McGill Law Journal — Revue de droit de McGill

DESIGNATED INHOSPITALITY: THE TREATMENT OF ASYLUM SEEKERS WHO ARRIVE BY BOAT IN CANADA AND AUSTRALIA

*Luke Taylor**

This paper argues that there are distinct parallels between changes to the *Immigration and Refugee Protection Act* enacted by Bill C-31 (2012), in particular the Designated Foreign National regime (DFN), and Australia's treatment of asylum seekers who arrive by boat. It is contended that recent Australian history and policy demonstrate the perils of adopting an ideology of control and exclusion toward asylum seekers instead of a politics of hospitality, and that Australia's present political climate provides a stark and salutary warning to Canada, as it follows a similar path of securitization. The paper first explains what is meant by a politics of hospitality. In Part I, it analyzes Australia's attitude toward, and its treatment of, asylum seekers, focusing in particular on the period since 1989. It is argued that Australia's inhospitable stance toward asylum seekers has had discernible negative outcomes that provide important lessons for Canada. Part II provides a brief historical overview of Canadian policy toward asylum seekers, followed by an analysis of the DFN regime with reference to international law. It then argues that the DFN provisions contravene the *Canadian Charter of Rights and Freedoms*. The paper concludes by suggesting that Canada is at risk of following Australia's security-oriented, inhospitable stance toward asylum seekers.

Cet article soutient qu'il y a des similarités distinctes entre les modifications apportées à la *Loi sur l'immigration et la protection des réfugiés*, promulguée par le Projet de Loi C-31 (2012), en particulier le régime de l'Étranger Désigné, et le traitement que réserve l'Australie aux demandeurs d'asile arrivés par bateau. En effet, l'histoire et la politique australiennes des dernières années mettent en lumière l'écueil que représente l'adoption d'une idéologie de contrôle et d'exclusion envers les demandeurs d'asile, par opposition à une politique fondée sur des valeurs d'hospitalité. Le climat politique actuel de l'Australie constitue en cela un avertissement sévère, mais salutaire pour le Canada qui semble s'engager dans cette même voie répressive de sécurisation territoriale. L'article explique d'abord ce qu'on entend par politique d'hospitalité. Ensuite, en première partie, il fait l'analyse de l'attitude et du traitement que réserve l'Australie aux demandeurs d'asile, se concentrant sur la période depuis 1989. L'attitude inhospitalière qu'a adoptée l'Australie a eu des effets néfastes dont le Canada devrait tirer des leçons. La deuxième partie fait un bref historique des politiques canadiennes envers les demandeurs d'asile, suivi par une analyse du régime de l'Étranger Désigné en regard du droit international. Enfin, l'article soutient que les clauses du régime de l'Étranger Désigné contreviennent à la *Charte canadienne des droits et libertés*. L'article se conclut en suggérant que la Canada est à risque d'adopter la posture axée sur la sécurité et inhospitalière de l'Australie à l'égard des demandeurs d'asile.

* Luke Taylor recently graduated from the LLM program at the University of Toronto Faculty of Law. He previously practiced civil litigation in Australia and is a former researcher with the High Court of Australia. The author would like to thank the anonymous referees for their useful feedback and the editorial board of the McGill Law Journal for their assistance.

Citation: (2015) 60:2 McGill LJ 333 — Référence : (2015) 60 : 2 RD McGill 333

Introduction

In 2009 and 2010, 575 Sri Lankan asylum seekers arrived on boats off the coast of British Columbia.[1] Canada responded by enacting Bill C-31,[2] which, *inter alia*, empowers the Minister of Citizenship and Immigration to declare that particular non-citizens are Designated Foreign Nationals (DFNs).[3] Persons subject to designation are liable to a suite of measures, including mandatory detention with limited review, and the inability to apply for permanent residence for five years from the date of designation, even if a genuine claim for protection is found to exist. The Canadian response bears striking parallels to Australia's introduction of mandatory

---

1 See e.g. Alex Neve & Tiisetso Russell, "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive By Sea" (2011) 62 UNBLJ 37 at 38.

2 Bill C-31, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2012 [Bill C-31].

3 Another particularly controversial change introduced by Bill C-31 is the Designated Countries of Origin list, which deems certain countries to be "safe," meaning that asylum claims of persons from listed countries are accelerated and negative decisions are not subject to review. Pursuant to s 109.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (inserted by s 58 of Bill C-31) [*IRPA*], the power to designate certain countries as safe rests with the Minister. Thirty-seven countries have been designated: *Order Designating Countries of Origin*, (2012) C Gaz I, 3378–80 (*Immigration and Refugee Protection Act*). The original list of countries has been modified as per *Order Amending the Order Designating Countries of Origin*, (2012) C Gaz I, 317 (*Immigration and Refugee Protection Act*) and *Order Amending the Order Designating Countries of Origin*, (2012) C Gaz I, 1434 (*Immigration and Refugee Protection Act*). See also Canadian Association of Refugee Lawyers, "Designated Countries of Origin", online: <www.carl-acaadr.ca/our-work/issues/DCO> (claiming that the DCO scheme violates the *Charter* rights of future claimants from these countries). At around the same time as the enactment of Bill C-31, the government also issued an Order in Council entitled *Order Respecting the Interim Federal Health Program*, *2012*, SI/2012-26 (2012) C Gaz II, 1135 (5 April 2012). That Order, revised by the subsequent *Order Respecting the Interim Federal Health Program*, *2012*, SI/2012-26 (28 June 2012), drastically reduced the scope of healthcare provided to the vast majority of refugee claimants. In July 2014, the Federal Court held that the changes effected by the Orders amount to cruel and unusual treatment contrary to section 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and the distinction between levels of care pursuant to the Designated Countries of Origin scheme infringes section 15 of the *Charter* (see *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 11–12 (available on CanLII) [*Refugee Care*]). The government has indicated its intention to appeal (see Laura Payton, "Federal Government to Appeal Ruling Reversing 'Cruel' Cuts to Refugee Health", *CBC News* (4 July 2014), online: <www.cbc.ca/news/politics/federal-government-to-appeal-ruling-reversing-cruel-cuts-to-refugee-health-1.2696311>).

and indefinite detention of non-citizens following the arrival of some 735 Cambodian asylum seekers between 1989 and 1994.[4]

Canada's DFN regime and Australia's system of mandatory detention (and offshore processing of asylum seekers) are examples of the shift among Western nations toward framing outsiders as potential security threats.[5] Detention of non-citizens is perhaps the most visible manifestation of the securitization[6] of migration law.[7] Increasingly, asylum seekers are constructed in political discourse as a threat associated with criminality, in part to create "the spectacle of being in control."[8] The language of burden sharing is being "transformed into a language of threats to the security of states"[9] that in turn operates to justify the erosion of core international law principles such as *non-refoulement*,[10] as well as carceral treatment of non-citizens.

This paper argues that the DFN provisions are antithetical to a politics of hospitality and infringe both the *Charter* and principles of interna-

---

4 See e.g. Janet Phillips & Harriet Spinks, "Immigration Detention in Australia" (Canberra: Parliamentary Library) (updated 20 March 2013) at 2; Robert Manne, "Australia's Shipwrecked Refugee Policy: Tragedy of Errors", *The Monthly* (March 2013), online: <www.themonthly.com.au/australia-s-shipwrecked-refugee-policy-tragedy-errors-guest-7637>.

5 See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008); Catherine Dauvergne, "Security and Migration in the Less Brave New World" (2007) 16:4 Soc & Leg Stud 533; BS Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection" (2000) 13:3 J Refugee Studies 243 at 245.

6 Following the Copenhagen School, "securitization" may be understood as the framing of a person or object as an existential threat through speech acts, which in turn justifies the use of exceptional measures (see Barry Buzan, Ole Wæver & Jaap de Wilde, *Security: A New Framework for Analysis* (London: Lynne Rienner, 1998) at 23–24).

7 See Dauvergne, "Less Brave New World", *supra* note 5.

8 Kim Rygiel, "Governing Mobility and Rights to Movement Post 9/11: Managing Irregular and Refugee Migration through Detention" (2012) 16:2 Rev Const Stud 211 at 241.

9 Chimni, "Globalization", *supra* note 5 at 252. In his view, the ideology of humanitarianism operates to "establish and sustain global relations of domination," utilizing the discourse of human rights to justify the use of force and the imposition of a neo-liberal economic and political agenda (*ibid* at 244). Chimni has also argued that commitment to principles of deliberative democracy is crucial to reform of the international refugee system (see "Reforming the International Refugee Regime: A Dialogic Model" (2001) 14:2 J Refugee Studies 151). Seyla Benhabib has similarly espoused the virtues of discourse ethics in resolving the tension between sovereignty and human rights that lies at the heart of contemporary debates over policies toward asylum seekers (see "Transformations of Citizenship: The European Union" in Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) 129).

10 See *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 33 (entered into force 22 April 1954) [*Refugee Convention*].

tional law. Moreover, it is suggested that recent Australian history and policy provide a stark and salutary warning to Canada concerning the perils of adopting an ideology of control and exclusion toward asylum seekers instead of a politics of hospitality.[11] Australia is a pertinent comparator because of its decades-long experience with mandatory detention and offshore processing, to which Canadian politicians have referred in justifying Bill C-31.[12] The advent of mandatory detention in Australia engendered a realization on the part of some politicians that the asylum seeker issue could be leveraged for political gain.[13] Ever since, measures designed to exploit this potential, under the guise of protecting Australia's interests, have emerged with alarming frequency.[14] Billions of dollars have been spent constructing offshore processing centres to detain asylum seekers while their claims are processed,[15] despite the fact that most boat arrivals are eventually found to be refugees and admitted to Australia.[16] The management of these facilities by private corporations[17] reflects the

---

11 This is to be contrasted with former Immigration Minister Jason Kenney's "interest" in the Australian model following the arrival of the Sri Lankan boat people (see "Canada Looks to 'Aussie Experience' in Crackdown on Asylum-Seekers", *The Globe and Mail* (16 September 2010), online: <www.theglobeandmail.com/news/politics/canada-looks-to-aussie-experience-in-crackdown-on-asylum-seekers/article4190170/>). Former Canadian diplomat James Bissett went further, expressly calling for Canada to adopt an Australian-style approach to the issue (see James Bissett, "Abusing Canada's Generosity and Ignoring Genuine Refugees: An Analysis of Current and Still-needed Reforms to Canada's Refugee and Immigration System" (2010) Frontier Centre for Public Policy Policy Series No 96).

12 In debate over the Bill, the Minister justified the detention provisions by pointing out that "as a matter of policy, the left-of-centre social democratic government of Australia detains all asylum claimants, not just smuggled asylum claimants, until their claims are determined." See "Bill C-31, An Act to Amend the Immigration and Refugee Protection Act", 2nd reading, *House of Commons Debates*, 41st Parl, 1st Sess, No 146 (March 6, 2012) at 5879 (Hon Jason Kenney).

13 See Manne, *supra* note 4.

14 See e.g. "Australia's Boat People: The PNG Solution", *The Economist* (27 July 2013), online: <www.economist.com/news/asia/21582320-shadow-looming-election-falls-desperate-asylum-seekers-png-solution>. See also Part I(B), *below*.

15 See Kazimierz Bem et al, *A Price Too High: The Cost of Australia's Approach to Asylum Seekers* (Glebe, NSW & Carlton, VIC: A Just Australia & Oxfam Australia, 2007) at 4.

16 See Austl, Commonwealth, Department of Parliamentary Services, Social Policy Section, *Boat Arrivals in Australia Since 1976* by Janet Phillips & Harriet Spinks (Canberra: Australian Government Publishing Service, 2013) at 17; Mary Crock & Daniel Ghezelbash, "Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals" (2010) 19:2 Griffith LR 238 at 244. For statistics concerning the number of asylum seekers accepted as refugees, see Part I(C), *below*.

17 See Part I(C), *below*.

link between transnational capital and the international refugee system.[18] Numerous reports attest to the psychological harm caused to detainees by long-term detention.[19] Yet the boats still come.

The DFN regime, which forms part of the *IRPA*, constitutes a troubling step toward the militaristic Australian approach. To be sure, designation of particular non-citizens is not the only example of Canada's shift away from a politics of hospitality. A recent report prepared by the Harvard Immigration and Refugee Law Clinical Program analyzing the *Canada–US Safe Third Country Agreement*[20] and Canada's Multiple Borders Strategy[21] concluded, "Canada is systematically closing its borders to asylum seekers and avoiding its refugee protection obligations under domestic and international law."[22] Nevertheless, the DFN provisions enact a securitizing logic that carries potentially destructive consequences for designees and Canadian society. In this respect, Canada may be likened to Australia between 1989 and 1992, when designation and mandatory de-

---

18 Chimni argues that the flow of transnational capital plays a causative role in creating the conditions from which refugees and asylum seekers seek protection ("Globalization", *supra* note 5). See also BS Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems" (2004) 23:3 Refugee Survey Q 55 at 56:

> [U]nless there is a clear recognition of the role external economic factors play in creating the conditions which lead to refugee flows, and steps proposed to address them, the humanitarian aid community may, in the final analysis, be seen as an instrument of an exploitative international system which is periodically mobilized to address its worst consequences.

19 See e.g. Austl, Commonwealth, Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network* (2011), online: Australian Human Rights Commission <www.humanrights.gov.au/australian-human-rights-commission-submission-joint-select-committee-australia-s-immigration> at paras 83–97; *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, at 4, online: Suicide Prevention Australia <www.suicidepreventionaust.org>; Australian Medical Association, Media Release, "Mandatory detention is harmful to the physical and mental health of asylum seekers" (23 August 2011), online: <ama.com.au/media/mandatory-detention-harmful-physical-and-mental-health-asylum-seekers>.

20 *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) [*Canada–US Safe Third Country Agreement*]. Article 5 of the *Agreement* provides that asylum seekers who transit through the US may not claim asylum in Canada (and vice versa).

21 The Multiple Borders Strategy involves measures to deter and deflect asylum seekers at particular external borderlines, such as airports, and through measures such as visa screening. See Efrat Arbel & Alletta Brenner, *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Cambridge, Mass: Harvard Immigration and Refugee Law Clinical Program, 2013) at 2, 4.

22 *Ibid* at 1.

tention were introduced. Having enabled the Minister to designate particular persons for mandatory detention and a host of other harsh measures, Canada is now faced with a choice: to continue with a politics of inhospitality, or revert to the type of stance that earned it global acclaim in the 1970s and 1980s for its generosity toward asylum seekers.[23]

It is important to clarify what is meant by a politics of hospitality. In *Perpetual Peace*, Kant argued that a "state of peace among men living in close proximity" must be established through the creation and acceptance of a form of civil constitution.[24] He proposed three forms of constitution—the most relevant of which for present purposes is *ius cosmopoliticum*, which conforms "to the *rights of world citizenship*, sofar as men and nations stand in mutually influential relations as citizens of a universal nation of men."[25] Kant's "Third Definitive Article for a Perpetual Peace" stipulates that "[c]osmopolitan right shall be limited to conditions of universal *hospitality*."[26] Kant defines hospitality as

> the right of an alien not to be treated as an enemy upon his arrival in another's country. If it can be done without destroying him, he can be turned away; but as long as he behaves peaceably he cannot be treated as an enemy.[27]

The right is not to remain indefinitely within the borders of a nation exercising hospitality; such a right arises only through "a special, charitable agreement" granted by the state.[28] This limitation is a product of Kant's belief in the importance of boundaries: that a world federation, as opposed to a world government, is a necessary condition for peaceful coexistence.[29]

The principles of cosmopolitanism and hospitality stress the value of what might be termed "inter-jurisdictional respect"; that is, state and individual respect for the legal subjecthood of persons who encounter the legal and political apparatuses of another jurisdiction.[30] Seyla Benhabib has described cosmopolitanism as "the emergence of norms that ought to govern relations among individuals in a global civil society," while "hospitality is of interest because it touches on the quintessential case of an indi-

---

23 See Part I(A), *below*.

24 See "To Perpetual Peace: A Philosophical Sketch" in Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals*, translated by Ted Humphrey (Indianapolis: Hackett, 1983) 107 at 111.

25 *Ibid* at 112 [emphasis in original].

26 *Ibid* at 118 [emphasis in original].

27 *Ibid*.

28 *Ibid*.

29 See *ibid* at 115, 124–25.

30 See e.g. Benhabib, "The Rights of Others", *supra* note 9 at 47.

vidual coming into contact with an organized and bounded political entity."[31] The right to hospitable treatment "entails a moral claim with potential legal consequences," the justification for which rests upon the "moral injunction against violating the rights of humanity in the individual person."[32] However, Benhabib also extends the Kantian obligation by arguing that, in the context of transnational migration, a cosmopolitan approach entails

> recognizing the moral claim of refugees and asylees to *first admittance*; a regime of *porous* borders for immigrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the right of every human being "to have rights," that is, to be a *legal person*, entitled to certain inalienable rights, regardless of the status of their political membership.[33]

The right to hospitality is not absolute.[34] Instead, according to Benhabib, it imposes an imperfect or conditional moral duty that permits cer-

---

[31] Seyla Benhabib, *Another Cosmopolitanism*, ed by Robert Post (Cary, NC: Oxford University Press, 2006) at 20, 21. See also Jeremy Waldron, "What is Cosmopolitan?" (2000) 8:2 J Political Philosophy 227 ("Kant's phrase 'cosmopolitan right' does not *merely* pick out a form, a topic or a level of legal analysis; it does also connote a kind of substantive view or attitude about the basis on which he thinks we ought to proceed when we are considering law and rights at a global level" at 230 [emphasis in original]).

[32] Benhabib, "The Rights of Others", *supra* note 9 at 29*,* 59. Jacques Derrida has suggested that without the right to hospitality, "a new arrival can only be introduced 'in my home,' in the host's 'at home,' as a parasite, a guest who is wrong, illegitimate, clandestine, liable to expulsion or arrest." "Foreigner Question" in Anne Dufourmantelle & Jacques Derrida, *Of Hospitality*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2000) 3 at 61.

[33] Benhabib, "The Rights of Others", *supra* note 9 at 3 [emphasis in original]. The reference to the right to have rights draws on Hannah Arendt's use of the phrase in *The Origins of Totalitarianism*, where she observed that "[t]he fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do." (Cleveland: World, 1958) at 296. Benhabib argues that the Arendtian right to have rights encompasses two forms or classes of rights. The first invokes "a *moral claim to membership* and *a certain form of treatment compatible with the claim to membership.*" The second use of "right" builds upon this prior claim—as a member of a particular community, one is thus able to claim particularized rights such as civil and political rights. Benhabib, "The Rights of Others", *supra* note 9 at 56, 56–61 [emphasis in original]. For a discussion of the problems with Arendt's conception of the right to have rights, see Frank I Michelman, "Parsing 'A Right to Have Rights'" (1996) 3:2 Constellations 200.

[34] According to Derrida, the law of hospitality contains within it a paradox:

tain exceptions and even derogation in the face of existential threats.[35] What is not permitted, though, is the implementation of processing regimes that designate claimants, based on their mode of arrival, for long-term detention and severely limited civil rights. From a cosmopolitan perspective, long-term detention may be seen as an infringement of the obligation not to cause destruction to a person who arrives at the borders of a polity; the detained person is not positively sent away, but neither is he or she permitted to enter as a welcome guest. Of course, most if not all asylum seekers are not merely seeking temporary sojourn. However, adopting Benhabib's expansive view of the right to hospitality, persons should not be subjected to destructive treatment by reason of their attempt to seek membership within a particular bounded community.

At the international level, the duty of non-destruction inherent within Kant's formulation of the obligation to accord hospitality is reflected in the *non-refoulement* obligation in article 33 of the *Refugee Convention*. The extended form of this obligation, in which enemy treatment is understood as encompassing not only denial of entry but also punitive or carceral treatment by reason of one's attempt to seek entry, is reflected in the *Refugee Convention*'s injunction in article 31(1) against penalizing refugees "on account of their illegal entry or presence ... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence," as well as in the prohibition on applying unnecessary restrictions to the movement of refugees.[36] While provisions such as articles 31 and 33 of the *Refugee Convention* are oriented toward upholding the rights of individuals, it is important to recall that refugee law assists not only asylum seekers, but also nations because "it accommodates the claims of those whose arrival cannot be dependably stopped, even as it vindicates the exclusionary norm in relation to other would-be entrants."[37] In other words, refugee law—which may be seen, in

---

> It seems to dictate that absolute hospitality should break with the law of hospitality as right or duty ... [because] absolute hospitality requires that I open up my home and that I give not only to the foreigner ... but to the absolute, unknown, anonymous other, and that I *give place* to them, that I let them come ... without asking of them either reciprocity (entering into a pact) or even their names. The law of absolute hospitality commands a break with hospitality by right, with law or justice as rights (*supra* note 32 at 25).

35 See Benhabib, "The Rights of Others", *supra* note 9 at 35–36. This limitation is also contained in the *Refugee Convention*, *supra* note 10, art 1(F) of which excludes certain classes of persons from protection on the basis of crimes committed or threats posed to the host state's security.

36 See *Refugee Convention*, *supra* note 10, art 31(2). Also relevant is the requirement that states provide lawful refugees with travel documents (see *ibid*, art 28).

37 James C Hathaway, "Why Refugee Law Still Matters" (2007) 8:1 Melbourne J Intl L 88 at 99.

part, as a legal instantiation of the principles of hospitality and cosmopolitanism—offers a way of addressing the tension between sovereignty and human rights[38] in the context of transnational migration.

Part I analyzes Australian policies toward asylum seekers. It begins with a historical overview in order to contextualize more recent developments. It then parses the changes since 1989 with a view toward demonstrating the lessons to be learned by Canada from Australia's inhospitable approach to asylum seekers. Part II analyzes Canada's position vis-à-vis asylum seekers, with a particular emphasis on the DFN regime. It begins with a brief foray into the history of Canada's treatment of asylum seekers. It then analyzes the mechanics of the DFN regime by reference to principles of international law. Lastly, a detailed argument is presented as to why the DFN regime contravenes the *Charter*. The paper concludes by suggesting that through the creation of Bill C-31, Canada risks adopting Australia's security-oriented, inhospitable stance toward asylum seekers.

I. Exclusion and Detention: Australia's Treatment of Asylum Seekers

A. A Legacy of Inhospitality

Definitional uncertainty regarding citizenship and an inhospitable attitude toward non-white foreigners (and Indigenous Australians) is a constitutive aspect of Australian law and culture. The drafters of the Australia Constitution[39] deliberately refrained from defining the meaning and parameters of citizenship—at least in part to exclude non-white persons as constituent members of the Australian polity.[40] Instead, the matter was left to Parliament, whose first legislative measure post-Federation was the *Immigration Restriction Act 1901* (Cth). That *Act* spelled out a distinct policy of racial bias in favour of white European immigrants—the infamous White Australia policy.[41] While Australia admitted large numbers of

---

38 The "paradox of democratic legitimacy," according to Benhabib. "The Rights of Others", *supra* note 9 at 47.

39 *Commonwealth of Australia Constitution Act 1900* (Cth) [Australian Constitution].

40 See Mary Crock, "Alien Fears: Politics and Immigration Control" (2010) 29:2 Dialogue 20 at 21; Kim Rubenstein, *Australian Citizenship Law in Context* (Sydney: Lawbook, 2002) at 38–39. Citizenship was not defined in Australian law until the passage of the *Nationality and Citizenship Act 1948* (Cth) (see Mary Crock, "Defining Strangers: Human Rights, Immigrants and the Foundations for a Just Society" (2007) 31:3 Melbourne UL Rev 1053 at 1058).

41 The genesis of the policy was concern over Chinese immigration, which had begun in earnest in the mid-nineteenth century as part of the Australian gold rush (see Don McMaster, "Asylum-Seekers and the Insecurity of a Nation" (2002) 56:2 Austl J Intl Af-

Europeans in the wake of World War II,[42] it is a testament to the country's deep anxiety regarding immigration, as well as the depth of its racist foundations, that the White Australia policy was not formally abolished until 1975.[43]

Attitudes toward refugees shifted in the 1970s. The dismantling of the White Australia policy seemed to herald a different attitude toward migrants; particularly those seeking protection. The arrival of some 2,000 Vietnamese asylum seekers by boat between 1976 and 1981 prompted the establishment of formal procedures to determine refugee status; those measures did not involve mandatory detention, temporary visas or interdiction of boats.[44] Part of the response was the establishment of a Comprehensive Plan of Action to facilitate the transfer of tens of thousands of Vietnamese nationals to Australia.[45] It was during this period that the term "multiculturalism," which was borrowed from Canada, entered the Australian cultural and political lexicon.[46]

The latter part of the 1980s saw a retreat from hospitality in Australia. The increasingly multicultural nature of Australian society—generated in no small part by the generosity demonstrated toward Vietnamese refugees in the 1970s—reignited latent concerns over the composition of the Australian population.[47] This anxiety, in conjunction with the shift in global power relations and conceptions of security engendered by the end of the Cold War,[48] contributed to a climate in which the Cambodian asylum seekers who began to arrive on Australian shores in 1989 "were offered not refuge but prolonged detention."[49]

The detention of the Cambodians was made possible by legislation passed in 1989,[50] which enabled the detention of persons on board a vessel

---

fairs 279 at 281). A precursor to the *Immigration Restriction Act 1901* was Victoria's *Act to Make Provision for Certain Immigrants 1855* (Vic), which defined "immigrant" as any adult male of Chinese descent (see Crock, "Alien Fears", *supra* note 40 at 20).

42 See McMaster, "Insecurity of a Nation", *supra* note 41 at 282.

43 See *Racial Discrimination Act 1975* (Cth).

44 See Crock, "Alien Fears", *supra* note 40 at 22.

45 See *ibid* at 21.

46 See McMaster, "Insecurity of a Nation", *supra* note 41 at 283.

47 See generally Anthony Burke, *Fear of Security: Australia's Invasion Anxiety* (New York: Cambridge University Press, 2008).

48 In the Australian context, see Richard Devetak, "In Fear of Refugees: The Politics of Border Protection in Australia" (2004) 8:1 Intl JHR 101 at 102.

49 Manne, *supra* note 4.

50 See *Migration Legislation Amendment Act 1989* (Cth) [*1989 Act*]. The bulk of the *1989 Act* was directed toward reducing ministerial discretion and implementing a system of

at the time of its arrival in port if "an authorized officer reasonably believe[d]" that the person was seeking to enter Australia in circumstances in which the person would become an illegal entrant, for such time "until the departure of the vessel from its last port of call in Australia."[51] Officially, the motivation for the introduction of the discretionary detention regime was to ensure that persons arriving by boat were not forced to "return to sea in unseaworthy vessels."[52] Whether or not the amendment was in fact motivated by compassion, it became the vehicle by which Australia began to construct and treat asylum seekers not only as undesirable others, but as criminals and security threats to be deterred and detained.

B. Detention: Mandatory and Indefinite

In the early 1990s, Australia experienced a dramatic increase (by Australian standards) in the number of asylum claims by people who had arrived by boat.[53] By June 1992, 478 people were in immigration detention:[54] 421 of those people were boat arrivals, 306 of whom were Cambodian.[55] In the same year, lawyers of thirty-six Cambodians whose applications for asylum had been rejected instituted proceedings to challenge the rejec-

---

determination based on statutory criteria. See Mary Crock, "A Legal Perspective on the Evolution of Mandatory Detention" in Mary Crock, ed, *Protection or Punishment: The Detention of Asylum-Seekers in Australia* (Sydney: Federation Press, 1993) 25 at 27; Austl, Commonwealth, Department of the Parliamentary Library, *Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context* (Current Issues Brief No 3 2003–04) by Dr Kerry Carrington (Canberra: Information and Research Services, Department of the Parliamentary Library, 2003) at 3–5.

51 *Migration Act 1958* (Cth), s 36 [*Migration Act*] as it appeared including amendments up to Act No 151, 1988, as amended by *Migration Legislation Amendment Act 1989* (Cth), s 17.

52 Austl, Commonwealth, Senate, *Migration Legislation Amendment Bill 1989* (Explanatory Memorandum) (Commonwealth Government Printer, 1989) at para 109.

53 See Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (Sydney: UNSW Press, 2007) at 133. See also Crock, "Evolution of Mandatory Detention", *supra* note 50 at 25: "Beginning in 1989, Australia experienced a sudden rise in the number of people seeking asylum both within the country and at point of entry."

54 See Phillips & Spinks, "Immigration Detention in Australia", *supra* note 4 at 4. In practice, this comprised detention at the Westbridge (now Villawood) Centre in Sydney. While the premises were unfenced, detainees were not permitted to leave the centre and were required to report daily to Australian Protective Services (see *ibid*).

55 See *ibid*. By the middle of 1993, asylum seekers who had arrived in 1989 and who were still in custody had experienced an average of 1,331 days in detention. Those who were no longer in custody had been detained for an average of 974 days. See Mary Crock, "Border Refugee Claimants at a Glance" in Mary Crock, ed, *Protection or Punishment: The Detention of Asylum-Seekers in Australia* (Sydney: Federation Press, 1993) xx at xxi.

tions.[56] Despite judicial orders setting aside the decisions rejecting the applicants' claims, Parliament pre-empted a scheduled application for their release by passing the *Migration Amendment Act 1992*.[57] That *1992 Act* introduced mandatory detention into Australian law.[58] In doing so, the *1992 Act* signalled a profound shift away from the hospitality demonstrated in the 1970s toward a securitizing approach that has influenced Australian policy ever since. Crucially, the *1992 Act* established the class of "designated person," defined in part by a temporally specific provision applying the regime to non-citizens who arrived on boats between 19 November 1989 and 1 December 1992[59]—a definition that was clearly designed specifically to capture the Cambodians who had arrived in that period.[60]

In *Chu Kheng Lim*, which challenged the detention of the thirty-six Cambodians and the provisions of the *1992 Act*, the High Court held that the detention of the asylum seekers up until the passage of the *1992 Act* was unlawful by reason of the very provision under which detention of designated illegal entrants had been introduced in 1989.[61] However, the Court was unanimous that the mandatory detention regime introduced by the *1992 Act* was a valid exercise of the Commonwealth's power over "aliens" under section 51(xix) of the Australian Constitution.[62] The result of

---

56 See Susan Kneebone, "The Australian Story: Asylum Seekers outside the Law" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law* (New York: Cambridge University Press, 2009) 171 at 186.

57 *Migration Amendment Act 1992* (Cth) [*1992 Act*].

58 See *ibid*, s 3, amending *Migration Act 1958* (Cth), ss 54L–54M.

59 See *ibid*, amending *Migration Act 1958* (Cth), s 54K (defining "designated person").

60 See *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs* (1992), 176 CLR 1, 110 ALR 97 [*Chu Kheng Lim*] (an argument that this specificity amounted to usurpation of judicial power by the targeting of persons involved in extant judicial proceedings was rejected on the basis that "the powers to detain in custody conferred by Div 4B are an incident of the executive powers of the exclusion, admission and deportation and, being non-punitive in character, are not part of the judicial power of the Commonwealth" at 120 (Brennan, Deane & Dawson JJ)).

61 See *Migration Act*, *supra* note 51, s 88, as it appeared including amendments up to Act No 59, 1989 (formerly s 36). In what must count as one of the most cynical measures enacted in this period, Parliament effectively forestalled the possibility of a monetary remedy in respect of that unlawful detention by legislation that capped any damages award to a designated person for wrongful detention at one dollar per day (see *Migration Amendment Act (No. 4) 1992* (Cth), s 6. See also Crock, "Evolution of Mandatory Detention", *supra* note 50 at 34).

62 See *Chu Kheng Lim*, *supra* note 60 at 113. The existence of "significant restraints" on the operation of the detention regime (the limiting of detention to 273 days following the making of an application for an entry permit (s 54Q) and provision for the removal of designated persons who requested removal (s 54P)) meant that the powers of detention conferred by ss 54L and 54N were "an incident of the executive powers of exclusion,

Chu Kheng Lim was that the plaintiffs remained in immigration detention.[63] In 1997, the United Nations Human Rights Committee found in *A v. Australia*[64] that the continued detention of the Cambodian applicant by Australian authorities for four years constituted arbitrary detention contrary to article 9, paragraph 1 of the *International Covenant on Civil and Political Rights*.[65]

In 1994, more comprehensive amendments to the detention regime came into effect.[66] Mandatory detention was extended to all "unlawful non-citizens" and the 273-day limit on such detention was removed. In essence, the changes coming into force in 1994 created a binary distinction between "lawful" and "unlawful" non-citizens: the former were, *inter alia*, non-citizens who held a valid visa; the latter were non-citizens in the mi-

---

admission and deportation of aliens and [were] not, of their nature, part of the judicial power of the Commonwealth" (*ibid* at 119–20). This being said, the Court struck down s 54R, which provided that "a court 'is not to order the release from custody of a designated person,'" as an impermissible encroachment upon the judicial process (*ibid* at 121).

63 In October 1993, the Minister for Immigration offered Cambodian asylum seekers in Australia the opportunity to obtain permanent residence if they agreed to return to Cambodia (at Australia's expense) for one year, after which time they would be able to return to Australia (at their own expense) if they had a sponsor who would provide accommodation and financial support for six months. Unsurprisingly, less than half of the Cambodian detainees availed themselves of this option. See Don McMaster, *Asylum Seekers: Australia's Response to Refugees* (Melbourne: Melbourne University Press, 2001) at 88. The remaining Cambodian refugees were released in late 1995 on humanitarian grounds (see *ibid* at 89).

64 Human Rights Committee, *Communication No 560/1993 (A v Australia)*, UNCCPR, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) at para 9.4 [*A v Australia*].

65 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]. Furthermore, the Committee in *A v Australia* held that the striking down of s 54R in *Chu Kheng Lim* did not insulate the mandatory detention provisions in the *1992 Act* from scrutiny because "court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law," whereas under the *Migration Act 1958*, review was, in fact, "limited to an assessment of whether [the applicant] was indeed a 'designated person' within the meaning of the Migration Amendment Act" (*A v Australia*, *supra* note 64 at para 9.5). The Committee held, pursuant to the ICCPR, *supra* note 65, art 2, para 3, that Australia was obliged to provide A with "adequate compensation for the length of the detention to which A was subjected" (*A v Australia*, *supra* note 64 at para 11). The Australian government rejected the Committee's findings and refused to pay compensation (see Austl, Commonwealth, Australian Human Rights Commission, *Human Rights Explained: Case Studies: Complaints Involving Australia* (2009), online: <www.humanrights.gov.au/human-rights-explained-case-studies-complaints-about-australia-human-rights-committee>).

66 See *Migration Reform Act 1992* (Cth) [*Reform Act*]. The need for comprehensive regulations delayed the *Reform Act* coming into force until 1 September 1994 (see Nicholls, *supra* note 53 at 134).

gration zone who were not lawful non-citizens.[67] Thus, with minor exceptions, any person in Australia without a valid visa was thenceforth an unlawful non-citizen. Section 54W[68] (now in expanded form section 189) of the *Migration Reform Act 1992* made detention of all unlawful non-citizens mandatory, while section 54ZD(1) (now in amended form section 196(1)) introduced indefinite detention.[69] Ten years later, in *Al-Kateb v. Godwin*,[70] the High Court upheld the validity of indefinite detention; in a companion case, the Court ruled that conditions of detention are irrelevant to their legality.[71] Soon after, in *Re Woolley*,[72] the High Court upheld the *Migration Act*'s detention provisions in respect of children.[73]

In spite of the introduction of mandatory detention, asylum seekers continued to arrive on Australia's shores. Unauthorized boat arrivals increased from 200 in 1998 to around 1,500 in October 1999,[74] prompting

---

67 See *Reform Act*, *supra* note 66, s 7, re-enacting *Migration Act 1958* (Cth), ss 14–15 as they appeared including amendments up to Act No 85, 1992.

68 *Reform Act*, *supra* note 66, s 13, inserting *Migration Act 1958* (Cth), ss 54W (detention of all unlawful non-citizens) and ZD(1) (indefinite detention).

69 In addition, the *Reform Act* purported to prevent "the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen [had] made a valid application for a visa and he or she [had] satisfied all of the criteria for the visa" (*supra* note 66, s 13, inserting *Migration Act 1958* (Cth), s 54ZD(3)). Bridging visas were also made unavailable to unauthorized (boat) arrivals, and detainees were made liable for the costs of their immigration detention (though only some 2.5% of debts were recovered in the 2004–2005 fiscal year and the policy was abolished in 2008) (see Phillips & Spinks, "Immigration Detention in Australia", *supra* note 4 at 6, n 30, 7).

70 [2004] HCA 37, 219 CLR 562 [*Al-Kateb*]. For an overview and commentary on *Al-Kateb* see Matthew Zagor, "Uncertainty and Exclusion: Detention of Aliens and the High Court", Case Comment on *Al-Kateb v Godwin* (2006) 34:1 Fed L Rev 127.

71 See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*, [2004] HCA 36, 219 CLR 486.

72 *Re Woolley and Another; Ex parte Applicants M276/2003*, [2004] HCA 49, 225 CLR 1.

73 Subsequently, laws were passed in 2005 that required determination of detained asylum seekers' applications for protection visas within 90 days, and provided that minors should only be detained as a last resort (see Kneebone, *supra* note 56 at 194 (referring to *Migration and Ombudsman Legislation Amendment Act 2005* (Cth), Schedule 1, s 1 (90-day limit) and *Migration Amendment (Detention Arrangements) Act 2005* (Cth), Schedule 1, Part 1, s 1 (detention of minors as last resort)).

74 See The Hon Phillip Ruddock MP (Minister for Immigration and Multicultural Affairs), Media Release, MPS 143/99, "Ruddock Announces Tough New Initiatives" (13 October 1999) online: Parliament of Australia <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYOG06%22>. According to Nicholls, *supra* note 53 at 136, the final figure for 1999 was 3,274 asylum seekers arriving by boat. The countries of origin also changed during this period, with increasing numbers of asylum seekers from Afghanistan, Iran, and Iraq.

the government to establish Temporary Protection Visas (TPVs).[75] The (then) Minister for Immigration and Multicultural Affairs, Phillip Ruddock, stated at the time that the measures would remove incentives for asylum seekers to arrive without authorization and remove the problem of "forum shopping" by refugees.[76] This was quickly proved wrong, as whole families boarded boats to Australia in order to remain together.[77]

The infamous *MV Tampa* incident in August 2001[78] and its aftermath were "the natural outgrowth of [the] restrictive and deterrent policies to refugees which had developed over the previous decade."[79] In the wake of *Tampa*, the government introduced the so-called "Pacific Solution."[80] Un-

---

75 See *Migration Amendment Regulations 1999 (No. 12)* (Cth), Schedule 1. The new TPVs permitted the holder to remain in (but not re-enter) Australia for a maximum of 36 months (see *ibid*, s 785.5). TPVs also prevented a holder from applying for a substantive visa other than a protection visa (see *ibid*, s 785.6), and they prevented a holder from sponsoring their family to come to Australia (see *ibid*, s 785.211).

76 Ruddock, *supra* note 74. This was despite comments made by the Minister in 1998 that temporary protection visas would be "highly unconscionable" (see Fethi Mansouri & Michael Leach, "The Evolution of the Temporary Protection Visa Regime in Australia" (2009) 47:2 Intl Migration 101 at 103).

77 Kneebone, *supra* note 56 at 177–78.

78 Briefly, in August 2001, the Norwegian-registered ship, *MV Tampa*, rescued some 433 Afghans from a sinking boat in international waters near Australia. The captain attempted to dock at the Australian territory of Christmas Island but was refused permission to land by the Australian government, which sent the Special Air Service onto the boat. Legal proceedings were instituted to have the Afghans brought into Australia's migration zone and released on the basis that their detention was unlawful. At first instance, the Federal Court held that detention and expulsion from Australian territory contravened Australian law (see *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs*, [2001] FCA 1297, 110 FCR 452). However, on appeal, a majority of the Full Federal Court held that the Australian Constitution conferred executive power upon the Commonwealth to board the *Tampa* and expel non-citizens (*Ruddock v Vadarlis*, [2001] FCA 1329, 110 FCR 491). See generally Mary Crock & Ben Saul, *Future Seekers: Refugees and the Law in Australia* (Sydney: Federation Press, 2002) at 35–37.

79 Kneebone, *supra* note 56 at 172. See also Matt McDonald, "Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School" (2011) 46:2 Austl J Political Science 281 at 285.

80 See the six Acts that were passed in the wake of *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth): *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth); *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). See *Plaintiff S157/2002 v Commonwealth*, [2003] HCA 2, 211 CLR 476 for an example of an attempt to restrain judicial review of decisions by the Refugee Review Tribunal via the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

der this policy, the territories of Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands[81] were excised from Australia's migration zone, and agreements were reached with the governments of Nauru and Papua New Guinea to process asylum seekers on Nauru and Manus Island (*PNG*) instead of Australia.[82] To implement this strategy, the government adopted a military-style operation of intercepting boats; either turning them back to Indonesia or sending them to Australian offshore processing centres.[83] Persons arriving at an "excised offshore place" were denied the ability to make a valid application for a visa, including protection visas, without approval by the Minister.[84]

A more hospitable approach to asylum seekers appeared likely with the 2007 election of the Labor Party, which had campaigned in part on a platform of ending the Pacific Solution. In early 2008, Labor resettled the last 21 asylum seekers on Nauru in Australia and announced that Nauru and Manus Island would no longer be used as processing centres. TPVs for persons found to be refugees were also abandoned.[85] Nevertheless, offshore processing remained in operation at Christmas Island and long-term mandatory detention continued unabated[86]—as did the arrival of boats. Whether as a direct result of Labor's somewhat less punitive stance, or by reason of other regional factors, there was a significant increase in the arrivals of boats following the dismantling of the Pacific So-

---

81 Along with any other prescribed territory, island, sea installation or resources installation: *Migration Amendment (Excision from Migration Zone) Act 2001*, *supra* note 80, Schedule 1, 1 Subsection 5(1).

82 See e.g. Crock, "Defining Strangers", *supra* note 40 at 1068, pointing out that this approach "was not original" and had been adopted by Charles II during the Restoration. Its more immediate policy predecessor was the United States government's creation of an offshore detention processing centre in Guantánamo Bay (see *ibid*). That regime was held legal by the United States Supreme Court in *Sale v Haitian Centers Council, Inc*, 509 US 155, 113 S Ct 2549 (1993).

83 See Mary Crock, "In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows" (2003) 12:1 Pac Rim L & Pol'y J 49 at 70–79.

84 *Migration Act*, *supra* note 51, ss 5, 46A, inserted by *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), Schedule 1, s 4. Between 2001 and February 2008 when the Pacific Solution was dismantled, 1,637 people were detained in the Nauru and Manus Island facilities; 70 per cent of those were found to be refugees and most were eventually settled in Australia (see Phillips & Spinks, "Immigration Detention in Australia", *supra* note 4 at 10).

85 See Mansouri & Leach, *supra* note 76 ("[e]xisting TPV holders would receive 'Resolution of Status' (subclass 851) visas, with equivalent rights to permanent protection visa holders" at 119).

86 See Phillips & Spinks, "Immigration Detention in Australia", supra note 4 at 11–12. In October 2011, 39 per cent of detainees had been in detention for more than twelve months (see *ibid*).

lution.[87] In 2008, seven boats arrived on Australian territory; in 2009 this number jumped to 60, and by 2012 it reached 278. As of June 30, 2013, the number of boats arrived had already reached 196.[88] Even more striking was the increase in the number of people making the journey: from 161 in 2008, to 17,202 in 2012, to 13,108 as of June 30, 2013.[89] Labor panicked at this new reality, introducing a series of legally and politically flawed measures. The "Malaysia Solution" was devised, under which Australia would send up to 800 boat people to Malaysia, and in return Australia would accept 4,000 refugees from Malaysia over four years. Before any transfers occurred, the plan was struck down by the High Court.[90] In response to that case and the recommendation of an Expert Panel[91] convened by the government, the Gillard Government passed legislation enabling the Minister to designate certain places as regional processing countries, without "reference to the international obligations or domestic law of that country";[92] the Minister subsequently designated PNG as a region-

---

87 See Phillips & Spinks, *Boat Arrivals in Australia*, *supra* note 16 at 22.

88 See *ibid*.

89 See *ibid*. Figures from the Department of Immigration reveal that most asylum seekers in these years hailed from Afghanistan, Iran, Pakistan, and Sri Lanka (a significant number of persons are also listed as stateless; presumably a large number of those persons are Palestinian) (see Australian Government, Department of Immigration and Citizenship, *Asylum Statistics—Australia: Quarterly Tables—March Quarter 2013* (Belconnen, ACT, Australia: Systems, Program Evidence and Knowledge Section, 2013) at 10, online: Department of Immigration and Border Protection <www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-stats-march-quarter-2013.pdf>).

90 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, [2011] HCA 32, 244 CLR 144 [*Plaintiff M70/2011*]. In brief, the majority found that the criteria governing the Minister's decision to issue a declaration authorizing removal were "jurisdictional facts," satisfaction of which was required for a declaration to be valid. Section 198A(3)(a) of the *Migration Act* empowered the Minister to declare that a country provided, for asylum seekers, access to effective procedures for assessment, and protection pending determination of status; and that the country met relevant human rights standards in providing such protection. The Court held that the absence of such access and protections under Malaysian law meant that the jurisdictional facts necessary to make a declaration were not established; accordingly, the Minister's decision was beyond power. See especially *ibid* at paras 101–36, Gummow, Hayne, Crennan and Bell JJ.

91 See Austl, Commonwealth, *Report of the Expert Panel on Asylum Seekers* (August 2012).

92 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), s 198AA(d). However, to address the High Court's finding in *Plaintiff M70/2011*, *supra* note 90, s 198AB(2) requires the Minister to have regard to the "national interest" in making a designation, which in turn requires consideration of whether the country has provided assurances that it "will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion" (*ibid*, s 198AB(3)(a)(i)).

al processing centre.[93] A challenge to the provision conferring power on the Minister to designate regional processing centres, and to the designation of PNG as such a centre, was recently rejected by the High Court.[94]

The current Liberal-National Government took power in 2013 on the back of a campaign that defiantly eschewed a politics of hospitality and promised to "stop the boats."[95] Among the new government's first measures was the implementation of its Operation Sovereign Borders policy, which centres on a Pacific Solution-style "military-led response to combat people smuggling and to protect our borders."[96] The key component of the policy is "external disruption";[97] that is, forcibly turning back boats.[98] Other measures include paying Indonesian villagers for information, purchasing unseaworthy boats, increasing the number of Australian Federal Police in overseas missions, and bolstering Australia's border protection fleet.[99] A ban on publication of the number of boat arrivals also forms part of the solution.[100]

---

93 See *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, 8 September 2012; *Plaintiff S156/2013 v Minister for Immigration and Border Protection*, [2014] HCA 22 at para 15, 2014 WL 2726182 (WL Can) [*Plaintiff S156/2013*].

94 See *Plaintiff S156/2013*, *supra* note 93. See also *Chu Kheng Lim*, supra note 60; *Al-Kateb*, supra note 70. The Court applied its earlier decisions in *Chu Kheng Lim* and *Al-Kateb* in finding that the designation provisions are within the aliens power in s 51(xix) of the Constitution. The challenge to the Minister's exercise of the power also failed on the basis that he was not obliged to have regard to considerations beyond the statutorily mandated "national interest."

95 See e.g. "PNG Solution", *supra* note 14. Crock's observation in 2007 that "[i]ncreasingly harsh and punitive laws ... have been made quite plainly with the voting electorate in mind" remains apposite ("Defining Strangers", *supra* note 40 at 1062).

96 Australian Liberal-National Coalition, *The Coalition's* Operation Sovereign Borders *Policy* (Barton, ACT, Australia: Liberal-National Coalition, July 2013) at 8, online: <www.liberal.org.au/latest-news/2013/07/26/operation-sovereign-borders>.

97 *Ibid* at 7.

98 See Institute of Public Affairs, "Tony Abbott on 70 Years of the IPA" (8 April 2013), online: YouTube <www.youtube.com/watch?v=j4pA5nTr8i0>. The text of the speech was publicly available on the Liberal Party's website until late October 2013. For media coverage of the speech, see e.g. Matthew Knott, "Tony Abbott Talks God and Western Values Behind Closed Doors", *Crikey* (5 April 2013), online: <www.crikey.com.au/2013/04/05/tony-abbott-talks-god-and-western-values-behind-closed-doors/>.

99 See Alex Reilly, "Comment: Where To Now for Asylum Policy under Abbott?", *SBS News*, (13 September 2013), online: <www.sbs.com.au/news/article/2013/09/13/comment-where-now-asylum-policy-under-abbott>.

100 See *ibid*.

Perhaps the most striking aspect of the government's recent approach is the return to a post-*Tampa* ideology of control and framing of asylum seekers as undesirable others. The newly dubbed Minister for Immigration and Border Protection issued a directive in October 2013 to all federal public servants to use the term "illegals" when referring to asylum seekers.[101] The government has adopted an approach of deliberate obfuscation concerning its policy on "irregular maritime arrivals,"[102] as well as the number of boats that have been successfully "disrupted" and those that have made it to Australian waters or the mainland.[103] Nevertheless, reports have emerged of asylum seekers being forcibly returned to Indonesia using lifeboats specially purchased for the task by the government.[104] Waiting times for initial review by the UNHCR in Indonesia now exceed twelve months.[105] Moreover, allegations of abuse by the Australian Navy have been made by some of the people on board the disrupted vessels.[106] Most recently, a boat carrying 157 Tamil asylum seekers was intercepted off the coast of Christmas Island. The asylum seekers were transferred to an Australian Customs vessel, where they remained for three weeks in windowless rooms for some twenty-one hours a day, without access to le-

---

101 See e.g. "Scott Morrison Defends Decision to Call Asylum Seekers 'Illegals'", *The Guardian* (21 October 2013), online: <www.theguardian.com/world/2013/oct/21/news-asylumseekers-immigration-government>.

102 See e.g. David Wroe & Michael Gordon, "Motion Passed to Force Immigration Minister Scott Morrison to Report Asylum-seeker Incidents at Sea", *Sydney Morning Herald* (15 November 2013) 13, online: <www.smh.com.au/federal-politics/political-news/motion-passed-to-force-immigration-minister-scott-morrison-to-report-asylumseeker-incidents-at-sea-20131114-2xjol.html>; David Wroe & Michael Gordon, "Immigration Minister Scott Morrison Stays Silent on Asylum Boats", *Sydney Morning Herald* (15 November 2013), online: <www.smh.com.au/federal-politics/political-news/immigration-minister-scott-morrison-stays-silent-on-asylum-boats-20131114-2xjnl.html>.

103 In keeping with this trend, the "Illegal Maritime Arrivals" page on the Immigration Department's newly updated website remained conspicuously devoid of any information until early December 2013, when a brief notice appeared advising that TPVs would not be reintroduced and that a cap had instead been placed on the number of protection visas to be granted in the 2013–14 financial year.

104 See George Roberts, "Asylum Seekers Give Details on Operation Sovereign Borders Lifeboat Turn-Back", *ABC News* (18 March 2014), online: <www.abc.net.au/news/2014-03-17/asylum-seekers-give-details-on-operation-sovereign-borders/5326546>.

105 See e.g. "Stopping the Pull Factors: Asylum Seekers in Indonesia", *ABC News Radio* (22 July 2014) (radio broadcast), online: <www.abc.net.au/radionational/programs/lawreport/turning-back/5598044>.

106 See *ibid*.

gal advice.[107] Eventually, the asylum seekers were briefly brought to Australia before being removed to Nauru.[108]

In December 2014, the Australian government passed legislation[109] that, *inter alia*, reintroduces TPVs[110] (including restrictions on the countries which holders may visit[111]); permits the Minister to set annual limits on the number of protection visas to be issued;[112] provides that *non-refoulement* obligations under the *Refugee Convention* are irrelevant in respect of unlawful non-citizens;[113] and institutes a new fast-track system of refugee determination for unauthorized maritime arrivals.[114]

C. Lessons from Australia

Since the arrival of Cambodian asylum seekers in 1989, Australia has been at the vanguard of the international trend toward securitizing migration laws and treating asylum seekers as threats, rather than as people deserving protection (or at the very least, a proper process of determining claims for protection). This inhospitable approach may be seen as a continuation of, or vestigial link to, the White Australia policy and the control Australia "wishes to exert over its national identity."[115] It is also a response driven by political expediency—the language of protection is deployed not in the form of an offer to outsiders, but rather as an alleged means of ensuring the safety of the nation and its citizens. This section argues, first, that Australia's approach has not worked at the level of de-

---

[107] As the vessel was interdicted outside of the migration zone as defined in section 5 of the *Migration Act*, the detention was purportedly legitimate pursuant to the *Maritime Powers Act 2013* (Cth), s 72.

[108] See "157 Tamil Asylum Seekers Sent from Curtin Detention Centre to Nauru", *ABC News* (2 August 2014), online: <www.abc.net.au/news/2014-08-02/tamil-asylum-seekers-sent-to-nauru/5642972>.

[109] Bill 2014*, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth), 2014 [2014 Bill].

[110] See *ibid*, Schedule 2, Part 4.

[111] See *ibid*, Schedule 2, Part 4, ss 31, 36A.

[112] See *ibid*, Schedule 7. An earlier attempt by the government to limit the number of protection visas was struck down by the High Court in June 2014 (see *Plaintiff S297/2013 v Minister for Immigration and Border Protection*, [2014] HCA 24 at para 69; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection*, [2014] HCA 25 at para 92 [*Plaintiff M150*]). In essence, the Court held in each case that section 85 of the *Migration Act* does not confer power on the Minister to limit the number of protection visas granted in a particular year.

[113] See 2014 Bill, *supra* note 109, Schedule 5.

[114] See *ibid*, Schedule 4, Part 1.

[115] Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 124.

terrence and, second, that the flow-on effects of the securitization of Australian immigration law are manifestly negative. In a clear warning to Canada, Catherine Dauvergne stated in evidence given to the Canadian Standing Committee on Citizenship and Immigration's inquiry into Bill C-31:

> Australia now has more than two decades of experience with a mandatory detention scheme for people seeking refugee protection. Almost everybody seeking refugee protection is detained at some point. This system has not achieved its deterrence objectives. It has harmed many people and it has cost thousands of millions of dollars.[116]

At the outset, it is to be observed that Australian data indicates that a high proportion of persons in immigration detention have legitimate claims for protection. 70 per cent of people detained on Nauru and Manus Island between 2001 and February 2008 were ultimately resettled in Australia or other countries.[117] Acceptance rates at Christmas Island were over 90 per cent in the period between July 1, 2009, and January 31, 2010.[118] These data suggest that a security-driven response to asylum seeker flows is somewhat excessive. While Canada does not presently conduct offshore processing,[119] the Australian experience suggests that Canada ought to seriously reconsider the extent to which it emulates Australian practices in respect of asylum seekers.

The UNHCR has stated that "[t]here is no empirical evidence that the threat of being detained deters irregular migration or discourages people from seeking asylum."[120] Drawing on research and government statements from around the world, the International Detention Coalition has found that asylum seekers generally have little understanding of the practices of destination states concerning asylum seekers; in any event,

---

116 House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 40 (7 May 2012) at 1 (Catherine Dauvergne).

117 See Phillips & Spinks, *Boat Arrivals in Australia*, *supra* note 16 at 17.

118 See Crock & Ghezelbash, *supra* note 16 at 244.

119 Persons subject to immigration detention in Canada are housed in immigration holding centres or provincial prisons. See Canada Border Services Agency, "CBSA Detentions and Removals Programs—Evaluation Study" (November 2010), online: <www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>.

120 UNHCR, "UNHCR Urges States to Avoid Detaining Asylum-Seekers" (12 May 2011), online: <www.unhcr.org/4dcbef476.html> [internal quotation omitted]. In fairness, it seems likely that there was a link between the extremely low number of boat arrivals in Australia in the mid-2000s and the harsh Coalition policies during that period. However, those policies came with costs to asylum seekers and Australian society that far outweighed their temporary benefits (see e.g. Crock & Ghezelbash, *supra* note 16 at 258ff).

such people are primarily motivated by the desire to escape situations of intolerable violence, danger, or economic vulnerability, which manifestly outweigh the perceived drawbacks of detention.[121] In the Australian context, it has been argued that the surge in boat arrivals in recent years was caused by the abandonment of the Pacific Solution in 2008.[122] However, this confuses correlation with causation: existing research suggests that family, social networks, and agents, including smugglers,[123] play a much more significant role in determining asylum seekers' ultimate destinations than knowledge of entry policies and putative detention.[124] Indeed, the cessation of boat arrivals to Australia in early 2014 is beginning to look like only a temporary decline, seeing as the numbers of asylum seekers in Indonesia are increasing and people smugglers are devising new means of enticing customers and evading detection by Australian border patrols.[125] To the extent that deterrence can even be considered a legiti-

---

[121] See Robyn Sampson, Grant Mitchell & Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Melbourne: International Detention Coalition, 2011) at 11, online: <idcoalition.org/cap/handbook/>.

[122] Spinks has observed that

> [c]hanges to asylum policy made by the Rudd Government in 2008 ... have been accused of acting as pull factors, as have Australia's comparatively generous welfare arrangements, and relatively high refugee recognition rates. However, beyond a simple correlation between policy changes and the numbers of boat arrivals at certain points in time, little empirical evidence has been presented to demonstrate that such pull factors are actually at play (Austl, Commonwealth, Department of Parliamentary Services, Social Policy Section, *Destination Anywhere? Factors Affecting Asylum Seekers' Choice of Destination Country* by Harriet Spinks (Canberra: Australian Government Publishing Service, 2013) at 1).

Richard Towle of UNHCR has argued that

> the higher number of people taking dangerous and exploitative sea journeys is a symptom of the grave human insecurity that refugees face at home and the risks they are compelled to take to find safety for their families. It is no coincidence that most boat people come from Afghanistan, Iraq, Iran and Sri Lanka—places that are suffering, or have recently emerged, from long periods of serious human insecurity (Phillips & Spinks, "Boat Arrivals in Australia", *supra* note 16 at 3, quoting UNHCR, Media Release, "Asylum-Seekers: Let's Have a Mature Discussion" (13 September 2012), online: <www.unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=265:asylum-seekers-lets-have-a-mature-discussion&catid=35:news-a-media&Itemid=63>).

[123] The influence of agents over those seeking their services does not mean that asylum seekers are aware of the risks involved in travelling to countries such as Australia and Canada; indeed, the limited available research suggests quite the opposite (see Spinks, *Destination Anywhere?*, *supra* note 122 at 16–17).

[124] For a useful summary of this research, see generally *ibid* at 9–17.

[125] See George Roberts, "People Smugglers Offering Discounts, Multi-Buys to Combat Federal Government Asylum Seeker Policies", *ABC News* (24 March 2014), online:

mate motivation for immigration detention, it would thus seem to rest on flawed assumptions regarding its efficacy, since, in Mary Crock's words, "[w]hile there are families striving to be reunited, while there are people caught in limbo yearning for a safe haven, the refugees will continue to batter at Australia's door."[126] There is no reason to think that the threat of detention is likely to function as a greater deterrent in Canada than in Australia.

The financial cost of immigration detention is breathtaking. Oxfam Australia has calculated that Australia spent over AUD$1 billion on offshore processing between 2001 and 2007.[127] Fewer than seventeen hundred people were processed during this period, meaning that the cost per person was in excess of AUD$500,000.[128] While the purpose of offshore processing (denial of access to the Australian legal system[129] and decreased visibility of detainees[130]) means that economic efficiency is not the only relevant factor in assessing the offshore processing regime, the scale of the expense is evident seeing as the cost of onshore detention for the same period would have amounted to around 3.5 per cent of the cost of offshore processing.[131] In May 2013, the Immigration Department submitted evidence to a Senate estimates hearing that the cost of detention (offshore and onshore) for 2012–2013 would be approximately AUD$1.5 billion.[132] By way of comparison, the funds available to UNHCR operations in 2013 were USD$3.234 billion, while some 11.7 million people were under the organisation's mandate.[133]

Expenditure of this magnitude by Western nations brings attention to the fact that internal conflicts, which give rise to flows of asylum seekers, "may be traced to shrinking shares of marginalized peoples in the globalization process" and the economic liberalization project of the post-Cold

---

<www.abc.net.au/news/2014-03-24/people-smugglers-adapting-methods-to-combat-australian-policies/5342276>.

126 Crock, "Conflicting Visions", *supra* note 83 at 94.

127 See Bem et al, *supra* note 15 at 4.

128 See *ibid*.

129 See discussion of the Pacific Solution, *above* at 16.

130 See Bem et al, *supra* note 15 at 4.

131 See *ibid*.

132 See "Department of Immigration Breaks Down $15 Billion Cost of Asylum Detention Centres", *ABC News* (28 May 2013), online: <www.abc.net.au/news/2013-05-28/immigration-department-breaks-down-asylum-detention-costs/4718730>.

133 See UNHCR, "Funding UNHCR's Programmes" in *Global Report 2013*, 106 at 108, online: <www.unhcr.org/539809dc0.html>; UNHCR, *Global Trends 2013* at 2, online: <www.unhcr.org/5399a14f9.html>.

War era.[134] A fitting, if perverse, end stage of this cycle of economic influence is the fact that private corporations manage Australia's immigration detention facilities. Since 2009, Serco Group has been contracted to manage the detention centre at Christmas Island and other centres throughout Australia.[135] In February 2014, the government awarded a AUD$1.2 billion contract to Transfield Services to operate the centres at Nauru and Manus Island.[136] Yet there is no evidence of a positive correlation between the spending and improvement of conditions in the centres; to the contrary—despite this degree of expenditure, the UNHCR's second report on the conditions at the Manus Island Regional Processing Centre found that "[p]hysical living conditions remain harsh" and "freedom of movement remains extremely limited" contrary to UNHCR's Detention Guidelines.[137] Given the disproportionate expense and poor standards of treatment reported in offshore Australian facilities, these findings reinforce why Canada would be well advised to avoid both building upon designation and mandatory detention, and the move to offshore processing.

The destructive impact of detention on those who are detained is manifest.[138] A litany of reports attests to the deleterious impact of long-term detention on asylum seekers. The Australian Human Rights Commission has drawn attention to the disturbingly high rates of self-harm, suicide, and generally poor mental health among asylum seekers.[139] Suicide Prevention Australia noted in 2011 that there were over 1,100 instances of threatened or actual self-harm, and at least five suicides by persons in detention—statistics that are "incomparable to any other situation or population."[140] A 2013 inquiry by the Australian Ombudsman found that be-

---

134 Chimni, "Globalization", *supra* note 5 at 245–46, citing Anne Orford, "Locating the International: Military and Monetary Interventions after the Cold War" (1997) 38:2 Harv Intl LJ 443 at 444.

135 See e.g. Cathy Alexander, "Meet the Companies that Run Our Immigration Detention Camps", *Crikey* (25 February 2014), online: <www.crikey.com.au/2014/02/25/meet-the-companies-that-run-our-immigration-detention-camps/>.

136 See Paul Farrell, "Manus Island and Nauru Centres to be Run by Transfield in $1.2bn Deal", *The Guardian* (24 February 2014), online: <www.theguardian.com/world/2014/feb/24/manus-island-and-nauru-centres-to-be-run-by-transfield-in-12bn-deal>.

137 *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11–13 June 2013* (Lyons, ACT: UNHCR, 2013) at 1, online: <www.refworld.org/docid/51f61ed54.html>.

138 See Mansouri & Leach, *supra* note 76 at 110–11 (temporary protection can also have significant mental health implications, primarily as a result of the isolation engendered by the prohibition on family reunification and the omnipotent threat of *refoulement*).

139 See Australian Human Rights Commission, *Submission to the Joint Select Committee*, *supra* note 19 at paras 83–97.

140 Suicide Prevention Australia, *Submission to the Joint Select Committee*, *supra* note 19 at 4.

tween July 1, 2010 and April 24, 2013, there were 11 deaths in immigration detention.[141] A 2014 inquiry into children in immigration detention heard evidence that 128 children had self-harmed in the preceding fifteen months.[142] A recent protest by detainees on Manus Island against the conditions of detention led to the death of one Iranian asylum seeker; 77 others were injured.[143]

The impact of detention on asylum seekers supports the argument that detention amounts to a violation of the right to hospitality at both a moral and legal level. Morally, detention of non-enemies infringes the obligation to accord hospitality, even if persons are seeking permanent membership in a community rather than temporary sojourn. Legally, detention

> on a mandatory and indefinite basis without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority amounts to arbitrary detention that is inconsistent with international human rights law.[144]

In 2013, the UN Human Rights Committee in *FKAG v. Australia*[145] found that Australia's indefinite detention of persons subject to adverse security assessments breached articles 7 and 9(1), (2) and (4) of the ICCPR.[146] The

---

141 See Austl, Commonwealth, Commonwealth and Immigration Ombudsman, *Suicide and Self-harm in the Immigration Detention Network* (Report No 2) by Ombudsman Colin Neave (Canberra: Commonwealth Ombudsman, 2013) at 2, online: <www.ombudsman.gov.au/media-releases/show/220>. The Ombudsman noted that these figures are based on departmental reports and expressed concern over both the reporting framework and the departmental structures for identifying and recording self-harming behaviour (see *ibid* at 3).

142 See Rebecca Barrett & Karen Barlow, "Immigration Detention Inquiry: Government Tried to Cover Up Asylum Seekers' Mental Health Problems, Inquiry Told", *ABC News* (31 July 2014), online: <www.abc.net.au/news/2014-07-31/detention-centre-inquiry-hears-claims-of-immigration-cover-up/5637654>. See also Australian Medical Association, *supra* note 19 ("'[c]hildren are particularly vulnerable and the detention environment places enormous stress on them'").

143 See Helen Davidson & Oliver Laughland, "Manus Island: One Dead, 77 Injured and Person Shot in Buttock at Australian Asylum Centre", *The Guardian* (18 February 2014), online: <www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock>.

144 UNHCR, *Manus Island*, *supra* note 137 at 1.

145 UNICCPR, Human Rights Committee, 108th Sess, UN Doc CCPR/C/108/D/2094/2011, 28 October 2013 at 17–23.

146 In particular, the Committee found that a blanket rule imposing detention without individual assessment was arbitrary within the meaning of article 9(1). It also found that substantive review of detention was unlikely in light of *Al-Kateb*, *supra* note 70, and that, in any event, *Plaintiff M47/2012 v Director-General of Security*, [2012] HCA 46 (5 October 2012) clarifies that a successful challenge to the making of an adverse security

fact that the DFN regime enables potentially indefinite detention suggests that Canada may very well be the subject of similar international criticism in the future.

Australia's culture and politics have also suffered from its inhospitality toward asylum seekers. Despite the nation's racist history, sovereignty has renewed its claim on the social consciousness in the form of xenophobia and callousness. Over the past twenty-five years, politicians have leveraged the asylum seeker issue for political gain,[147] and refugees have become the means by which politicians pander to unease over perceptions of a rapidly changing nation.[148] The secrecy that is inherent in the logic of securitization has resulted in attempts by government departments to conceal the various impacts of detention on detainees.[149] To maintain the position that its inhospitable policies are achieving their deterrence objective, the government has resorted to claiming that the aforementioned Sri Lankan asylum seekers who were kept on a customs vessel for some three weeks are in fact economic migrants liable to being returned to India.[150]

---

assessment does not necessarily bring detention to an end; accordingly, article 9(4) was infringed. The cumulative impact of "the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant." Human Rights Committee, *Communication No 2094/2011 (FKAG v Australia)*, UNCCPR, 108th Sess, UN Doc CCPR/C/108/D/2094/2011 (2013) at para 9.8.

147 For example, in the wake of the *Tampa* incident, the Prime Minister declared, "we will decide who comes to this country and the circumstances in which they come" (Australian Liberal-National Coalition, *supra* note 96 at 4). Subsequently, approval ratings for the Coalition Government jumped to their highest levels since entering office (see Devetak, *supra* note 48 at 107).

148 See e.g. Christos Tsiolkas, "Why Australia Hates Asylum Seekers", *The Monthly* (September 2013), online: <www.themonthly.com.au/issue/2013/september/1377957600/christos-tsiolkas/why-australia-hates-asylum-seekers>.

149 See Barrett & Barlow, *supra* note 142.

150 See Karen Barlow, "Scott Morrison Says 157 Tamil Asylum Seekers are 'Economic Migrants' Not in Danger of Persecution in India, Calls Labor and Greens 'Surrender Monkeys'", *ABC News* (28 July 2014), online: <www.abc.net.au/news/2014-07-28/consular-staff-begin-processing-of-tamil-asylum-seekers/5627732>. Pre-empting a High Court challenge to the asylum seekers' continuing detention on the Australian vessel, the Minister announced in late July 2014 that they would be brought to Australia. While that transfer took place, the asylum seekers have since been transferred from Curtin Detention Centre to Nauru (see "157 Tamil Asylum Seekers Sent from Curtin Detention Centre to Nauru", *ABC News* (2 August 2014), online: <www.abc.net.au/news/2014-08-02/tamil-asylum-seekers-sent-to-nauru/5642972>). The plaintiffs have amended their claim in the High Court to state a case for damages for unlawful detention and false imprisonment (see *CPCF v Minister for Immigration and Border Protection*, [2014] HCATrans 156 (28 July 2014)).

While it may be true that not all of the Sri Lankans meet the criteria for protection, the government's position is an example of a broader trend toward involuntary repatriation by states that are "unwilling to actualize the principle of burden sharing."[151] The rhetoric surrounding the introduction of Bill C-31 suggests that Canada is at risk of following a similar path.[152] Recent Australian history would indicate that Canada ought to eschew a politics that rests on the construction of asylum seekers as scapegoats in order to confront deeper concerns over national identity and economic inequality.

The point of drawing attention to the negative outcomes of immigration detention is not to suggest that borders do not matter, or that sovereignty is unimportant—the right of hospitality presupposes both the existence of boundaries and a commitment to sovereignty. Furthermore, in the context of boat arrivals, it must be acknowledged that most boats used by asylum seekers are not equipped for the type of journey being made, and as a consequence, people die. The SIEV X incident in late 2001, in which 353 asylum seekers drowned on their way to Australia, exemplifies this reality.[153] Thus, as Crock and Ghezelbash have pointed out, "stopping irregular migration by boat is a laudable policy objective."[154] What is not acceptable is a system that treats asylum seekers who do arrive by boat as enemies, by subjecting them to punishment and contraventions of international law. The shift in Australia toward securitizing migration, particularly forced migration, amounts to an inhospitable attempt to avoid addressing the needs of people who, in the eyes of proponents of such policies, have the temerity to seek protection at the doorstep without calling first to seek permission. This approach has had a demonstrably destructive effect not only on detainees, but also on the nation as a whole. In view of the recent enactment of Bill C-31 and the DFN regime, Canada ought to consider closely the lessons offered by the Australian regime when formulating future laws and policies concerning asylum seekers.

---

151 Chimni, "From Resettlement to Involuntary Repatriation", *supra* note 18 at 66.

152 For example, in his second reading speech concerning Bill C-31, former Immigration Minister Jason Kenney averred, "Canadians are worried when they see large human smuggling operations, for example, the two large ships that arrived on Canada's west coast in the past two years with hundreds of passengers, illegal migrants who paid criminal networks to be brought to Canada in an illegal and very dangerous manner" (Kenney, *supra* note 12 at 5872).

153 See e.g. "Questions Still Abound Ten Years After the Sinking of SIEV X", interview of Steve Biddulph by Geraldine Doogue (22 October 2011) on *Saturday Extra*, ABC Radio National, online: <www.abc.net.au/radionational/programs/saturdayextra/questions-still-abound-ten-years-after-the-sinking/3595014>.

154 *Supra* note 16 at 245.

II. The DFN Regime: Protecting Canada's Immigration System?

A. A Mixed Legacy

Canada has never formally enacted an equivalent to the White Australia policy. However, at various points in its history it has evinced an equivalent attitude of antipathy toward non-white immigrants and asylum seekers.[155] The relevance of ethnicity to Canadian immigration policy in the nineteenth and early twentieth centuries is apparent in the longstanding Chinese head tax,[156] which continued in force until 1923 when it was replaced by legislation that blocked virtually all Chinese immigration until 1947.[157] The nervousness engendered by boat arrivals and refugees is evident in the passage of the *Immigration Act 1910*,[158] which conferred power on the federal government to prohibit the landing of immigrants "belonging to any race deemed unsuited to the climate or requirements of Canada,"[159] as well as the infamous *Komagata Maru* and *St. Louis* incidents.[160] To be sure, Canada admitted hundreds of thousands of displaced Europeans in the wake of World War II, but the right to discriminate on the basis of race was upheld.[161] Furthermore, those who were admitted tended to accord with the prevailing Anglo-American con-

---

[155] See generally Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540–1997*, revised ed (Toronto: Dundurn Press, 1997). The first federal law dealing with immigration was passed in 1869 (see *The Immigration Act, 1869*, SC 1869, c 10 (see Knowles, *supra* note 155 at 49–50)). That Act was consolidated and the categories of undesirable immigrants extended by *The Immigration Act, 1906*, SC 1906, c 19 (see Knowles, *supra* note 155 at 82–83).

[156] See *The Chinese Immigration Act, 1885, SC 1885, c 71*; *The Chinese Immigration Act, 1903*, SC 1903, c 8. For an overview of the response to Chinese migration in Canada in this period, and the litigation brought by descendants of those subjected to the head tax (*Mack v Canada (Attorney General)* (2001), 55 OR (3d) 113, 2001 CanLII 27983 (Ont SC) and *Mack v Canada (Attorney General)* (2002), 217 DLR (4th) 583, 60 OR (3d) 737 (Ont CA)), see generally David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Head Tax Case* (Toronto: University of Toronto Press, 2005).

[157] *The Chinese Immigration Act, 1923*, SC 1923, c 38.

[158] *An Act Respecting Immigration*, SC 1910, c 27 [*Immigration Act 1910*].

[159] *Ibid,* s 38.

[160] The *Komagata Maru* arrived in Vancouver in 1914 carrying 376 mostly Sikh passengers. The ship was forced to return to India. In 1939, the *St. Louis*, which was carrying over 900 Jewish refugees, was denied permission to land in Halifax and the ship was forced to return to Europe. See Neve & Russell, *supra* note 1 at 38–39. See also Knowles, *supra* note 155 at 93 (the *Komagata Maru* incident) and 117 (the *St. Louis* incident).

[161] See Knowles, *supra* note 155 at 131–32.

ception of the Canadian nation,[162] and did not affect "the underlying economic determinants of Canadian immigration policy."[163]

Like Australia, Canada's attitude toward refugees shifted in the 1970s.[164] In 1976, Canada enacted a new *Immigration Act*[165] that expressly recognized its obligations under the *Refugee Convention*, which it had ratified in 1969.[166] Between 1975 and 1981, Canada demonstrated an attitude of cosmopolitan hospitality by admitting some 77,000 refugees from Southeast Asia, along with several thousand refugees from Uganda and Chile; many of those admitted were privately sponsored by Canadian citizens.[167] Canada's generosity during this period, when it accepted more refugees per capita than any other nation, led to its receipt of the Nansen Medal—awarded to a country for the first time in history.[168]

By the late 1980s, however, Canadian hospitality was threatened by a global upsurge in the number of refugees and undocumented migrants.[169] The arrival of Sikh asylum seekers by boat in Nova Scotia in 1987 appeared to confirm the "fear that Canada was in imminent danger of being overwhelmed by non-genuine refugee claimants."[170] In conjunction with administrative difficulties created by the Supreme Court's ruling in *Singh v Minister of Employment and Immigration*,[171] it can be argued that the arrival of the Sikhs influenced the passage of Bill C-84, the *Refugee Deter-*

---

[162] See *ibid* at 131–34.

[163] James C Hathaway, "Selective Concern: An Overview of Refugee Law in Canada" (1988) 33:4 McGill LJ 676 at 682.

[164] See Knowles, *supra* note 155 at 161ff.

[165] *The Immigration Act*, SC 1976, c 24 [*Immigration Act 1976*].

[166] The *Immigration Act 1976* did empower authorities to detain aliens with respect to whom an examination or inquiry was to be held, or a removal order had been made, where the person was considered a public danger or posed a flight risk (see *ibid*, s 104(1)). Review of detention was required within forty-eight hours and further review was required every seven days (see *ibid*, s 104(6)).

[167] See Knowles, *supra* note 155 at 172–75. See also Hathaway, "Refugee Law in Canada", *supra* note 163 at 683–84.

[168] See Knowles, *supra* note 155 at 181; Neve & Russell, *supra* note 1 at 39.

[169] For an overview of developments in the 1980s, see generally Howard Adelman, "Canadian Refugee Policy in the Postwar Period: An Analysis" in Howard Adelman, ed, *Refugee Policy: Canada and the United States* (Toronto & New York: York Lanes Press & Centre for Migration Studies, 1991) 172 at 204–10.

[170] Hathaway, "Refugee Law in Canada", *supra* note 163 at 686, n 37.

[171] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*].

rents and Detention Act.[172] This *Act* extended powers of detention,[173] limited access to the determination system, and established a new system of refugee determination utilizing adversarial hearings, the outcomes of which were non-appealable.[174]

The arrival of 599 Chinese nationals off the coast of British Columbia in 1999 triggered another round of discussions concerning asylum seekers. A report issued by the House of Commons Standing Committee on Citizenship and Immigration framed the issue as one requiring a balance between refugee protection and border security.[175] However, the stated security concerns "were not centrally about terrorists or persons who pose major security threats," but rather dealt with "the economic impacts of people working illegally, of opportunistically drawing on the public purse, or of feathering the pockets of smugglers."[176] This assessment of the situation was not entirely unreasonable given that the majority of the boat arrivals were economic migrants.[177] The Committee viewed detention as a necessary component of Canada's immigration system, and its recommendations largely accorded with the prevailing detention provisions in the *Immigration Act 1976*.[178] Thus, when the *IRPA* first came into effect, detention remained discretionary and individualized, and regular reviews

---

172 Bill C-84, *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, 2nd Sess, 33rd Parl, 1987 (first reading 11 August 1987) [*Refugee Deterrents and Detention Act*].

173 The new provision enabled authorities to detain a person who was unable to satisfy an officer as to that person's identity (see Arthur C Helton, "The Detention of Asylum-Seekers in the United States and Canada" in Howard Adelman, ed, *Refugee Policy: Canada and the United States* (Toronto & New York: York Lanes Press & Centre for Migration Studies, 1991) 253 at 261). Helton further notes that the objective of this amendment was to deter undocumented persons from attempting to enter the country (see *ibid*).

174 See Hathaway, "Refugee Law in Canada", *supra* note 163 at 686. See also Wendy Chan, "Undocumented Migrants and Bill C-31: The Criminalization of Race" in Law Commission of Canada, ed, *What Is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004) 34 at 35–36.

175 See House of Commons, Standing Committee on Citizenship and Immigration, *Refugee Protection and Border Security: Striking a Balance* (22 March 2000).

176 Constance MacIntosh, "Insecure Refugees: The Narrowing of Asylum-Seeker Rights to Freedom of Movement and Claims Determination Post 9/11 in Canada" (2012) 16:2 Rev Const Stud 181 at 186–87.

177 See Alexandra Charlton et al, "The Challenges to Responding to Human Smuggling in Canada: Practitioners Reflect on the 1999 Boat Arrivals in British Columbia" (2002) Vancouver Centre of Excellence, Research on Immigration and Integration in the Metropolis Working Paper No 02-23 at 24–25, online: <mbc.metropolis.net/assets/uploads/files/wp/2002/WP02-23.pdf>.

178 See MacIntosh, *supra* note 176 at 188.

were required;[179] the number of persons in immigration detention did, however, increase sharply in the years following the introduction of *IRPA*.[180]

Viewed in the context of Canada's historical nervousness over unauthorized boat arrivals, it is not especially surprising that the arrival of 575 Sri Lankan nationals in 2010 triggered public anxiety and a securitizing response on the part of the Canadian government. What is surprising is the extent to which Bill C-31—and particularly the DFN provisions—depart from principles of hospitality and international law, as well as the *Charter*.

B. The DFN Regime

The progenitor of Bill C-31—Bill C-49[181]—was introduced in Parliament on October 21, 2010. That Bill lapsed with the dissolution of the 40th Parliament.[182] On June 16, 2011, a new bill, Bill C-4, was introduced.[183] In a manner reminiscent of the Australian legislation introducing the concept of designated persons and mandatory detention in the 1990s, "Bill C-4 was hastily drafted by the government when Canadians witnessed the spectre of two boats coming to the shores of British Columbia carrying some of the most damaged and wounded people on earth."[184] Putatively entitled the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, the Bill in fact targeted "those who turn to smugglers for assistance."[185] In 2012, the substantive provisions of Bill C-

---

[179] *IRPA*, *supra* note 3, ss 55(3), 57(1)–(2). These provisions remain in effect for non-citizens who are not classed as DFNs. It is to be observed that s 55(2) in the *IRPA* did remove a temporal restriction on the power to detain on the basis of identity concerns by making the power exercisable at any time.

[180] See François Crépeau, Delphine Nakache & Idil Atak, "International Migration: Security Concerns and Human Rights Standards" (2007) 44:3 Transcultural Psychiatry 311 at 321.

[181] Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, 3rd Sess, 40th Parl, 2010.

[182] See House of Commons, Order Paper, 40th Leg, 3rd Sess, No 149A (26 March 2011). See also Julie Béchard, House of Commons, Social Affairs Division, *Legislative Summary of Bill C-4* (August 2011).

[183] Bill C-4, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, 1st Sess, 41st Parl, 2011. See *House of Commons Debates*, 41st Parl, 1st Sess, No 12 (21 June 2011) at 595 (Hon Vic Toews (Minister of Public Safety)).

[184] *House of Commons Debates*, 41st Parl, 1st Sess, No 90 (6 March 2012) at 5876 (Don Davies).

[185] Neve & Russell, *supra* note 1 at 42. See also Canadian Bar Association, *Bill C-49, Preventing Human Smugglers from Abusing Canada's Immigration System Act* (Ottawa: Canadian Bar Association, 2010) at 1, online: <www.cba.org/cba/submissions/pdf/10-78-

4 were incorporated within the omnibus Bill C-31, *Protecting Canada's Immigration System Act*.

The DFN regime introduced by Bill C-31 hinges on section 20.1 of *IRPA*,[186] which confers power on the Minister to "designate as an irregular arrival the arrival in Canada of a group of persons" on the basis that examinations for the purpose of determining identity and inadmissibility cannot be conducted in a timely manner, or because of a reasonable suspicion that their entry involved people smuggling (contrary to section 117(1)).[187] Section 20.1 does not on its face restrict the application of the DFN provisions to asylum seekers, although in reality "irregular arrivals" are virtually certain to be refugee claimants. While the Minister must have regard to "the public interest"[188] when making a designation, an opinion that the relevant criteria are established is a sufficient basis for designation. Furthermore, subsection (b)[189] enables designation by association, since it is sufficient that a person's arrival in Canada was as part of a group in circumstances that *may* have involved a contravention of section 117(1), irrespective of whether the person is deemed a legitimate asylum seeker. This may contravene international non-discrimination principles.[190] It also squares with a turn toward treating refugee claims as a matter of security, rather than a matter of human rights and immigra-

---

eng.pdf>. The disingenuousness of the title is made particularly clear when it is recalled that section 117(1) of *IRPA*, before it was amended by Bill C-31, already made it an offence to "organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act." Section 41 of Bill C-31 amended this provision to include recklessness as an alternative *mens rea* element.

186 Inserted by section 10 of Bill C-31. The exception in the *IRPA* concerning foreign nationals referred to in section 19 means that permanent residents are not subject to designation (see *IRPA*, *supra* note 3, s 20.1(2)).

187 Section 117(1) of the *IRPA* as amended by Bill C-31 provides: "No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act."

188 *IRPA*, *supra* note 3, s 20.1(1).

189 *Ibid*, s 20.1(1)(b).

190 See e.g. articles 2 and 26 of the ICCPR and possibly article 3 of the *Refugee Convention*. See also UNHCR, "UNHCR Submission on Bill C-31", Legislative Comment on Protecting Canada's Immigration System Act (2012) at para 8. The designation of persons based on their *possible* connection to people smuggling operations also potentially infringes article 16 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) [*Convention Against Smuggling*].

tion.[191] From this perspective, inhospitable treatment of asylum seekers is framed as muscular state policy designed to protect the nation from external threats.

In a manner reminiscent of Australia's temporally specific definition of "designated person" in the *1992 Act*, Bill C-31's transitional provisions enable the Minister to designate persons who arrived after March 31, 2009, which is prior to the arrival of the Sri Lankans.[192] The regime applies to adults and persons who are over the age of sixteen on the date of arrival that is the subject of designation.[193] The detention of children[194] under the DFN regime would seem to contravene the *Convention on the Rights of the Child*, which requires that the best interests of the child be a primary consideration in all state action concerning children,[195] and moreover, stipulates that detention of children should be "a measure of last resort and for the shortest appropriate period of time."[196] This latter principle is incorporated in section 60 of the *IRPA*, suggesting that there is also a conflict within the terms of the *Act*.

Once a person is designated, they *must* be detained until: (a) a final determination is made to allow their claim for refugee protection or application for protection; (b) they are released by the Immigration Division under section 58; or (c) they are released as a result of a Ministerial order under section 58.1.[197] The mandatory nature of detention upon designation is a significant departure from the discretionary detention powers that operate in respect of non-DFNs. Section 55(3) of the *IRPA* provides that "a foreign national *may*, on entry into Canada, be detained"[198] if it is necessary for the completion of an examination or because of suspected inadmissibility. While Bill C-31's introduction of mandatory detention echoes the reforms initiated by the *1992 Act* in Australia, it is important to recall that detention in Canada is only mandatory upon designation; that is, it remains somewhat more particularized than the approach taken

---

191 See Chimni, "Globalization", *supra* note 5; Dauvergne, "Less Brave New World", *supra* note 5; Rygiel, *supra* note 8; MacIntosh, *supra* note 176.

192 Bill C-31, *supra* note 2, cl 81(1).

193 See *IRPA*, *supra* note 3, s 55(3.1).

194 Under international law, a child is any person under the age of eighteen years (see *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 1 (entered into force 2 September 1990)). Under Canadian law, a minor is anyone under the age of eighteen or nineteen (depending on the province in question).

195 See *ibid*, art 3(1).

196 *Ibid*, art 37(b).

197 See *IRPA*, *supra* note 3, s 56(2)(a)–(c).

198 [Emphasis added].

in Australia whereby *all* unauthorized boat arrivals are subject to mandatory detention.

Initial review of a DFN's case must occur within fourteen days of designation. By section 58(1.1),

> on the conclusion of a review under subsection 57.1(1), the Immigration Division shall order the continued detention of the designated foreign national if it is satisfied that any of the grounds described in paragraphs (1)(*a*) to (*c*) and (*e*) exist, and it may not consider any other factors.[199]

If release is ordered, the Immigration Division may impose any prescribed condition on the DFN.[200] If release is not ordered, further review must *not* occur for six months from the date of the previous review.[201]

The *IRPA* does not impose a ceiling on the period for which a DFN may ultimately be detained. In theory, if the Immigration Division is satisfied at each review that the person falls within one of the specified categories in section 58(1), detention may be indefinite. In this respect, the amendments are similar in effect to the 1994 changes to Australia's immigration system, in which detention of asylum seekers became potential-

---

[199] See *ibid*, s 58(1). Those grounds encompass satisfaction on the part of the Immigration Division that:

> (*a*) they are a danger to the public;
>
> (*b*) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
>
> (*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
>
> ...
>
> (*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

[200] See *ibid*, s 58(4).

[201] See *ibid*, s 57.1(2). Further review was originally precluded for twelve months, but the government followed a recommendation by the House Standing Committee on Citizenship and Immigration that this be reduced to six months (see House of Commons, Standing Committee on Citizenship and Immigration, *Third Report* (May 2012) (Chair: David Tilson)). In contrast, section 57 provides that initial review of permanent residents and non-DFN foreign nations is to take place within forty-eight hours, then at least once more in the following seven days, and at least once more in every thirty-day period thereafter.

ly indefinite.[202] The *Immigration and Refugee Protection Regulations* articulate a list of factors to be considered in determining whether a person is to be released from detention.[203] However, as the Immigration Review Board's Guidelines make clear,

> [i]f detention under the *IRPA* has been lengthy and there are still certain steps that must be taken in the immigration context, if valid reasons still remain to order continued detention, such as flight risk or danger to the public, an order for continued detention does not constitute indefinite detention.[204]

In this context, it is to be recalled that in *A v. Australia*, the Human Rights Committee determined that prolonged administrative detention is a breach of article 9 of the ICCPR.[205] Similarly, the Supreme Court in *Charkaoui v. Canada (Citizenship and Immigration)* held that prolonged detention without meaningful review could constitute cruel and unusual punishment contrary to section 12 of the *Charter*.[206] As noted above, long-term detention of asylum seekers may also be viewed as a contravention of the right to hospitality.

DFNs are also subject to a suite of detrimental consequences in addition to detention. By section 20.2(1) of the *IRPA*, a DFN may not apply for permanent residence for five years from the date of designation;[207] where a claim or application for protection has been made, permanent residence cannot be granted until five years from the date on which a final determination is made in respect of the claim or application, as applicable.[208] This means that even persons who are granted refugee protection are unable to apply for permanent residence until five years from the date of that determination. The five-year bar also applies to applications for permanent residency on humanitarian grounds.[209] The inability to regularize one's

---

202 See *Al-Kateb*, *supra* note 70.

203 SOR/2002-227, s 248.

204 Immigration and Refugee Board of Canada, "Guideline 2: Guideline on Detention", Guidelines Issued by the Chairperson, Pursuant to Paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* (Ottawa: Immigration and Refugee Board of Canada, 5 June 2013) at para 3.4.1.

205 Arguably, detention of smuggled migrants also contravenes art 16 of the *Protocol Against Smuggling* (see "UNHCR Submission on Bill C-31", *supra* note 190 at para 6).

206 See 2007 SCC 9 at para 107, [2007] 1 SCR 350 [*Charkaoui*].

207 For reasons that have not been publicly explained, this provision appears to replicate s 11(1.1).

208 Similarly, if a foreign national who has lodged an application for permanent residence is subsequently designated a DFN, their application is suspended for five years (see *IRPA*, *supra* note 3, s 20.1(2)). Section 24(5) operates in the same way in respect of temporary resident permits.

209 See *IRPA*, *supra* note 3, s 25(1.01).

status means that DFNs are prevented from sponsoring their family members to join them for five years from the date of designation.[210] This is compounded by the inability of DFNs to obtain travel documents. Section 31.1 provides that a DFN is not "lawfully staying in Canada" for the purposes of article 28 of the *Refugee Convention*. The cumulative effect of these provisions is that persons deemed to be DFNs are cut off from their families for up to seven years, and possibly even longer, given that impecuniousness could preclude immediate travel. The UNHCR has observed that this outcome does not accord proper respect to the principle of family unity under international law.[211] The Canadian Bar Association has argued that "[d]enying family reunification by denial of access to [permanent resident] status is inconsistent with Article 23 of the [ICCPR]."[212] In view of these consequences, it seems reasonable to argue that the DFN regime, in whole or in part, is punitive. A punitive regime contravenes article 31(1) of the *Refugee Convention* and demonstrates a deliberately inhospitable stance toward those persons for whom an absence of protection and even minimal rights may be destructive.

Fair procedure is significantly compromised as the scope for appeals by DFNs is extremely limited. The *IRPA* does not provide a mechanism for appeals against designation, while rights of appeal in respect of "a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a [DFN]" are also precluded.[213] The UNHCR has observed that the removal of merits reviews of first instance decisions risks contravention of the *non-refoulement* principle in the *Refugee Convention*.[214] In combination with mandatory detention, this policy also breaches article 9 of the ICCPR.[215]

In December 2012, pursuant to section 20.1(1)(b) of the *IRPA*, the Minister of Public Safety designated 85 Romanians[216] who arrived in Quebec after having crossed the Canada-US border in five groups be-

---

[210] See *ibid*, ss 13(1) (enabling permanent residents to sponsor a foreign national), 20.2(1)(a)–(c) (preventing designated foreign nationals from applying to become permanent residents for five years; see *supra* notes 186-190 and accompanying text).

[211] See "UNHCR Submission on Bill C-31", *supra* note 190 at para 25.

[212] Canadian Bar Association, *supra* note 185 at 9.

[213] See *IRPA*, *supra* note 3, s 110(2)(a).

[214] See "UNHCR Submission on Bill C-31", *supra* note 190 at para 45.

[215] See *ibid* at para 11.

[216] See Daniel LeBlanc, "Ottawa Gets Tough with Romanian Asylum Seekers", *The Globe and Mail* (5 December 2012), online: <www.theglobeandmail.com/news/politics/ottawa-gets-tough-with-romanian-asylum-seekers/article5992117>.

tween February and October 2012.[217] Given that none of the eighty-five DFNs were ever proven to be the smugglers who facilitated the Romanians' entry, it is doubtful that the designation succeeds in sending the "strong message" that the government of Canada "will take decisive action against those who earn their livelihood by criminally exploiting Canada's immigration system."[218] Instead, the designation demonstrates the actualization of the securitizing logic that undergirds Bill C-31 and distances Canada from the politics of hospitality.

C. The DFN Provisions Contravene the Charter

Perhaps the strongest indication of the extent to which an ideology of control has taken root in Canadian immigration policy is the multiple ways in which the DFN provisions infringe the *Charter*. As a threshold matter, the *Charter* is not confined to Canadian citizens or residents. *Singh* and *Charkaoui* make it clear that at the very least, rights granted by sections 7, 9, 10, and 12[219] of the *Charter* may be asserted by everyone who is physically present in Canada.[220] This being said, *Toussaint v. Canada (AG)* indicates that there are limits to the ability of non-citizens within Canada to invoke the protection of the *Charter*.[221] Furthermore, in a recent study of *Charter* cases involving non-citizens, Catherine Dauvergne concluded that the *Charter* has failed "to deliver on its promise of human rights protections for non-citizens."[222]

---

[217] See Public Safety Canada, News Release, "Minister of Public Safety Makes First Designation of Irregular Arrival Under *Protecting Canada's Immigration System Act*" (5 December 2012), online: <www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20121205-eng.aspx>.

[218] *Ibid*.

[219] *Charkaoui* also dealt with a claim under s 15 of the *Charter*. However, the Court rejected the application of section 15 to non-citizens based on section 6 (see *Charkaoui*, *supra* note 206 at para 129). The Court said that while the applicants' detentions had been lengthy, it was not divorced from the purpose of deportation (see *ibid* at para 131). Thus, while the possibility of a section 15 challenge remains if it can be shown that the consequences of a contravention of immigration law bears no relation to deportation, it is not a particularly fruitful line of argument and accordingly is not dealt with any further in this paper.

[220] See *Singh*, *supra* note 171 at 202.

[221] 2010 FC 810, [2011] 4 FCR 367, aff'd 2011 FCA 213, [2013] 1 FCR 374, leave to appeal to SCC refused, 34446 (5 April 2012). The Federal Court rejected the applicant's claim that denying her health coverage infringed section 7 of the *Charter* because she had chosen to remain in Canada illegally (see *ibid* at para 94).

[222] "How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663 at 666.

1. Detention and Imprisonment

The designation and detention provisions, in whole or in part, likely breach sections 9 and 10(c) of the *Charter*. Of course, in *Charkaoui*, the Court unanimously held that detention of foreign nationals against whom security certificates had been issued did *not* per se infringe section 9 because there was a rational connection between the issuing of the certificate and the objective of national security.[223] This invites greater scrutiny as to the objectives of the DFN regime. Section 20.1 of the *IRPA* indicates that the regime's objectives are to determine the identity and potential security risks of irregular arrivals; textually, therefore, the objectives of the regime are not intrinsically irrational or arbitrary. It follows that the designation and *initial* detention for fourteen days under the DFN regime may not necessarily infringe sections 9 and 10(c) of the *Charter*, because such measures are, arguably, either necessary to realize the legislative objectives, or bear a rational relationship to those objectives.[224] Crucially, though, the consequences of designation strongly suggest a deterrence objective. Section 3(2) of the *IRPA* indicates that deterrence is not a valid objective within the terms of the *Act*.[225] Such an objective in conjunction with the absence of judicial oversight of designation, *and* the fourteen-day initial detention period without review, may render the detention arbitrary, and hence in contravention of sections 9 and 10(c). As the Court in *Charkaoui* observed, the provisions in the *IRPA* that provide for review of detention of permanent residents named in security certificates within forty-eight hours, and of foreign nationals outside of the security certificate context within twenty-four hours, "indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed."[226] In any event, the subsequent detention of DFNs for a minimum of six months is much more likely to be considered arbitrary. The Court in *Charkaoui* held that the lack of review of detention of foreign nationals for 120 days following judicial determination[227] of the reasonableness of the certificate infringed both

---

[223] See *Charkaoui*, *supra* note 206 at paras 88–89.

[224] See *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 132, [2011] 3 SCR 134 [*PHS*], citing *Chaoulli v Quebec (AG)*, 2005 SCC 34 at paras 131–32, 232, [2005] 1 SCR 791 [*Chaoulli*].

[225] It is conceivable that a deterrence objective grounded in concern over loss of life occasioned by the mode of irregular arrival (for example, dangerous vessels) might be valid; however, the attendant consequences of designation would still be arbitrary and disproportionate.

[226] *Charkaoui*, *supra* note 206 at para 91.

[227] See *ibid* at paras 61, 65 (albeit pursuant to a flawed process that infringed section 7 of the *Charter*).

sections 9 and 10(c) of the *Charter*.[228] By parity of reasoning, it is difficult to see how detention for six months following an administrative determination is necessary, or in furtherance of the legislative objective, which in turn suggests that such detention is arbitrary and in contravention of sections 9 and 10(c). This being said, it is arguable that the time involved in processing significant numbers of asylum seekers justifies the lengthy detention period.

2. Fundamental Justice

It is likely that the absence of judicial review of mandatory detention of DFNs breaches section 7 of the *Charter* because loss of liberty is imposed in an arbitrary manner contrary to fundamental justice;[229] in particular, the principle that persons must be able to challenge ongoing detention or the conditions of release. In the migration context, *Charkaoui* makes clear that a challenge "to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise[s] important issues of liberty and security" and, accordingly, engages the detainee's section 7 *Charter* rights.[230] The Court in that case held that judicial oversight of the process did not meet the requirements of section 7 because "the secrecy required by the scheme denie[d] the named person the opportunity to know the case" against them, thereby failing to afford the fair hearing that is required before depriving a person of life, liberty, or security.[231] In contrast, the DFN scheme does not provide for even minimal judicial scrutiny of the Minister's determination that a foreign national is a DFN. While the argument that immigration detention is not arbitrary per se might support a finding that the initial fourteen-day period of detention is valid, it is unlikely that ongoing detention without judicial scrutiny could pass constitutional muster. According to McLachlin CJ in *Charkaoui*:

> [W]here a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful oppor-

---

[228] See *ibid* at para 91.

[229] See *Chaoulli*, *supra* note 224 at paras 128–53.

[230] *Charkaoui*, *supra* note 206 at para 18. The Court clarified that while deportation of a non-citizen does not *in itself* constitute a breach of section 7 of the *Charter*, the manner in which a decision to deport a non-citizen is reached may implicate that section (*ibid* at paras 16–17; Accord *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46, [2005] 2 SCR 539).

[231] *Charkaoui*, *supra* note 206 at para 65.

> tunities to challenge their continued detention or the conditions of their release.[232]

For similar reasons, the detention provisions for DFNs may infringe section 7 by reason of overbreadth.[233] The decision in *R v. Heywood*[234] makes clear that the doctrine of overbreadth looks to the purpose underlying a law, and considers whether the means are sufficiently tailored to meet that objective. Specifically, *Heywood* suggests that the question of breadth is likely to turn on the period of time deemed necessary to achieve the legislative object.[235] The government has made it clear that detention of smuggled migrants is intended to enable identification and assessment of security risks.[236] Fourteen days' detention is arguably not excessive (and therefore not overbroad) for this purpose; on the other hand, six months' detention may well be sufficiently disproportionate—that is, beyond what is necessary to achieve the legislative object—to warrant judicial intervention.

The DFN provisions may also constitute an infringement of the right to security of the person guaranteed by section 7 of the *Charter* because of their likely or demonstrated deleterious impact on the psychological well-being of designated persons. It is an established principle in Canadian law that "serious state-imposed psychological stress" can infringe security of the person for the purposes of section 7.[237] The cases thus far have applied this principle in the context of criminal law,[238] child custody,[239] and unreasonable delay by government entities.[240] There exists overwhelming evidence, much of it derived from the Australian experiment, that immigration detention, particularly indefinite detention, has disastrous effects on the mental health of detainees.[241] In addition, it is reasonable to assume that the denial of the ability to regularize one's status, combined with en-

---

[232] *Ibid* at para 107.

[233] See e.g. Canadian Association of Refugee Lawyers, "The Unconstitutionality of Bill C-4, The Preventing Human Smugglers from Abusing Canada's Immigration System Act" (October 2011) at 12, online: <www.cdp-hrc.uottawa.ca>.

[234] [1994] 3 SCR 761 at 792, 120 DLR (4th) 348 [*Heywood* cited to SCR].

[235] See *ibid* at 796.

[236] See Kenney, *supra* note 12 at 5873 ("[w]e have to be able to keep illegal immigrants in custody, in a completely humanitarian way, so that they can be identified").

[237] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 55–56, [2000] 2 SCR 307 [*Blencoe*].

[238] See *R v Morgentaler*, [1988] 1 SCR 30 at 56, 44 DLR (4th) 385.

[239] See *New Brunswick v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124; *Winnipeg Child and Family Services v KLW*, 2000 SCC 48, [2002] 2 SCR 519.

[240] See *Blencoe, supra* note 237 at para 115.

[241] See *supra* note 19.

forced family separation, will have serious negative psychological effects.[242] The cumulative effect of putative or actual psychological harm by reason of the DFN provisions may in itself ground a claim under section 7 since, as the Court in *Suresh v. Canada (Minister of Citizenship and Immigration)* made clear, grossly disproportionate government responses may not satisfy the second limb of section 7, amounting to a denial of fundamental justice.[243] This being said, to the extent that a person seeking protection is found to be a security risk, psychological harm occasioned by lengthy detention appears less likely to result in a finding that the *Charter* has been infringed.[244]

As an additional rider to the comments above concerning section 7, section 58.1 of the *IRPA* enables release of DFNs from detention upon the request of a DFN "if, in the Minister's opinion, exceptional circumstances exist that warrant the release"; release is also possible on the Minister's own initiative "if, in the Minister's opinion, the reasons for the detention no longer exist." The insertion of these provisions responds to the finding of the Supreme Court in *Canada (AG) v. PHS Community Services Society* that the existence of a potential ministerial exemption from certain consequences may protect legislation that confers discretion.[245] Thus, section 58.1 might insulate the designation provisions from a finding that they contravene principles of fundamental justice. Notwithstanding, *PHS* also demonstrated that even if impugned *provisions* are valid, the correlative *exercise* of discretion (including failure to act) might infringe the *Charter*.[246] Thus, the Minister's decision not to grant an exemption under section 58.1 could itself be arbitrary or grossly disproportionate by reason of its consequences, thereby infringing section 7.[247] This would of course necessitate consideration of the facts in relation to a particular DFN; concrete evidence that a person was operationally involved in human smuggling or terrorism might justify ongoing detention.[248] However, if the evidence put forward relies on the simple fact that a person is an asylum seeker who engaged the services of a human smuggler, this might lead to the conclusion that detention is grossly disproportionate.

---

242 See Mansouri & Leach, *supra* note 76 at 110.

243 2002 SCC 1 at para 47, [2002] 1 SCR 3 [*Suresh*].

244 See *Mahjoub (Re)*, 2013 FC 1095, FCJ No 1216 (QL).

245 See *PHS*, *supra* note 224 at para 114.

246 See *ibid* at para 117. See also *Suresh*, *supra* note 243 at para 5.

247 See *PHS*, *supra* note 224 at paras 127–36.

248 Whether on the grounds of necessity for or consistency with a legitimate state interest (see *ibid* at para 132).

3. Cruel and Unusual Punishment

The detention provisions appear to infringe the guarantee in section 12 of the *Charter* against cruel and unusual treatment or punishment. It is clear that section 12 applies in contexts beyond penal incarceration.[249] *Charkaoui* tells us that, because of its potentially harmful psychological effects, prolonged detention under immigration law requires ongoing review and the provision of meaningful opportunities to challenge detention or conditions of release.[250] In that case, the Court denied that a breach of section 12 (or section 7) of the *Charter* had occurred by reason of extended detention[251] since there were found to be meaningful opportunities for review based on established criteria.[252] Accordingly, it may be that the existence of review at six monthly periods in accordance with the criteria in section 58(1) and Part 14 of the Regulations satisfies the requirement put forward in *Charkaoui*. However, there is a crucial difference between the DFN regime and that which was considered in *Charkaoui*: review under the DFN regime is conducted by the Immigration Division—an administrative entity—whereas the acceptability of the review process in *Charkaoui* was premised on "robust ongoing *judicial* review of the continued need for and justice of the detainee's detention."[253] This distinction in itself may be sufficient to challenge the detention regime on the basis of section 12.

4. Section 1

Assuming that one or more of the grounds above is successful, it will fall to the government to justify the infringement(s) under section 1 of the *Charter*.[254] The first limb of the *R v. Oakes*[255] test requires that the objec-

---

[249] See e.g. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342; *R v Blakeman* (1988), [1990] 48 CRR 222, [1988] OJ No 1382 (QL) (Ont HC).

[250] See *Charkaoui*, *supra* note 206 at para 107.

[251] See *ibid* at para 110. A breach of section 7 was found on the alternative basis that detainees were not provided with information necessary to effectively rebut the basis for their incarceration (see *ibid* at para 65).

[252] See *ibid* at paras 110–16, 123.

[253] *Ibid* at para 123 [emphasis added]. See also *ibid*: "there must be detention reviews on a regular basis, at which times the reviewing *judge* should be able to look at all factors relevant to the justice of continued detention" at para 117 [emphasis added]).

[254] There is little doubt that the DFN provisions constitute a regime "prescribed by law." See *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69 at para 133, [2002] 2 SCR 1120 for the argument that the discretion conferred upon the Minister to make designations means that the decision, rather than the statute, is amenable to challenge. The detailed nature of the provisions that come into play upon the making of a designation suggests that it would be specious to characterize the regime as not being prescribed by law.

tive sought by the limit is sufficiently important.[256] As noted above, the stated objectives of the DFN regime (determination of the identity and potential security risks of irregular arrivals[257]) are by no means unimportant. The underlying objective, however, is potentially on less stable ground. While section 3(2) of the *IRPA* provides that deterrence is not a valid objective, in Canada, as in Australia,[258] "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[259] There is added support for the conclusion that deterrence is, in law, a permissible objective despite the *IRPA* if a national security element inheres in the purpose of the DFN regime,[260] since "protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective."[261] Assuming that this first limb is satisfied, designation and initial detention likely bear a sufficiently rational connection to the purpose of the provisions given that these mechanisms enable identity and security checks. It is less clear whether long-term or indefinite detention, denial of status and rights to family reunion, and rights of appeal bear a rational connection to the purpose of the law. On the one hand, their punitive nature could be considered a rational, if inhumane, means of deterring unauthorized arrivals. On the other hand, these means can be considered so disproportionate that any connection cannot rightly be called rational; indeed, this would be the case if the core objectives were found to be identity and security checks. Whether or not the provisions survive this far, it is

---

255 [1986] 1 SCR 103 at 138–39, 26 DLR (4th) 200 [*Oakes*].

256 Determination of the specific purpose of the DFN regime will be a matter for judicial determination, since legislative intent is not divined merely by recourse to the subjective intentions of policy makers. While "[l]egislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation," Hogg argues that there is no reason why such history should not be resorted to in the context of judicial review. In addition, "it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible" (Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2012) at 15-15).

257 See *IRPA*, *supra* note 3, s 20.1.

258 See *Chu Kheng Lim*, *supra* note 60.

259 *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 at 733, 90 DLR (4th) 289.

260 For example, s 20.1(1)(b) refers to "criminal organization[s] or terrorist group[s]." That said, a reviewing court may be inclined to treat the reference to terrorist groups as a colourable device to achieve validity rather than a legitimate government objective (see *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537 (colourability doctrine allowing Court to go beyond "form alone ... [and] examine the substance of the legislation to determine what the legislature is really doing" at 496).

261 *Charkaoui*, *supra* note 206 at para 68.

likely that they will fall foul of the next limb of the proportionality inquiry, which questions whether the means adopted minimally impair *Charter* rights. It is not clear that the *IRPA*'s initial fourteen-day detention period without review (at section 57.1(1)) can be considered a minimal impairment.[262] The Supreme Court has indicated that a margin of appreciation must be accorded to the legislature; however, it has also made clear that infringements of section 7 in particular are held to an extremely high standard of justification.[263] For argument's sake, if the provisions were held to minimally impair a DFN's *Charter* rights, it could also be argued that the effects of those impairments outweigh the benefits of the law in the final consideration of the *Oakes* test.[264] This is in essence a normative determination as to whether even minimally impairing measures constitute impermissible infringements of *Charter* values.[265] Given the nature and severity of the infringements, it seems unlikely that the DFN provisions would survive the final part of the test.

Conclusion

During debate in the House of Commons concerning Bill C-31, then Minister of Citizenship, Immigration and Multiculturalism Jason Kenney stated:

> Canada has a proud tradition as a welcoming country. For generations, for centuries, we have welcomed newcomers from all parts of the globe. For more than four centuries, we have welcomed new arrivals, economic immigrants, pioneers, farmers, workers and, of course, refugees needing our protection. We have a humanitarian tradition that we are very proud of. ... With this bill, this government is going to reinforce and enhance our tradition of protecting refugees.[266]

---

[262] For example, this initial detention period could be shortened to accord with the requirement that the Immigration Division review the reasons for permanent residents who are taken into detention under section 57(1) of the *IRPA* within forty-eight hours. The time in which subsequent review occurs could be shortened. The denial of status could be removed or at least shortened; so too could the prohibition on family sponsorship and the grant of travel documents.

[263] See *Charkaoui*, *supra* note 206 ("violations of s. 7 are not easily saved by s. 1" at para 66). The Court also referred to *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536, in which Lamer J (as he then was) stated, "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."

[264] See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

[265] See Hogg, *supra* note 256 at 38-43.

[266] Kenney, *supra* note 12 at 5872.

While the Minister engaged in an overly generous reading of Canadian history, it is true that Canada has periodically evinced great hospitality toward non-citizens. However, it is difficult to see how Bill C-31 will reinforce or enhance the protection of refugees. Instead, as demonstrated, the measures introduced by the Bill, particularly the DFN provisions, reinforce the veracity of Dauvergne's view that

> migration is becoming normalized as a security threat at this point in time ... it is more and more normal to treat migration, and asylum seeking, as a policing matter rather than a question of economic redistribution, social composition, or humanitarianism.[267]

In this respect, the DFN regime is antithetical to a politics of hospitality; it is also contrary to international law and the *Charter*.

The passage of Bill C-31 places Canada in a position analogous to Australia following its introduction of mandatory and indefinite detention in the early 1990s. In the context of a comparison between Canadian and Australian detention regimes, it must be recalled that the fulcrum upon which Australia's mandatory detention system initially swung was the creation of a class of "designated persons"—a group of others who deserved neither hospitality nor humane treatment. Having enacted its own designation provisions in respect of groups of individuals, and countries deemed to be safe,[268] Canada now faces a choice similar to that confronting Australia two decades ago: to proceed down a path of securitization and ideological hostility toward asylum seekers, or to revert back to the more hospitable position taken in the 1970s.

The analysis in this paper demonstrates that Australia erred not only in introducing designation and mandatory detention, but more particularly, in building upon this policy based on a "self-referential" philosophy wherein "[e]ach decision to tighten the law was made on the logic of earlier initiatives."[269] Logic of this sort led the former government to propose the draconian measure of sending asylum seekers to a country that has not ratified the *Refugee Convention*, and where refugees "may be subject to detention, prosecution, whipping and deportation."[270] The present government has adopted an approach to asylum seekers that rhetorically and operationally resembles military action; an approach that in certain in-

---

[267] Dauvergne, "Less Brave New World", *supra* note 5 at 542.

[268] See *Order Designating Countries of Origin*, *supra* note 3.

[269] Crock, "Defining Strangers", *supra* note 40 at 1070.

[270] Spinks, *Destination Anywhere?*, *supra* note 122 at 8 [internal citation omitted].

stances amounts to an attempt to deny the very right to have rights.[271] To borrow from Benhabib, in Australia the "right to universal hospitality [has been] sacrificed on the altar of state interest."[272]

Unless Canada distances itself from Australia's model, Bill C-31 puts Canada at risk of sinking further into the securitizing logic that characterizes Australia's approach to asylum seekers; history supports this claim. Without wishing to obscure differences in context and approach, there is an undeniable correspondence between the treatment of, and attitudes toward, refugees in Australia and Canada throughout much of the twentieth century; in no small part because of a shared "degree of angst about their national identity."[273] While Canada largely eschewed militaristic policies toward asylum seekers in the 1990s and even in the wake of 9/11, Bill C-31 (and other measures such as the *Canada—US Safe Third Country Agreement* and the Multiple Borders Strategy) suggests that Canada is deliberately working toward Australian-like migration policies.[274] For Canada to regain the position it held in the 1970s and early 1980s as a global leader in refugee protection, it must realign its policies away from an ideology of security and control, toward a politics of hospitality. Repealing the DFN provisions will be a crucial step in this process.

---

[271] See *supra* note 33 for a discussion of the right to have rights. In particular, the detaining of 157 Sri Lankan asylum seekers onboard an Australian customs vessel constituted an attempt to deny access to legal representation and the judicial system.

[272] "The Rights of Others", *supra* note 9 at 177.

[273] Dauvergne, *Humanitarianism*, *supra* note 115 at 10.

[274] See *Refugee Care*, *supra* note 3 (the government's attempt to limit refugees' access to health care is another example of this trend). While the Federal Court struck down the measures at issue in *Refugee Care*, the government has indicated its intention to appeal (see Payton, *supra* note 3).