and therefore infringes the above mentioned human rights instruments.[230]

Infringes Non-Refoulement Obligations

The expulsion and detention of asylum seekers under the "Pacific Solution" puts Australia at risk of violating its duties not to expel or *refouler* refugees under Articles 32 and 33 of the Refugees Convention[231] and the *non-refoulement* provisions of the CAT Article 3,[232] the ICCPR Article 7, and the CROC Articles 3, 20, 22, 39, and 37. This is because there are no guarantees that detainees will have information concerning their right to claim protection, there is no guarantee that their claims will be properly assessed, and there is no appeal right against adverse decisions made on their status in these circumstances.[233] There is also no right for these individuals to apply for refugee status under Australian law, as this can only be applied for in the Australian migration zone. This means individuals detained in third countries under the "Pacific Solution" are at risk of being *refouled* to their countries in contravention of the above-mentioned conventions.

For those detained in mainland IDCs, the fact that there is no onus to provide information to detainees on their legal rights unless the detainee should specifically request it, may well lead to the *refoulement* of an individual who may not have been aware that they had the right in Australian law to claim protection under the *Refugees Convention*, again contrary to the above mentioned conventions.

Denies Right of Asylum Seekers to Apply for Refugee Status

Closely linked with the above, the restrictions on providing information to prospective asylum seekers in mainland IDCs as to their rights to claim asylum effectively inhibit the individual's right to claim asylum and to have their cases assessed against international standards.[234] Worse, the fact that an individual can only claim refugee status within the Australian migration zone means that removal of asylum seekers pursuant to the "Pacific Solution" prevents them from seeking to apply for refugee status or from having Australia's protection obligations to them under the Refugees Convention invoked. This

infringes Article 14 of the UDHR; Article 31 of the Refugees Convention; provisions of the CROC; and the ICCPR.[235]

Rights of the Child

There are various articles contained in the CROC which guarantee that a child will not suffer discrimination, will be treated equally before the law, will not be detained arbitrarily, and will not be subject to torture or trauma, etc.[236] According to the UNHCR Guidelines,[237] Australia is obliged to ensure an appropriate environment for children who are detained. If children who are asylum seekers are detained they must not be held under "prison-like" conditions. All efforts must be made to have them released from detention and placed in other accommodation.[238] Australia fails this, especially considering there are some 365 children in mainland IDCs as well as some fifteen children who are unaccompanied minors – even more so given that under the Migration (Guardianship of Children) Act 1946 (Cth) the Minister is the Guardian charged with their welfare.[239]

The government has rejected criticism of its policy of detaining children. The Department stated: "The Australian Government is aware of its responsibilities under the UNCROC and does its utmost to ensure that children are treated in accordance with the provisions of the Convention."[240] Recently the government has commenced trial of a scheme under a Memorandum of Understanding with the South Australian Department of Human Services to provide alternative care to certain unaccompanied minors. Currently there are nine children placed under this alternative care mechanism.[241]

There have been several accusations of sexual abuse of children in the detention centres. DIMIA claims that it responded quickly on being notified of these allegations, alerting the police and ensuring the children received counselling. However, this begs the question of why children are kept in a situation where they are at risk in the first place. Detention centres after all are prisons, and the activities of the inmates cannot be monitored all the time. The fact that children are detained at all is clearly in breach of the CROC.[242]

Infringes Obligations Not to Inflict Torture or Cruel or Unusual Punishment

Article 7 of the ICCPR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…." Article 16 of the CAT states:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

Article 37 of the CROC states:

> States Parties shall ensure that; (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age…"

Given the evidence that the Australian mandatory detention policy inflicts mental and physical detriment on asylum seekers, is of undefined duration, and is inflicted arbitrarily, it could be concluded that Australia is in breach of the above conventions. It is arguable that mandatory detention results in the infliction of (at the very least) cruel and unusual punishment, if not, in some circumstances, torture.

Alternatives to Detention

The scope of alternative schemes to the mandatory detention policy is too complex for canvassing in this paper; suffice to note that several alternatives to detention have been proposed.[243] HREOC in the "Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program" recommended, *inter alia*:[244]

1. Australia should replace the current system of mandatory universal detention of unauthorized arrivals with the alternative set of community release based on reporting conditions.
2. All immigration detainees should be permitted to apply for release on the ground that their detention is unnecessary and/or disproportionate and should provide for judicial review of all unsuccessful applications.
3. Australia's commitments under international law require the retention of the right of appeal and judicial review for protection visa applicants.
4. Australia must present the opportunity to all asylum seekers to receive protection where their claims fall within other international conventions such as the ICCPR, CAT, etc.

The government has not acted upon these suggestions and has even rejected the principles that HREOC formulated to govern the current detention system. In the government's response to the findings on a complaint lodged with the HREOC, the Department stated that it rejected the Commission's Detention Centre Guidelines

in preference for its own principles to assess standards inside the detention centres:

> Immigration detention management and services are governed by the Immigration Detention Standards (IDS) developed by DIMA, in consultation with the Commonwealth Ombudsman's Office. DIMA advised the former Human Rights Commissioner, Mr Sidoti, in November 1999 that the IDS, which form part of DIMA's contractual agreement with ACM, meet Australia's international obligations in relation to core human rights principles.[245]

Observations

The justification employed by the Australian government for detaining asylum seekers focuses on the need for national security and public health, and on the deterrent effect that it is supposed to have in protecting the borders.[246] This strategy clearly singles out unlawful asylum seekers for treatment different from that applied to asylum seekers who arrive on valid visas. Since the difference in treatment is detention, limited rights, and even expulsion under its so-called "Pacific Solution,"[247] it is impossible not to conclude those arriving unlawfully in Australian territory are being punished for so doing.

This is a matter of concern since it breaches Australia's responsibilities under the ICCPR, the CROC, and the Refugees Convention against discrimination and punishment of asylum seekers, and infringes the rule against arbitrary detention. The detention of children is clearly contrary to international human rights norms. The semantic argument used by Australia, that asylum seekers are not refugees until granted that status and hence no specific duties are owed to them, merely obfuscates the real issue – that is, whether Australia has a duty to assess claims to asylum from those who arrive on its shores in a just manner, regardless of whether their arrival was lawful; or whether Australia can avoid its obligation to assess claims for protection by using detention and expulsion as tools to prevent applications for asylum being made in the first place.

Australia has consistently maintained a policy of executive control of the country's migration intake, preferring only those applicants processed from other countries, and deterring those who may seek asylum directly in Australia. On face value this may seem sensible enough. But essentially it involves a blurring of the issues of control of borders and national security with obligations owed to asylum seekers. In the contest between the two competing interests, international human rights obligations have consistently played second fiddle.[248] To justify its policy, the official rhetoric over some twenty-five years has been to dehumanize and delegitimize asylum seekers. This undermines support in the public mind for a humanitarian response, which in turn demands a strong response from government to be seen to be doing something about it, irrespective of the individual circumstances which may have impelled the asylum seeker in the first place. The Minister justifies the mandatory detention regime as punishing and deterring what are referred to as "queue jumpers," "forum shoppers," and "lawbreakers,"[249] maintaining that Australia should not be a country of first asylum as this is "unfair" to refugees waiting in camps.[250] The emphasis on "fairness" or concern for the refugees[251] (as opposed to those arriving unlawfully by boat) forms a large part of the official rhetoric towards onshore asylum seekers.

What the government fails to understand is that there is no competition or tension between the two policy objectives. Indeed, it is possible to maintain border control and security without sacrificing the rights of human beings in the process.[252] Regardless of whether asylum seekers are admitted and processed or not, the government maintains effective control of the borders and national security. No matter how an individual arrives in Australia, the *government* determines whether that person may remain in Australia and on what conditions. Whether such people are detained is not strictly relevant. The central issue regarding the problem of asylum seekers is one of fairness and expeditious processing of claims – rather than whether or not detention policy is efficacious in maintaining border control. Clearly it is not – since the asylum seekers keep coming and have consistently done so for the past fourteen years.[253]

National security became particularly important following the sad events of 11 September 2001. However, the government rhetoric in this regard was particularly base, since it cast aspersions on all people arriving from Middle Eastern countries and of Arab backgrounds as posing considerable risk to the Australian community.[254] Much residual sympathy for asylum seekers at this point quickly evaporated as the detention policy and border control became the central policy debate in the lead-up to the federal general election in November 2001.[255]

Despite the government's claims that its policy maintains strong borders, it is futile to hope that the borders of any country can be made impermeable to those who may be fleeing hardship and distress. If someone is driven by desperation to attempt to come to Australia, they will do so no matter how severe the detention regime nor how tight the government attempts to make the frontiers.

Even if detention were considered necessary for the purposes of confirming the identity of arrivals and for public health reasons, these issues do not justify mandatary detention for an extended period as the government maintains. Most identification checks and all necessary health checks should only require a few weeks to carry

out, and if a proper system, say, of mandatory reporting were instituted, there would be no necessity to keep the vast majority of people currently held in IDCs. This would be at far less social and economic cost to the Australian community than is now the case.

Most asylum seekers pass through another country before arriving in Australia where, it is alleged, if they were genuine refugees, they would have sought asylum. This puts unlawful asylum seekers in a "pincer movement": either they remain in third countries and await processing to come to Australia (which, for the reasons discussed below, may never happen) or they would accept asylum in that country to which they have fled. In any event there would be no need for them to come to Australia unlawfully.

This is a simplistic argument which conveniently overlooks several important facts, not least of which is that it is only possible to claim refugee status when *in the territory of a signatory state*. The government's assertion that there is an orderly queue for "refugee status" outside Australia is complete fiction: the definition of a refugee under Article 1A(2) of the Refugees Convention is not the criterion of *any* offshore class of visa that Australia offers. Under international law, while there may not yet exist an agreed "right to seek asylum," those countries which are signatory to the Refugees Convention have assumed a duty not to *refoule* or expel any person who comes within the ambit of the definition of a refugee as found in Article 1A(2). In the view of some, this is in order to deter signatory states from adopting practices that may deter prospective refugees from entering their territory to claim protection.[256] It would hence make a mockery of the Convention if signatory states (like Australia) were to adopt policies which would prevent or deter a prospective refugee from entering their territory to claim their protection. If at best Australia's policy is not a breach of its obligations under the Refugees Convention, it is definitely not in compliance with its spirit.

Given Australia's geographical location it is virtually impossible to arrive directly without first passing through a third country. Many of the countries that lie on the route to Australia (such as Indonesia and Thailand) are not signatories to the Refugees Convention, and not all Australian embassies have Immigration Department offices capable of processing such claims. Indeed, many of the countries that have refugee exoduses or are the first port of call for asylum seekers have no Australian representation at all.[257] This necessitates that prospective applicants send their applications through the post to the Australian immigration office that has responsibility for such applications.[258] Applications must be made in English and must have accompanying documentation, including identity documents and other forms of proof substantiating the applicant's claims. This poses difficulties for those people who do not have education or status or other forms of access to information; indeed, it becomes impossible for the bulk of asylum seekers.

Furthermore, most applicants who are in refugee camps are not aware they can make applications for protection in Australia. Even if they manage to make an application they can wait years to be processed, and frequently the only correspondence they may receive from the Department will be a rejection of their claims. There are no appeal rights from decisions to refuse a visa applied for offshore, no right of putting a case in person, nor any obligation on immigration officers to inform applicants about evidential problems with their claims. Finally, but importantly, applications received at Australian posts are not processed in a "first in, first served" basis. Applications are processed until the officer is satisfied the applicant meets the requirements for the grant of the visa or not. Those that are approved may not be granted a visa if the quota for the financial year has already been reached; in this case, they could be held over for years before final decision.

For the above reasons, the criticism and punishment of asylum seekers for resorting to people traffickers is easy to refute. Desperation will force people to try any means to alleviate their condition. This makes them easy prey to people smugglers who exploit them to the point that their lives can be threatened. However, the Australian government prefers to punish the asylum seekers with detention or expulsion.

The government would do better to address the issues as to why so many people should risk their lives and savings to attempt to come to Australia in a perilous sea voyage; they may in fact find that all the answers would be legitimate as to why a person should do so. Persecution (for Refugees Convention or some other reason), repression, discrimination, and poverty are sadly too common a state of affairs for a large proportion of the population of this planet. The desire to find solace in other countries (and the need to use any means at one's disposal to do so) means that industrialized nations will continue to have problems with asylum seekers until these root causes are addressed.

However, one may ask why, if the policy of detaining refugees were so successful in achieving its ends, do boatloads of asylum seekers keep arriving?[259] Why do successive Australian governments see the need to slowly remove detention from the purview of the courts and forbid media and other access to the detention centres? As part of this, the government shifts the onus onto the system's critics to propose alternatives to the detention regime, despite the fact that an alternative scheme has

never been trialled nor publicly canvassed and that the government shows no inclination to do so. In truth, the number of onshore asylum seekers arriving unlawfully every year in Australia is relatively insignificant compared with most other industrialized nations, yet the passion that it evokes and the severity of the government response are wholly out of proportion.[260]

Due to economic pressures within, and a Machiavellian twisting of policy and public opinion, Australia has become a place where asylum seekers are increasingly demonized and where, far from being seen as people deserving of compassion, they are viewed as objects deserving of punishment. It seems that compassion comes at too high a price, but that AUD$1billion to detain asylum seekers and to support the "Pacific solution" is not too costly. Quick and proper processing of refugee claims would offer those who are genuinely fleeing persecution the chance to normalize their lives more quickly without the infliction of further trauma which currently occurs when a person may be incarcerated in a detention centre for an indeterminate period. Other counties which receive far larger numbers of asylum seekers than Australia manage to do so without detention and with far less fuss. It is perhaps more a reflection on the dark side of human nature and a level of immaturity in the Australian political processes than a reflection of policy which is proper and truly beneficial to the Australian community as a whole.

There are no plans for the Australian government to ameliorate the system of mandatory detention, let alone to abolish it.[261] The policy still enjoys bipartisan support in Parliament, and without a seismic ground-shift in public opinion, this is not likely to change in the near future; although cracks in its support are starting to appear.

Conclusion

Detention centres tend to be placed in remote parts of Australia, in fact, anywhere that is not easily accessible to the bulk of Australian citizens, their representatives, the advocates representing the asylum seekers, and members of the press. By way of justification, the government claims that detention is necessary for security and public health risks that detainees pose to the Australian community. Detention is a mandatory regime under which there is no right to access legal advice, to make visa applications, or to have information about visas (even that asylum seekers may be eligible to apply for visas).[262]

The result of this policy is that the asylum seekers themselves remain largely faceless and voiceless – something which obviously works to the advantage of the government, which wishes to exploit the issue of asylum seekers for domestic political purposes. It does not take one long to find negative representations of asylum seekers in the mass media, usually fed by politicians, even emanating from the Immigration Minister or the Prime Minister's office.[263]

The mandatory detention policy has taken a heavy toll: personal (for the mental health and well-being of asylum seekers themselves),[264] social, economic, and legal. It has caused severe schisms within Australian society and made many think seriously about the state of Australian democracy, in that the governing political party can unscrupulously manipulate public opinion for the sake of votes and sacrifice the basic rights of human beings in the process. It has also brought Australia's international reputation into disrepute. It can only be concluded that such a cost, compared with what the policy of mandatory detention is supposed to achieve, is too much.

Openness and accountability are keystones of democracy – but it would seem that in Australia the government has implemented legislation that effectively deprives detained asylum seekers of normal democratic safeguards.[265] To make matters worse, some detainees can find themselves detained for periods amounting to years, which, under tyrannical regimes, would be considered at the least as "severe or unusual punishment" and at worst as "torture" – even the more so when one considers that under Australian law, even those accused of the most heinous crimes still obtain the right to apply for bail pending the outcome of a trial.[266]

Men, women, and children peering out through barbed-wire fences, detained in camps in remote places, far from the eyes of the public who know little, if anything, about the issues involved, how these camps are run, and in what standard the inmates are kept: one might be forgiven for thinking that such an image is drawn from camps dating to another era. This, however, is the image of detention centres currently run by the Australian government to house asylum seekers. This is not an image that bodes well for a country that claims moral leadership on global issues.

Sadly, until elected politicians cease to exploit human rights as a tool of political expediency and there is an informed, intelligent debate within the wider Australian community concerning detention policy, asylum seekers will continue to remain, literally and figuratively, "between a rock and a hard place" if they should attempt to seek asylum on Australia's shores.

Notes

1. *Infra* note 17. All Australian legislation can be obtained online: Australasian Legal Information Institute Homepage fs2 <http://www.austlii.edu.au/> (date accessed: 24 February 2002). The "Immigration Department" has

undergone various name changes reflecting its role according to evolving government policy. It has been known as "DILGEA" (Department of Immigration, Local Government and Ethnic Affairs); "DIEA" (Department of Immigration and Ethnic Affairs); "DIMA" (Department of Immigration and Multicultural Affairs) and most recently "DIMIA" (Department of Immigration, Multicultural and Indigenous Affairs). The same applies to the title of the Minister for Immigration, whose various acronyms have included "MILGEA", "MIEA," and "MIMA," and who is now referred to by the acronym "MIMIA" (Minister for Immigration, Multicultural and Indigenous Affairs). In this paper I shall refer to the former as "DIMIA" and the latter as the "Immigration Minister" or the "Minister." Since no Immigration Minister has been female, I refer to the person holding that office with the third person pronoun "he" and its declensions.

2. I.e., without a valid visa, and more often than not without identity papers and passports. The Migration Act 1958 (Cth) (No.62 of 1958) (hereinafter *Migration Act*), s.13(1) defines a "lawful non-citizen" as "a non citizen in the migration zone who holds a visa that is in effect"; s.14 defines "unlawful non-citizen" as a person who is present within the "migration zone" unlawfully, i.e., without a valid visa: *infra* note 47 and 69. See Department of Immigration, Multicultural and Indigenous Affairs, *Unauthorised Arrivals and Detention – Information Paper* (Canberra: DIMIA, 15 October 2001) at 3; online: DIMIA Homepage <http://www.immi.gov.au/illegals/uad/ uad_paper.pdf> (date accessed: 20 February 2002): "In broad terms, there are four kinds of unlawful non-citizens: persons whose visas have expired, persons whose visas have been cancelled, persons who have entered Australia illegally (unauthorised arrivals) and persons whose visas have ceased by operation of migration law."
3. Most often "refugee status," which is a criterion for Protection Visas*: infra* note 9.
4. The mandatory detention policy covers all "unlawful non-citizens" including those who have arrived unlawfully. All are commonly referred to as "detainees." For the purposes of this paper "asylum seekers" shall be used to denote more specifically those who arrive by boat or plane without lawful permission, are denied entry, and may or may not have actually applied for a Protection Visa.
5. Given the length of time that some spend in detention, many of the children can spend their early childhood or some of their formative years in detention, although never willingly having committed an offence against any law of the Commonwealth: M. Einfeld, "Is There a Role for Compassion in Refugee Policy ?" (2000) 23(3) University of New South Wales Law Journal [hereinafter UNSW L.J] 303–14 at 308. For the numbers of women and children in mainland detention centres, *infra* note 126. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), s. 6 the Immigration Minister is the guardian of all non-citizen children who do not arrive in the company of a relative over the age of twenty-one.
6. Human Rights and Equal Opportunity Commission [hereinafter HREOC], *Those Who've Come across the Sea: Detention of Unauthorised Arrivals* (Canberra: AGPS 1998) at 101: "[h]unger strikes are not a new phenomenon among asylum seekers detained in Australian immigration detention centres. They certainly occurred in the early 1980s. In response to a hunger strike in 1992 by three Cambodian women at Villawood, the then Minister for Immigration promulgated a regulation allowing the Department to direct physicians to force-feed asylum seekers whose lives are at risk because of their refusal to eat. The provision has been amended from its original form and is now contained in [*Migration Regulations 1994*] regulation 5.35." According to the press information page, Immigration Minister, Philip Ruddock MP, "Detention Update", as at 28 January 2002 there were 287 individuals on hunger strike in mainland Australia's IDCs (including five minors); forty-one individuals had "stitched" their lips together in protest, and of these nine were also participants in the hunger strike. Online: Immigration Minister, Philip Ruddock MP Homepage <http://www.minister.immi.gov.au/detention/update.htm> (date accessed: 24 March 2002).
7. "Refugees Desperate" *The* Age (27 January 2002); "Policy on Refugees Repugnant – We Are All Immigrants" *The Age* (26 January 2002); "Never Confuse the Law with Justice" *The Sydney Morning Herald* (30 January 2002); "Refugee Hunger Protest Grows" *The Sunday Age* (16 January 2002).
8. In July 2000, the UN Human Rights Committee stated: "The Committee considers that the mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right." Online: UNHCHR Homepage <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e1015b8a76fec400c125694900433654? Opendocument> (date accessed: 25 September 2001); HREOC, *Preliminary Report on the Detention of Boat People* (November 1997). HREOC, *supra* note 6; HREOC, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program* (November 2000)(*infra* note 85); Human Rights Watch, *No Safe Refuge: The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide,* Human Rights Watch Backgrounder (18 October 2001); U.S. Department of State, *Country Reports on Human Rights Practices – 2001: Australia,* released by the Bureau of Democracy, Human Rights, and Labor, 4 March 2002; online: U.S. State Department Homepage <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8249.htm> (date accessed: 24 March 2002).

9. *Migration Act,* s.36(1) states that a criterion of a Protection Visa is that the applicant "meets the definition of a refugee as found in the United Nations *Convention relating to the Status of Refugees of 28th July 1951* and the *Protocol Relating to the Status of Refugees, 31 January 1967*". See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status (*Geneva: UNHCR, January 1992*)* ["UNHCR Handbook"], online: UNHCR Homepage <http://www.unhcr.ch/cgi-bin/texis/vtx/ home?page=publ> (date accessed: 21 February 2002). The *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 137, Australian Treaty Series (A.T.S.) 1954, No. 5 (entered into force for generally and for Australia 22 April 1954). The *Protocol Relating to the Status of Refugees,* 31 January 1967, 606 U.N.T.S. 267, A.T.S. 1973 No. 37 (entered into force generally 4 October 1967, entered into force for Australia 13 December 1973). Both the *Refugees Convention* and the *Optional Protocol* are referred hereinafter as the "*Refugees Convention.*" The *Migration Regulations 1994* (Cth) (hereinafter "*1994 Regulations*") contain the other criteria for the grant of a Protection Visa, among which is that "the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention" [*1994 Regulations*, Schedule 2, Part 866, clause 866.221; and Schedule 2, Part 785, clause 785.221].
10. The government claims that journalists and photographers from many media organizations have participated in tours to Immigration Detention Centres (hereinafter IDCs) arranged by the Department. There have been numerous tours of IDCs since 1992. In recent years the media visited Port Hedland in June 1999 and February 2000; Woomera in November 1999 and in January, March, and December 2001; Maribyrnong in March 2001; and Curtin in June 2001. Of course, these "tours" are arranged by the Department and are highly orchestrated and controlled; the government claims this is for security reasons and the need to protect the identity and privacy of asylum seekers: *infra* note 92. The government further claims that visits to the centre by external bodies average more than one a week and that this demonstrates "that the immigration detention program is among the most closely scrutinised of government programs." On 26 January 2002, during riots and unrest at the Woomera Detention Centre, the media were forcibly removed from outside the perimeter fencing; however, the government stated that DIMIA had no knowledge of the directive to move the media and that it was not a DIMIA directive. This of course begs the question, if DIMIA did not know of the directive what other events concerning the IDCs is the government not aware of? The government claims that IDCs are monitored or scrutinized, that they are subject to both administrative and judicial review, and that they are subject to full parliamentary scrutiny and accountability, even claiming that immigration detention is among the most closely scrutinized government programs. A number of government and non-government agencies make regular visits to detention facilities, such as the HREOC, the Commonwealth Ombudsman, the Australian Parliament's Joint Standing Committee on Migration, other members of Parliament, and the Immigration Detention Advisory Group. Press information page of the website of the Immigration Minister, Philip Ruddock MP, "January 2002 Rebuttals to False Information Relating to Immigration Detention"; on-line: Immigration Minister, Philip Ruddock MP Homepage <http://www.minister.immi.gov.au/detention/update.htm> (date accessed: 24 March 2002).
11. "Boat people" is the term commonly used to denote those arriving unlawfully by boat in Australian territory.
12. These countries usually accept this burden after being granted millions of dollars in extra aid assistance. This *should* be added to the true financial cost of the policy; see "Costello Forced to Find $400m as Refugee Costs Spiral" *Australian Financial Review*, (14 February 2002) and "Budget Faces $1.8bn Hit from Refugees and Terror" *Australian Financial Review* (30 January 2002).
13. The name the government devised for its program of expelling asylum seekers.
14. *Infra* note 127.
15. *Commonwealth of Australia Constitution Act,* 63 & 64 Victoria c12, s.51(xix), (xxvii), (xxix).
16. The most notable exception being aliens classified as "hostile" or as "enemy aliens" in time of war.
17. *Chu Kheng Lim* v. *MILGEA* (1992) 110 ALR 97 at 107 (hereinafter "*Lim* v. *MILGEA* (1992)").
18. These concerns have arisen partly from historical factors and partly from political expediency. Australia's relative geographic remoteness, its large size (being an island continent) and relatively small population have fostered the belief that Australia is remote but also vulnerable. This has led to a certain amount of underlying paranoia in the Australian psyche (which is easily manipulated) about feared invasions from the heavily populated areas of Asia to the north and a fear of losing control of the migration system. This fear concerning the geographic placement of Australia was manifested in the "White Australia policy" in force until 1973 under which only white Europeans were permitted to migrate to the country. Arrival by boat of (what seems to the Australian mind) large numbers of asylum seekers from Asia tends to awaken these deeply held fears, an irony considering that the only invasion of Australia to have taken place in the last forty millennia was that of white Europeans. Australia's policy of preferring repatriation of asylum seekers is expressed in the following article: P. Ruddock, "Refugee Claims and Australian Migration Law: A Ministerial Perspective" (2000) 23(3) UNSW L.J 1–12 at 3–4.
19. This empowered the Minister to grant an applicant a visa according to his discretion. The practice arose that his press releases would indicate on what basis he would exercise this discretion to do so. This system remained in place until December 1989.
20. Between 1976 and 1978, fifty-five boats arrived in Australia carrying 2,087 people. By 3 July 1979 Australia had accepted over 6,000 refugees from Laos, Cambodia, and Vietnam. In order to manage the crisis, Australia signed bilateral agreements with several Southeast Asian countries such as Hong Kong, Malaysia, and Indonesia in which it

agreed to receive refugees processed in camps in those countries, in return for which those governments would restrict the passage of asylum seekers through their territory to Australia. See A. Schloenhardt, "Australia and the Boat-People: 25 Years of Unauthorised Arrivals" (2000) 23(3) UNSW L.J. 33–55 at 34–35.

21. Between 1977 and 1989 the process of determining whether a person had the status of a refugee was a matter which lay within the discretion of the executive: see D. H. N. Johnson, "Refugees, Departees, and Illegal Migrants" (1980) 9 Sydney Law Review [hereinafter Syd. L.R] 11 at 47; I. Shearer," Extradition and Asylum" in J. Ryan, ed., *International Law in Australia,* 2nd ed. (Sydney: Lawbook Co., 1984) at 206. Until 1980 with the introduction into the Migration Act of s.6A(1)(c) (*infra*, note 25), it appears that there was no Commonwealth legislative or regulatory provision which referred to any mechanism for deciding whether a person had the "status of refugee," what obligations were owed to a person who was determined to have such a status, nor expressly or impliedly conferred upon any Minister or other person the function of making a determination that a person had that status for the purposes of Australian law. By administrative arrangements, responsibility for refugees had been allotted to the Immigration Minister who established an interdepartmental committee to advise him on the question whether a particular person was a refugee within the meaning of the Refugees Convention. If the recommendation was positive, the Minister would utilize the provisions of the Migration Act under which he had discretionary power to grant a visa. The functions of the Minister and the interdepartmental committee in determining refugee status had no statutory foundation but were carried on as a prerogative of the executive until 1989.
22. Schloenhardt, *supra* note 20 at 35–36.
23. The Association of South East Asian Nations [hereinafter ASEAN] called for UN intervention. The Meeting on Refugees and Displaced Persons in South East Asia was called by the UN Secretary General and held in Geneva in July 1979.
24. UNHCR, Report UN Doc A/AC.96/751 (1990) 2. Malaysia even turned boats out to sea: Schloenhardt, *supra* note 20 at 35–36.
25. Introduced into the *Migration Act* by the *Migration Amendment Act (No 2)(1980)* (Cth) (No.175 of 1980). Following amendment, *Migration Act*, s.6A(1)(c) read: "(1) an entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say – … (c) he is the holder of a temporary permit which is in force and the Minister has determined by instrument in writing that he has the status of a refugee within the meaning of the *Convention relating to the Status of Refugees* that was done at Geneva on 28 July 1951 or of the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967." A person who has entered Australia, but did not hold a valid entry permit (either because it was refused on arrival, or it was cancelled or expired subsequent to that person's entry to Australia), was defined by s.6 (1) of the Migration Act, as a "prohibited immigrant."
26. No.112 of 1980.
27. IUA Act, ss.13, 17, 20, 23 and 26.
28. IUA Act, s.9(4).
29. IUA Act, s.12 (1); the "relevant passenger" was defined in s.9.
30. IUA Act s.14 determined a prescribed authority to be a Magistrate *et al.* appointed as such under the legislation of the respective States of the Federation and pursuant to an agreement for this purpose by the Governor General.
31. IUA Act, s.12(2).
32. IUA Act, s.12(3).
33. IUA Act, s.12(3)(a).
34. IUA Act, s.12(3)(b). The entry permit could be issued to the person under the IUA Act, s.10(1), in which case the person was deemed to have entered Australia on the day the entry permit was granted.
35. IUA Act, s.12(3)(c).
36. IUA Act, s.11(1).
37. IUA Act, s.12(5).
38. No.112 of 1983.
39. *Migration Act*, s.15 – now substituted.
40. Some countries, such as Singapore, Thailand, and Brunei, refused to admit the boat people: V. Muntarbhorn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992) at 97, 127 & 129; A. Helton, "The Comprehensive Plan of Action for Indo Chinese Refugees" (1990) 8 New York Law School Journal of Human Rights 111 at 111–13.
41. Held in Geneva on 13–14 June 1989; Helton, *supra* note 40 at 111–13.
42. UN Doc A/44/523 (22 Sept 1989).
43. No.59 of 1989.
44. Under the 1989 changes, the power of the Minister to grant refugee status was retained. The *Migration Act*, s.6A(1) was amended and renumbered – the various grounds for granting a visa were transformed from a discretionary system exercised by the Minister to one governed by the *Migration Regulations 1989*. Among the classes of visa were certain classes of refugee visa. However, the grant of refugee status (a contingent criterion [*inter alia*] for being granted a Refugee Visa and/or Entry Permit) remained at the discretion of the Minister. After amendments to the *Migration Act* (effected by the *Migration Amendment Act (no 2) 1988* (Cth), the *Migration Amendment Act 1989* (Cth), and the *Migration Legislation Amendment Act 1989* (Cth), the provisions of the *Migration Act*, s.6A became s.47 and read as follows: "s.47 (1) A permanent entry permit shall not be granted to a non-citizen after entry into Australia unless at least one of the following paragraphs applies to the non-citizen:… (d) he or she is the holder of a valid temporary permit and the Minster has determined in writing that the non-citizen has the status of a refugee within the meaning of:(i) the *Convention relating to the Status of Refugees* that was done at Geneva on 28 July 1951; or (ii) the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967;..."
45. J. Crawford, "Australian Immigration Law and Refugees: The 1989 Amendments" (1990) International Journal of Refugee Law [hereinafter IJRL] 626 at 626–27.

46. These sections have been amended on several occasions by *Migration Amendment Act 1979* (Cth)(No.117 of 1979); *Migration Amendment Act 1983* (Cth)(No.112 of 1983); and *Migration Amendment Act 1987* (Cth)(No. 133 of 1987). They were repealed and substituted by the *Migration Amendment Act (1989)* (No. 59 of 1989) as s.6(1), (2), (3) and s.11A respectively. However, as part of the same amendment, the entire Act was renumbered, after which s.6(1), (2), (3) became s.14(1), (2) and (3), while s.11A became s.20. Hereafter, the sections of the *Migration Act* are referred to in their post December 1989 amendment numbering, the pre December 1989 amendment numbers, where applicable, being referred to in square brackets " [...]". It should be noted that the entire Act was again substantially amended and renumbered by the *Migration Reform Act 1992* (Cth) (No. of 1992).
47. The terminology applied to those in Australia without valid authority has altered with various changes to the *Migration Act 1958*. Following passage of the *Migration Legislation Amendment Act (1989) (Cth)* (No.59 of 1989) on 19 December 1989, from then until 1 September 1994, persons arriving in Australia without visas or entry permits were referred to as "prohibited entrants": *Migration Act,* s.54B and s. 88 [s.36]. Persons who entered Australia and whose entry permit expired after entry, or their entry permit was cancelled, became known as "illegal entrants": *Migration Act*, s.14 [s.6(1)] and s.20 [11A] . This was a change from the term applied under the earlier form the *Migration Act,* s.6 which before 2 April 1984 described a person who arrived in Australia and was refused a valid entry permit, or whose entry permit was cancelled or expired after entry, as a "prohibited immigrant," and after 2 April 1984 as a "prohibited non-citizen." Following the passage of the *Migration Reform Act 1992* (Cth) (No.184 of 1992) and its coming into effect on 1 September 1994 the previous terminology was abandoned. The classification now differentiates simply between "unlawful non citizens" and "lawful non citizens" under the *Migration Act*, s.13 and s.14; *supra* note 2 and *infra* note 69.
48. *Migration Act,* s.88 read: "(1) A person who is on board a vessel (not being an aircraft) at the time of the arrival of the vessel at a port, whether or not that port is the first port of call of the vessel in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which the person would become an illegal entrant, (in this section the "prohibited entrant") may – (a) if an authorized officer so directs; or (b) if the master of the vessel so requests and an authorized officer approves, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs. (2) Where a person ... who has travelled to a port in Australia on board a vessel (not being an aircraft), whether or not that port is the first port of call of the vessel in Australia, has, after the arrival of the vessel at its first port of call in Australia, sought and been refused an entry permit, the person may, if an authorized officer so directs, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs." The section was amended and renumbered from s.36 to become s.88 following passage of the *Migration Legislation Amendment Act (1989)* (Cth) (No.59 of 1989). Following the *Migration Reform Act 1992* (Cth) (No.184 of 1992), s.88 was substantially amended and renumbered to become s.250. The requirement of s.88 that a "prohibited entrant" "be returned on the boats" on which they had entered Australian territory was to be crucial in the High Court consideration of the validity of the *Migration Act*, s. 88 as empowering the mandatory detention of asylum seekers: *Lim* v. *MILGEA* (1992) 110 ALR 97: *supra* note 17; *infra* note 52.
49. *Migration Act,* s.92 and s.93.
50. *Migration Act,* s.13 [s.5J]. The "period of grace" ran from the time the last entry permit held by the person expired, but stopped when any valid application for a visa was made, and only started running when that application was finalized: *Migration Act*, s.13(2).
51. UN Doc. CCPR/C/59/D/1993 (1993); reproduced in "*UN Human Rights Committee*. Communication No 560/1993 *A* v. *Australia*" (1997) 9 IJRL at 506–27. In response to the UN Committee's finding that Australia was in breach of some of its obligations under the International Convention on Civil and Political Rights [hereinafter ICCPR]; *infra* note 190) Australia made a veiled threat to withdraw from the optional protocol which permitted appeals to be taken to the UN Human Rights Committee; see Australia, "Response of the Australian Government to the Views of the Human Rights Committee in Communication No 560/1993 (A v Australia)," (1997) 9 IJRL at 674–78.
52. This case involved a group of Cambodian asylum seekers who had arrived in Australia on two separate boats on 27 November 1989 and 31 March 1990. Upon arrival they were detained under the *Migration Act*, s.88. Between 3 and 6 April 1992 the applicants' claims to refugee status were refused by the Minister. Applications were then made to the Federal Court under s.15 of the *Administrative Decisions (Judicial Review) Act 1997* (Cth) [hereinafter ADJR Act] on the basis that the detentions were without legal authority. The Minister conceded the case before it came to hearing, vacating the decisions and remitting them to the Department for reassessment, but keeping the applicants in detention in the meantime. For a complete discussion of the case see M. Crock, "Climbing Jacobs Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia" (1993) 15 Syd L.R at 338.
53. In the end, it was not necessary for the Court to consider this second question.
54. No. 24 of 1992. It received the royal assent the following day. See Crock, *supra* note 52 at 340.
55. *Lim* v. *MILGEA* (1992) 110 ALR 97; at 109 per Brennan, Deane and Dawson JJ; at 127 per Toohey J; and at 143 per McHugh J. After examining the legislation in force before

7 May 1992, five judges held that the detention of the asylum seekers was or was probably unlawful.

56. *Migration Act*, s.177 [s.54K] defined a "designated person" as a "non-citizen who a) had been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992 [later amended and extended to 1 September 1994]; and b) has not presented a visa; and c) is in Australia; and d) has not been granted an entry permit; and e) is a person to whom the Department has given a designation by: i) determining and recording which boat he or she was on; ii) giving him or her an identifier that is not the same identifier as an identifier given to another non-citizen who was on the boat; and includes a non-citizen born in Australia whose mother is a designated person." See Crock, *supra* note 52 at 340.
57. Excluding certain days such as those spent waiting for visa processing, attending hearings, etc.
58. *HREOC, supra* note 6 at 23–24.
59. *Lim v MILGEA* (1992) 110 ALR 97 at 120–21.
60. *Ibid.* at 115 per Brennan Deane and Dawson JJ.
61. *Ibid.* at 114–15.
62. That the Parliament had decided it is in the national interest for "designated persons" to be kept in detention until they leave Australia or be granted a visa.
63. *Lim* v. *MILGEA* (1992) 110 ALR 97 at 100 per Mason CJ; at 113 per Brennan, Deane and Dawson JJ; at 128 per Toohey J; at 135 per Gaudron; at 143–44 per McHugh J.
64. *Ibid.* at 100 per Mason CJ; at 117–18 per Brennan Deane and Dawson JJ; at 128 per Toohey J; at 135 per Gaudron; at 143–44 per McHugh J.
65. *Senator Nick Bolkus & Joanna McRae* v. *Tang Jia Xin* (1993) 47 FCR 176; (1993) 118 ALR 603 where the Full Court of the Federal Court upheld the decision of the judge at first instance to order the release of the detainee because the period of detention had exceeded the maximum number of days permitted by the Migration Act.
66. This case, and the attempts by the government to legislate itself out of the difficulty of having illegally detained people, shows how far the government was prepared to go to maintain its detention policy, even to the extent of legalizing it retrospectively and attempting to remove all judicial intervention or oversight of the detention regime.
67. No.184 of 1992. It came into force on 1 September 1994. It repealed and substituted large parts of the Migration Act and renumbered it. Hereinafter, the section numbers cited are those post 1 September 1994, and the section numbers pre 1 September 1994 (where applicable) as introduced by the *Reform Act 1992* are cited in square brackets "[..]".
68. The prescription was changed from "temporary" visa to a non-defined temporal phrase "visas" by the *Migration Legislation Amendment Act 1994* (Cth) s 9.
69. *Migration Act*, s. 14 reads: "An unlawful non citizen is: (1) A non citizen in the migration zone who is not a lawful non citizen is an unlawful non citizen. (2) To avoid doubt, a non citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non citizen." For "migration zone," *infra*, note 71.
70. *Supra* notes 2 and 69. See M. Crock, "A Legal Perspective on the Evolution of Mandatory Detention" in M Crock ed., *Protection or Punishment*: *The Detention of Asylum Seekers in Australia* (Sydney: Federation Press, 1993) Chapter 5 *passim;* Joint Standing Committee on Migration [hereinafter JSCM], *Asylum, Border Control and Detention* (Canberra: AGPS 1994) at 49ff.
71. The "migration zone" is defined by *Migration Act,* s.5(1) to include land above or below the low watermark and sea within the limits of a port in a state or territory but does *not* include the sea within a state or territory or the "territorial sea" of Australia. The migration zone includes Christmas Island and Ashmore Reef (*Migration Act*, s.7). The "migration zone" is a creation of Australian domestic law, not international law.
72. *Migration Act*, s.189(2).
73. *Migration Act*, s.190.
74. *Migration Act*, s.192.
75. *Migration Act*, s.196(5).
76. *Migration Act*, s.199.
77. JSCM, *supra* note 70 at 49ff. The need to ameliorate the system was also supported by the severe criticisms of the law by numerous bodies, a view later vindicated by the UN Human Rights Committee in 1997 in a case brought before it by one of the plaintiffs in *Lim* v. *MILGEA* (1992): *A* v. *Australia* 30 April 1997, UN Doc. CCPR/C/59/D/560/1993: *supra* note 51.
78. *Migration Act*, s.73.
79. *1994 Regulations*, reg. 2.20(2) and (3).
80. *1994 Regulations*, reg. 2.20(5) and reg. 2.20(7): if the state or territory child welfare authority has certified that release from detention is in the child's best interests and also that the Immigration Minister is satisfied that arrangements have been made for the child's care and welfare, these arrangements are in the child's best interests and release would not prejudice the rights and interests of the child's parents or guardian.
81. *1994 Regulations*, reg. 2.20(4).
82. *1994 Regulations*, reg. 2.20(8).
83. Based either on health or on previous experience of torture or trauma; the test is whether the person can be properly cared for in a detention environment: *1994 Regulations*, reg. 2.20(9).
84. *Migration Act*, s.72(3). The power to make a determination is stipulated to be exercisable only by the Minister if: the person has made a valid application for a Protection Visa; the person has been in detention for more than six months since the visa application was made; the Minister has not yet made a primary decision (that is, the conclusion of the first stage of the formal refugee determination process) in relation to the visa application; and the Minister thinks release would be in the public interest: The *Migration Act*, s.72(2).

85. HREOC, "Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program" (November 2001) at 7; online: HREOC Homepage <http://www.hreoc.gov.au/ word/human_rights/asylum_seekers/h5_2_3.doc> (date accessed: 20 February 2002). The government claims that separating children from their parents is not in the best interests of the child, and since there is no power to release the parents, the children *ipso facto* should remain in detention. As at 1 February 2002, there is one child in foster care having been released on a bridging visa: Press information page, Immigration Minister, Philip Ruddock MP, "Women and Children in Detention"; online: Immigration Minister, Philip Ruddock MP Homepage <http://www.minister.immi.gov.au/ detention/women_ &_children.htm> (date accessed: 24 March 2002).
86. Amended by *Migration Legislation Amendment Act 1994 (Cth)* (No. 60 of 1994).
87. *Migration Legislation Amendment Act 1994 (Cth)* (No.60 of 1994) repealed and substituted s.54ZA which thence became s.193.
88. *Migration Act*, s. 256 reads: "Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention."
89. S. Taylor, "Should Unauthorised Arrivals in Australia have free Access to Advice and Assistance" (2000) 6(1) Australian Journal of Human Rights [hereinafter AJHR] 34 at 43.
90. Effected by the passage of *Migration Legislation Amendment Act (No.1)(1999)*(No.89 of 1999).
91. S. Taylor, "Protecting Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms" (2000) 22(1) Syd. L.R. 62; M. Phillips, "Impact of Being Detained On-Shore: The Plight of Asylum Seekers in Australia" (2000) 23(3) UNSW L.J. 288–302 at 290; DIMIA, *supra* note 2 at 8.
92. The Company is Australian Correctional Services Pty Ltd. The government claims that: "Detention centres are not open to unrestricted access by the public because of the need to protect potential refugees and the family and friends they have left behind. Indeed, many detainees seek anonymity." DIMIA, *supra* note 2 at 12.
93. Between 1990 and November 1999 there were fifty-eight complaints made to the Human Rights Commission: HREOC, *1998–1999 Review of Immigration Detention Centres* (Canberra 2000) at 2; online: HREOC Homepage <http://www.hreoc.gov.au/word/human_rights/asylum_seekers/idc_review.doc> (date accessed: 22 February 2002).
94. HREOC, *supra* note 6 at 23–24.
95. *Ibid.* at 24.
96. HREOC, *supra* note 85 at 3–5.
97. *Migration Legislation Amendment Act 1999 (No. 1)* (Cth) (No. 89 of 1999).
98. Schloenhardt, *supra* note 20 at 52.
99. *1994 Regulations*, reg. 785.212 state that the applicant for a Temporary Protection Visa has entered the migration zone but has not been immigration cleared; *infra* note 101.
100. *1994 Regulations*, reg. 866.212 limits application for a Subclass 866 (Protection) Visa to those who have been immigration cleared. Reg. 866.228 prevents a person who has been granted a Subclass 785 (Temporary Protection) Visa from being granted a Subclass 860 (Protection) Visa unless they have held that temporary visa for a period of thirty months continuously. HREOC has stated its concern that these changes discriminate between asylum seekers, and is contrary to international Conventions, such as Article 26 of the ICCPR (*infra* note 190), and Article 2(1) of the *International Convention on the Rights of the Child* [hereinafter CROC] (*infra* note 191), and Articles 31–32 of the *Refugee Convention*: HREOC, *Briefing Paper: Human Rights and International Law implications of Migration Bills* (21 September 2001); online: HREOC Homepage <http://www.hreoc.gov.au/human_rights/ asylum_seekers/migration_bills.html> (date accessed: 20 February 2002).
101. *1994 Regulations*, reg. 785.511 permits the holder of the visa (when granted) to remain in, but not re-enter, Australia until the end of thirty-six months from the date of grant of the visa; or until the day on which an application by the holder for a permanent visa is finally determined, whichever is later. Importantly, Regulation 785.611 forbids the holder from being granted a substantive visa other than a Subclass 866 Protection Visa.
102. *1994 Regulations*, reg. 785.222 permits a member of the family unit as a person granted a Subclass 785 (Temporary Protection) Visa to apply for a Temporary Protection Visa; however, reg. 785.411 requires that family member must be in Australia at the time the decision is made to grant the visa.
103. On 26 August 2001 a boat which had stalled near Australian territory carrying 433 asylum seekers was spotted by Coastwatch. The next day, a Norwegian freighter, the MV *Tampa* responded to a call by the Australian Search and Rescue (AusSAR) to render assistance. After taking the asylum seekers on board, it is alleged that the captain of the MV *Tampa*, Arne Rinnan, turned towards Christmas Island after the passengers requested him to do so. Capt. Rinnan later stated that the Indonesian authorities denied him permission to enter Indonesian territory. The Australian authorities also denied the boat permission to enter Australian territory, ordering the MV *Tampa* to remain in the "contiguous zone." Since no assistance had been forthcoming within forty-eight hours, the captain ordered a distress signal to be sent and on 29 August 2001 he steered the ship into Australian territorial waters near Christmas Island. The ship was intercepted by forty-five SAS members. The government attempted to pass a Border Protection Bill through Parliament legalizing its ac-

tions, but this bill was rejected by the Senate. A stalemate ensued for several days during which the ship was anchored off Christmas Island. The Norwegian Ambassador to Australia visited the ship on 30 August 2001. On 31 August 2001 two applications were made to the Federal Court of Australia, the *Victorian Council for Civil Liberties Incorporated* v. *MIMA* [2001] FCA 1297 and *Ruddock* v. *Vidarlis* [2001] FCA 1329; (2001) 110 FCR 391; (2001) 183 ALR 1 [online: AusTLII Homepage <http://www.austlii.edu.au/>] (*infra* note 226), seeking restraining orders preventing the Commonwealth and the Minister from removing the asylum seekers from the territorial sea. On 3 September 2001 the asylum seekers were forcibly removed to the HMAS *Manoora* on which they were eventually transported to Nauru where the government had established a detention centre where the asylum seekers would be processed by the UNHCR. Before they arrived, the HMAS *Warramanga* intercepted on 7 September 2001 another vessel, later identified as the Indonesian fishing vessel, the *Aceng*, which was heading for Ashmore Reef. This boat was boarded by Australian authorities and the passengers were transferred to the HMAS *Manoora*, in which these people were also transhipped eventually to Nauru.

104. HREOC, *supra* note 100: "The provisions of the Amendment Bills are of great concern to the Commission … . It is the Commission's view that the provisions of the Amendment Bills undermine Australia's commitment to international human rights obligations." These laws included the *Border Protection (Validation and Enforcement Powers) Act 2001* (No. 126 of 2001) [hereinafter *BP(VEP) Act*] which introduced into the *Migration Act* s.7A, which expressly re-enforces the right of the Commonwealth to exercise its executive power to "protect Australia's borders, where necessary, by ejecting persons who have crossed those borders"; the *Migration Amendment (Excision from Migration Zone) Act 2001* (No. 127 of 2001) [hereinafter the *MA(EMZ) Act*]; the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (No. 128 of 2001) [hereinafter the *MA (EMZ) CP Act*]; the *Migration Legislation Amendment Act (No. 5) 2001* (No. 130 of 2001) which empowers officers under the *Migration Act* to obtain information from agencies, both private and public, about the travel to and from Australia of individuals without reaching the terms of the *Privacy Act 1988* (Cth); and the *Migration Legislation Amendment Act (No. 6) 2001* (No. 131 of 2001). In considering Australia's actions against the MV *Tampa*, one should keep in mind the requirements of the UN Convention on the Law of the Sea, 10 October 1982, 1833 UNTS 1994 No 34 [Ratified by Australia 5 October 1994, entry into force for Australia 16 November 1994] Article 98, which requires signatory states to ensure that the master of a ship sailing under its flag render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance.

105. *Customs Act* 1901 (Cth) s.185(3A), introduced by schedule 1, Item 3, *BP(VEP)Act 2001;* and the *Migration Act 1958*, s.245F(9), introduced by schedule 2, Item 8, *BP(VEP) Act 2001*. Furthermore, the *MA(EMZ)(CP) Act 2001* inserts into the *Migration Act* a new s.198A which empowers an officer of the Commonwealth to take an offshore entry person from Australia to a country declared under the provisions of the *Migration Act* at subsection 198A(3). Before removing a person to a third country, the Minister must declare in writing that a country specified provides access for persons seeking asylum to effective procedures for assessing their protection needs; provides protection for person seeking asylum pending determination of their refugee status; provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and meets relevant human rights standards in providing that protection.

106. Even though present in Australian territory, in order to make a valid application for a Protection Visa a person must be in Australia in the "Australian migration zone" *1994 Regulations* at Schedule 1 – an area defined by legislation in the *Migration Act*, s.5(1): *supra* note 71. The *Migration Act,* s.36 stipulates that a criterion for a Protection Visa is that the applicant for the visa is a "non-citizen *in Australia* to whom Australia has protection obligations under the *Refugees Convention* as amended by the *Refugees Protocol*" [emphasis added]. The *Migration Act* does not define what "in Australia" signifies ["enter in Australia" is defined in s.5(1) as "enter the migration zone"]. The *Acts Interpretation Act 1901* (Cth), s. 17 states that "Australia" means "the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island". It also includes the "coastal sea of Australia" (s.15B(1)(b)) and this in itself includes the "territorial sea" (s.15B(4)). It would thus appear that Australia owes protection obligations to a refugee who has entered the territorial sea; i.e., a person is entitled to make a valid claim for refugee status under the Refugees Convention if they have entered the territorial sea of Australia, regardless of whether they are in the "migration zone" as defined by the Migration Act. But without being in the migration zone, it is not possible to apply for a Protection Visa. The *MA(EMZ) Act* (*supra* note 104), s.1 removed certain places from the migration zone by amending the *Migration Act,* s.5(1) so as to define an "excised offshore place" as including "the territory of Christmas island; the territory of Ashmore and Cartier Islands; the territory of Cocos (Keeling) Islands; any other external territory that is prescribed by the regulations for the purposes of the subsection; any island that forms part of a State or Territory and is prescribed for the purposes of the subsection; Australian sea installations; and Australian resource installations." Asylum seekers in Australian territory may find themselves in the anomalous position that even though Australia may owe protection obligations to them under the Refugees Convention, there is no mechanism for them to have this status recognized by applying for a Protection Visa.

107. *MA (EMZ) Act 2001* schedule 1, Item 3, inserts into the *Migration Act,* s.5(1) the definition of "excised offshore place" and "offshore entry person"; HREOC, *supra* note 100. The *MA(EMZ) Act 2001* also inserts into the Migration Act a new s.46A which provides that an application for a visa (including a Protection Visa) by an "offshore entry person" (i.e., a person who has entered an "excised offshore place" after the excision time for that place) will not be valid if that person is "in Australia" and is "an unlawful non-citizen" (s.46A(1)); i.e., the person has entered Australia (its territorial waters) and has entered what would be (if it were not for the excision of that place) the "migration zone". The *Migration Act*, s.46A(2) (introduced to the Migration Act by *MA(EMZ) Act* 2001, Schedule 1, Item 4) grants the Minister a discretionary power to allow an application made by a particular offshore entry person for a particular class of visa if he thinks it is in the public interest to do so.
108. *Migration Act*, s.189 introduced by *MA(EMZ)(CP) Act 2001*, Schedule 1, Item 4. Such people are not offshore entry persons.
109. *Migration Act,* s.198(4) introduced by *MA (EMZ)(CP) Act 2001* Schedule 1, Item 6.
110. *Customs Act* 1901, s.185(3AA) introduced by *BP(VEP) Act 2001,* Schedule 1, Item 3. Officers acting under this subsection are immune under s.185(3AB) from prosecution provided they act in good faith and use no more force than is authorized by the *Customs Act 1901,* s.185(3b).
111. *Customs Act 1901,* s.185AA introduced by *BP(VEP) Act 2001*, Schedule 1, Item 4.
112. "Ineligibility period" is defined to mean the period from the time of the offshore entry until the time when the person next ceases to be an unlawful non-citizen: *Migration Act*, s.494AA(4) introduced by *MA(EMZ)(CP) Act 2001*, Schedule 1, Item 7.
113. *Migration Act*, s.494AA introduced by *MA (EMZ)(CP) Act 2001*, Schedule 1, Item 7.
114. DIMIA, *Fact Sheet 74: Unauthorised Arrivals by Air and Sea,* Public Affairs Section DIMIA. Revised 8 November 2001; online DIMIA Homepage <http://www.immi.gov.au/facts/74unauthorised.htm> (date accessed: 20 February 2002).
115. *Ibid.*
116. *Ibid.*
117. Refugee Council of Australia [hereinafter RCOA], *The Size and Composition of the 2000–2001 Humanitarian Program: Views from the Community Sector* (February 2000) at 50; Immigration Minister, Philip Ruddock MP, *supra* note 18 at 3–4.
118. For analysis of the figures of unauthorized arrivals, refugee applicants, those approved, those rejected, etc., for the period between 1989 and 1999, see Schloenhardt, *supra* note 20 at 41–43.
119. DIMIA, *Fact Sheet 74, supra* note 114. This Fact Sheet contains a list of boats and a breakdown of the passengers between November 1989 and 22 August 2001.
120. *Ibid.*; *Migration Act*, s.250.
121. *Ibid.*
122. The difference in the figures between the numbers of people admitted to the IDCs and the actual numbers held in detention at any given time fluctuates according to various factors, such as how many are processed, released, or removed from Australia, the number of unlawful arrivals, etc.
123. DIMIA, *Fact Sheet 70: Border Control*, Public Affairs Section DIMIA. Revised 19 November 2001; online: DIMIA Homepage <http://www.immi.gov.au/facts/doc/70border.doc> (date accessed, 22 February 2002).
124. DIMIA *Fact Sheet 82: Immigration detention*, Public Affairs Section DIMIA. Revised 19 November 2001; online: DIMIA Homepage <http://www.immi.gov.au/facts/doc/82detention.doc>.
125. The Minister for Immigration is appointed as the guardian of unaccompanied minors who arrive in Australia unlawfully: *Immigration (Guardianship of Children Act 1946* (Cth) s.6.
126. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 85.
127. Despite carefully perusing the DIMIA Homepage <http://www.immi.gov.au> (date accessed: 20 February 2002 and 24 March 2002), I was unable to find any information regarding the exact figures of those detained offshore in Christmas Island, Manus Island, and Nauru.
128. Press information page, Immigration Minister, Philip Ruddock MP, "Frequently Asked Questions – Detention"; on-line: Immigration Minister, Philip Ruddock MP Homepage <http://www.minister.immi.gov.au/faq/detention.htm> (date accessed: 24 March 2002).
129. *Ibid.*
130. DIMIA, *supra* note 2: "Once detained, the period of time it takes for applications to progress through the refugee determination process and, hence, the period of detention is minimised." And again: "The majority of people in immigration detention are only held for a short time. Significant measures have been introduced to improve the speed and effectiveness of the decision-making process."
131. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
132. DIMIA, *Fact Sheet 70*, *supra* note 123; also DIMIA, *Fact Sheet 64: Temporary Protection Visas*, Public Affairs Section DIMIA, Canberra, 14 November 2001; on-line: DIMIA Homepage <http://www.immi.gov.au/facts/doc/75processing.doc> (date accessed: 22 February 2002).
133. DIMIA, *Fact Sheet 75: Processing Unlawful Boat Arrivals*. Public Affairs Section, DIMIA, Canberra, 14 November 2001; on-line DIMIA Homepage <http://www.immi.gov.au/facts/doc/75processing.doc>. (date accessed: 22 February 2002).
134. *Ibid.*
135. DIMIA, *Fact Sheet 82*, *supra* note 124; and DIMIA, *Fact Sheet 70, supra* note 123.
136. I.e., those who have arrived by air without valid documentation or have been refused entry clearance to Australia, or have been immigration cleared but have overstayed the validity period of their visas or their visas have been cancelled due to breach of conditions.
137. DIMIA *Fact Sheet 70*, *supra* note 123.

138. DIMIA, *Fact Sheet 82*, *supra* note 124.
139. *Ibid.*
140. *Ibid.*
141. Although the writer knows of two separate incidents in 2000 where lawyers were denied entry to the IDC by ACS to speak to detainee clients concerning Protection Visa applications unless the solicitor concerned divulged to the officer the content of what would be discussed between them and the detainee.
142. DIMIA, *Fact Sheet 82, supra* note 124. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
143. HREOC, *supra* note 8. *Migration Act*, s.193(2); see *supra* note 91.
144. *Ibid.*
145. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
146. *Supra* note 12.
147. *The Sydney Morning Herald* (4 May 2001) 6.
148. For an examination of the impact detention has on asylum seekers, Phillips, *supra* note 89. For more expert opinions, see A. Burnett and M. Peel, "Health Needs of Asylum Seekers and Refugees" (2001) 322 British Medical Journal at 544–47; D. Silove, Z. Steel and R. F. Mollica, "Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development" (2001) 357 The Lancet at 1436–37. The effects in terms of the effect of detention in the Australian context, see Joint Standing Committee on Foreign Affairs, Defence and Trade [hereinafter JSCFADT], *A Report on Visits to Immigration Detention Centres* (Canberra: AGP 18 June 2001) Chapter 7 *passim;* online: at <http://www.aph.gov.au/house/committee/jfad t/IDCVisits/IDCindex.htm> (date accessed, 24 March 2002).
149. R. Julian, "Invisible Subjects and the Victimized Self: Settlement Experiences of Refugee Women in Australia" in R. Lentin, ed., *Gender and Catastrophe* (London & New York: Zed Books, 1997) at 196–210; R. Zetter, "Labelling Refugees: Forming and Transforming a Bureaucratic Identity" (1991) Journal of Refugee Studies [hereinafter JRS] 4(1); Phillips, *supra* note 89 at 291.
150. *Supra* note 10.
151. JSCFADT, *supra* note 148, Chapter 7, at 7.21: Symptoms of psychological distress are common in asylum seekers and refugees, people may show symptoms of depression and anxiety, panic attacks or agoraphobia; poor sleep patterns are almost universal but may not be described spontaneously; hostile media reports have not nurtured good relationships with the community. At 7.24: Women are more likely than men to report poor health and depression. They may be lonely and isolated but often welcome the opportunity to belong to a support group. At 7.25: Children may have arrived alone and may be living with unfamiliar carers. They may have developmental difficulties, seeming to be mature beyond their years. While they may show problems such as anxiety and nightmares, few need psychiatric treatment.
152. Phillips, *supra* note 89 at 294–95. JSCFADT, *supra* note 148 at 7.21.
153. HREOC, *supra* note 6.
154. DIMIA, *supra* note 2 at 8.
155. *Ibid.*
156. *Ibid.*
157. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 3.
158. DIMIA, *Fact Sheet 75*, *supra* note 133; DIMA, *supra* note 2 at 3.
159. DIMIA, *supra* note 2 at 3.
160. *Ibid.* at 5.
161. Minister for Immigration, P. Ruddock, "Australian statement to parties to the convention related to the status of refugees UNHCR Ministerial Council" (Geneva, 12 December 2001); online: DIMIA Homepage <http://www.minister.immi.gov.au/transcripts/transcr ipts01/ refugees_121201.htm> (date accessed: 20 February 2002).
162. M. Kingston, "Politics and Public Opinion" in M. Crock, ed., *Protection or Punishment ?: The Detention of Asylum Seekers in Australia* (Sydney: Federation Press, 1993) 9; also Phillips, *supra* note 80 at 290.
163. Immigration Minister, Philip Ruddock MP, *supra* note 161.
164. A. Clennell & C. Skehan, "I knew story was false but didn't tell PM, Reith admits" *The Sydney Morning Herald* (22 February 2002). This refers to the allegations made by the Minister for Immigration and the Prime Minister in the days before the federal election in November 2001 that asylum seekers had thrown their children into the ocean when intercepted by RAN vessels. It emerged from the Navy about two days before the election that the story was not true, and recently, the former Minister of Defence, Mr. Reith, admitted he knew for three days the story was untrue but did nothing to correct the story in the public mind.
165. DIMIA, *supra* note 2 at 3.
166. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
167. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 5–6.
168. *Ibid.* 6.
169. DIMIA, *Fact Sheet 75, supra* note 133.
170. DIMIA, *Fact Sheet 70*, *supra* note 123; DIMIA, *Fact Sheet 82*, *supra* note 124.
171. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 4–5.
172. DIMIA, *Fact Sheet 70, supra* note 123. Also *Fact Sheet 74, supra* note 114; *Fact Sheet 75, supra* note 133; and DIMIA, *Fact Sheet 73, People smuggling* and *Fact Sheet 71, New measures to strengthen border control* (Canberra: Public Affairs Section DIMIA, 28 September 2001); online: DIMIA Homepage <http://www.immi.gov.au/facts/doc/71newmeasures.doc>.
173. *Ibid.*
174. Immigration Minister, Philip Ruddock MP, *supra* note 161. The government, and Minister Ruddock himself, have accused those who are opposed to mandatory detention and deterrence strategies as "supporting people

smuggling:" M. Saunders, "Refugee Video Sparks Row" *The Weekend Australian* (17–18 June 2000).

175. DIMIA, *Fact Sheet 75, supra* note 133.
176. DIMIA, *supra* note 2 at 3; also, Immigration Minister, Philip Ruddock MP, *supra* note 18 at 7.
177. A phrase drawn from the game of cricket, which is renowned for its "fairness." "Not to abide by the umpire's decision" suggests that one is not playing in a sportsmanlike manner and is not "playing fair."
178. DIMIA, *supra* note 2 at 6–7. *Migration Act*, Part 8, substituted by the *Migration Legislation Amendment (Judicial Review) Act 2001*, Schedule 1, Item 7.
179. This does *not* mean "according to government policy" – since the government must also abide by the rule of law – although this distinction seems to be lost on the government itself.
180. DIMIA, *supra* note 2 at 6: "Many unauthorised arrivals have disposed of their identity documents en route to Australia. Establishing the identity of these people can take considerable time but it is essential to determine whether Australia owes them a protection obligation." Legislation which commenced in October 2001 allows the Minister or other approved decision maker to draw adverse inferences about the veracity of the person's claimed identity, nationality or citizenship if that person refuses to provide identity documents without reasonable explanation: *Migration Act,* s..91V and s.91W as introduced by *Migration Legislation* Amendment Act (No. 6) 2001 (No.131 of 2001), Schedule 1, Item 5.
181. *DIMIA, supra* note 2 at 6–7. Immigration Minister, Philip Ruddock MP, *supra* note 18 at 8.
182. *DIMIA, supra* note 2 at 6–7.
183. *Ibid.*
184. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
185. DIMIA, *supra* note 2 at 6–7.
186. *Ibid.*: "The majority of people in immigration detention are only held for a short time. Significant measures have been introduced to improve the speed and effectiveness of the decision-making process."
187. For a comprehensive survey of the position regarding detention and penalization of asylum seekers see G. S. Goodwin Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection," a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001; online: UNCHR Homepage: <Http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations > (date accessed: 24 March 2002).
188. *Universal Declaration of Human Rights* (UDHR), United Nations General Assembly Resolution 217A (III) (10 December 1948).
189. According to Lauterpacht, at the time the UDHR was proclaimed there was a consensus among the member states of the UN that the Declaration did not impose upon them any duties or legal obligations with respect to its content: H. Lauterpacht, "The Universal Declaration of Human Rights," (1948) 25 British Year Book of International Law 354 at 373–74. Fifty years later, there is general consensus that the provisions of the UDHR have become part of general international law principles: I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Oxford University Press, 1985) at 570–71. In any event, contravention of the principles contained in the UDHR is, at the very least, morally reprehensible.
190. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, A.T.S. 1980 No. 23 (entered into force generally [except Article 41] 23 March 1976. Entered into force for Australia [except Article 41] 13 November 1980. Article 41 came into force generally 28 March 1979 and for Australia 28 January 1993).
191. *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, A.T.S 1991 No.4 (entered into force generally 2 September 1990. Signed for Australia 22 August 1990. Instrument of ratification, with reservation to Article 37(c) regarding separate imprisonment, deposited for Australia 17 December 1990. Entered into force for Australia 16 January 1991).
192. *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, A.T.S 1989 No.21 (entered into force generally 26 June 1987 (including Articles 21 and 22). Signed for Australia 10 December 1985. Instrument of ratification deposited for Australia 8 August 1989. Entered into force for Australia 7 September 1989. Declaration of acceptance of Articles 21 and 22 deposited for Australia 28 January 1993 with effect from that date).
193. *Refugees Convention,* Article 31.
194. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 10.
195. This is a position that Australia has taken for some years. With respect to the UNHCR Executive Committee, *Conclusions No. 58 (XL) – 1989 : The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection*, the following "interpretative declaration or reservation" was made by the delegation of Australia, that "…Australia wishes it to be pointed out that its endorsement of the draft conclusions is subject to it being clearly understood that refugees and asylum seekers should not necessarily be afforded the same treatment". See *Report* of the 40th Session of the Executive Committee: UN doc. A/AC.96/737, part N, p.23.
196. The Senate Legal and Constitutional References Committee, *Sanctuary Under Review*: *An Inquiry into Australia's refugee and humanitarian program* (Canberra: AGPS, June 2000) was not an inquiry into the detention system as some advocates had called for. The Committee was clear on this in the introductory comments: "the legitimacy or otherwise of the policy of detaining illegal arrivals…are not within the terms of reference of this inquiry." However, the report did make recommenda-

tions critical of the government's restriction of information flow to asylum seekers and recommended that more information be provided to onshore asylum seekers concerning the making of protection applications, in preparing their claims, in receiving legal advice, and in having legal aid for initial advice on judicial reviews. It also recommended that the entire system of protection determination be reviewed in order to see whether an entirely judicial system or determination would be preferable to the administrative system currently in place. See HREOC, *Report on the Human Rights Commissioner's Visit to Curtin IRPC in July 2000* ; online HREOC Homepage <http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html> (date accessed: 22 February 2002); – reiterated view that detention transgresses Australia's human rights obligations citing: the continued refusal to advise new arrivals of their right to request legal assistance (HREOC *Immigration Detention Guidelines*, March 2000) [hereinafter HREOC Guidelines] section 2.1; online HREOC Homepage, <http://www. hreoc.gov.au/ human_rights/asylum/idc_guidelines> (date accessed: 21 February 2002); the alleged failure to provide legal assistance upon request to some individuals who have been "screened in" to the asylum application process (HREOC Guidelines section 4.4); the inappropriateness of the detention environment for children; the practice of referring to detainees predominantly by number rather than by their given or proper names; the inadequacy of clothing and bedding provided to detainees (HREOC Guidelines sections 9.1, 9.5 and 9.6); the inadequacy of phone lines and of access for lawyers and others needing to contact detainees (HREOC Guidelines sections 3.6 and 4.1); concerns about access to health services, with particular concerns expressed about the availability of dental and ophthalmology services (HREOC Guidelines Part 13). See *supra* note 8.

197. EXComm *Conclusion No. 44 (XXXVII) – 1986: Detention of Refugees and Asylum Seekers*, Report of the 37th Session: UN doc. A/AC.96/688, para. 128: Recommendation (d).
198. *Ibid.* at Recommendation (e). See also HREOC, *supra* note 85 at 4–5.
199. EXComm *Conclusion No. 44 (XXXVII)* – 1986, *supra* note 197, Recommendation (d). See also ExComm *Conclusion 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). UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Geneva: February 1999); available online: UNHCR Homepage <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations > (date accessed: 24 March 2002), Guideline 3: Exceptional Grounds of Detention.
200. *EXComm Conclusion No. 44 (XXXVII) – 1986, supra* note 197.
201. UNHCR, *supra* note 199.
202. *Ibid.* Guideline 1.
203. *Ibid.* Guideline 3: "(i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (iv) to protect national security and public order."
204. *Ibid.* Guideline 3; also ExComm Conclusion No. 58 (XL) – 1989: The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection; Report of the 40th Session of the Executive Committee: UN doc. A/AC.96/737, part N, p.23." at (h): "The problem of irregular movements is compounded by the use, by a growing number of refugees and asylum seekers, of fraudulent documentation and their practice of wilfully destroying or disposing of travel and/or other documents in order to mislead the authorities of their country of arrival. These practices complicate the personal identification of the person concerned and the determination of the country where he stayed prior to arrival, and the nature and duration of his stay in such a country. Practices of this kind are fraudulent and may weaken the case of the person concerned; (i) It is recognized that circumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified; (j) The wilful destruction or disposal of travel or other documents by refugees and asylum seekers upon arrival in their country of destination, in order to mislead the national authorities as to their previous stay in another country where they have protection, is unacceptable. Appropriate arrangements should be made by States, either individually or in co-operation with other States, to deal with this growing phenomenon."
205. ExComm Conclusion No. 58 (XL) at (f): "Where refugees and asylum seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if (i) they are protected there against *refoulement* and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them."
206. UNHCR, *supra* note 199 at Guideline 2.
207. ExComm *Conclusions No. 15 (XXX) – 1979 : Refugees without an Asylum Country,* Report of the 30th Session: UN doc. A/AC.96/572, para. 72(2)] General Principles (h)(iv), and (k).
208. See also *Note on International Protection*, 15 August 1988: UN Doc. A/AC.96/713, paragraph 19. Also, HREOC, *supra* note 106 at 4–5.
209. UNHCR, *supra* note 199, Guideline 3 (4).
210. Established pursuant to Resolution 1991/42.
211. Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997. See also the Report of the Working Group: UN doc. E/CN.4/1998/44, 19 December 1997; E/CN.4/RES/1998/ 41, 17 April 1998.

212. Report of the Working Group, UN doc. E/CN.4/1999/63, 18 December 1999, paragraph 69 (fourteen guarantees).
213. Commission on Human Rights: United Nations Working Group on Arbitrary, *Detention Deliberation No. 5: Situation regarding immigrants and asylum seekers*, UN doc. E/CN.4/2000/4, 28 December 1999, Annex II relating to the situation of immigrants and asylum seekers and guarantees concerning persons held in custody. The Declaration was noted by the Commission on Human Rights in Resolutions 2001/40, 23 April 2001 and 2000/36, 20 April 2000.
214. HREOC, *supra* note 85 at 3.
215. *Migration Act* s.189 and s. 196.
216. HREOC, *supra* note 85 at 4.
217. UN Human Rights Committee, *A v Australia*, Communication No. 560/1993. Views of the Human Rights Committee, 30 April 1997: UN Doc. CCPR/C/59/D/560/1993. Reproduced in *UN Human Rights Committee.* Communication No 560/1993 *A v Australia* (1997) 9 IJRL at 506–27.
218. HREOC, *Report on Visit to Curtin,* ***supra*** note 196.
219. *A* v. *Australia, supra* notes 51 and 217. The Committee stated: "remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."
220. UNHCR, *supra* note 199, Guideline 5.
221. HREOC, *supra* note 85 at 4–5.
222. HREOC, *Report on Visit to Curtin,* ***supra*** note 196.
223. *Veen* v. *The Queen (No.2)* (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ at 472; HREOC, *Report on Visit to Curtin, supra* note 196.
224. *Torres* v. *Finland*, Communication No. 291/1988. View adopted 2 April 1990, Report of the Human Rights Committee, Vol II, Supplement No.40: UN Doc. A45/40, page 96; HREOC, *supra* note 85 at 8.
225. HREOC, *supra* note 85 at 4–5.
226. UNHCR, *supra* note 199, Guideline 3.
227. Note *Ruddock* v. *Vadarlis*, [2001] FCA 1329; (2001) 110 FCR 491; (2001) 183 ALR 1; online: AusTLII Homepage <http://www.austlii.edu.au/>. In response to the MV *Tampa* incident, applications were filed, Vadarlis claiming, *inter alia*, that the asylum seekers were being unlawfully detained by the government, and seeking writs of habeas corpus. The writs were granted; release was ordered to the mainland. On appeal by the Minister, a majority of the Full Court of the Federal Court of Australia held that actions of the Australian government did not amount to detention, such as to attract the remedy of habeas corpus. The majority of the Court, per French J, held that the actions of the government had been incidental to preventing the rescued from landing on Australian territory, "where they had no right to go," (paragraph 193), while the asylum seekers' inability to go elsewhere derived from circumstances "which did not come from any action on the part of the Commonwealth." This was especially so since it was the captain of the *Tampa* who refused to sail from Australian waters while the asylum seekers were on board his boat (paragraph 202). Chief Justice Black dissented. His Honour concluded that actual detention and complete loss of freedom is not necessary to found the issue of the writ of habeas corpus (paragraph 69). Moreover, whether a detainee had a right to enter was not relevant; the real issue was whether there were reasonable means of egress open to the rescued people such that detention should not be held to exist (paragraph 79); "viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them..." (paragraph 80). However, the Court was not called upon to consider the operation of obligations that Australia may owe under international treaties such as the ICCPR or the Refugees Convention.
228. H. Esmaeili & B. Wells, "The 'Temporary' Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People" (2000) 23(3) UNSW L.J. 224–45 at 235–36.
229. Such as *Refugee Convention,* Articles 26, 28, 31, etc.
230. HREOC, *supra* note 100.
231. Australia has implemented certain provisions of the Refugees Convention into domestic law by reference via the *Migration Act*, s.36(1): see *MIMA* v. *Thiyagarajah* (1997) 151 ALR 685 at 697. Just what parts of the Convention are directly incorporated into domestic law is a matter of some discussion. While Australia is a signatory to the Convention and Protocol, it has not enacted every part of the Convention into domestic law, thereby giving rise to enforceable rights. It would appear that the central obligations are those contained in Articles 32 and 33 (against *non-refoulement* and expulsion of refugees) and the definition and exclusion clauses contained in Article 1 of the Convention. *MIMA* v. *Thiyagarajah* (1997) 151 ALR 685 at 697–98; see also *MIMA* v. *Ibrahim* [2000] HCA 55 per Gummow J paras 107–109–136 who referred to these duties as ones being owed to refugees. See also *MIMA* v. *Khawar* [2002] HCA 14 (11 April 2002) at paras. 45 and 46 per McHugh and Gummow JJ; online: AusTLII Homepage <http://www.austlii.edu.au/>. See Esmaeili & Wells, *supra* note 228 at 228–29.
232. CAT, Article 3: "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
233. HREOC, *supra* note 196. Also Human Rights Watch, *supra* note 8 at 12; Esmaeili & Wells, *supra* note 228 at 238–39.
234. Human Rights Watch, *supra* note 8 at 165.
235. HREOC, *supra* note 196.
236. CROC Articles 2, 3, 30, 22, 37, and 39.
237. UNHCR, *supra* note 199, Guideline 5.
238. HREOC, *supra* note 167.
239. *Supra* notes 5 and 126.
240. DIMIA, *Response to the Human Rights Commissioner's July 2000 Review of Curtin IRPC* (15 December 2000); online: HREOC Homepage <<http://www.hreoc.gov.au/

word/human_rights/ asylum_seekers/DIMA_response.doc>> (date accessed: 21 February 2002).

241. Press information page, Immigration Minister, Philip Ruddock MP, *supra* note 85.
242. HREOC, *supra* note 167.
243. For a comprehensive and thoughtful analysis of these issues, see M. Crock, "A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program ?" (2000) 23(3) UNSW L.J 246–87.
244. HREOC, supra note 85 at 12; and also ROC, "Alternative Detention Model"; online: ROC Homepage <http://www.refugeecouncil.org.au> (date accessed: 22 February 2002).
245. DIMIA, *supra* note 239.
246. DIMIA, *Fact Sheet 70, supra* note 123.
247. An uncomfortable use of words, since it so clearly resonates with another type of "solution" implemented by another regime in the middle of last century.
248. HREOC, *supra* note 85 at 12: " The convergence of border control on the one hand and protection obligations under the Refugee Convention and Protocol on the other gives rise to policies of mandatory detention as a deterrent. The impact of this convergence is disproportionately felt by asylum seekers who arrive by boat and claim refugee status on-shore. Some may be illegal immigrants and some refugees. On the surface, however, they are often indistinguishable and are treated as such."
249. Immigration Minister, Philip Ruddock MP, *supra* note 161; Phillips, *supra* note 89 at 289 and fn7.
250. The notion of "queue jumping" or "forum shopping" is not entirely new in Australian domestic politics. In 1979, a Sydney newspaper, the *Daily Telegraph*, in its editorial of 8 January 1979, noting Australia's offer to take 10,500 "properly processed" refugees by June 1979 from camps in Malaysia then holding 500,000 people, commented: "it would be unfair to them if a substantial part of this quota was made up of refugees who have sailed directly here": Johnson, *supra* note 21 at 14.
251. Implicitly differentiating between "deserving" and "undeserving" refugee applicants.
252. Let's be clear, incarcerating anyone without recourse to the courts is a punishment.
253. Since the government strengthened its mandatory policy by introducing expulsion of asylum seekers following the *Tampa* incident, it claims that these "policies of deterrence" are working, in that the number of boat arrivals has dropped. This conveniently ignores the fact that since the policy's introduction in November 2001, the monsoon season, which extends from November to February, is unsuitable and highly dangerous to open sea crossings. Indeed, the initial upsurge in unauthorized arrivals in August/September 2001 at the time following the *Tampa* incident was probably more indicative of people wishing to make the crossing to Australia before the commencement of the wet season than a measure of the success or failure of the government's policy. For negative characterizations of asylum seekers, see D. Corlett, "Politics, Symbolism and the Asylum Seeker Issue" (2000) 23(3) UNSW L.J 13–28 at 19–20.
254. It makes no sense that Al Qaeda or any terrorist group would spend time and money to train a potential terrorist merely to put them on a leaking boat in the Indian Ocean in the hope that they may arrive in Australia in order to end up in a detention centre, possibly for years on end. The sad irony is that all the suspects in the attacks in New York were by all reports well dressed, well educated young men with money, passports, and regular documentation – meaning that they had in fact been granted visas and immigration-cleared to enter the U.S. This is not the type of person usually found on a boat off the coast of Australia seeking asylum.
255. The government even claimed to have found terrorists among purported asylum seekers, this not so much refers to those who may pose a genuine security risk to the Australian community, but are alleged to have been involved in terrorist or criminal actions overseas. While it may be desirable to detain such people in detention, this does not serve as justification to keep all asylum seekers in detention.
256. Esmaeili & Wells, *supra* note 228 at 229.
257. For example, at the Australian embassy in Nairobi, Kenya, there are two and half Australian staff members, with responsibility for processing applications from thirty-four countries in Africa. Only around half of Australian representative posts overseas have Migration Department offices. There are usually around 10,000 visa places reserved in the yearly migration quotas for the refugee, humanitarian, and special assistance categories. Only Principal and Senior Migration officers and other Australian Immigration Department officers can process such visas: S. Dunbar, "The Myth of the Off-Shore Refugee Queue: The Reality of Despair" (2000) 9(1) *Human Rights Defender* at 20–21.
258. *Ibid.* at 20–21.
259. *Supra* note 253.
260. The government's response is that it is up to critics to state when the problem does become significant, pointing to the vast numbers of asylum seekers that beset other industrialized countries: Immigration Minister, Philip Ruddock MP, *supra* note 18 at 4.
261. DIMIA, *supra* note 2 at 8: "There is currently no intention to end the policy of mandatory detention of unauthorised arrivals, which has bipartisan support in Parliament."
262. N. Poynder, "The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy" (1997) 3(2) AJHR 53 at 63.
263. S. Pickering, "The hard press of asylum" (2000) 8 *Forced Migration Review* 32; R. McGregor, "Minister Warns of Boatpeople Flood" *The Australian* (16 November 1999) 1.

264. Esmaeili & Wells, *supra* note 228 at 237–38; RCOA, *supra* note 117 at 59.
265. Einfeld, *supra* note 5 at 308.
266. *Ibid.* at 308.

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Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers

Eleanor Acer

Abstract

The U.S. detention system for asylum seekers is fundamentally flawed. These flaws reflect an underlying lack of fairness that is inconsistent with international law and with U.S. traditions of fairness. For instance, the initial determination to detain an asylum seeker is not the result of an individualized determination, but is instead mandatory. Subsequent parole decisions are entrusted to the INS, which is the detaining authority, rather than to an independent authority. In short, the system lacks the kinds of safeguards necessary to promote due process and to guard against unfair and arbitrary detention. Reform is possible. The detention system for asylum seekers can be improved so that it is consistent with the values of fairness that the United States strives to meet.

Résumé

Le système américain de détention des demandeurs d'asile souffre de lacunes fondamentales. Ces lacunes reflètent un manque d'équité sous-jacent qui est incompatible avec le droit international et les traditions américaines d'équité. Par exemple, la décision initiale de détenir un demandeur d'asile n'est pas une décision individualisée, mais est en fait obligatoire. Les décisions de libérations conditionnelles sont laissées à la discrétion du service d'immigration et de naturalisation (INS) – qui est lui-même l'autorité détenant les prisonniers – plutôt qu'à une autorité indépendante. Bref, le système n'est pas doté des garanties nécessaires pour promouvoir le respect des procédures et protéger les intéressés contre la détention injuste et arbitraire. La réforme du système est possible. Le système de détention des demandeurs d'asile peut être amélioré afin de le rendre compatible avec les valeurs d'équité auxquelles les États-Unis s'efforcent de se conformer.

Introduction

> After they took my statement, they put me in handcuffs. I was very surprised by this. I remember asking one of the officers whether it was a crime to ask for asylum. He replied: "This is the law." After that they brought me to a detention center in New Jersey. I was even more surprised to be taken to a place where they took away my clothes and gave me the uniform of a prisoner.

These are the words of a torture survivor who was detained in the U.S. for seven months while he waited for his asylum claim to be granted. He later explained:

> I knew that asking for asylum was a right under international law. In my country, when I used to think about international law and human rights, the United States was the first country I associated with those ideals. What I experienced when I arrived here did not correspond to the vision that those outside of the United States have of this country.[1]

Whether they are Christians fleeing religious persecution in Sudan, torture survivors from Iraq, pro-democracy activists fleeing a repressive regime in Congo, victims of coercive population control policies in China, rape survi-

vors from minority clans in Somalia, or gay men attacked in Colombia because of their sexual orientation, those who flee to the United States arrive with the belief that they have finally reached a place where they will be safe, free, and treated fairly. For those who seek asylum at the U.S. borders and airports, the welcome they receive – handcuffs, shackles and mandatory detention – can be a devastating surprise.

The hurdles facing these asylum seekers are truly daunting. Summary "expedited removal" procedures, "mandatory detention," inconsistent parole practices, lack of government-funded legal representation, and language and translations difficulties are among the many hurdles arriving asylum seekers must navigate in their efforts to secure refuge in the United States.

In the wake of the tragic events of September 11, these hurdles have only multiplied. While none of the perpetrators of the September 11 attacks were asylum seekers or refugees, various measures taken by the U.S. government that affect non-citizens in general will necessarily affect those who seek asylum in the U.S. At the same time, new concerns have arisen regarding the use by the U.S. Immigration and Naturalization Service (INS) of its detention and parole authority with respect to asylum seekers – with reports of discriminatory parole policies aimed at asylum seekers from Arab or Muslim backgrounds, and, as the situation in Haiti has deteriorated, at asylum seekers who have fled to the U.S. from Haiti.

The U.S. detention system for asylum seekers is vulnerable to these and other abuses in part because of some fundamental flaws in the system. The initial determination to detain an asylum seeker is not the result of an individualized determination, but is instead mandatory. Subsequent parole decisions are entrusted to the INS, which is the detaining authority, rather than to an independent authority. The parole criteria for asylum seekers are set forth in guidelines rather than in enforceable regulations. The system does not provide for an appeal of parole denials to an independent judicial authority. In short, the system lacks the kinds of safeguards necessary to promote due process and to guard against unfair and arbitrary detention. Reform is possible. The detention system for asylum seekers can be improved so that it is consistent with the values of fairness that the United States strives to meet.

The U.S. System for Detaining Asylum Seekers

In 1980, the United States reversed its nearly thirty-year policy of detaining only those non-citizens who were considered a danger to the community or flight risks.[2] Instead, it began a policy of detaining those who sought to enter the U.S. with false or invalid documents—a situation which faces many genuine refugees since they may be unable to obtain travel documents from the governments that persecute them or may, like the Kosovo refugees, be stripped of their documents by their persecutors.[3]

This detention regime has been codified in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA or the "1996 immigration law"), which requires the "mandatory detention" of various classes of non-citizens. The 1996 immigration law's "expedited removal" provisions require "mandatory detention" of all asylum seekers who arrive in the United States without valid documents, until they pass out of the "expedited removal" process by establishing a "credible fear of persecution" in an interview with an INS asylum officer or a subsequent review by an immigration judge.4 The credible fear standard is met if there is a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum…."[5]

The expedited removal process itself is wrought with serious flaws. It entrusts the decision to deport an individual who arrives with false or invalid travel documents to an immigration inspections officer, instead of a trained immigration judge. While asylum seekers are not supposed to be deported unless they are first given a chance to prove to an INS asylum officer that they have a "credible fear of persecution," mistakes have been made.[6] The press and human rights organizations have documented instances of mistaken expedited removal determinations and other abuses relating to the conduct of the expedited removal process. Mistakes are indeed inevitable given the summary nature of the process and its lack of crucial safeguards.[7]

Shortly before the expedited removal provisions went into effect in April 1997, the INS increased its detention space and opened two large detention facilities to house asylum seekers subject to the expedited removal/mandatory detention provisions. These two facilities, both run by private contractors, are the two-hundred-bed facility near JFK International Airport in Queens, New York, which is run by Wackenhut Corrections Corporation, and the three-hundred-bed facility near Newark International Airport in Elizabeth, New Jersey, which is run by Correction Corporation of America. Asylum seekers are also held in other facilities across the country, including county and local jails.

While the expedited removal provisions of the 1996 immigration law require the detention of asylum seekers during the expedited removal process, they do not prohibit parole once asylum seekers have established a credible fear of persecution and are therefore no longer subject to expedited removal proceedings.[8] The authority to parole arriv-

ing asylum seekers, however, is entrusted to the detaining authority, the INS. If the INS denies parole, that decision cannot be appealed to an independent or judicial authority. While immigration judges can review INS custody and bond decisions with respect to various other categories of non-citizens,[9] immigration judges are precluded from reviewing issues relating to the detention of "arriving" aliens, a category which includes all arriving asylum seekers.[10]

After the passage of the 1996 immigration law, INS headquarters repeatedly advised local INS districts that asylum seekers who have established a credible fear of persecution are eligible for parole, and INS issued memoranda setting forth guidelines regarding the parole of asylum seekers. In December 1997, the INS issued guidelines which specifically confirmed that "[p]arole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct."[11] These guidelines were derived from the APSO (Asylum Pre-Screening Officer) Parole Program of the early 1990s.[12] In October 1998, another set of INS guidelines stated that "[a]lthough parole is discretionary in all cases where it is available, it is INS policy to *favor release* of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community."[13]

While the INS has issued guidelines regarding the parole of asylum seekers, it has refused to issue regulations specifically addressing the parole of asylum seekers. In January 1996, the Lawyers Committee for Human Rights filed a Petition for Rulemaking, requesting that the INS issue regulations codifying its parole guidelines for asylum seekers. In its Petition, the Lawyers Committee addressed in detail the deficiencies in the implementation of the INS parole program for asylum seekers and stressed the need for regulations to ensure that the parole program would be implemented properly and consistently.[14]

For years, human rights organizations, refugee advocates, and the press have documented the inconsistencies in parole practices from one INS district to another, and have documented cases of individual asylum seekers who have been detained for years while awaiting resolution of their asylum cases.[15]

These problems are so acute that the Department of Justice and the INS, in December 2000, issued a regulation to "clarify" that the INS Commissioner, other officials at INS headquarters, and regional directors are authorized to grant parole from INS custody.[16] Some INS district directors had apparently maintained that INS headquarters did not have the authority to interfere in their parole determinations.[17] The fact that the Department of Justice had to take the step of issuing a regulation simply to ensure that INS district directors understood that the INS Commissioner had authority over their parole determinations underscores how deeply rooted these problems are in the asylum detention system.

While the December 2000 regulatory change was a positive step, this change has not led to any significant improvement in the asylum detention system. In fact, as discussed below, the fundamental flaws in the system have made it more vulnerable to abuse in the post-September 11 climate. Significantly, the revised rule, in and of itself, does not fix many of the underlying problems in the U.S. system for detaining arriving asylum seekers. For instance, it did not codify the guidelines for parole of asylum seekers into enforceable regulations. It also left parole decisions in the hands of the INS rather than entrusting these decisions to independent adjudicators.

The Impact of the Detention Regime

At any time, the U.S. government detains about twenty-two thousand non-citizens in INS detention facilities and jails, and it has been estimated that several thousand of those detainees are asylum seekers.[18] Precise statistical information about asylum seekers, including the number of asylum seekers in detention, has long been difficult to obtain from the INS. For years, in fact, the INS has been unable to regularly provide statistical information relating to detained asylum seekers – even in the face of a federal statute requiring the INS to report these numbers to Congress.[19]

While there may be a dearth of statistical information, there is no dearth of individual stories. The press, human rights groups, and faith-based organizations have detailed the harsh impact of detention on individual asylum seekers.[20] Particularly disturbing are the reports of lengthy detentions – sometimes lasting for several years.[21] In researching the immigration detention system, the *Dallas Morning News* obtained statistics revealing that over 851 non-citizens in detention had been detained for over three years, and that 361 of these detainees were asylum seekers or other detainees who had not been convicted of any crime.[22] The *San Jose Mercury News*, in the course of conducting interviews for its award-winning series on asylum, gathered information relating to about fifty-six asylum seekers who were detained for over one year before being granted asylum.[23]

The impact of detention on children has been the subject of increasing scrutiny over the last two years.[24] The intense public interest in the case of Elian Gonzalez, a young Cuban boy who was paroled to relatives in Miami, helped to highlight concerns about the INS's detention and treatment of so many other children.[25] About 5000 children have been reported to be in INS custody; many are held in juvenile

jails and shelters.[26] Children have also been detained in adult jails and detention facilities when the INS has mistakenly concluded that they are adults based on dental examinations – a procedure that has been widely criticized by medical experts and is no longer relied upon even by the U.S. State Department.[27]

Detention can be particularly difficult for the many asylum seekers who are survivors of rape, torture and other traumatic experiences. Medical experts have documented the fact that many refugees often suffer from post-traumatic stress disorder, major depression, or other illnesses.[28] As one expert explained: "For someone who's been tortured and locked up in a cell as a political prisoner in their native countries … the experience of being locked up here again can trigger panic attacks, flashbacks."[29]

The costs of detention are tremendous. The INS detention and removal budget is now over $1 billion. The INS reportedly spends an average of $78 a day to detain a non-citizen. To detain an asylum seeker through his or her initial hearing before an immigration judge has been reported to cost, on the average, $7259 for a single asylum seeker. This does not include the substantial expense of additional detention while any appeals are pending. It has been estimated that detaining asylum seekers costs taxpayers at least $42.7 million per year.[30]

Additional challenges in the wake of September 11

In the wake of the September 11 attacks on the World Trade Center and the Pentagon, the difficulties facing asylum seekers in the U.S. have multiplied. While none of the perpetrators of the September 11 attacks were asylum seekers or refugees, the U.S. Department of Justice has instituted a number of measures that apply more broadly to all non-citizens but will negatively affect asylum seekers as well. Of great concern is the Department of Justice's proposal to drastically restrict the ability of the Board of Immigration Appeals to review decisions of immigration judges.[31] The proposal seeks to eliminate the Board's de novo factual review in most cases and encourages the issuance of summary orders. Advocates for refugees have roundly criticized the proposal as it would severely undermine the asylum appellate process and deprive asylum seekers of a meaningful appellate review.[32]

On December 3, 2001, the U.S. and Canada announced, in the context of broader co-operation on a range of border and security issues, that they will revive discussions on a safe third-country exception to the right to apply for asylum. According to the joint statement issued by the U.S. and Canada, the safe third-country arrangement "would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries."[33] Such an arrangement could further limit the ability of asylum seekers who transit through the U.S. before seeking asylum in Canada (including asylum seekers who are detained in the U.S.) to access the Canadian asylum system – even if their only family or contacts are in Canada.[34]

Also troubling are a series of regulations issued by the Department of Justice in late September and October 2001 which expand INS detention authority. One of these regulations authorizes an increase in the time to charge detained non-citizens to forty-eight hours and, in cases of undefined "extraordinary" circumstances or an "emergency," to some unspecified greater "reasonable" period of time. As a result, the INS has been given the power to detain a non-citizen who has committed no crime – and who is not in any way suspected to be a danger to anyone – for an unspecified period of time without even charging the non-citizen with an immigration violation.[35] A second new regulation allows an INS attorney to, in essence, overrule an immigration judge's decision to release a detainee on bond. There is no requirement that the individual be suspected of a crime or of terrorist activity.[36]

With respect to the over 1,100 non-citizens detained in the wave of arrests following September 11, the press and human right organizations have documented a range of disturbing abuses including lengthy detentions without charges, denial of access to counsel, the conduct of secret hearings, and abusive treatment.[37] These detainees are overwhelmingly non-citizen men of Arab or Muslim background who are being held or have already been deported based on immigration violations. While the vast majority of these individuals are not asylum seekers, a few refugees have been caught up in this wave of detentions.[38]

At the same time, the INS's handling of the asylum detention system has also raised concerns. Parole for asylum seekers, already restrictive in some areas of the U.S., seems to have become even more restrictive in the wake of September 11. This may be the result of a memorandum issued by the INS in November 2001, which states that "[d]uring the nation's heightened security alert and until further notice," District Director (or other specified) approval is required in order to parole aliens or take certain other actions. The memorandum states that: "discretion should be applied only in cases where inadmissibility is technical in nature (i.e., documentary or paperwork deficiencies), or where the national interest, law enforcement interests, or compelling humanitarian circumstances require the subject's entry in the United States …." The memorandum, however, also states that the guidance does not change existing statutory and regulatory standards for parole.[39]

Particularly troubling are reports of discriminatory parole practices. The press has documented cases in which asylum seekers from Arab or Muslim backgrounds, who

would previously have been paroled prior to September 11, have been denied parole. For instance, two Christian women who fled Iraq were denied parole in Miami, even though one of the women has strong community ties, specifically her U.S. citizen sister and U.S. legal permanent resident mother. Another young man, whose family is also Christian, fled forced conscription by the Iraqi regime. He too was denied parole even though he had a U.S. citizen brother and parents who also live in the U.S.[40]

Additional charges of discriminatory parole practices have been leveled with respect to Haitian asylum seekers. In early December 2001, a boat bearing nearly 200 Haitian men, women and children arrived off the coast of Florida. In response, the INS has instituted a policy of denying parole to Haitian asylum seekers. A lawsuit filed in March 2002 alleges that the policy discriminates against Haitians based on their race and nationality and violates the U.S. Constitution's guarantees of due process and equal protection. The INS has admitted that this policy is designed to deter other Haitian asylum seekers from fleeing to the U.S.[41]

The impact of these various policy and regulatory changes on asylum seekers is significant and will become even more significant as the Department of Justice moves forward with additional changes. These actions, taken by the INS and the Department of Justice in the wake of the September 11 attacks, are particularly troubling in that these actions are undermining a system that protects people who are victims of horrific human rights abuses.

Compounding this irony is the fact that the asylum system is replete with rigorous safeguards designed to flag and exclude those who are a danger. The fingerprints of every asylum applicant are taken and sent to the FBI for a security check. The names and birth dates of applicants are also checked against various FBI, State Department, and CIA databases.[42] Anyone who presents a risk to U.S. security is barred from asylum, as are those who have persecuted others or committed serious crimes.[43] The INS regulations and the INS parole guidelines specifically prohibit the parole of anyone who would be barred from asylum or would present a risk to the community.[44]

The Lack of Fairness in the Asylum Detention System

There are a number of fundamental flaws in the U.S. asylum detention system. These flaws reflect an underlying lack of fairness that is inconsistent with international law and standards and with U.S. traditions of fairness and due process.

- *Detention is mandatory for all asylum seekers who arrive without valid documents.*

Genuine refugees often have no choice but to flee to safety by using false or invalid travel documents. Many asylum seekers – from the Jews who fled Nazi persecution using false travel documents to the ethnic Albanians who were stripped of their documents as they fled Kosovo – have no choice but to flee to safety without valid travel documents.[45] For instance, one client of the Lawyers Committee, a young Afghan woman who was persecuted by the Taliban because she ran a school for young girls, purposefully left her identification documents behind, knowing that if other Taliban forces intercepted her as she fled her country, her danger would be multiplied if they were to learn her true identity.[46] Ironically, even asylum seekers who arrive on their own valid passports and visas that were actually issued to them by the United States government are considered to have "invalid" travel documents and are subject to mandatory detention if they honestly inform U.S. officials upon their arrival that they are planning to apply for asylum.[47]

Under the U.S. expedited removal law, detention is mandatory for arriving asylum seekers who arrive without valid travel documents, and as there is no valid visa for seeking asylum in the U.S., any arriving asylum seeker is generally considered to have invalid travel documents. The initial decision to detain is automatic under the law, not providing for individualized determinations of who should and should not be detained.

This mandatory or automatic approach to detention is inconsistent with international law and guidelines, which limit restrictions on movement to cases in which such restrictions are necessary. Article 31 of the 1951 Refugee Convention generally exempts refugees from being punished because of their illegal entry or presence and provides that states shall not place restrictions on the movements of refugees other than those that are necessary.[48] In order to ensure consistency with Article 31, the Detention Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), provide that: "[D]etention should only be resorted to in cases of necessity. The detention of asylum-seekers who come 'directly' in an irregular manner should, therefore, not be automatic nor should it be unduly prolonged." Indeed, the Executive Committee of the UNHCR, of which the United States is a member, has stated in Conclusion 44, that detention of asylum seekers "should normally be avoided."[49]

- *The U.S. has failed to issue regulations specifically addressing parole of asylum seekers; instead the criteria are set forth in unenforceable guidelines.*

As detailed above, the INS has refused to issue regulations setting forth the criteria for paroling asylum seekers. Instead, these criteria – which include the establishment of identity, the existence of community ties, the satisfaction of the credible fear standard, the absence of bars to asylum involving

violence or misconduct, and that the individual does not pose a danger to the community – are detailed in a series of memoranda which the INS has labeled as "guidelines."[50]

As a result, the INS and its District Directors have, in effect, been left free to ignore the guidelines. And they do. Asylum seekers who satisfy the criteria have been denied parole. Parole policies have varied widely between INS Districts, as have parole rates.51 Some individual INS Districts have radically changed their parole policies, disregarding the guidelines, and choosing instead to refuse to parole asylum seekers in response to specific goals of deterring asylum seekers. For instance, the New Jersey INS changed its parole policy in 1998, admitting that its detention policies were premised on deterrence objectives. Its parole rate dropped dramatically: from a parole rate that was reportedly about 89 percent to a rate of about 21 percent.[52] Most recently, the Florida INS district, which had previously paroled eligible Haitian asylum seekers, began to refuse to parole Haitian asylum seekers in an attempt to deter additional Haitian asylum seekers from coming to the United States.[53]

Thus, parole determinations in the U.S. are often based not on whether individual asylum seekers satisfy the criteria specified in the INS parole guidelines, but instead on vagaries such as the airport the asylum seeker arrived at, the availability of bed space in the area, and the particular policies of individual INS District Directors. These disparities, as illustrated by the following excerpt from a *Detention Watch Network* newsletter, can dramatically affect the experiences of individual refugees:

> Adams Bao and Hua Zhen Chen are both seeking asylum in the United States. But their experiences in the asylum process have been radically different. Why? One reason is a surprisingly arbitrary one: Adams' boat docked in New Orleans and Chen's plane landed in Virginia.
>
> Adams fled Sierra Leone, where his father and sister were killed in the civil war. He had access to one of the few alternatives to detention in this country. As a result, while he awaits his asylum hearing Adams is working to support himself and mastering rare glass-blowing skills in New Orleans.

Chen was not so fortunate. After arriving at Dulles Airport in December 1999, she spent 20 months detained in five different jails in Virginia before INS finally released her in late July. A native of China, Chen suffered the forced abortion of her second child and fled to the United States to avoid sterilization and imprisonment. During those 20 months INS denied her parole three times even though Chen had family in Ohio willing to take her in.[54]

Such a process is plainly arbitrary. Detention determinations that are based not on clear rules, but instead on ever-shifting factors that are not established by law, are arbitrary by definition. The International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party, specifically provides in Article 9(1) that: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[55]

- *The initial parole decisions are made by INS detention officers who are ill-trained and ill-equipped to make these determinations.*

Under U.S. regulations, the decision to parole an asylum seeker is entrusted to local INS District Directors. In practice, it is typically an individual INS detention officer who makes the initial assessment and recommendation on release. These officers are not adequately trained to make these determinations. They are officers whose primary responsibility is enforcement of the immigration laws, rather than adjudication. Also, unlike the specially trained INS asylum officers, these officers do not receive extensive training in asylum law or in the human rights situations of the various countries from which asylum seekers flee. Compounding this difficulty is the fact that there are significant career, budgetary, and other considerations that create incentives for local INS district officials not to release asylum seekers from detention.[56]

- *Neither initial detention determinations nor reviews of parole denials are conducted by an independent authority. The INS, in effect, is judge and jailer with respect to parole decisions.*

Under U.S. procedures, the decision of whether or not to parole an arriving asylum seeker is entrusted to the INS, the same authority that is charged with seeking to detain and deport the individual. The INS, in effect, acts as both judge and jailer with respect to parole decisions. And, as discussed above, when the INS denies parole to an arriving asylum seeker, the law does not provide for an appeal of this determination to an independent or judicial authority.[57]

This lack of meaningful independent review of decisions to detain asylum seekers is a clear violation of U.S. obligations under international law. Article 9(4) of the ICCPR provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may, decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[58]

This provision applies to all detainees, including immigration detainees.[59] The UN Human Rights Committee, in its decision in *Torres* v. *Finland*,[60] explained that Article 9(4) of the ICCPR "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence…." In the case of *A* v. *Australia*, the UN Human Rights Committee, in finding that a limited court review did not satisfy the requirements of Article 9(4), emphasized that court review "must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law," and must be "in its effects, real and not merely formal."[61] The UNHCR Detention Guidelines call for procedural guarantees, when a decision to detain is made, including "automatic review before a judicial or administrative body independent of the detaining authorities."[62]

- *U.S. law does not provide a limit on the length of time asylum seekers may be detained.*

In the United States, arriving asylum seekers are regularly held in detention facilities or jails for months, and sometimes for years. The INS does not regularly release information about lengthy detention of asylum seekers. In fact, as noted above, while the INS has repeatedly failed to provide statistical information relating to detained asylum seekers, the press and human rights groups have documented numerous examples of asylum seekers who have been detained for lengthy periods of time.[63]

Neither U.S. statutes nor regulations specify a limit on the length of time an asylum seeker may be detained while his or her removal and asylum proceedings are pending. But the reasoning of a recent U.S. Supreme Court decision, which examined a statute governing the detention and release of aliens who had already been ordered removed, makes clear that indefinite detention raises serious due process concerns under the U.S. Constitution. In *Zadvydas* v. *Davis*, the Supreme Court ruled that the indefinite detention of aliens who had been admitted to the United States and subsequently ordered removed would raise serious concerns under the U.S. Constitution.[64] The Court construed the statute at issue to contain an implicit reasonable time limitation, which citing to Congressional intent, the Court determined to generally be a period of six months.[65]

The *Zadvydas* case involved non-citizens who had been admitted to the United States as opposed to non-citizens who had not yet gained admission. The latter category would include arriving asylum seekers who are deemed to have not yet been admitted. The Court, noting that its decision involved individuals who had been admitted to the U.S., concluded that it did not need to examine the question of the continued authority of the doctrine that has drawn a legal distinction between non-citizens who were afforded constitutional rights because they had "entered" the U.S. and those non-citizens who have traditionally been afforded less rights because they were deemed not to have entered the U.S. The continued viability of this legal fiction has been questioned by some legal experts.[66] The Department of Justice, citing this distinction, has refused to recognize the applicability of the *Zadvydas* decision to the detention of arriving non-citizens who have not yet been admitted to the U.S.[67]

The absence of a limit on the length of detention is problematic under international standards as well. In *A* v. *Australia*, the UN Human Rights Committee recognized that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed."[68] The UN Working Group on Arbitrary Detention, in its Deliberation No. 5, has set forth a number of guarantees to be considered in assessing whether an asylum seeker's deprivation of liberty is arbitrary under international law. One of these guarantees provides that: "A maximum period should be set by law and the custody may in no case be unlimited or of excessive length."[69]

- *The U.S. does not fund legal representation for indigent asylum seekers.*

The U.S. government, unlike some European and other governments, does not provide funding for legal representation of asylum seekers. A study conducted by the Georgetown University Institute for the Study of International Migration, which analyzed U.S. government statistics, revealed that asylum seekers are four to six times more likely to be granted asylum when they are represented. The Georgetown analysis also revealed that in immigration court, more than one out of three asylum seekers lacks representation. For detained asylum seekers, the situation is even worse – more than twice as many detained asylum seekers lack representation when compared with non-detained asylum seekers in defensive proceedings.[70] This is no surprise as detained asylum seekers typically have less access to legal representation, particularly as some are detained in remote areas that are far from legal service providers.

At the same time, detained asylum seekers face greater burdens in attempting to prove their cases. The ability of a detained asylum seeker to gather documentation and locate and communicate with witnesses who could corroborate the facts of her claim is severely hampered by the very fact of detention. Although telephones are available in detention, she may not be able to afford a calling card or may be limited to collect calls, which some individuals and non-profit organizations may not accept. The telephones are routinely located

in large "pod" or "dorm" areas that may hold scores of other detainees, so that no meaningful degree of privacy is available to make calls to counsel or potential witnesses.[71] In addition, detained asylum seekers often have little or no meaningful access to legal materials or country condition reports that are essential to the preparation of their cases.[72]

- *The United States has not implemented nationwide alternatives to detention for asylum seekers.*

There are a number of successful models of alternatives to detention that have been tested in the United States. These models have demonstrated high appearance rates for asylum seekers – ranging from 93 per cent to 96 per cent – and significant cost savings for the U.S. government.

The most comprehensive model alternative program was a pilot project conducted by the Vera Institute of Justice in contract with the INS. In this pilot program, which was called the Appearance Assistance Program, the Vera Institute supervised the release of asylum seekers and other non-citizens. In order to be released to supervision, participants were required to report regularly in person and by phone. Their whereabouts were monitored. Participants were also provided with information about the consequences of failing to comply with U.S. immigration laws. Participants in a less intensive program were given reminders of court hearings and were provided with legal information, and referrals to lawyers, and other services.[73]

The Vera Institute pilot project reported a very high appearance rate of 93 per cent for asylum seekers released through its appearance assistance program, and also concluded that the cost of supervision was 55 per cent less than the cost of detention.[74] In concluding that supervised release is more cost effective than detention for asylum seekers, the Vera Institute noted that "[i]t costs the INS $3,300 to supervise each asylum seeker who appears for hearings compared to $7300 for those detained."[75] Based on its research, the Vera Institute actually concluded that: "Asylum seekers do not need to be detained to appear for their hearings. They also do not seem to need intensive supervision."[76]

Another successful model is a project that was coordinated by the Lutheran Immigration and Refugee Service (LIRS). Through that project, the INS released twenty-five Chinese asylum seekers from detention in Ullin, Illinois, to shelters in several communities. The community shelters reminded participants of their hearings, scheduled check-ins with the INS, organized transportation, and accompanied asylum seekers to their appointments. In addition, non-profit agencies also found pro bono attorneys for all of the asylum seekers who were released to the shelters. The project achieved a 96 per cent appearance rate.[77]

Despite these very successful models and the Vera Institute's finding that asylum seekers do not need to be detained, the U.S. government has not instituted a nationwide program of alternatives to detention for asylum seekers. While the U.S. Congress has allocated some resources (U.S. $3 million) for alternatives to detention during fiscal 2002, as discussed below, it not clear to what extent, if any, those funds will be used to release from detention asylums seekers who would otherwise have been detained.

Improving the Fairness of the U.S. Detention System

The U.S. detention system for asylum seekers can be reformed to improve its fairness. Indeed, some concrete improvements are urgently needed as the current system is fundamentally unfair and fails to meet international standards. A number of critical changes are outlined below.

- *The decision to detain an asylum seeker should be made by an appropriately trained adjudicator in an individualized proceeding.*

At a very fundamental level, the premise of the U.S. detention system must change. The U.S. system is currently based on a requirement of "mandatory detention" for all arriving asylum seekers. A decision to detain should instead be made in an individualized proceeding, and detention should only be authorized in cases in which it has been demonstrated to be necessary.

Detention determinations should be made by trained adjudicators who have received specialized training in a range of areas including asylum law, country conditions, and special issues relating to survivors of torture. Other appropriate training would include training to assist in assessing asylum seekers' community ties and proof of identity. These adjudicators should be independent of both the INS and the Department of Justice, which are the detaining authorities.

In these proceedings, the asylum seeker should have the right to be represented and to present testimony and other evidence. Appropriate translation must be provided. If the INS believes that an individual should be detained, the INS should also have the opportunity to present evidence relevant to the detention determination.

- *When parole is denied, an asylum seeker should have the opportunity to have that decision reviewed by an independent court.*

When a request for parole is denied, the asylum seeker should have the opportunity to have that decision reviewed by a court that is independent of the detaining authority. This independent review is particularly important where the

parole decision is made, as is currently the case in the U.S., by the detaining authority itself.

As an initial step, immigration judges should be authorized to review INS detention determinations relating to arriving asylum seekers. This reform is currently included in a bill, called the Refugee Protection Act, which has been introduced in both the U.S. Senate and the House of Representatives.[78] The need for an independent adjudicator to make or review parole determinations has been stressed by a number of human rights organizations and by experts in the field.[79]

One of these experts has pointed out that in the U.S. criminal justice system, pre-trial release decisions are made by judges – and not by the enforcement-oriented prosecuting authority. Looking to the Bail Reform Act of 1984 as a model, Professor Michele Pistone has recommended that U.S. law be changed to take "authority **over parole** decision-making out of the hands of local districts and put it into the hands of neutral immigration judges . . ."[80]

Ultimately, additional reforms – such as moving the immigration court system from the direct control of the Department of Justice – would be necessary to ensure the independence of immigration judges. The U.S. Commission on Immigration Reform and the National Association of Immigration Judges have both urged that immigration courts be removed from the Justice Department.[81]

- *The criteria for detention and parole of asylum seekers should be spelled out in regulations.*

Congress should direct the Justice Department to issue regulations providing for the release of asylum seekers who meet the "credible fear" standard, satisfy the identity and community ties criteria, and pose no danger to the community. The INS should not be permitted to issue only guidelines—rather than regulations—specifying the criteria for parole of asylum seekers, as this practice has repeatedly proven insufficient to ensure accountability and compliance by local INS districts. Experts who have monitored the implementation of the asylum parole guidelines have recommended just such an approach, and the Refugee Protection Act would require the Justice Department to issue regulations setting forth the criteria for paroling asylum seekers.[82]

- *A limit on the length of detention for asylum seekers should be prescribed.*

Some limits must be placed on the length of time that an asylum seeker may be detained while his or her asylum proceedings are pending. These limits could be established by regulation or by statute. Other countries have placed limits on the length of time that asylum seekers may be detained.[83] At the very least, a decision to detain an asylum seeker should be reviewed by an independent court on a regular basis. Asylum seekers who are detained for longer periods of time should be held in facilities that allow greater outdoor access, contact visits with family and friends, English classes and other educational opportunities.

- *The U.S. government should fund legal representation for children and for indigent asylum seekers.*

As detailed above, asylum seekers who are represented are more likely to win their cases. In turn, asylum seekers who are not represented (or are poorly represented) are sometimes detained for lengthy periods of time while they pursue their appeals.

While some European and other states provide funding for legal representation for asylum seekers,[84] the U.S. does not. The funding options for non-governmental organizations that provide legal representation to asylum seekers are very limited. These organizations, given their lack of resources, cannot come close to meeting the substantial need for representation in asylum cases. While the U.S. government has just announced plans to provide some limited funding to conduct legal orientation presentations for asylum seekers, this effort, while commendable, will not meet the substantial need for legal representation in individual asylum cases. Government funding of legal representation would increase the number of individuals who win asylum at an early stage, and would decrease the number of appeals and the corresponding detention time leading to a savings of detention costs.

The U.S. government should fund representation for children in asylum and immigration proceedings. About half of the roughly five thousand children in INS detention are reportedly not represented.[85] A bill, called the Unaccompanied Alien Child Protection Act, which would require that all unaccompanied children be provided with guardians *ad litem* and court-appointed lawyers to identify and defend their best interests, has been introduced in the U.S. Congress.[86]

- *The U.S. government should devote significant resources to the advancement of alternatives to detention for asylum seekers.*

While the U.S. Congress has allocated $3 million for alternatives to detention during fiscal year 2002, it is not clear to what extent any projects initiated with those funds will be used to release from detention asylum seekers who would otherwise have been detained. Given the limited amount of funds, the INS would only be able to launch projects at a few locations. Some of these projects will likely be designed for immigration detainees who are not asylum seekers. In addi-

tion, given the restrictive parole policies and resistance to outside involvement in parole determinations that have been evidenced by some INS districts that house significant numbers of detained asylum seekers, there is a chance that the INS will not make these projects available to the very asylum seekers who are most in need of them.

The U.S. Congress should continue to fund alternatives to detention, and should do so at a level that would ensure the availability of alternatives to detention across the country, rather than at just a few locations. Congress should also ensure that a significant amount of this funding is allocated to provide alternatives to detention to asylum seekers who would otherwise be detained.

- *Asylum seekers should only be detained in appropriate facilities.*

In the U.S., detained asylum seekers are held in large immigrations detention facilities and in local and county jails. Upon their arrival in the U.S. they are often handcuffed or shackled. Their clothes are taken from them. They are given prison uniforms to wear. Families are sometimes separated. Asylum seekers in some facilities are denied contact visits, even with young children. Asylum seekers have, over the years, reported abuse and mistreatment at some of these facilities.[87] In March 2002, Haitian women detained at a jail in Florida reported that they were not provided with adequate medical care. One woman reported that she woke up spitting blood every morning and had yet to see a doctor after three months in detention, and two pregnant women detainees had received no medical checks.[88]

Some asylum seekers have fled from torture or other traumatic experiences. Refugees often suffer from post-traumatic stress disorder, major depression, or other illnesses.[89] As experts have emphasized, detention can exacerbate the suffering that these vulnerable individuals face.90

When detention is used for asylum seekers, the conditions of detention should be appropriate for asylum seekers. Asylum seekers should not be held in criminal facilities. As asylum seekers are not criminals, when they are detained, they should generally be held in less restrictive settings, allowed to wear their own clothing, and given access to educational opportunities (such as English language classes) and, for those who are survivors of rape, torture, or other trauma, appropriate counselling.

Conclusion

The U.S. asylum detention system can be reformed. Reforming the system will require committed action by the U.S. Congress, the Department of Justice, and the INS itself. A major step towards reform would be the passage of the Refugee Protection Act, a bill which would provide for immigration judge review of parole denials, the issuance of regulations specifying the parole criteria for asylum seekers, and the expanded use of alternatives to detention. The American public's increasing concern over the U.S. government's treatment of asylum seekers – as evidenced by the growing attention of religious leaders, the press, and other citizens across the country[91] – will help to make reforms possible.

A central objective of these reforms must be to ensure that U.S. procedures are fundamentally fair. Only then can we ensure that those who flee to our shores seeking protection find the safety, freedom and fairness that are central to American values.

Notes

1. A refugee from Cameroon, statement submitted to the U.S. Senate, Immigration Subcommittee, Committee on the Judiciary (3 May 2001) on file with the Lawyers Committee for Human Rights.
2. Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (New York: LCHR, 1999) at 19; online: <http://www.lchr.org>.
3. D. Williams, "Macedonia Slows Flow of Incoming Refugees" *The Washington Post* (31 March 1999). ("Many refugees have reported that Yugoslav authorities are stripping them of their passports and other personal documents . . .").
4. Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV).
5. INA § 235(b)(1)(B)(v).
6. E. Shmitt, "When Asylum Requests Are Overlooked" *The New York Times* (15 August 15 2001) A6; J. M. Gonzalez, "Amityville Woman Seeks $8Million in JFK Mix-up" *Newsday* (12 July 2000).
7. *Ibid*; The Expedited Removal Study, "Report on the First Three Years of Implementation of Expedited Removal" (San Francisco: University of California, Hastings College of Law, 2000), online: <http://www.uchastings.edu/ers/>; Lawyers Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (2000).
8. *Supra* note 4; INA Section 212(d)(5)(A) (providing for parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" for an alien applying for admission); 8 Code of Federal Regulations (C.F.R.) § 235.3(c); 8 C.F.R. § 212.5(a); Memorandum from Office of INS Deputy Commissioner, "Implementation of Expedited Removal," (31 March 1997), reprinted in 74 *Interpreter Releases* (21 April 1997) ("[o]nce an alien has established a credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under section 240, release of the alien may be considered under normal parole criteria") (1997 INS Guidelines).
9. 8 C.F.R. § 3.19.

10. 8 C.F.R. § 3.19 (h)(2)(i)(B).
11. 1997 INS Guidelines, *supra* note 8.
12. Memorandum from G. McNary, INS Commissioner, "Pilot Parole Project for Aliens Seeking Asylum in Exclusion Proceeding," (27 April 1990); Memorandum from G. McNary, INS Commissioner, "Parole Project for Asylum Seekers at Ports of Entry and in INS Detention" (20 April 1992); Lawyers Committee for Human Rights, *Interim Report on the Pilot Parole Project of the Immigration and Naturalization Service* (New York: 1990).
13. Memorandum from INS Executive Associate Commissioner for Field Operations, *Detention Guidelines Effective October 9, 1998*, 75 *Interpreter Releases* 1523 (2 November 1998) (emphasis added) (1998 INS Guidelines).
14. Petition to the INS, EOIR, DOJ, Seeking a Rule on Procedures for Parole of Detained Asylum Seekers, submitted by the Lawyers Committee for Human Rights, January 1996.
15. L. Getter, "Freedom Elusive for Refugees Fleeing to the U.S." *Los Angeles Times* (31 December 2001); F. N. Tulsky, "Uncertain Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes" *San Jose Mercury New,*(10 December 2000); M. Ohito, "Inconsistency at INS" *The New York Times* (22 June 1998); T. Beach & P. Yost, "INS Jailing Many Asylum Seekers" *The Boston Globe* (17 November 1998) A27; see also Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998); Lawyers Committee for Human Rights, Refugees Behind Bars, supra note 1; Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County, Pennsylvania* (July 1998).
16. 65 Fed. Reg. 82254–82256, "Clarification of Parole Authority" (INS No. 2004–9965) (28 December 2000).
17. *Ibid.* (the change was needed because "[s]ome have interpreted Sec. 212.5 [the relevant parole regulation] to mean that the authority to grant parole is limited to the DD [district director] and the CPA [chief patrol agent].").
18. D. Mallone, "851 Detained for Years in INS Centers – Many Are Pursuing Asylum," *Dallas Morning News* (1 April 2001); U.S. National Council of Churches, Press Release, "People Fleeing from Persecution Held in Worse Than Prison Conditions in the U.S." (20 April 20 2001), online: <http://www.ncccusa.org/news/ 01news38.html>; Testimony of Bishop T. G. Wenski on behalf of National Conference of Catholic Bishops Committee on Migration, before the House Judiciary Subcommittee on Immigration and Claims (15 May 2001).
19. FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Public Law 105–277), §§ 903–4; supra notte 15, F. N. Tulsky, "Asylum seekers face tougher U.S. Laws, attitudes" (INS lacks precise data on detained asylum seekers; regarding failure to comply with statute requiring that INS report data: "An INS spokesman said that complying with the law would drain resources from other mandated responsibilities.").
20. See *supra* note 15; "Detainees held in prison-like conditions," *Ecumenical News International* (June 2001), online: <http://www.dfms.org/episcopal-life/Detainee.html>.
21. *Supra* note 2, at 6–7 (Somali asylum seeker detained for 4 years before being granted asylum); M. Clancy, "Nigerian Finally Wins Asylum After Long Fight" *The Herald News* (20 July 20 2001) (Nigerian refugee granted asylum after 3 years and 4 months in detention); D. Malone, "Man Locked up for Four Years but Convicted of Nothing" *The Dallas Morning New,* (1 April 1 2001) (Sri Lankan asylum seeker detained for four years); C. Hedges, "Immigrant Detained for 3 and 1/2 years Emerges from Labyrinth," *The New York Times* (6 November 2000) (Congolese refugee granted asylum after three and one-half years in jails and detention facilities); B. Walth, "Asylum Seekers Greeted With Jail," *The Oregonian* (10–15 December 2001 (Liberian asylum seeker detained for six years, Chinese asylum seeker detained over two years, Sri Lankan asylum seeker detained for four years).
22. D. Mallone, "851 Detained for Years in INS Centers – Many Are Pursuing Asylum" *The Dallas Morning News* (1 April 2001).
23. F. N. Tulsky, "Asylum Seekers Face Tougher US Laws, Attitudes" *San Jose Mercury News* (10 December 2000.
24. A. Elsner, "Congressmen Protest INS Treatment of Retarded Boy," *Reuters*, (27 March 2002); and articles referenced in notes 25 to 27 *infra*.
25. E. Herman, "Immigration: No Kid Gloves," *The New York Daily News* (30 April 2000).
26. *Ibid.;* E. Amon, "Access Denied, Children in INS Custody Have No Right to a Lawyer" *The National Law Journal* (12 April 2001).
27. A. Elsner, "New York Dentists Can Settle Fate of Migrants" *Reuters* (11 January 2002); C. Hedges, "Crucial INS Gatekeeper: The Airport Dentist" *The New York Times* (22 July 2001).
28. M. R. Pistone and P. G. Schrag, "The New Asylum Rule: Improved but Still Unfair" (Fall 2001) 16 *Georgetown Immigration Law Journal* 49, n. 272 & n. 273 (citing numerous medical reports, including: N. R. Holtan, Survivors of Torture (1999) 114 *Pub. Health Rep*. 489; D. Silove, et al., "Anxiety, Depression and PTSD in Asylum-Seekers: Associations With Pre-Migration Trauma and Post-Migration Stressors" (1997) 170 *British J. Psychiatry* 351, 351–57; H. Thulesium and A. Hakansson, "Brief Report: Screening for Posstraumatic Stress Disorder Symptoms Among Bosnian Refugees" (1999) 12 *J. Traumatic Stress* 167, 171–73).
29. E. Llorente, "Dreams Turn to Despair" *The Bergen County Record* (24 May 1999) (quoting Dr. Beverly Pincus, director of Cross-Cultural Counseling Center at the International Institute of New Jersey).
30. B. Walth, "Asylum Seekers Greeted with Jail" *The Oregonian* (10–15 December 2001)*; Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (August 2000) vol. 1 at 66.

31. 67 Fed. Reg. 7309–7318, "Board of Immigration Appeals: Procedural Reforms to Improve Case Management" (19 February 2002).
32. American Immigration Law Foundation News, Volume 4, Issue 3, March 2002, available online at <http://www.ailf.org>; see Comments filed by Capitol Area Immigrants Rights Coalition (CAIR) and Comments filed by the Lawyers Committee for Human Rights [on file with the author].
33. "Joint Statement on Cooperation on Border Security and Regional Migration Issues" issued by the U.S. and Canada (3 December 2001); D. L. Brown, "U.S., Canada to Sign Border Accord" *Washington Post Foreign Service* (4 December 2001) A16.
34. See B. Frelick, "Who's On First? The Canada-U.S. Memorandum of Agreement on Asylum" (26 February 1996) 73 *Interpreter Releases* 217.
35. 66 Fed. Reg. 48334, INS No. 2171–01, "Custody Procedures," Sept. 20, 2001. The regulation does not limit this power to high level officials; it could allow individual INS officers to decide whether there is an "extraordinary" or "emergency" situation.
36. 66 Fed. Reg. 54909, "Automatic Stay of Bond Orders of Immigration Judges" (31 October 2001).
37. Amnesty International, *Amnesty International's Concerns Regarding post September 11 detentions in the USA* (March 2002) (AI Index: AMR 51/044/2002); J. Edwards, "Attorneys Face Hidden Hurdles" *New Jersey Law Journal* (3 December 2001).
38. J. A. Benjamin, "Iraqi Refugees Cleared by FBI Could Still Face Deportation" *South Florida Sun-Sentinel* (12 December 2001).
39. Memorandum from M. D. Cronin, INS Executive Associate Commissioner, "Deferred Inspection, Parole and Waivers of Documentary Requirements," 1(4 November 2001), reprinted in 79 *Interpreter Releases* 49 (7 January 2002).
40. R. A. Serrano, "Ashcroft Denies Wide Detainee Abuse" *Los Angeles Times* (17 October 17 2001); R. A. Serrano, "Judge Denies Young Iraqi's Bid to Join Family" *Los Angeles Times* (14 January 2002); A. Viglucci and A. Chardy, "Iraqi Christians Get Caught up in Security Web" *Miami Herald* (26 December 2001); J. Benjamin, "Mideast Detainees Await Freedom," *The South Florida Sun-Sentinel* (8 December 2001).
41. Editorial, "Justice Denied, Again for Haitian Asylum Seekers," *Miami Herald* (18 March 2002); J. Benjamin, "INS Admits New Get-Tough Policy on Haitians Aimed at Preventing Exodus," *South Florida Sun-Sentinel* (20 March 2002); A. Chardy, "INS Clamps Down on Haitian Asylum-Seekers" *Miami Herald* (20 March 2002).
42. INA § 208(d)(5)(A)(i).
43. INA § 208(b)(2).
44. 8 C.F.R. § 212.5(a) (prohibiting parole of anyone who is a security risk). The 1997 INS Guidelines, *supra* note 8, specify that parole is only a viable option for asylum seekers who meet certain criteria and "are not subject to any possible bars to asylum involving violence or misconduct." The 1997 INS Guidelines detail procedures to be followed if some concern arises that an individual may be a security risk, may be subject to a terrorist bar or may otherwise be a danger to the community. These procedures include an investigation and inquiries to the FBI and other appropriate agencies. The 1998 INS Guidelines, *supra* note 13, provide that "it is INS policy to favor release of aliens found to have a credible fear of persecution, *provided that they do not* pose a risk of flight or *danger to the community*" [emphasis added].
45. D. Williams, "Macedonia Slows Flow of Incoming Refugees" *The Washington Post* (31 March 31 1999) ("Many refugees have reported that Yugoslav authorities are stripping them of their passports and other personal documents ….); The American Jewish Committee Office of Government and International Relations, News Release, "American Jewish Committee Speaks at Capitol Urging Rollback of Harsh Immigration Legislation" (17 September 1999) ("Often those fleeing repressive regimes have no means of escape except by using invalid travel documents. It should be recalled that this nation has long honored Raoul Wallenberg, who saved countless lives during the Holocaust by issuing unofficial travel documents.")
46. *Supra* note 2, at 7.
47. For instance, the Lawyers Committee is aware of a number of asylum seekers who fled to the U.S. on their own valid passports and on visas that were originally obtained for legitimate reasons but were detained under expedited removal after they explained to INS officials at the airport that they wished to apply for asylum.
48. Article 31, United Nations Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [hereinafter *Refugee Convention*]. The U.S. became bound by Articles 2–34 of the Convention when, in 1968, it acceded to the United Nations Protocol Relating to the Status of Refugees, 31 January 1967, 19 U.S.T. 6223, 60 U.N.T.S. 267 (1968) (entered into force October 4, 1967, accession by the United States in 1968) [hereinafter *Protocol*]. For a detailed discussion of the scope and meaning of Article 31 of the Refugee Convention, see G. S. Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection," October 2001 (prepared at the request of UNHCR for the Global Consultations), online: <http://www.unhcr.ch>.
49. United Nations High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, February 1999, online: <http://www.unhcr> at 3 [hereinafter *UNHCR Detention Guidelines*]; UNHCR Executive Committee Conclusion on Detention of Refugees and Asylum Seekers, No. 44 (1986).
50. 1997 INS Guidelines, *supra* note 8; 1998 INS Guidelines, *supra* note 13.
51. See note 15 *supra*.
52. E. Llorente, "Dreams Turn to Despair" *The Bergen County Record* (24 May 1999) (quoting New Jersey District Director); Lawyers Committee for Human Rights, *Refugees Behind Bars* at 29 n.96 (reporting statistics).
53. A. Elsner, "Haitian Women Asylum Seekers Complain about US Prison" *Reuters* (14 March 2002); National Coalition for

Haitian Rights, Press Release, "Haitian Coalition Urges the Release of over 200 Haitian Asylum Seekers in Miami," (8 March 2002); A. Chardy, "INS Clamps Down on Haitian Asylum-Seekers" *Miami Herald* (20 March 2002).

54. E. Ebrahimian, Lutheran Immigration and Refugee Services, "Senate Committee Votes to Fund Legal Orientations and Detention Alternatives" *Detention Watch Network News*, Issue 18 (Summer 2001). See also M.-L. Hopgood, "Immigrant Detention under Fire" *Dayton Daily News* (13 August 13 2001). Chen was only released after human rights and refugee advocacy organizations raised her case with the press and with INS headquarters. She was subsequently granted asylum.
55. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 9(1) (entered into force 23 March 1976, accession by the United States 8 June 1992) [hereinafter *ICCPR*].
56. M. R. Pistone, "Justice Delayed Is Justice Denied" (1999) 12 Harvard Human Rights Journal 197 at 247.
57. See notes 9–10 *supra* and accompanying text. Federal court habeas petitions have not proved an effective tool for review of parole denials. Not only does it often take months or longer for federal courts to make decisions, but federal courts have in some cases refused to review INS parole determinations in the wake of the 1996 law, and in other cases have deferred to INS parole determinations as long as the INS cites a reason for its parole denial. See *Veerikathy* v *INS*, 98 Civ. 2591, 1998 U.S. Dist. LEXIS 19360 (E.D.N.Y. Oct. 9, 1998); see *also Bertrand* v. *Sava* 684 F.2d 204 (2d Cir. 1982); *Zhang* v. *Slattery*, 840 F. Supp. 292 (S.D.N.Y. 1994).
58. ICCPR, art. 9(4).
59. See United Nations Human Rights Committee, General Comment 8/16 ("the important guarantee laid down in paragraph 4 [of article 9], i.e. the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention."); United Nations Commission on Human Rights, resolution 1997/50, Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997 (requesting that Working Group on Arbitrary Detention "devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy ….").
60. *Torres* v. *Finland*, UN Human Rights Committee, Communication No. 291/1988, 2 April 1990 (concluding that asylum seeker's detention during period in which he was unable to appeal detention order to court violated ICCPPR Article 9(4)).
61. *A* v. *Australia,* UN Human Rights Committee, Communication No. 560/1993, 3 April 1997 (finding that a court review, which was limited to a finding that the asylum seeker was indeed a "designated person" within the meaning of Australia's Migration Amendment Act did not satisfy the requirements of Article 9, paragraph 4, of the ICCPR).
62. UNHCR Detention Guidelines, *supra* note 49*; see also* UNHCR Executive Committee Conclusion 44 (1986) ("detention measures taken in respect of refugees or asylum seekers should be subject to judicial or administrative review.").
63. See note 21 *supra* and accompanying text.
64. *Zadvydas* v. *Davis*, 533 U.S. 678, 121 S. Ct.249 (2001).
65. "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the reasonably foreseeable future conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701.
66. See, e.g., K. Coffey, "The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy" (2001) 19 Yale Law and Policy Review 303; Brief Amicus Curiae of the Lawyers Committee for Human Rights to the U.S. Supreme, *Reno* v. *Ma*, 26 December 2000. (The Supreme Court consolidated the *Ma* and *Zadvydas* cases.)
67. 66 Fed. Reg. 56967 – 56982, "Continued Detention of Aliens Subject to Final Orders of Removal," 14 November 2001 (excluding arriving aliens from regulations issued pursuant to *Zadvydas* decision).
68. *A* v. *Australia*, *supra* note 61.
69. UN Working Group on Arbitrary Detention, Deliberation No. 5, Principle 7, UN doc. E/CN.4/2000/4, 28 December 1999, Annex II.
70. "Asylum Representation, Summary Statistics" prepared by Dr. Andrew I. Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, May 2000.
71. See Pistone, "Justice Delayed," *supra* note 56 at 218 ("Being in detention frustrates asylum seekers' ability to work efficiently with their representatives. Detained asylum seekers are not able to locate witnesses, gather evidence, or otherwise assist their attorneys in case preparation.")
72. *Ibid.*, at 219–20.
73. *Ibid.,* at 2.
74. Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, vol. 1, pp iii, 8, 27 (August 2000), online: <http://www.vera.org>; C. Stone, "Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project" (2000) Georgetown Immigration Law Journal at 283, 285.
75. *Ibid.*, Vera Institute, at iii.
76. *Ibid.*, Vera Institute, at 31.
77. E. Ebrahimian, "The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention," *Detention Watch Network News*, August/September 2000, at #8.

78. Refugee Protection Act (S1311, H4074), test available online: <http://www.lchr.org>; F. Trejo, "Senators Propose Bill to Ease Provisions for Asylum Seekers" *The Dallas Morning News* (3 August 3 2001).
79. See, e.g., Lawyers Committee for Human Rights, *Refugees Behind Bars*, *supra* note 2 at 3; Women's Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center,* October 2000; Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998) at 7; F. N. Tulsky, "Uncertain Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes" *The San Jose Mercury News* (10 December 2000) (quoting recommendation of T. Alexander Aleinikoff, expert on immigration law and former INS Associate Commissioner for Programs); M. Pistone, Harvard Human Rights Journal, *supra* note 56.
80. M. R. Pistone, " Justice Delayed Is Justice Denied: Proposal for Ending the Unnecessary Detention of Asylum Seekers" (Spring 1999) Harvard Human Rights Journalat 56.
81. S. McRae, "Judges Pursue New Level of Independence" *Daily Journal Newswire* (17 January 2002), online: <http://www.dailyjournal.com>.
82. A. C. Helton, "A Rational Release Policy for Refugees: Reinvigorating the APSO Program," 75 *Interpreter Releases* No. 19 (May 18, 1998) ("The Department of Justice should engage in rulemaking to embody [APSO asylum parole] program criteria and procedures in regulation."); Lawyers Committee for Human Rights, Petition for Rulemaking, note 14 *supra*. The text of the proposed Refugee Protection Act is available at <http://www.LCHR.org>.
83. G. Goodwin-Gill, Article 31, *supra* note 48 at 24 ff (discussing practices of various states).
84. The United Kingdom, Ireland, Denmark and some other European states provide some funding for legal representation of asylum seekers. The Australian government also funds some legal representation for asylum seekers.
85. E. Amon, The National Law Journal, supra note 26.
86. Unaccompanied Alien Child Protection Act of 2001, S 121 (HR1904). The text of the bill and additional information relating to the bill are available at <http:/www.lirs.org>.
87. Human Rights Watch, *Locked Away, supra* note 79; Lawyers Committee for Human Rights, *Refugees Behind Bars*, *supra* note 2.
88. A. Elsner, "Haitian Women," *Reuters* (14 March 2002).
89. Pistone & Schrag, The New Asylum Rule, *supra* note 28.
90. *See* note 29 *supra* and accompanying text.
91. E. Ibrahimian, Lutheran Immigration and Refugee Service, "Religious Leaders Decry Detention Conditions and Call for Changes" *Detention Watch Network Newsletter*, Summer 2001; Bishop Nicholas DiMarzio, Chairman of the U.S. Catholic Bishops' Committee on Migration, "Liberty (But Not) For All" *The Newark Star Ledger* (24 May 2001); L. S. Glickman, President of the Hebrew Immigrant Aid Society, *The Bergen County Record* (10 July 2001).

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Detention of Asylum Seekers in Mexico

Gretchen Kuhner

Abstract

Mexico ratified the Convention relating to the Status of Refugees and the 1967 Protocol in April 2000. While Regulations establishing a mechanism for eligibility determination were issued at the same time, the Mexican government began a transitional process to take over eligibility in March 2002. Prior to that time, the UNHCR had been recognizing refugees under its mandate. As of this writing no national policy regarding the detention of asylum seekers has been established, nor have refugee advocates begun to pressure the government to comply with Article 31 of the Convention. Rather, whether an asylum seeker is detained during the eligibility process depends in part on the place and timing of the request as well as on the knowledge and goodwill of the migration authority.

Resume

Le Mexique a ratifié la Convention des Nations Unies relative au statut des réfugiés et le Protocole de 1967 au mois d'avril 2000. Alors que des règlements établissant un mécanisme pour déterminer l'admissibilité ont été émis au même moment, le gouvernement mexicain a mis en place un processus transitionnel visant à prendre en charge l'admissibilité en mars 2002. Jusqu'à cette date, c'était la HCR qui, comme partie de son mandat, s'occupait de la reconnaissance du statut de réfugié. À l'heure de la rédaction du présent article, une politique nationale de détention des réfugiés n'avait pas encore été établie, et les défenseurs des réfugiés n'avaient pas non plus commencé à faire pression sur le gouvernement pour qu'il se conforme à l'article 31 de la Convention. Au contraire, qu'un réfugié soit détenu ou non durant le processus d'admissibilité dépend en partie du lieu et de l'heure de la demande, aussi bien que du niveau de connaissance et de la bonne volonté de l'agent de l'immigration.

I. Introduction

The situation for asylum seekers in detention in Mexico at the time of this writing is in turmoil due to procedural changes in the asylum process that began in March 2002. These changes are a result of the government's new policy of adjudicating asylum claims, rather than accepting the eligibility determinations of the United Nations High Commissioner for Refugees (UNHCR). This is the first such procedural modification since the UNHCR signed an accord de siege with the Mexican government in October 1982 and began recognizing refugees under its mandate. It represents the Mexican government's commitment to begin implementing the 1951 Convention relating to the Status of Refugees and the 1967 Protocol ratified in April 2000 as well as the Regulations to the General Law on Population (Regulations) that were issued at the same time. By bringing asylum procedures into compliance with the existing legal framework, the Mexican government will have the option to continue to detain asylum seekers while their applications are pending or to create a new policy. This article describes the current legal framework for asylum procedures and detention, and follows with a description of the current situation in practice and future challenges.

II. Background

Mexico has a long tradition of providing asylum, most notably to exiles during the Spanish Civil War, to persons fleeing the dictatorships in Argentina and Chile, and to Central American refugees during the 1980s to mid-1990's. This tradition is supported by a comprehensive Mexican asylum framework. For example, Mexican law provides for diplomatic and territorial asylum as well as establishing a separate definition for refugees.[1] Mexico is also a signatory to various regional instruments.[2] In fact, the current definition of refugee contained in the General Law on Population is based on the definition from the Cartagena Declaration on Refugees of 1984.[3]

The current asylum situation is marked by a small number of refugees who, in their majority, utilize Mexico as a route to reach other countries. Many of these refugees come from outside the Latin American region, do not speak Spanish, and have been forced to resort to international agents to help them surmount travel restrictions. In 2001, for example, the 161 refugees recognized in Mexico represented nationals from Albania, Algeria, Bangladesh, Byelorussia, Colombia, Congo, Cuba, Ethiopia, Guatemala, Honduras, Iran, Iraq, Pakistan, Palestine, Russia, Sierra Leone, Sri Lanka, Somalia, Sudan, Togo, Tunisia, and Yemen.[4] Fewer than half (seventy-seven) originated from countries in the region (Colombia, Cuba, Guatemala, and Honduras). This may change if the situation in Colombia continues to escalate, but has been the pattern for approximately the last six years.

As most refugees traveling through Mexico do not wish to request asylum here, but rather to reach the United States and Canada, it is believed that the UNHCR and the Mexican National Migration Institute (INM)[5] come into contact with few of the people who have valid refugees claims. Rather, these organizations come into contact with asylum seekers after they have been apprehended or are being held in detention centres, and are facing the choice of applying for asylum or being deported to their country of origin.

For example, in 2001, of 436 applications filed with the UNHCR, 71.3 per cent were presented by asylum seekers in the Mexico City detention centre.[6] INM officers referred many other applicants to the UNHCR office from the INM regional offices in Tabasco, Campeche, Chiapas, and Veracruz. Several officers have been trained by the UNHCR to screen apprehended migrants, and in many cases officials have worked with the UNHCR on an ad hoc basis to provide travel documents so that applicants can reach Mexico City for their asylum interview. While there is no reliable data regarding the most common routes for asylum applicants, it is believed that the majority enters Mexico through the southern border with Belize and Guatemala, or by sea through Veracruz, Chiapas and Oaxaca.[7]

Asylum Applications Presented to the UNHCR

Year	*Number of Applications*	*Applications made from Detention Centre*	*% of Applications made from Detention Centre*	*Total Number Accepted**
2000	280	176	62.8%	77
2001	436	311	71.3%	150

* The remainder of the cases were denied, closed, or pending at the beginning of the following calendar year. This number does not include family reunifications.

Source: UNHCR Regional Office Mexico City

In the past, the UNHCR did not seek the release of asylum seekers in detention during the application process because acquiring legal custody was too risky should applicants abandon their claims. This policy was partially based on the fact that between 70 and 80 per cent of recognized refugees "spontaneously resettle" to other countries within one year of receiving refugee status.[8] Advocates recognize that integration is extremely difficult in Mexico for refugees from outside the region due to language barriers, discrimination, scarce employment opportunities, and lack of ethnic communities fundamental to the orientation process.

Until March 2002, asylum seekers who were detained prior to presenting an application for refugee status endured between one and five months in detention in the Mexico City migrant detention facility while UNHCR protection officers prepared their cases and deliberated them during the weekly eligibility committee meetings. Asylum seekers could face many more months in detention if the UNHCR denied refugee status while they either appealed their case (to the same eligibility committee), or waited for the INM to deport them to their country of origin or to release them with an exit order.[9]

As the government has recently decided to take over the asylum process, it is assumed that the ad hoc procedures of the past will slowly fade while authorities begin to utilize the existing legal framework.

III. Legal Framework for the Detention of Asylum Seekers in Mexico

Eligibility Process

Mexico ratified the 1951 Convention relating to the Status of Refugees and the 1967 Protocol in April 2000, and issued regulations with new asylum procedures one day later. These regulations contain a strict fifteen-day application deadline.[10] Once the application has been submitted to the INM local or regional office, it must be forwarded to the central offices in Mexico City, where it is then presented to the Eligibility Committee. This Committee consists of the Vice Minister for Population, Migration and Religious Affairs, and representatives from the Ministry of Foreign Affairs, the Ministry of Labor, the Mexican Commission for Refugee Aid (COMAR),[11] and the INM.[12] In addition, the Committee may invite a representative of the UNHCR and representatives of other organizations to participate. The UNHCR and other representatives may participate in the deliberations, but are not granted voting rights.[13] The Eligibility Committee issues an opinion that is sent back to the INM to be ratified or rejected. According to the time frames established in the Regulations, the total period from

the moment the application is presented to resolution of the asylum case is a maximum of thirty days.

If the asylum application is denied, the law provides for administrative review by the INM adjudicating officer's superior.[14] If the administrative review (recurso de revisión) results in a negative decision, the refugee applicant has the option to appeal to the Federal Tribunal for Fiscal and Administrative Justice (Tribunal Federal de Justicia Fiscal y Administrativa), an independent judicial court.[15] If this decision is contrary to law, the applicant can present a constitutional lawsuit (amparo).[16] The addition of the Federal Tribunal for Fiscal and Administrative Justice has only been in place since January 1, 2001, and has not been utilized in refugee cases, as the UNHCR was still in charge of eligibility determination. Depending on the specific situation, the legal system allows the applicant to decide whether he or she will file a constitutional lawsuit against the administrative act or against the judicial decision of the administrative tribunal.

One caveat in the due process guarantees is article 33 of the Mexican Constitution, which provides that migrants whose stay is considered "inconvenient"17 may be deported without a hearing. However, in practice, an asylum seeker should not be deported until having exhausted all legal recourses.

Detention of Asylum Seekers

INM officials as well as other law enforcement authorities participate in the apprehension of asylum seekers who do not have proper travel documents. According to the Regulations, an asylum seeker must present the application within fifteen days of having entered Mexico at the closest INM Office.[18] Once the application has been presented, article 166 of the Regulations allows the INM authority to "take the necessary measures to ensure that the applicant remains at his or her disposition."[19] However, as of this writing, it is unclear what those measure will be.

The measures for asylum seekers combine with article 73 of the General Law on Population authorizing federal, state, and local law enforcement officials to collaborate in the arrest of migrants in general.[20] All migrants who are detained by non-immigration authorities should be transferred to the nearest migration office for further processing. If the migrant is from a country other than those in Central America, he or she should be transferred to the Mexico City detention centre after initial processing.[21] This may take several days depending on the place of detention. Migrants may be temporarily housed in local jails, INM offices, or the twenty-five migration detention centres throughout the country.

Before March 2002, if an asylum seeker presented the application to the UNHCR office before entering into the detention process, he or she would be released into UNHCR custody. However, if the detention based on undocumented status or other migration violations occurred before the application was presented, the applicant would be transferred to the Mexico City detention centre and remain in detention during the interview and review process.

During this transitional period, it is likely that if the asylum seeker is apprehended before presenting the application, he or she will continue to be transferred to the detention centre in Mexico City. However, asylum seekers from Central American countries who face rapid deportation procedures directly to the border from the various regional INM offices will need to assert their right to request asylum. While the UNHCR has made an effort in recent years to train INM personnel, particularly in southern Mexico, there is no general knowledge of refugee issues and no formal procedures for screening migrants for potential refugee cases.

Protections for Detained Asylum Seekers

Alternatives to detention. The General Law on Population authorizes the INM to grant custody to individuals and non-governmental organizations at its discretion. However, because many migrants, including asylum seekers, are attempting to reach other countries, organizations are wary of accepting the legal obligation.[22] Until March 2002, Sin Fronteras and the UNHCR monitored the physical and mental health of detainees and made custody requests when the detainee's health was at risk. Accommodation was then provided by these organizations. In some cases, refugee applicants in Comitán Chiapas were released in custody to the UNHCR Chiapas office and remained in a shelter until the UNHCR office in Mexico City had reviewed their application. Asylum seekers who had not been detected by INM or who possessed a tourist visa could remain in the migrant shelters throughout Mexico, particularly along the southern and northern borders. While there are no migrant shelters in Mexico City, Sin Fronteras maintains service agreements with several religious shelters where vulnerable applicants could stay during the eligibility process.

Independent review of the detention decision. In theory, an asylum seeker should have access to independent review through the same administrative proceeding and constitutional procedure described above. There has not been a judicial decision specific to migration law to determine whether administrative detention for longer than thirty-six hours is legal. In January 2001 the Federal Tribunal for Fiscal and Administrative Justice was empowered to hear these cases, yet it is unclear what results these changes will bring. These venues may have to be utilized now that the government is in the process of taking over asylum procedures.

Limits on period of detention. New regulations for detention centers were published in the Federal Registry (Diario Oficial de la Federación) on November 26, 2001. According to article 7, the general rule is that detention cannot exceed ninety days. However, there are fifteen exceptions, including "any other reason duly justified by the Coordinator of Migration Control and Verification."[23] Another reason includes a request by national or international organizations.[24] Although there is a Supreme Court decision establishing that administrative arrest shall not exceed thirty-six hours, in practice INM officers prolong the detention for extended periods arguing that "arrest" is not the same as "aseguramiento" (administrative detention).

Periodic review of detention. According to the new detention regulations, the INM must resolve the legal situation of the detained migrant in no more than fifteen working days.[25] While it is not regulated, a committee within the INM meets periodically to review the cases of detainees who have been in detention for more than three months.[26] Due to lack of consular representation and, in some cases, consular co-operation, the INM has a difficult time obtaining identity and travel documents for some nationalities. The Mexican Constitution provides for judicial review in cases of wrongful detention, but in practice it is unlikely that such a case would have a positive outcome, as the General Law on Population allows for the detention of undocumented asylum seekers.

Access to government-funded legal aid. There is no state-funded independent legal aid for asylum seekers. Under the UNHCR procedures, interviews were "non-adversarial." Under the new procedure, NGOs will need to observe the interview and eligibility process to evaluate whether asylum seekers require representation.

Vulnerable groups. Unaccompanied minors should be assisted by the Department of Family Integration (Departamento de Integración Familiar) and held in its custody throughout the asylum proceeding. In practice, there have been no asylum requests from unaccompanied minors in recent years. Minors accompanied by their mothers are detained in the women's section of the detention centre. On occasion, the UNHCR requested custody of the mother and children so that they could remain in a shelter during the application process.

Interview conditions. UNHCR staff personally interviewed all asylum seekers in a private room. If an interpreter was needed, the UNHCR provided one. This could prolong the process, as it is difficult to find interpreters for some languages in Mexico City.

The UNHCR ensured that all female applicants or female family members of applicants were interviewed individually. The UNHCR provided female interviewers for female asylum applicants and, when possible, female interpreters. These procedures are not expected to change in the short term as COMAR personnel are conducting interviews with UNHCR consultation.

Physical Conditions of Detention

Information provided by the INM shows that twenty-five immigration detention centres exist in Mexico. Only one, the Mexico City centre, is considered a long-term detention centre, while the others are located within Immigration Offices and are used to process migrants within several days. Those migrants that can be deported to Guatemala through the bilateral agreement are returned directly to that country, while migrants of all other nationalities are transferred to the Mexico City centre for further processing and consular access. In 2001, the INM began deporting some extra-regional migrants to Guatemala, rather than deporting them to their country of origin.[27] No bilateral agreement exists between Mexico and Guatemala that allows this procedure.

While some information is available regarding detention conditions for migrants in the Mexico City centre, virtually no systematic information has been obtained on the other centres.[28] Several articles have documented irregularities in basic procedural guarantees including corrupt practices as well as physical conditions that violate basic human rights standards.[29] One problem is consistent overcrowding of the centre, particularly in the male section. The centre has a 140-person capacity, while the men's section frequently houses over four hundred detainees. As a result, people are forced to sleep on the floor in rows along the hallway. This situation has exacerbated hygiene problems including soiled and flea-infested mattresses and blankets and skin irritations. Overcrowding has also prompted disruption of recreational activities, escalating tension among the detained population and, on occasion, led to riots. Other common complaints among detainees include lack of potable water (causing dehydration and gastrointestinal disorders) and inadequate medical attention.

Another problem concerns accusations of sexual harassment in the women's section. While the detention regulations require female personnel in the women's section, detainees have reported the presence of male officers on a regular basis. Women have also complained about the lack of female medical personnel.

Complaints of physical and verbal abuse have also been reported, but not well documented. The Mexican NGO Sin Fronteras began to offer pro bono legal representation to detained migrants in February 2002. In this short time, the legal advocate has documented three cases of physical

abuse, including the case of a man who was severely beaten by an INM official, leading to the loss of three teeth, among other injuries.

The INM has responded to these complaints by promising to remodel the facilities, to improve hygiene conditions, and to train INM officers in human rights practices. In August 2001, the INM announced plans to enlarge the facilities increasing capacity to 396. To date, the construction has not been completed.

IV. Current Procedures

As of this writing, the COMAR has been presiding over an ad hoc Eligibility Working Group for approximately one month. The UNHCR and Sin Fronteras still participate in the meetings and have maintained voting rights during this transitional process. Refugees who receive a positive decision are placed in custody of the COMAR and given a letter stating that their migration documents are in process.[30] The UNHCR Chiapas Office is also referring asylum seekers to the COMAR. Meanwhile, the INM has suspended all refugee documentation procedures while it determines how to issue the migration documents utilizing the articles contained in the Law and Regulations.

Detention procedures have not yet changed. COMAR officers continue to interview asylum applicants in detention or in the COMAR offices and UNHCR officers are providing consultation during the transition process. The issue of releasing asylum seekers while their applications are being reviewed has not yet been debated.

As a result of this abrupt transition, new ad hoc procedures are being created to replace the old ones. For example, the COMAR has taken over the eligibility process, but the INM representative is the only other government participant to date. In addition, the INM is referring all of the cases to the COMAR rather than taking on its legal responsibilities in the refugee process. These problems, combined with more fundamental questions such as who will continue to conduct the interviews and prepare the objective case information, what kind of documentation will be provided to refugees, who will provide and pay for it, etc., are in the process of being determined.

V. Conclusions

Considering the direct impact that this ambiguous transition in asylum procedures is having on the current refugee population and those organizations that assist refugees, it is easy to lose perspective of the broader context of refugee protection in Mexico. For example, the underlying problem is not only the inadequate Mexican legal framework and lack of implementation, but also the fact that many asylum seekers in Mexico would rather be in other countries. Those who are detained during their journey are forced to request asylum in Mexico in order to avoid being returned to their country of origin. Refugee advocates understand and respect this desire and recognize the principle of choosing one's country of asylum contained in article 14 of the Universal Declaration of Human Rights and UNHCR Executive Committee Conclusion 15.[31]

This situation became more apparent after the September 11 attacks in the United States when Mexico began to heighten security measures along the southern and northern borders. On this same day, a group of Iraqi asylum seekers were detained in Tijuana, Baja California, and transferred to the Mexico City detention centre (an approximately thirty-five-hour trip by land). Due to overcrowding, the INM transferred the group of detainees to a military base in Champoton, Campeche (an approximately twenty-hour trip by land). The UNHCR was contacted and protection officers flew to the military base to conduct interviews. However, none of the asylum seekers wished to request refugee status in Mexico.

Over the course of several months, at first through UNHCR negotiations that succeeded in obtaining the release of those who had asylum applications pending in the U.S., and later through alternative procedures, the majority of the Iraqis were able to make their way to the border. Sin Fronteras received reports from several detainees that they had paid large sums of money to obtain their release, but no one wished to sign a statement or initiate a legal procedure. This experience demonstrated that finding ways to protect asylum seekers, including legal alternatives to detention, might come into conflict with people's wishes and right to choose their country of asylum.

The issue regarding the detention of asylum seekers in Mexico will have to be redebated. It is clear to refugee advocates that asylum seekers should not be in detention during the application process. Ironically, advocates may now be in a better position to pressure INM officials to release asylum seekers once they have submitted their application, because they will have a legal procedure pending rather than an application to the UNHCR office. If this were to happen, those asylum seekers wishing to continue their journey could attempt to do so, while those who desired to remain in Mexico would avoid the trauma of detention.

In the meantime, refugee advocates need to focus on projects that will ensure protection for those people who wish to apply for asylum and remain in Mexico, and to advocate for better conditions and procedures in the existing detention centres. One immediate priority is to ensure that the eligibility process remains objective, fair and non-adversarial. Other priorities include:

- promoting reforms to the General Law on Population and the Regulations that comply with the Refugee Convention and establish more realistic timeframes and due process procedures to protect refugees;
- developing mechanisms to monitor the numbers of potential asylum applicants that are trying to reach the border or who are caught up in migration procedures in Mexico;
- continuing to coordinate with legal representatives in the United States to ensure that persons who attempt to apply for asylum along the Mexico-U.S. border are provided access to the procedure.

Notes

1. While the Mexican legal framework distinguishes between refugees and asylees, the two are used interchangeably for purposes of this article.
2. Convention on Territorial Asylum, adopted in Caracas, March 28, 1954; Convention on Diplomatic Asylum, adopted in Caracas, March 28, 1954; Cartagena Declaration on Refugees, subscribed in Cartagena de Indias, Colombia, November 22, 1984.
3. Article 42 (VI), Refugee: " to protect a person's life, safety or freedom when he or she has been threatened by generalized violence, foreign aggression, internal conflicts, or massive human rights violations that have severely disturbed the public order in his or her country of origin and forced him or her to flee to another country [author's translation]." The Declaration of Cartagena on Refugees states: "Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."
4. These statistics, compiled by the UNHCR Regional Office in Mexico City and Sin Fronteras, include family reunifications for 2001.
5. The Mexican National Migration Institute was created by decree in October 1993 as a technical agency dependent of the Interior Ministry. It is responsible for the planning, administration, enforcement, and evaluation of migration services in Mexico.
6. Statistics compiled by the UNHCR Regional Office in Mexico City, January 2002.
7. UNHCR officers ask refugees for their point of entrance, but many are unable to identify the place due to language difficulties and due to the fact that they report having travelled for several days through jungle-like areas.
8. While the UNHCR and Sin Fronteras (a Mexican NGO that provides legal and social services to refugees) are unable to systematically track the number of refugees who leave the country, these estimates are based on the number of refugees who lose contact with both offices, do not return after a year to renew migration documents, or have re-established contact after arriving in other countries (e.g., refugees may recontact the offices if they are facing removal proceedings in the United States).
9. Article 212 of the Regulations of the General Law on Population grants discretion to the INM to issue an exit order to migrants instead of deporting them from the country as long as the migrant requests the exit order voluntarily or as the consequence of an immigration proceeding and if the migrant has not committed repeated violations of the law.
10. Article 166 (VII) (a) of the Regulations allows for a waiver of the deadline when "the motives for the claim came about after having entered the country." This article apparently covers refugees sur place, but does not apply to those who have missed the deadline for other reasons
11. The Mexican Commission for Refugee Aid was created by decree in July 1980 as a permanent, inter-ministerial agency. Its mission is to provide aid, protection and durable solutions to refugees in Mexico.
12. Article 167 of the Regulations.
13. Ibid.
14. Article 227 of the Regulations.
15. Article 11 (XIII) of the Law of the Federal Tribunal for Fiscal and Administrative Justice.
16. Regulatory Law in Constitutional Matters (Ley de Amparo).
17. The lack of a definition or guiding criterion to determine "inconvenient" allows administrative officers to exercise discretion that has been widely criticized for leading to arbitrary and abusive decisions. See Corcuera, Santiago, *La Facultad Constitucional del Poder Ejecutivo Mexicano para Expulsar a Extranjeros del Territorio Nacional vs. El Derecho Internacional de los Derechos Humanos*, paper presented to the Centre for Latin American Studies, University of Cambridge, England, June 1998.
18. Art. 166 (I).
19. Article 166 (II): "The migration authority shall take the necessary measures to ensure that the applicant remains at his disposition, until the application has been resolved [author's translation]."
20. Article 73: "The authorities who by law are authorized to act in federal, local and municipal enforcement will collaborate with migration authorities upon request, in order to enforce the dispositions of this law [author's translation]." It is important to note that military personnel, private security agents, and even fiscal authorities have been known to detain undocumented migrants.
21. Migrants from Central American members of the CA-4 agreement (Guatemala, El Salvador, Honduras, and Nicaragua) are deported to Guatemala through a bilateral agreement between Mexico and Guatemala. From Guatemala, a pilot program supported by the U.S. government assists with return to the migrant's country of origin.
22. Article 153 of the General Law on Population authorizes the National Migration Institute to grant custody of migrants in administrative detention to financially solvent individuals or institutions. Article 139(i) of the General Law on Population establishes a fine of up to 1,000 days of the Mexico City

minimum wage, or approximately $4,5000.00 USD, to be applied if the individual or organization loses contact with the migrant.

23. Article 7 (VX), Agreement to Establish Norms for the Functioning of the Migration Centres of the National Migration Institute, Federal Registry, November 26, 2001.
24. Article 7 (XIII), Agreement to Establish Norms for the Functioning of the Migration Centres of the National Migration Institute, Federal Registry, November 26, 2001.
25. Article 6, Agreement to Establish Norms for the Functioning of the Migration Centres of the National Migration Institute, Federal Registry, November 26, 2001.
26. Interview with the National Director of Migration Inspection and Verification, Mexico City, March 14, 2002.
27. The most documented case involves a group of migrants from India who were deported from Mexico to Guatemala and redetained there. After approximately six additional months in detention, one of the migrants, Kanu Patel, hung himself. As a result of this incident, the Guatemalan National Migration Forum (MENAMIG) sued the Guatemalan Migration Directorate. The remaining migrants were released from detention and some tried to make their way north again, only to be redetained in Mexico.
28. The Mexican Migration Forum, Foro Migraciones, conducted over three hundred interviews in eight different centres and is currently preparing the results for publication.
29. See Juan Carlos Romero Puga, "En los sótanos de Migración," *Milenio Semanal*, June 11, 2001; Luis Alegre, "Ilegales en México: sin sueño y sin cupo," *Reforma,* August 12, 2001; and Alonso Urrutia, "Viaje hacia ninguna parte," *La Jornada*, September 20, 2001.
30. This is an unusual ad hoc procedure considering that one governmental agency is granting custody to another.
31. Universal Declaration of Human Rights, Article 14: 1. "Everyone has the right to seek and to enjoy in other countries asylum from persecution," ExCom Conclusion No. 15 (XXX) – 1979) (h) (iii): "The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account."

Sin Fronteras, I.A.P. is a Mexican non-governmental organization dedicated to promoting and defending the human rights of migrants through advocacy and social and legal assistance. Programs include social and legal services for refugees and migrants, education and training, and advocacy work on a national and regional level. Gretchen Kuhner is a U.S. trained lawyer who has worked with Sin Fronteras since 1998.

Seeking Freedom: A Child Finds Himself behind Bars

Leonard S. Glickman

Abstract
This article examines the case of a seventeen-year-old Algerian teen, indefinitely detained by the United States Immigration and Naturalization Service in an adult facility, on the basis of radial and dental exams.

Résumé
Cet article se penche sur le cas d'un jeune Algérien de dix-sept ans détenu indéfiniment par le service d'immigration et de naturalisation des États-Unis dans un établissement pour adultes, à partir d'examens dentaires et d'examens du radius.

Seventeen-year-old Mohamed Boukrage, an asylum seeker currently in the care of the United States Immigration and Naturalization Service (INS), fled his native Algeria several years ago, after a terrorist group composed of religious fundamentalists murdered his family.[1] A stowaway on an Italian container ship making its way to Canada, he was discovered by the captain of the ship, turned over to U.S. customs officials at the New Jersey port, and subsequently detained by the INS. Because he did not have Algerian citizenship papers, his age was determined through outdated procedures – dental and radial exams.[2] Although Mohamed said he was under the age of eighteen, a dentist determined that he was an adult. Since being discovered, he has been kept in a prison-like adult detention facility, in violation of international law signed by the U.S.[3]

Mohamed has been fortunate in only one aspect of his life since arriving in the U.S.: he has a lawyer. Erin Corcoran of HIAS, the Hebrew Immigrant Aid Society, provides him, and other refugees, with pro bono counsel. In discussing his case, she says, "Children are the most vulnerable of any refugees, especially the unaccompanied ones. They are not even guaranteed counsel."[4]

Mohamed's story has come out in interviews with Corcoran and the child psychologist she found to evaluate him. He was ten when his parents and sister were killed in a car bomb set off by Islamic fundamentalists. After his parents' death, he sought shelter at an aunt's house. She took him in for a while, but believed his presence endangered her. So she beat him and eventually threw him out of her house, at the age of twelve. He wandered from place to place for years, eventually making it to the Italian ship when he was sixteen. He has been in INS custody since October 23, 2000, and recently marked his seventeenth birthday behind bars.

If Mohamed were recognized as a child, he would be subject to certain protections under U.S. law after experiencing so much suffering in his native country.[5] As a minor, he could receive a "special immigrant juvenile status visa," which allows abused, neglected, or abandoned children to remain in the United States.[6] But his teeth – which the INS has ruled could only belong to an adult – are in the way.

Most government agencies, such as the United States Department of State and Office of Refugee Resettlement, have discarded dental and radial exams as the sole means for age determinations because they are inherently inaccurate.[7] Other countries, including the Netherlands, have ruled that the tests are unconstitutional. The INS still uses them to determine the age of people who arrive in this country without documentation, such as Mohamed. However, the UNHCR's handbook *Refugee Children: Guidelines on Protection and Care* cautions that, even when these exams are used, authorities should let common sense and decency guide their actions: "When identity documents are not relied on to establish age, authorities usually base age assessments on physical appearance. Sometimes scientific procedures are used, such as dental or wrist bone x-rays.

Precautions must be taken if such methods are used. First such methods only estimate age.… [S]pecial procedures or programmes usually are intended to help younger persons when their needs are greater. When the exact age is uncertain, the child should be given the benefit of the doubt."[8]

The dentist who examined Mohamed, Dr. Robert M. Trager, was recently profiled in the *New York Times*.[9] Although he is not trained in orthopedics, Dr. Trager takes teeth and wrist X-rays of undocumented refugees to determine their age. The article quotes Dr. Trager, who examines around six hundred people for the INS each year, saying, "I would say at least 90 per cent don't tell the truth [about their age]."

However, child psychologist Dr. Alice Frankel evaluated Mohamed and determined that he did not have the sophisticated knowledge necessary to lie about his age. In addition, based on her evaluation of Mohamed, she found that he is under eighteen. Corcoran reports that he looks and acts like a child. The Immigration Judge who heard his asylum claim expressed doubts that the age procedures conducted by the INS were determinative, but she does not have the authority to overrule the INS' decision. And so he continues to be treated as an adult.

This has important legal ramifications. People seeking asylum in the U.S. are put through extensive background checks and an intensive interviewing process to verify their claims that they are unsafe in their native country.

Mohamed is being held to the same standards of proof as an adult (although the INS recognizes that children may not be able to recall events that give rise to their claim of persecution with the clarity and detail as an adult).[10] But, because of his youth and the trauma he has undergone, he is unable to remember or clearly describe what happened to him. It doesn't help that, as Corcoran has observed, "people that have been trained to work with adults often have not developed sensitivity to child issues." Judges rejected Mohamed's claims on the grounds that his testimony was not detailed enough, and have denied his petitions for appeal.

In detention, Mohamed has been sexually harassed by adult men. He has not had access to the much-needed counselling and educational services that would be available in a children's facility. In fact, he has been placed in solitary confinement several times for month-long stretches, as a punishment for wetting the bed during nightmares.

The INS has denied Mohamed an opportunity to seek a determination in state family court that he is eligible for foster care. The INS's sole reasoning for this denial is that Mohamed is over eighteen. At this point, his best hope lies in an appeal Corcoran – with the law firm of Latham and Watkins, which runs a pro bono project to assist immigrant children – is preparing to the INS ruling. On February 1, 2002, they filed a complaint in federal court to compel the INS to release Mohamed to the family court's jurisdiction. The federal judge has temporarily stayed the immigration judge's order of removal and is currently deciding whether he has jurisdiction to hear Mohamed's claim.

But time is running out. When Mohamed turns eighteen in June, he will be ineligible for foster care, a prerequisite for obtaining a special immigrant juvenile visa, which would eventually make him eligible for a green card.[11] If Mohamed is unable to secure a dependency order in state court, the INS will actively begin trying to remove him to Algeria. However, as he has no citizenship papers, the Algerian government is under no obligation to accept him back into the country. If Algeria refuses to issue him travel documents, he could remain in detention in the U.S. indefinitely.

In the meantime, Mohamed, who speaks only Arabic, has a sense of isolation and growing desolation. Corcoran does whatever she can for him, becoming more engaged in his life than she would for an adult client. "It's hard because he needs so many things. The facilities aren't providing them, or allowing access to social workers or child psychologists. I'm the only one who has contact with him – I end up fulfilling all of these roles, which is really tough."

The two have developed a close relationship. "Mohamed is a very smart kid. The psychologist said he's above average intelligence. But he doesn't get any schooling. He is so thirsty to learn." She has given him a math workbook and an Arabic/English dictionary, both of which he studies eagerly. He also called her after the terror attacks of September 11, knowing that HIAS's offices are in Manhattan. "You're the only family I have," he tells her. "You're like my sister."

Gridlock within the INS bureaucracy over hearings is not unheard of. HIAS staff report having several child clients in the past who have been held as adults. Proposed U.S. legislation offers hope for similar future cases. On February 28, 2002, a Congressional hearing was held for S.121/H.R. 1904 – The Unaccompanied Minor Act. Introduced by Senator Dianne Feinstein of California, the bill proposes the elimination of dental and radial exams as the sole means for determining the age of an unaccompanied minor. It also would give unaccompanied minors the right to counsel. However, the bill has not yet been passed, and may not pass before Mohamed turns eighteen, effectively aging out of the benefits the bill would bring.

Corcoran has great hopes for the bill, but, in the meantime, continues to closely follow Latham and Watkins' federal court actions on Mohamed's behalf. She says, "I

think we're going to have to go the court route rather than the legislative route, because I think judges are sympathetic to how children are treated, and are less sensitive to politics. It can be faster, too, and time is really running out for Mohamed."

For the moment, Mohamed remains unembittered. But he worries that, after his eighteenth birthday, he is fated to remain in detention. Corcoran says, "This kid is so great. He just needs a break – a chance. To survive so much and then be detained indefinitely, it's just such a waste of human life."

Notes

1. Such attacks are common in Algeria. Amnesty International's 2001 report on this troubled country states that, in the year 2000 alone: "More than 2,500 people were killed in individual attacks, massacres, bomb explosions, ambushes and armed confrontations between the security forces and armed groups. Hundreds were civilians killed by armed groups in individual attacks, massacres and indiscriminate bomb explosions. Often groups of up to 25 civilians, including women and children and entire families, were killed in their homes or at false checkpoints set up in rural areas by armed groups. Most killings and attacks took place outside the main cities and the perpetrators were routinely able to escape undisturbed, even though some attacks were committed near army and security force checkpoints or outposts. Hundreds of members of the security forces, paramilitary militias and armed groups were killed in ambushes and armed confrontations. However, as a result of official restrictions on such information it was often impossible to obtain precise details about the identity of the victims or the exact circumstances of their deaths."
2. For articles detailing the known inaccuracy of these techniques, see Chris Hedges, "Crucial I.N.S Gatekeeper: The Airport Dentist," *New York Times*, July 22, 2000; Alan Elsner, "Harsh Fate Can Await Young Refugees in U.S.," Reuters, December 20, 2001; Alan Elsner, "New York Dentists Can Settle Fate of Migrants," Reuters, January 11, 2002.
3. Convention on the Rights of the Child, G.A. Res. 44/25, Sept. 2, 1990 (US signatory as of 1997).
4. Other studies reinforce her point. See Jacqueline Bhabha and Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 Interpreter Releases 757, 772 (1998).
5. This is part of the settlement reached in *Flores* v. *Reno*, Case No. CV-85-4544-RJK (Px) (1997), governing the treatment of minors in INS custody.
6. 8 United States Code § 1101 (a)(27)(J).
7. See United States Department of State cable No. 98-State-096341 (May 28, 1998); Letter from Carmel Clay Thompson, Acting Director, Office of Refugee Resettlement to State Refugee Coordinators, ORR State Letter #01-27 (Oct. 2, 2001).
8. United Nations High Commissioner for Refugees, Geneva 1994.
9. Chris Hedges, "Crucial I.N.S Gatekeeper: The Airport Dentist," July 22, 2000.
10. Memorandum from Jeff Weiss, Acting Officer for Int'l Affairs, to Asylum Officers, Immigration Officers and Headquarter Coordinators, *Guidelines for Children's Asylum Claims* (December 10, 1998).
11. See the New Jersey state law defining who is eligible for foster care, New Jersey Statutes Annotated 9:2–13 (b).

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Detention in Canada: Are We on the Slippery Slope?

Catherine Gauvreau and Glynis Williams

Abstract

Canada's detention policies and practices are far less draconian than those of our neighbours. There are nevertheless concerns about the commitment to detain more people as a measure of security and deterrence, in part as the response to September 11. This article describes the situation of detention in Canada, making reference to new legislation passed in November 2001.

Résumé

Les politiques et les pratiques de détention du Canada sont bien moins draconiennes que celles de nos voisins. Malgré tout, des inquiétudes ont été exprimées sur l'engagement à détenir plus de gens par mesure de sécurité et de dissuasion – partiellement en réaction au 11 septembre. Cet article décrit la situation de la détention au Canada, tout en se référant à la nouvelle législation adoptée en novembre 2001.

Canada's problem is that we often look good by comparison. This statement definitely applies to Canada's treatment of those who are detained. The horrendous stories of injustice and inhumane treatment of asylum seekers in Australia, France, the United States, and many other countries have lowered the standard to such a place that we risk being numbed to the fundamental human rights that are eroding, even in Canada.

The following brief comments are the reflections of a small non-governmental organization, Action Réfugiés Montréal, which visits regularly the detention centre located outside Montreal, Quebec. One evening each week, the detention worker, accompanied by several volunteers and law students, can be found providing legal information and emotional support to those who are in detention. Visits are restricted to the common lounge areas and detainees can decide whether they wish to avail themselves of this service or not.

Asylum seekers who are just entering the country as well as those who have been refused and are subject to removal are among the population detained. Statistics from Citizenship and Immigration Canada (CIC) indicate that at any one time there are an average of 455 persons detained under the Immigration Act across the country. The average number of minors detained for immigration reasons at any one time, both accompanied and unaccompanied, is eleven across Canada. There are no statistics indicating how many persons detained are refugee claimants. The three main grounds for detention are flight risk, danger to the public (criminality and security), and identity.

In addition to providing information, Action Réfugiés workers attempt to find lawyers to represent people at their detention reviews, which are regularly scheduled hearings to determine if detention is to be continued or the person released. On occasion long distance phone cards are provided so that detainees can contact families and obtain documents to establish their identity or support their refugee claim. Another important aspect of the work is monitoring the conditions in detention: who is being detained and for what reasons. Anecdotal evidence suggests that persons with apparent mental health problems and communication difficulties are overrepresented in the population. Finally, we assist people to make arrangements to leave in dignity and with the resources needed to survive upon return to their country of origin.

Background

New legislation entitled The Immigration and Refugee Protection Act (IRPA) passed into law November 1, 2001. Im-

plicit in the legislation is the motif of the immigrant- as-security-threat.[1] In the name of security, among other measures the new Act expands the use of detention. The grounds for detention remain the same but the new bill broadens the provisions whereby people can be detained at the port of entry and throughout the determination process. This is significant for refugee claimants. For example, a person can be detained in order to continue an interview; in other words, for administrative convenience. More disturbing is the identity document provision which directly affects refugee claimants who are sometimes forced to flee without identification, because it is their identity which puts them at risk. Once someone is detained for identity reasons, the bill suggests that they may be detained for long periods.[2] Historically, Canada has not detained large numbers of refugee claimants at ports of entry. It appears as though a shift in policy is emerging, with detaining of people in groups, such as Chinese claimants who arrived in significant numbers by boat in 1999.

Although the legislation was in the works long before September 11, 2001, there is no doubt that anxiety regarding security has influenced the public debate. Immigration Minister Denis Coderre has indicated that measures focusing on deterrence and detention are part of the safety and security strategies being employed.[3] It is in this context that the following comments are made.

Current Concerns

Immigration detainees are held in one of three centres run by CIC or in jails. In regions where CIC has no facility, people are transferred into the prison system, alongside the criminal population. To be detained is to be imprisoned. Surveillance cameras, entry searches with metal detectors, chain-link perimeter fences topped by barbed wire, handcuffing during transfers, and restricted access to the outside leave no doubt that the detention centres are prisons. In smaller cities, there may not be any NGOs working with refugees and the UN High Commission for Refugees (UNHCR) is not able to respond even if contacted. An additional complication is that CIC says it is unable to provide data indicating where people are held and if they are claiming refugee status. Lengthy detention can result when people have no access to advocates and legal counsel.

The detention of children, whether separated or with family, is a disturbing phenomenon. The IRPA states that the detention of minors should only occur as a last resort, and that decision makers must consider the best interests of the child. There is concern expressed by both NGOs and the Parliamentary Standing Committee on Citizenship and Immigration that the regulations do not adequately incorporate this principle. They leave the impression that if detention facilities are adequate, minors can be detained.

> *Detention when unable to remove someone is inhumane. A. is stateless. In spite of having no country to which he can be removed he endured a long period in detention. A victim of the breakup of the former Soviet Union, he is denied residency in Estonia where he grew up because they consider him Russian. Russia refused him entry because he has never lived there. Ironically, had he not met Action Réfugiés staff while in detention, he might never have been in contact with UNHCR who determine statelessness. Sadly, CIC lost the opportunity to include stateless persons in the category of persons needing protection in the new law.*
>
> *A thirteen-year-old Congolese girl is being held with her father in the Laval detention centre. She has been detained for three weeks now because the authorities are not satisfied with the lack of original documents. Symptoms of depression are appearing. When we visited her on the eve of Good Friday, her Bible was open to Psalm 142 which she said she liked to sing. The passage read: "I call to my Lord for help. I tell him all my troubles. When I am ready to give up, He knows what I should do." One wonders who is determining the best interests of this child.*

There is fear that children brought by people smugglers will be detained for reasons of protection, a view that is opposed by advocates, who favour other options such as safe houses. Children should not be detained for lack of identity documents alone, which is the current practice.[4]

Since September 11, there have been calls for greater co-operation between the U.S. and Canada, including the exchange of information and a harmonization of immigration policies. Given the power imbalance between the two countries, harmonization would inevitably result in Canada adopting U.S. practice. In 1996, the U.S. adopted laws which resulted in massive increases in immigration detention. These measures did nothing to protect the country

from the September 11 attacks.[5] In other words, there is no automatic link between detention and security. Sophisticated criminals will find ways to bypass detection, often using excellent documents to enter the country, a fact demonstrated by the September 11 perpetrators. Large-scale detention in the U.S. has not addressed security concerns and imposes serious hardship on refugees seeking protection.

Hopeful Initiatives

After many months of negotiation, Action Réfugiés has recently signed an agreement with CIC which details access rights and practices. In the preamble, several assertions contained in early drafts regarding the principles implicit in relevant human rights treaties were deleted on the basis that they were self-evident, as Canada has signed these conventions. While this was a disappointment, we are pleased to have our work with detainees officially recognized.

Colleagues in other countries have often commented on the effectiveness of the refugee advocacy community in Canada, with special acknowledgement being given to the Canadian Council for Refugees (CCR). In the course of recent consultations with CCR members and Immigration Department officials, we were encouraged by the commitment to develop an external complaints mechanism and to establish Citizens Advisory Committees for Immigration detention centres. Both these initiatives would be important monitoring mechanisms, something that is seriously lacking in the current system. A final positive initiative is an agreement that CIC has signed with the Canadian Red Cross to do monitoring.[6]

Conclusion

Comparisons can ignore the ideals against which we must ultimately be judged. Detention deprives individuals of a most basic human right, liberty, and must therefore be considered an extraordinary measure. With rare exceptions, detainees have not been accused of any crime, and yet they are locked up behind barbed wire. For those who have fled repressive regimes and hope to find protection here, the trauma of detention can be devastating.

Detention has been described as a grey zone in refugee work, not well understood and, consequently, seriously underfunded. And yet, it is a snapshot of how well we are defending the human rights of all people. Lest we find ourselves in the same situation as too many other countries, it is time we paid more attention to the realities of detention in Canada.

Notes

1. Audrey Macklin, "Borderline Security," in *The Security of Freedom*, R. Daniels *et al.* (Toronto: University of Toronto Press, 2001), 383.
2. For more analysis on this and other aspects of Bill C-11, consult the Canadian Council for Refugees website, online: <www.web.net/~ccr>.
3. CIC News Release, February 26, 2002, Backgrounder C.
4. Action Réfugiés made representation on C-11 focusing on these issues in detention and on the issue of statelessness. The comments are available upon request.
5. Post-September 11: Questions about Refugees and Refugee Policies, Canadian Council for Refugees.
6. The Canadian Red Cross will monitor detention conditions to ensure that Canada conforms to International conventions and norms. Their reports are given to CIC and are not made public. This initiative was at the request of CIC.

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