

Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia

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I. Introduction

James Hathaway writes that:

[c]urrent refugee law can be thought of as a compromise between the sovereign prerogatives of states to control immigration and the reality of coerced movements of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both humanitarian and human rights paradigms would suggest), but rather to govern disruptions of regulated international migration in accordance with the interests of states.¹

This paper accepts that Hathaway's characterisation of international refugee law is largely correct and examines the future for refugee law using the Cambodian asylum-seekers² in Australia as a case-study. It is argued that States are adopting restrictive or deterrence strategies to prevent asylum-seekers from reaching their borders, further limiting the already constrained protection offered by international refugee law. The paper summarises the treatment of Cambodian asylum-seekers, placing it in the global context of restrictive strategies. Then, the capacity of the international legal order to respond to the refugee crisis is examined, paying particular attention to the system's underpinnings of sovereignty and State practice. Some models for more positive

1 Hathaway J, *The Law of Refugee Status* (1991), p 2.

2 The term "asylum-seeker" is used for all persons seeking admission to other countries on the basis that their decisions to leave have been coerced in some sense. The term "refugee" is reserved for persons determined to meet the definition contained in the 1951 Convention relating to the Status of Refugees, done 28 July 1951, 189 UNTS 150 (entered into force 21 April 1954) [hereafter "Refugee Convention" or "the Convention"] as amended by the 1967 Protocol relating to the status of Refugees, done 1 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [hereafter "the Protocol"]; references to the Convention will mean the Convention as amended by the Protocol]. See n 40 below and accompanying text for the definition of refugee contained in the Convention. The term migrant or immigrant is used as a general category for persons whose movement across international borders is categorised as "voluntary".

action, namely State responsibility, collective action through the United Nations (UN) and burden-sharing are explored. Finally, the treatment of the Cambodians is returned to and appraised in detail. It is demonstrated that some aspects of the Cambodians' treatment show that the Australian Government is more concerned to control its borders than to provide an effective humanitarian response to the refugee crisis.

II. Treatment Accorded to Cambodian Asylum-Seekers in Australia in Global Context

In late 1989, as internationally sponsored peace talks between the four factions fighting the Cambodian civil war foundered, the first of several small boats carrying Cambodian asylum-seekers arrived on Australian shores. Shortly afterward, Prime Minister Robert Hawke announced that the Cambodians were economic migrants.³ While Australian officials helped to push the peace talks toward resolution in 1991, this group of asylum-seekers was detained for over two years awaiting the Australian Federal Government's determination concerning their claims for refugee status.⁴ In April 1992, about 37 of these asylum-seekers were denied refugee status and a Federal Court action⁵ was initiated, challenging these decisions and requesting release of the "boat people".⁶ Counsel for the Government admitted legal mistakes in the decisions on refugee status.⁷ The Court set the decisions aside and fixed the date of the hearing regarding the request for release for 7 May 1992.

3 See Masanauskas, "Government has only itself to blame", *The Age* (17 April 1992), p 4.

4 Australia is party to both the Refugee Convention and the Protocol and the definition of refugee applied in Australian refugee status determination proceedings is that contained in the Convention.

5 The Federal Court, one of three courts exercising federal jurisdiction in Australia, is the first judicial port of call in immigration matters. Immigration matters are dealt with by administrative bodies and judicial scrutiny in the first instance has generally been limited to review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) [hereafter "ADJR Act"]. The Migration Reform Act 1992 (Cth) [hereafter "Migration Reform Act"] alters the scheme for review. This Act was to have come into force in 1993, but it has provoked considerable controversy. Implementation of most of its provisions was delayed until 1 September 1994, with the expectation that it would be substantially amended before then. The Migration Reform Act abolishes access to the Federal Court through the ADJR Act. Instead, the Migration Reform Act sets out limited grounds of review by the Federal Court. See analysis at n 211 below, and accompanying text. The next step in judicial review is the High Court, the peak of the Australian judicial system, which may be called upon to review decisions of the Federal Court.

6 The term "boat people" is widely used for persons arriving by boat who have not gained authorisation for entry under national immigration laws.

7 Reuter, "Australia admits bungling deportation order" (14 April 1992) [available in LEXIS-NEXIS library non-US news file].

On 5 May 1992, the Government pushed through Parliament new legislation inserting what is now Division 6 of Part 2 into the Migration Act.⁸ Sections 177 and 178 of Division 6 provide for the compulsory detention of “boat people”, or “designated persons” to use the legislators’ words.⁹ A time limit of 273 days of detention is specified in the legislation. But this period only covers situations where the immigration authorities are responsible for the length of time in detention because they have not yet processed the application for entry.¹⁰ Periods when court proceedings concerning the asylum-seekers’ applications for entry are in train are defined as situations where the immigration authorities are not responsible for the time spent in detention. In these cases, the clock stops running and the asylum-seekers may legally be detained for over 273 days. Thus the legislation contemplated prolonged periods of detention such as those experienced by the Cambodian asylum-seekers. For good measure, Section 54R (now Section 183), which was declared invalid by the Australian High Court, provided that “courts shall not order the release of designated persons.”

The legislation sparked a national controversy. Human rights advocates charged that the asylum-seekers’ human rights had been violated; the Government retorted that it was protecting Australia’s right to control its borders and restrict immigration;¹¹ and the High Court confirmed the constitutional validity of most of the legislation.¹² Emboldened by the High Court’s decision, the Government passed further legislation limiting compensation claims by all asylum-seekers wrongfully detained before the

8 Migration Act 1958 (Cth) [hereafter “Migration Act”] as amended by the Migration Amendment Act (No 4) 1992 (Cth). These amendments originally appeared as Division 4B, but from 1 September 1994, the amendments appear as Part 2, Division 6 of the Migration Act and are referred to hereafter as “Division 6”. In addition a new regime of immigration detention applies for “boat people” arriving after 1 September 1994. See n 20 below, and accompanying text.

9 See Section 177. The term “designated persons” is defined in Section 177. Despite the over-broad terms of the definition—the High Court found in its review of Division 6 that the definition could include tourists from New Zealand who go on a fishing trip while visiting Australia—the definition was upheld and its terms will not be discussed as it clearly encompassed the Cambodian asylum-seekers. See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, 110 ALR 97 [hereafter “*Lim*”] at 110 (Brennan, Deane, and Dawson JJ).

10 The effectiveness of these limitations, set down in Section 182 of Division 6, in ensuring compliance with Australia’s international human rights obligations is analysed below, in Section IV(B).

11 See eg Milliken, “Voyage of hope ends in despair for boat people”, *The Independent* (30 November 1992), p 13; Suganthi, “Cambodians fail to find freedom even away from home”, Interpress Service (4 January 1993) [available in LEXIS-NEXIS library wires file]; Reuters, “Australia insensitive to Cambodia Refugees—Judge” (17 June 1992) [available in LEXIS-NEXIS library non-US news file]; Easterbrook, “Boat people on a rocky shore”, *The Age* (30 November 1992), p 13; Easterbrook, “Refugee policy assumes guilt, says council”, *The Age* (12 November 1992), p 15.

12 *Lim*, n 9 above.

passage of Division 6.¹³ Then, despite a Federal Court ruling¹⁴ that it was open to the responsible Minister¹⁵ to exercise his discretion to grant stay on humanitarian grounds to those asylum-seekers who did not qualify for refugee status, the Minister declared that he would not consider exercising this power in favour of the forty-eight persons involved in that court action.¹⁶

The Government's triumph may be short-lived as even it appears to have recognised, to a small extent, with the introduction of a new "special assistance" category of immigration from Cambodia. This category is open to people with close links to Australia who are experiencing "hardship as a result of the upheavals in Cambodia over recent years".¹⁷ Asylum-seekers who arrived in Australia between 28 November 1989 and 26 April 1991, and who were placed in immigration detention are eligible to migrate to Australia, provided they return to Cambodia for twelve months.¹⁸ In addition, the Government has legislated for "bridging visas" which permit release of some immigration detainees. Bridging visas are part of the Government's overhaul of the Migration Act carried out by the Migration Reform Act.¹⁹ From 1 September 1994 new arrivals of "boat people" will be subject to detention under the same regime as persons who have entered Australia but do not have valid immigration status. The 273 day limit is no longer applicable—presumably because it is anticipated that refugee status determinations will not be subject to the same delays experienced by some of the Cambodian asylum-seekers—and detainees are to be held until removed or granted a visa,²⁰ subject to the availability of a bridging visa.²¹ Bridging visas are available to persons who have been "immigration cleared" or have been prescribed as an eligible class.²² "Boat people" have been prescribed eligible for bridging visas on an extremely limited

13 The Immigration Amendment Act (No 4) 1993 (Cth) inserted Section 54 RA into the Migration Act, limiting compensation to \$1 a day. From 1 September 1994, this section appears as Section 184. For the text of Section 184, see n 286 below.

14 See decision of Justice Wilcox in *Lek Kim Sroun v The Minister for Immigration, Local Government and Ethnic Affairs* (No 1) (1993) 43 FCR 100.

15 Final responsibility for most immigration decisions rests with the Minister for Immigration and Ethnic Affairs [hereafter, "Minister for Immigration" or "Minister"], although successive amendments have sought to diminish the role of the Minister in the decision-making process.

Note that until recently the Department was entitled, the Department of Immigration, Local Government and Ethnic Affairs or DILGEA.

The procedures for determination of refugee status are dealt with below, in Section IV(A).

16 Easterbrook, "Bolkus refuses to budge over Cambodian asylum", *The Age* (25 June 1993), p 5.

17 See Class 214 Cambodian (Special Assistance) Visa and Entry Permit, Division 1.3, Permanent Resident Refugee and Humanitarian Offshore Program, Migration Regulations 1994 (Cth).

18 Detention under Division 6 falls within the definition of "close links" to Australia for purposes of migration. All applicants for this class of visa must have resided in Cambodia for 12 months prior to the application for migration.

19 See n 5 above.

20 Migration Act, s 189.

21 See Migration Act, s 37 and ss 72-76.

22 Migration Act, s 72.

basis. Children, the elderly, spouses of Australian citizens and persons requiring medical treatment, for example because they have suffered torture, are eligible.²³ Thus the policy which caused the controversy has been softened slightly, but is otherwise unchanged.

Any feeling of triumph on the part of the Government for outmanoeuvring the asylum-seekers is unjustified in any event. The Government seeks to prevent the asylum-seekers from establishing a presence in the Australian community by evading immigration authorities. But many detained asylum-seekers have experienced severe depression and have been on hunger-strikes, while others have threatened suicide.²⁴ This demonstrates that the policy of detention has adverse effects which may retard the ability of the asylum-seekers to readjust to any community, whether the Australian community, if they are recognised as refugees, or the Cambodian community, if they are refused refugee status and repatriated. The Government's treatment of asylum-seekers has come under scrutiny from all directions. The Government itself initiated a parliamentary inquiry into detention of asylum-seekers, although the inquiring body, the Joint Standing Committee on Migration, essentially endorsed the Government's mandatory detention policy, with the concession that there be a discretion to order release in limited circumstances if the detention had lasted for six months.²⁵ Judicial scrutiny of the Cambodians' claims has flourished. The Joint Standing Committee expressed concern over the capacity of judicial review to add to the period of detention, but in one of the many Federal Court cases involving asylum-seekers, the Court held that there was a reasonable apprehension of bias in the Australian decision-making process regarding some of the Cambodians' claims for refugee status, due to former Prime Minister Hawke's statement that the asylum-seekers were economic migrants.²⁶ Australia also faces scrutiny under the International Covenant on Civil and Political Rights (ICCPR), as a communication alleging arbitrary detention of the Cambodian asylum-seekers has been lodged with the Human Rights Committee.²⁷ A similar complaint to the UN Working Group on Arbitrary Detention which concerns detained Vietnamese boat people in Hong Kong²⁸ is

23 See regulation 2.20; Bridging visa E, class WE, Schedule 1, 1305; Bridging visa E, class WE, Schedule 2, 050, 051, Migration Regulations 1994 (Cth).

24 Suganthi, n 11 above; Kessels and Efimiou, "Effects of Incarceration" in Crock M (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993), p 91. See generally, Becker and Silove, "The Psychological and Psychosocial Effects of Prolonged Detention" in Crock M (ed), *Ibid*, p 81.

25 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994), AGPS, recommendation 10, p 156.

26 *Mok Gek Bouey v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 47 FCR 1 (appeal pending at the time of writing).

27 Copy on file with the author. The main claim of the communication is that the asylum-seekers have been arbitrarily detained in violation of article 9 of the International Covenant of Civil and Political Rights (ICCPR), 16 December 1966, UNTS entered into force 23 March 1976.

28 Copy on file with the author. The submission, prepared by a team working for the Lawyers Committee for Human Rights, was lodged a couple of months earlier than the Cambodians' communication to the Human Rights Committee. It makes a

likely to be examined before the Human Rights Committee hears the Cambodians' communication and may provide an important precedent on the issue. Regardless of the outcome of the complaints before the Human Rights Committee and the Working Group on Arbitrary Detention, the fact that they have been made, together with the continuing uncertainty regarding the resolution of Cambodia's internal situation, and further action on behalf of detained asylum-seekers in Australian courts,²⁹ should prompt Australians and the international community to rethink current responses to the problem of asylum-seekers.

At stake in this controversy is the fate of the Cambodian asylum-seekers, Australia's concept of sovereignty and, ultimately, the future of the 1951 Convention Relating to the Status of Refugees. Australia's detention policy is just one of the restrictive strategies adopted by traditional countries of refugee resettlement in response to increasing numbers of asylum-seekers. Other measures adopted include interdiction of boats of asylum-seekers on the High Seas,³⁰ direct flight requirements,³¹ "safe-country" determinations,³² orderly

similar case to the Cambodians' claim, alleging that Vietnamese asylum-seekers in Hong Kong have been arbitrarily detained in violation of international law. The author gave assistance to the team preparing the brief.

- 29 Asylum-seekers have successfully argued that the Government has exceeded even the broad mandate for detention set out in Division 6. See, *The Minister for Immigration, Local Government and Ethnic Affairs v Tang Jie Xin* unreported, Neaves J, Federal Court, 13 August 1993. [(1994) ACL Rep (Iss 1) 77 FC 11]. There has also been an unsuccessful class action alleging denial of natural justice by failure to give asylum applicants oral hearings: *Zhang de Yong v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165. And an action has been commenced challenging the limitation of compensation to a dollar a day: *Ly Sok Pheng v The Commonwealth and the Minister for Immigration, Local Government and Ethnic Affairs* (pending at the time of writing). See Porter, "Boat people to claim for damages", *The Age* (24 January 1993). In fact, as of August 1993 every person detained under Division 6, bar one, was involved in litigation against the Government. Department of Immigration and Ethnic Affairs, Submission to the Joint Standing Committee on Migration's Inquiry into Detention Practices, in Crock (ed), n 24 above, p 129 at 137.
- 30 The United States has undertaken a policy of interdicting Haitian asylum-seekers. Successive court challenges of the policy resulted in a "circuit split" between the Second and Eleventh Circuits of the United States Court of Appeals centring on the meaning of "return" or "*refoulement*" under the Refugee Convention. In *Haitian Centers Council, Inc v McNary*, 969 F 2d 1350 (2d Cir 1992), the Second Circuit held that "return" from the High Seas was forbidden and thus the interdiction policy was incompatible with the US legislative provisions which implemented the Protocol. The Eleventh Circuit in *Haitian Refugee Center, Inc v Baker*, 953 F 2d 1498 (1992) held that "return" referred only to return from territorial frontiers and the interdiction policy was therefore legal. The Eleventh Circuit's interpretation was adopted by the Supreme Court in *Sale v Haitian Centers Council, Inc*, 113 S.Ct. 2549; 121 L Ed 2d 441 (1993).
- 31 The term "direct flight requirement", also referred to as the principle of country of first asylum, refers to the practice of requiring an asylum-seeker to claim asylum at the first port of call.
- 32 A recent example of the implementation of "safe country" determinations occurred in Germany, where various countries were described as "safe", creating a

departure programs,³³ and visa regimes and carrier sanctions.³⁴ These measures have been prompted by a number of factors. The sheer number of asylum-seekers has forced the realisation that the refugee phenomenon is not the temporary aberration anticipated by the framers of the Refugee Convention, who formulated a definition designed to fit the class of persons displaced by World War II and its aftermath.³⁵ The end of the Cold War has also made redundant the perceptions of the Convention's framers that refugees are part of the battle for ideological victory.³⁶ The recent experiences of the resettlement countries as countries of "first asylum"³⁷—heightened in Western Europe by the removal of

presumption that asylum applications from nationals of those countries were ill-founded. See, "German parties agree curbs on asylum-seekers", *The Guardian* (7 December 1992), p 9. As Bill Frelick of Amnesty International has noted, the list included Ghana and Romania which were decidedly unsafe for some sections of those countries' populations. (Remarks of Bill Frelick at "The Global Refugee Crisis: Rethinking Policy and Methods of Empowerment", 27 March 1993, New York University School of Law, NYC)

33 An orderly departure program (ODP) seeks to provide a channel of immigration for potential refugees through immigration offices of the potential State of refuge within the source country.

34 Stenberg writes:

[D]uring the latter half of the 1980's... Western States to an increasing extent have introduced visa regulations regarding nationals of States which produce asylum seekers and sanctions against carriers who do not check that their passengers have the appropriate visa at the point of departure.

Stenberg G, *Non-Expulsion and Non-Refoulement* (1989), p 291.

35 The temporal and geographic restrictions of the Refugee Convention definition which were lifted by the Protocol were designed to limit the Convention's definition to refugees displaced by World War II and its aftermath. Similarly, Section 5 of the Statute of the UNHCR, annexed to GA Res 428(V), 14 December 1950, established the organisation for an initial period of three years.

36 Hathaway writes:

The refugee definition was carefully phrased to include only persons who have been disenfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion, matters in regard to which East bloc practice has historically been problematic. Western vulnerability in the area of respect for human rights, in contrast, centres more on the guarantee of socio-economic human rights than on respect for civil and political rights. Unlike the victims of civil and political oppression, however, persons denied even such basic rights as food, health care, or education are excluded from the international refugee regime (unless that deprivation stems from civil or political status). By mandating protection for those whose (Western inspired) civil and political rights are jeopardised, without at the same time protecting persons whose (socialist inspired) socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale.

Hathaway, n 1 above, p 7.

For an analysis of the role of ideology and foreign policy in US asylum adjudications, see Gibney, "Who is Our Favorite Refugee Today? For People Seeking Asylum, the Question May be Life or Death. For our Government, the Question May be Which Government we Favor" (1988) 15 *Human Rights Quarterly* 30.

37 The term "first asylum" is commonly used for countries which are the first place where a person seeks asylum. See n 31 above. Frequently, countries in this

the Iron Curtain—has forced resettlement countries to face growing domestic discontent and xenophobia.³⁸ These attitudes result from the perceived inability to control the intake of asylum-seekers which had been achieved in the past by selective resettlement from refugee camps abroad and donations to the United Nations High Commissioner for Refugees (UNHCR). The recent world recession may also have had an impact on the numbers of asylum-seekers, and it certainly has affected States' assessment of their capacity to assist and resettle refugees.³⁹ Many States perceive that they can no longer deal with the numbers of asylum-seekers and that the vast majority of asylum-seekers do not meet the definition of refugee contained in the 1951 Convention relating to the status of refugees, that is, a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁰

Rather, asylum-seekers are thought to be “economic migrants” motivated by pull factors—like the Western economies—rather than push factors such as persecution, human rights violations or civil disturbances.

position are not parties to either the Refugee Convention or the Protocol but have agreed to grant “temporary refuge” to asylum-seekers on the understanding that resettlement or repatriation will occur. In this paper, such countries are denominated “countries of temporary refuge”, but it should be noted that others frequently use “first asylum” to cover this situation too. Many Asian countries have undertaken the obligation of temporary refuge under the Comprehensive Plan of Action relating to Indo-Chinese Refugees. See Office of the United Nations High Commissioner for Refugees, International Conference on Indo-Chinese Refugees, *Report of the Secretary-General* (Item 111(c) of the Provisional Agenda), UN Doc A/44/523 (1989). Talk about “temporary protection” in cases of mass exoduses, which is analogous to the concept of temporary refuge as used under the CPA but where the aim is to secure repatriation when circumstances in the country of origin have improved, has been prevalent in recent years because of crises such as those in the former Yugoslavia. See eg the Executive Committee of the UNHCR's General Conclusion on International Protection paragraph (m) in, *Report of the Forty-Fourth Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/821, 12 October 1993, reprinted in (1994) 6 *International Journal of Refugee Law* 123.

- 38 The worst level of violence against asylum-seekers has been in Germany, but the rest of Europe has also seen ugly incidents. See eg, “The huddled masses— asylum-seekers”, *The Economist* (5 December 1992). Asylum-seekers in Australia have faced similar attitudes. See Daly, “Racism pushes refugees to brink—study”, *The Age* (12 February 1993), p 3.
- 39 Remarks of Jon Van Dyke in, “Human Rights and the Movement of Persons” (1984) 78 *American Society of International Law Proceedings* 339 at 353.
- 40 Article 1A(2), Refugee Convention.

A major UN report on the refugee problem gives some support to States' perceptions,⁴¹ although the accuracy of concerns about the pulling power of the Western economies may be questioned on the basis that so many refugees are given shelter in developing States. Also, given the discrepancy between the layperson's understanding of the term refugee and the Convention definition, it is arguable that persons perceived as migrants drawn by pull factors are in fact coerced and may have a moral claim on the States to which they have fled. Furthermore, deterrence mechanisms are indiscriminate in their effect and therefore unjust towards Convention refugees. A person must be outside her home State to qualify as a refugee, but potential States of refuge are willing to do anything to contain the flight of refugees. And, it should be noted that not only are States unjustifiably characterising as abusive the asylum-seeker who does not meet the Convention definition, but some Western States have shown a propensity to regard *bona fide* refugees who manage to reach their frontiers as attempting to evade refugee resettlement quotas. This attitude is adopted regardless of whether it is fair or realistic from the perspective of the refugee, whether the refugee has in fact accessed or been able to access the possibility of refugee settlement abroad through stay in a country of "first asylum".⁴²

The above-mentioned responses to asylum-seekers by resettlement countries, which are all justified on the basis of the sovereign prerogative to control entry, restrict the ability to seek asylum and to gain the fundamental protection of *non-refoulement* (the principle that a refugee must not be returned to a place of persecution) which is guaranteed by the Refugee Convention.⁴³ In turn, the categorisation of asylum-seekers as economic migrants places responsibility for the unwelcoming reception of unauthorised arrivals firmly on the shoulders of the individual migrant, refugee or asylum-seeker. The terminology of push and pull easily reduces to semantics enlisted in the justification of deterrence mechanisms.

While refugee law is, on one level, a response to human rights abuses, it cuts across the innermost sanctum of sovereignty, the power to control immigration. It may, therefore, be that this restrictive practice will be permitted to control the direction of the law, constraining the reach of the Refugee Convention and rendering it largely redundant. In the analysis below, the capacity of the international legal system to respond to the refugee crisis as a humanitarian problem is explored, setting the scene for a critical analysis of Australia's treatment of Cambodian asylum-seekers. First, the place of sovereignty in international law and the ability of human rights and interdependence to constrain sovereignty are examined. Then the roots of the plenary immigration power are evaluated and it is suggested that the plenary power has been and

41 Sadruddin Aga Khan, Special Rapporteur, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, UN Doc E/CN.4/1503, p 39 (31 December 1981).

42 Anker, "First Asylum Issues Under United States Law" in Coll G and Bhabha J (eds), *Asylum Law and Practice Europe and North America* (1992), p 125.

43 Article 33, Refugee Convention.

must be further reduced. Next, the constraints set by the Refugee Convention and subsequent practice are outlined and the legality, and implications for the Refugee Convention, of States' current restrictive strategies are analysed. Lastly, some alternatives to deterrence and their potential to revitalise international refugee law are examined.

III. Capacity of the International Legal System to Respond to the Refugee Crisis: Overcoming Sovereignty

(A) The place of sovereignty in the international legal order: Interdependence, human rights and the search for a new paradigm

“Sovereignty” is an ill-defined term in international law. It has evolved from the notion of the absolute power of princes over their subjects to include notions of territorial integrity and equality of States. Within the sphere of sovereignty, and its corollary “domestic jurisdiction”, a State is free to regulate matters as it sees fit. Whatever falls beyond sovereignty may be viewed as a concern of the “community of States”: a subject for international politics and regulation by international law. But drawing the line where sovereignty begins and ends is problematic.

Once the “law of nations” was a construct of natural law philosophy. In the modern international legal system, the impetus for law-making is State consent. Implicit in this model of international law is the liberal social contract. This contract has not resulted in agreement to a system of international government, but “the functions associated with governance under a legal system are performed”⁴⁴ nevertheless. The consent-based system seeks to ensure that States have freedom to choose their political systems without intervention and to pursue self-defined national interests in international relations.⁴⁵ Included in this notion of freedom is the idea that a State’s community has the right to determine its own composition and control immigration.

In short, there is a presumption against law on the international plane.⁴⁶ This presumption mirrors the cardinal principle of the liberal State. This principle holds that people should be free to pursue their own visions of the good within a protected sphere of privacy and that the State should not legislate on matters about which people might reasonably disagree. One potential difference

44 Henkin, “International Law: Politics, Values and Functions—General Course on Public International Law” (1989) 216 *Receuil des Cours* 10 at 21.

45 The ICJ found that the principle of non-intervention had crystallised into a principle of customary international law in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14 [hereafter “*Nicaragua case*”], paras 202–05.

46 Henkin, n 44 above, at 127–31. Thus one of the cardinal principles of the international legal system is said to be the Lotus principle, extracted from the Permanent Court of Justices Judgment in the *Lotus* case: international law permits whatever is not prohibited. See the case of the *SS Lotus (France v Turkey)*, PCIJ Ser A, No 10. See also Parry, “The Function of Law in the International Community” in Sorensen M (ed), *Manual of Public International Law* (1968), p 1 at 2–8.

between the liberal State and the international State system is that a strict interpretation of the requirement of consent implies that *any* disagreement, whether "reasonable" or not, will prevent the creation of international law. As Allott has said, we are presented with a "sovereignty/higher law paradox" in which nations can:

admit that their external status [is] *under the law* in some way, without acknowledging any superior sovereign as empowered to make law that applie[s] to them or ever having to form any clear, let alone shared, view of a convincing socio-philosophical basis for that law.⁴⁷

Although the strictly voluntarist or consent-based model of international law is extolled by some international lawyers who point to the dangers of a powerful elite imposing a so-called "community" moral standard on less powerful States,⁴⁸ there are limits to this model in practice. In certain areas of legal regulation, such as the prohibition on the use of force or the protection of human rights, international tribunals are prepared to pay more attention to what States *should* be doing than what they actually do. Of course, this apparent overriding of States' will can be reconciled with the strictly consent-based view of international law: in the *Nicaragua* case for example, the International Court of Justice made this reconciliation by privileging statements of *opinio juris* over State practice in violation of the prohibition on the use of force.⁴⁹ Even in mundane areas of legal regulation, *positive* consent is not required from *all* States, since a rule of customary international law requires only general and consistent practice.⁵⁰ Thus the strictly voluntarist model of international law is not espoused by many today. At the very least it is accepted that international law recognises the value of interdependence and cooperation.⁵¹ International law is found wherever States' conduct is accepted as having created reasonable expectations which are acted on or otherwise relied upon, and its creation is unhampered by the dissent of particular States.⁵² It is also accepted that international human rights law has pierced the sovereign veil, admitting individuals to limited participation in the international legal order. Nevertheless,

47 Allott, "Mare Nostrum: A New International Law of the Sea" (1992) 86 *American Journal of International Law* 764 at 770.

48 See particularly Weil, "Toward Relative Normativity in International Law" (1983) 77 *American Journal of International Law* 413.

49 Note 45 above.

50 *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v The Netherlands*), [1969] ICJ Rep 3. The ICJ held that the same requirements held for a regional custom in the *Asylum* case (*Colombia v Peru*), [1950] ICJ Rep 266.

51 Thus Schachter has dubbed the Charter era the "Law of International Cooperation". Schachter O, *International Law in Theory and Practice* (1991), p 75. See also Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205 at 219.

52 If a State has publicly and consistently objected to a particular practice from its inception, that State may not be bound by the resultant rule, but it cannot prevent the crystallisation of law which applies among other States. See *Anglo-Norwegian Fisheries* case (*United Kingdom v Norway*), [1951] ICJ Rep 116.

the inroads of interdependence and human rights can comfortably be accommodated within a predominantly statist,⁵³ consent-based view of international law.⁵⁴ As the weaknesses of the statist model become more apparent, most graphically in the disintegration of some States, its relevance is questioned. Increasingly, there are suggestions from very different perspectives that an entirely new paradigm is needed.

It is suggested by some that a State's claim to membership of the international community should depend on its adherence to human rights⁵⁵ or perhaps democratic governance.⁵⁶ In contrast to these perspectives which might be categorised as part of what Knop terms "the revival of liberalism in international legal discourse",⁵⁷ critical legal scholars have attacked the implicit liberal social contractual basis of international law, arguing that the liberal ideal of moral agnosticism is unachievable.⁵⁸

Koskenniemi argues that in order to avoid the problems inherent in the strictly voluntarist system—the propensity to support the powerful and the dangers of the law being a mere reflection of the lowest common denominator of what States define as "national interest", removed from any standard of human morality—international lawyers are inevitably driven to rely on arguments based on morality and natural law. He describes international legal argument as a constantly shifting interplay between ascending arguments based on State will and descending arguments based on natural law or morality. Consequently, according to Koskenniemi, international law is perceived either as nothing more than what States do already (apologism) or high-minded morality which, due to lack of consensus in the international community, leads to rules which are vague to the point that they are meaningless (utopianism).⁵⁹

53 I use the word "statist" in the way defined by Karen Knop: "By statism, I mean the view of international law that regards State sovereignty as a function of political power, rather than justice...": Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293 at 296.

54 As Schreuer remarks:

The States have retained control over their obligations. International law has increased in volume, but has mostly remained a law that is applicable among States. Sovereignty is no longer absolute. It has been harnessed to some extent, but its core has remained intact. The volume of international regulation has not changed the basic power structures.

Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law" (1993) 4 *European Journal of International Law* 447 at 448.

55 Reisman, "Sovereignty and Human Rights in International Law" (1990) 84 *American Journal of International Law* 966.

56 Franck, "The Emerging Right to Democratic Governance" (1992) 86 *American Journal of International Law* 46.

57 Knop, n 53 above, at 297. See generally Slaughter Burley, n 51 above.

58 For examples of critical legal thought in international law, see Kennedy D, *International Legal Structures* (1987), and Koskenniemi M, *From Apology to Utopia* (1989).

59 Koskenniemi, *ibid*, p 40–42.

In particular, Koskenniemi argues that sovereignty remains a slippery concept which continually threatens to swallow up legal rules that seek to constrain it.⁶⁰

There is something about Koskenniemi's argument which accurately describes the process of international law-making. Even in the area of treaty law, a more readily identifiable form of law than customary international law, the "obligations" to which States consent are often couched in vague or precatory language open to widely different interpretations. As will be seen below in Section III, the Refugee Convention raises many problems of interpretation, even where the obligations are couched in fairly firm language. States are currently asserting arguments based on sovereignty to avoid their obligations under the Convention. Furthermore, recognition of interdependence on the question of refugees has either been completely absent or has served merely to bolster cooperative efforts to repel refugee flows, thus denying refugees a voice in their treatment.⁶¹

Koskenniemi criticises the notion of interdependence on the basis that it suffers from the same manipulability or indeterminacy as sovereignty: interdependence may be used both to override sovereignty or to buttress it.⁶² This is quite true and well-illustrated by States' current responses to the refugee problem. However, such manipulability may actually be flexibility if we are able to push forward progressive meanings of sovereignty which serve to alleviate, rather than perpetuate, oppression. Feminist scholars of international relations and law have pointed out that the prevailing conception of sovereignty equates with national security and ensuring that borders are impermeable, ignoring the possibility raised by Gilligan's work⁶³ that "the overall interdependent relationship among the actors in a game is important enough to encourage management of potential conflict"⁶⁴ or the definition of power formulated by Hannah Arendt as "the human ability to act in concert, or take action in connection with others who share similar concerns".⁶⁵ Still, even this line of thought may be open to the charge of privileging the State. Karen Knop, for example, has criticised the unreality of replacing the individual in the liberal social contract with the State and argues that feminist scholars have fallen prey to this mistake.⁶⁶ Knop attacks the notion of the State as an "unbounded, unified

60 Koskenniemi, *ibid*, Chapter 4; Koskenniemi, "Sovereignty, Prolegomena to a Study of the Structure of International Law as a Discourse" (1987) 4 *Kansainoikeus Jus Gentium* 71.

61 See n 142 below and accompanying text.

62 Koskenniemi, "Theory: Implications for the Practitioner" in Allott P, Carty A, Koskenniemi M and Warbrick C, *Theory and International Law: An Introduction* (1991), p 1 at 30.

63 Gilligan C, *In a Different Voice* (1982).

64 Grant, "The Sources of Gender Bias in International Relations Theory" in Grant R and Newland K (eds), *Gender and International Relations* (1991), p 8 at 15.

65 Tickner, "Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation" in Grant and Newland (eds), n 64 above, p 33.

66 According to Knop, even feminist scholars who have done much to show how the notion of sovereignty masks the reality of real people's lives, particularly women's lives, adopt the analogy of the individual central to traditional international legal thought, n 53 above, at 321-32. I would argue that the analogy of the individual as

self" because it hides the reality of the State as a collectivity of diverse individuals and groups: it "renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic state".⁶⁷ Like Knop, Schreuer and MacCormick argue for an international legal system that recognises seats of power other than the State,⁶⁸ relying in part on the reality of other relevant actors⁶⁹ and in part on the need for an international order which is normative, not merely power-driven.⁷⁰ As Secretary-General Boutros-Ghali states:

While respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory. A major intellectual requirement of our time is to rethink the question of sovereignty—not to weaken its essence, which is crucial to international security and cooperation, but to recognise that it may take more than one form and perform more than one function. This perception could help solve problems both within and among states. And underlying the rights of the individual and the rights of peoples is a dimension of universal sovereignty that resides in all humanity and provides all peoples with legitimate involvement in issues affecting the world as a whole.⁷¹

This plea acknowledges that for a new paradigm to emerge, the site of this intellectual activity must extend beyond juristic thought: it will be necessary to overcome the perception of those seeking power, whether they be States or non-State actors, that sovereignty is "the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it".⁷²

(B) Re-examining the historical, philosophical and jurisprudential roots of the plenary immigration power

International migration is an area where the process of intellectual re-evaluation and redefinition suggested above is essential. It is an area where even the recognition of the values of human dignity and interdependence has been slow:

used by feminists is generally used to highlight the very point which Knop seeks to make. Thus feminist scholars of international law and relations point out that the prevailing concerns with national security concentrate on making borders impermeable, sealing the division between public and private and concealing the violence committed against women within the State. See Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1991) 85 *American Journal of International Law* 613. Yet it is perhaps true that feminist arguments for a different approach to power retain the monolithic State as their premise.

67 Knop, n 53 above, at 320.

68 Schreuer, n 54 above; MacCormick, "Beyond the Sovereign State" (1993) 56 *Modern Law Review* 1.

69 MacCormick, *ibid.*, at 16; Schreuer, *ibid.*, at 449–53.

70 MacCormick, *ibid.*, at 11; Schreuer, *ibid.*, at 471.

71 Boutros-Ghali, "Empowering the UN" (Winter 1992–93) *Foreign Affairs* 89 at 98–99. See the similar sentiments expressed by former UN Secretary-General, Pérez de Cuéllar during an address at the University of Florence on 21 November 1991, reprinted in (1991) 47 *International Commission of Jurists Review* 24. See also Henkin, n 44 above, at 24–25.

72 MacCormick, n 68 above, at 16.

sovereignty still rules. Total freedom of movement is perceived to undermine the right of political self-determination of States, the right of the communities of nation-States to determine their own composition and to structure their communal life according to the ideals they have agreed upon. But this right of self-definition merely implies that there might be some right to exclude aliens who don't agree with the ideals of the community to which they seek entrance. In addition, the fact of scarcity means that there can be numerical controls on immigration. There is nothing to support the conclusion that freedom of movement, which is valuable to both individuals and national communities as a means of cultural exchange, diversification, recognition and renewal of personal and cultural ties which extend across artificial State borders, should be suppressed. Rather, a balance between States' rights and human rights needs to be struck. Yet, it is commonly accepted that immigration policy is largely a matter of domestic jurisdiction to be determined by each State at its own discretion. Thus States are left to make the balance between their rights and human rights. The characterisation of the immigration power as plenary needs to be revised. The focus needs to be moved away from the assertion of the maxim of "the sovereign right to exclude" towards an assessment of the root causes of immigration and the requirements of human dignity of persons applying for admission.

At the dawning of the era of modern international law,⁷³ it was not human rights but nationality which provided the link between States and individuals. Nationality provided the basis for the precursors of human rights—diplomatic protection of nationals abroad and State responsibility for injuries to aliens. It also provided the basis for the sovereign right to exclude aliens. At customary international law, even the question of nationals' right to enter their own countries was dealt with in a manner which seems upside down to persons accustomed to the paradigm of international human rights law, because of its origins in a time when individuals were the mere "objects" of international law. The right of entry into one's own country depended on the sovereign right of other States to exclude non-nationals.⁷⁴

An examination of the historical, philosophical and jurisprudential basis of the plenary immigration power leads to questions as to whether the right to exclude aliens should be retained in the absolute form it took in the late 19th century. This is particularly true now that international law recognises universal human rights. Nafziger, for example, argues that as the exclusionary proposition is based on a few key decisions of courts in the United States and the United Kingdom which concerned blatantly racist policies it must be re-examined.⁷⁵

73 The commencement of the era of modern international law is commonly dated to the Peace of Westphalia in 1648, which marked the end of 30 years war between Catholic and Protestant princes, the demise of the Holy Roman Empire and the emergence of European nation States, all to be treated as "sovereign" equals. See Falk R, *Revitalizing International Law* (1983).

74 See Plender R, *International Migration Law* (1972), p 71.

75 Nafziger, "The General Admission of Aliens Under International Law" (1972) 77 *American Journal of International Law* 804 at 823–29.

Two of the most important cases establishing the plenary power over immigration are a decision of the Privy Council concerning the exclusion of a Chinese man from the Australian colony of Victoria⁷⁶ and the United States Supreme Court decision in the *Chinese Exclusion* case.⁷⁷ These cases concerned policies excluding Chinese immigrants adopted in reaction to popular anti-Chinese sentiment.⁷⁸ Australia's transition from colony to sovereign State owes much to the battle over which authority had power to make decisions regarding immigration policy: the colonial governmental representatives who had to deal with the racism and employment insecurity of their constituents; or the British colonial office which had to confront the embarrassing spectacle of its Australian colonies excluding the nationals of its other colonies and States with which it maintained friendly relations.⁷⁹ The new Commonwealth of Australia's first policy act was to pass the Immigration Restriction Act 1901 (Cth).

At its inception, the formulation of the right to exclude pursuant to this case-law was indeed absolute. Aliens had little opportunity to argue with immigration authorities about the unfairness of exclusion on the basis of race or nationality, or the unfairness of exclusion on the basis of alienage despite long-term residence in the community. In Australia, some extent of natural justice has been accorded to aliens seeking entry through administrative regulations, with the potential for judicial review.⁸⁰ However, these extensions of due process are claimed to be discretionary grants of bounty. Thus the maxims "sovereign right of exclusion", "due process for aliens is whatever the legislature concedes" and "deportation is not punishment", serve to discourage acknowledgment of the affronts to human dignity committed in their name and to discourage thought as to what is a reasonable exercise of discretion.

Various judicial justifications have been given for the harsh stance towards aliens seeking admission, the most reasonable being the social contract approach; that is, the notion that aliens, perhaps depending on their history of connection with the community, are not part of the body politic and therefore are not owed anything by the body politic. Justice Gaudron of the Australian High Court adopted the latter approach when analysing the question of legislative power over aliens in the *Lim* case⁸¹ and "community" was traditionally the defining approach in Australian deportation cases.⁸²

76 *Musgrove v Chun Teeong Toy* [1891] AC 272.

77 *Chae Chan Ping v United States*, 130 US 581; 9 S.Ct. 623; 32 L Ed 1068 (1889).

78 See eg, "The Arguments Against the Chinese on the Gold Fields" (1857), Report of the Select Committee on the Subject of Chinese Immigration, pp iii–iv; V and P of the Legis Coun of Vic 1856 in Clark M, *Select Documents in Australian History* (1950), vol 2, pp 67–71; House of Representatives, *Debates*, vol 3 (1901–02), p 3497.

79 See Official Report of the National Australasian Convention Debates, Sydney, 2 March–9 April 1881 (facs repr, Legal Books, Sydney, 1986).

80 Note 5 above.

81 Justice Gaudron carefully makes clear that what is a law in respect of aliens must be considered not in terms of a simplistic contrast between aliens and citizens, but through a consideration of the person's links to the community, and that there will be a limit to "plenary powers" such as the power over aliens:

However, the social contract approach is questionable. Philosophers like Walzer argue that national communities have the right to determine their own make-up, distribute the benefits of that community and ensure the sense of cohesion so important to human beings.⁸³ But there is a danger that "community" can become a code word for xenophobia and racism. "Community" may be defined by ethnic and racial characteristics, not by the community's ideals, meaning for liberal democracies that consideration of what is reasonable according to liberal lights is completely abandoned and the value of equality is discarded. In the case of the increasingly multicultural society of Australia, any attempt to restrict immigration by ethnicity or race degrades the membership qualities of the many immigrants who are not descendants of Anglo-Celtic stock. It is important to consider who and what defines our community. Thus Carens writes that for liberal democracies, "[a]ny approach like Walzer's that seeks its ground in the tradition and culture of *our* community must confront, as a methodological paradox the fact that liberalism is a central part of our culture".⁸⁴ Therefore restrictions based purely on racial or nationality criteria are objectionable because they do not respect equality.

Exclusion of aliens is in fact an exercise of *jurisdiction* over the individual seeking entry. This is not altered by the fact that the exercise of this jurisdiction is, in a sense, forced on the State by the alien's arrival at the border, particularly if the person is a refugee or asylum-seeker. It is not sufficient to rely on the plaintive cry of Judge Vance in *Jean v Nelson* that it was not the United States' fault that the Haitian applicant for immigration parole would not be accepted anywhere else.⁸⁵

a law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s 51(xix) of the Constitution. A law of that kind does not operate by reference to any matter which distinguishes aliens from persons who are members of the community constituting the body politic, nor by reference to the consequences which flow from non-membership of the community and thus, in my view is not a law with respect to aliens.

Lim, n 9 above, at 138.

- 82 See Wood, "Deportation, the Immigration Power and Absorption into the Australian Community" (1986) 16 *Federal Law Review* 288.
- 83 Walzer M, *Spheres of Justice: A Defence of Pluralism and Equality* (1983), p 39.
- 84 Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49 *Review of Politics* 251 at 268.
- 85 Judge Vance stated that the decision in *Rodriguez-Fernandez* (654 F 2d 1382 (10th Cir 1981)) would "ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back". *Jean v Nelson*, 727 F 2d 957, 975 (11th Cir 1985). In fairness to Judge Vance it must be acknowledged that there are examples of mass expulsion where it is evident that the Government is trying to get rid of people it regards as undesirable and refuses to take them back. However, the proper response to such an action is to recognise that it is not the alien's fault either. The person may qualify for refugee status because exile is a violation of the right to return to one's own country and therefore persecutory. If this persecution is linked to one of the five Refugee Convention grounds, then the person is a refugee. In this situation, the United States

Taking the view that an exercise of jurisdiction is involved reveals that "sovereignty" over immigration, like sovereignty generally, entails responsibilities, not the exercise of naked power. This means that a convincing basis for immigration policy is needed, just like any other governmental policy, and that the discretion over entry may be scrutinised according to international human rights standards.

For a start, while some discrimination is necessarily entailed in tailoring immigration policy, invidious forms of discrimination, such as racial discrimination, are no longer permitted.⁸⁶ Thus the Human Rights Committee's General Comment on the Position of Aliens under the ICCPR confirms that although the Covenant does not grant a right of entry, "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise".⁸⁷ This kind of approach has been used by the European human rights organs in decisions which hold that to send a person to a place where the person might be exposed to torture, inhuman or degrading treatment or punishment would violate article 3 of the European Convention For the Protection of Human Rights and Fundamental Freedoms.⁸⁸ Together with article 13, which requires a right to an effective remedy, this creates an implied obligation of *non-refoulement* for refugees under the European Convention.⁸⁹ European decisions on this issue have included a case prohibiting the extradition of a murder suspect to the United States because the suspect faced the death penalty and extended incarceration on death row,⁹⁰ and at least one decision involving an asylum-seeker.⁹¹

The European Commission also held in the *East African Asians* case that racial discrimination by the United Kingdom in relation to decisions concerning the entry

should not act as an accomplice to the source State by further ill-treating the alien. Rather the United States should pursue the abusing State.

- 86 Goodwin-Gill G, *International Law and the Movement of Persons Between States* (1978), p 86.
- 87 General Comment 15[27] relating to the position of aliens under the Covenant, CCPR/C/21/Rev 1, 19 May 1989.
- 88 Done at 4 November 1950, entered into force 3 September 1953 [hereafter "European Convention"].
- 89 See Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to De Facto Asylum" (1990) 2 *International Journal of Refugee Law* 361. See also Fullerton, "Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 29 *Virginia Journal of International Law* 33.
- 90 The *Soering* case, [1989] Eur Ct HR, Ser A No 161. This case diverges from jurisprudence of the Human Rights Committee regarding the same situation. See *Pratt and Morgan v Jamaica*, Communications Nos 210/1986 and 225/1987, in Report of the Human Rights Committee, UNGAOR, 44th Sess, Supp No 40 (A/44/40) p 215, 231.
- 91 *Amekrane v The United Kingdom* [1973], YB Eur Conv on Hum Rts 356 (opinion by Eur Comm'n on Hum Rts). It should be noted that the Commission negotiated a friendly settlement of this case whereby the United Kingdom agreed to pay a substantial sum in an *ex gratia* payment to Amekrane's wife.

of a group of East African Asians amounted to a form of degrading treatment under article 3 of the European Convention.⁹² Although the case involved nationals of former British colonies, the Commission stated that even without this link to the United Kingdom, racial discrimination would qualify as degrading treatment.⁹³ There is also European case law supporting the proposition that any individual admitted for immigration must be allowed to have her family with her.⁹⁴

The Refugee Convention has also carved out an exception to the plenary immigration power, although it will be seen below that it is a somewhat ambiguous exception. Much of the ambiguity has been resolved in favour of the refugee through the extension and entrenchment of the principle of *non-refoulement* by State practice and pronouncements by UNHCR. However, State practice is now in reverse. The new problem to be faced is that the Convention is in danger of being by-passed as States adopt mechanisms for avoiding the presence of asylum-seekers on their territory. What can be done to open States' immigration policies to further scrutiny? It is important to examine how the current deterrence practices of States may be met with arguments based on the Convention and more general human rights instruments and the limits of relying on State practice for viable law-making.

(C) The Refugee Convention and State practice under the auspices of the UNHCR: Building, then eroding, an exception to the plenary power

In lay terms, the refugee is viewed as an exception to the sovereign prerogative of exclusion because a refugee is not a voluntary migrant. She has some moral claim to enter the community to which she flees. However, international law's formulation of the refugee exception is greatly restricted, both as to who qualifies as a refugee and the response required of States. The Refugee Convention is strained by the tension between sovereignty and human rights. Its framers sought to guard the sovereign right to determine who should be allowed to enter a State's territory and the instrument was designed to deal with refugees already in third States' territories as a result of World War II and its aftermath. The Convention only obliges State parties to guarantee *non-refoulement* or non return to the place of persecution. It does not guarantee asylum in the sense of

92 *East African Asians v United Kingdom* 3 EHRR 76 (1973) [hereafter "*East African Asians case*"]. Note that the Commission eventually declared the case moot since the United Kingdom did allow entry of the persons concerned.

93 *East African Asians case*, *ibid* at 81–82, 86. Note that the dissenting opinion of Mr Fawcett holds that degrading treatment had not occurred. Mr Fawcett held that although there was no right to entry (even for nationals) under the Convention (as opposed to the Fourth Protocol to the Convention), these British nationals had been deprived of a right open to every other national under British law and thus their personal security (article 5) had been interfered with. *East African Asians case*, *ibid*, p 92.

It should be noted that the Convention on the Elimination of All Forms of Racial Discrimination, done at 21 December 1965 (entered into force 4 January 1969), makes an exemption for distinctions between citizens and non-citizens (article 2(2)) and national provisions concerning nationality, citizenship or naturalisation (article 2(3)).

94 See Goodwin-Gill, n 86 above, p 163. See also Plender, n 74 above, p 92.

permanent residence or full membership of the community, nor does it guarantee admission to potential countries of asylum. Rather, the Convention establishes a regime of temporary or interim protection. Three durable solutions, which are not expressly included in the Convention, are recognised by the international community. They are local integration in the country of first asylum, resettlement in a third country or voluntary repatriation, which is the solution currently favoured by UNHCR.⁹⁵ Attempts to establish a Convention on Asylum have failed,⁹⁶ and the incomplete protection of the Refugee Convention is replicated in general human rights instruments. The Universal Declaration of Human Rights grants only a right to seek asylum and even this limited right failed to find its way into the two human rights covenants which built on the Declaration.⁹⁷

In addition to the temporary nature of the regime of protection contemplated by the Refugee Convention, there are various limitations and distinctions which States are permitted to make. The Convention only partially remedies the refugee's lack of protection from her State of nationality. Instead of guaranteeing the same treatment as nationals, the reference point for rights under the Convention is frequently only the lesser entitlements of aliens, sometimes to the standard of most favoured nation status, sometimes only to the standard required for aliens generally. Moreover, many rights are only granted to refugees "lawfully" within the contracting State's territory. Various provisions make even finer distinctions between refugees habitually resident, refugees lawfully staying, and refugees merely lawfully present. Rights of great importance such as the right to freedom of movement (article 26) and the right to work (article 17) are so limited. Freedom of movement is guaranteed only for those refugees lawfully present, while the right to work is reserved for those "lawfully staying" and it is guaranteed only to the standard of most favourable treatment for aliens. On the basis of these restrictions, refugees may not be given the full benefits of community membership even in countries which are party to the Refugee Convention. In such cases the impact of international human rights law generally may be an ameliorating factor, since

95 As Goodwin-Gill writes, voluntary repatriation has always been contemplated as one of the durable solutions for refugees as it is mentioned in the UNHCR Statute, but it has only come to the fore in recent years with the UNHCR's Executive Committee's conclusions No 18 of 1980 and No 40 of 1985. See Goodwin-Gill, "Voluntary Repatriation" in Loescher G and Monahan L (eds), *Refugees and International Relations* (1989), p 255.

96 See generally, Grahl-Madsen A, *Territorial Asylum* (1980).

97 Article 14 of the Universal Declaration of Human Rights comes closest to recognising an exception to the prerogative over entry as it provides that everyone has the right to seek and to enjoy in other countries asylum from persecution. Most of the norms included in the Universal Declaration are considered to have binding force, and it would appear that the right to seek asylum, as opposed to actually receiving it, has entered the corpus of customary international law. When the USSR suggested inclusion in the ICCPR of an article to guarantee a right of asylum, however, consideration of this question was deferred in anticipation of a separate instrument regarding asylum. See UN Doc A/5144 (1962), p 9. In fact, the work on asylum has proved fruitless as no agreement on a binding instrument has been reached and the concept of asylum remains a discretionary right of States to grant rather than a right of individuals to receive.

human rights are owed to all human beings within a State's territory and jurisdiction regardless of nationality.⁹⁸ And while the development of human rights law may have expanded the possibilities for protection of the refugee within a State's territory, State practice has extended the protection of the Refugee Convention to the refugee at the border. It is also very likely that State practice has extended the obligation of *non-refoulement* to States which are not party to the Convention, through the development of a customary norm.

State practice "which establishes the agreement of the parties regarding its interpretation"⁹⁹ is a legitimate interpretative source for treaties. It is also possible for State practice to generate customary international law.¹⁰⁰ In both contexts, State practice poses difficulties as a source of law because *opinio juris* is difficult to establish. In the case of generation of custom from treaty provisions, *opinio juris* is a slippery element since States are following the practice because they are already bound by treaty. Thus the International Court of Justice has imposed stringent requirements for the generation of custom in this fashion, holding that the norm asserted to have generated a customary rule must be of a "fundamentally norm-creative character" and that the relevant State practice must be both widespread and consistent and include the practice of specially affected States.¹⁰¹ In the case of both generation of custom and the question of interpretation of the Refugee Convention through State practice, the tension between the human rights function of the Convention and the context of the plenary immigration power, together with the fact that the Convention guarantees *non-refoulement* but does not formally implement any burden-sharing scheme, means there is potential difficulty regarding the capacity of generous practice under the Convention to evince the necessary *opinio juris* to establish agreement. This is exacerbated by the disuse of the compromissory clauses in article 38 of the Convention and article IV of the

98 For example, see article 2 of the ICCPR and the Human Rights Committee's General Comment on the Position of Aliens under the Covenant, n 87 above. It should be noted that the International Covenant on Economic, Social and Cultural Rights (ICESCR) does allow distinctions concerning the economic rights of non-nationals in developing countries. This includes the right to work. In other respects, however, although the ICESCR does not include the terms "within territory and jurisdiction", the Covenant consistently refers to "all persons". In general, it would appear that limitations on many of these rights could be justifiable conditions of the stay of aliens (see generally Lillich R, *The Human Rights of Aliens in Contemporary International Law* (1984), pp 47-48). However, the principle of *non-refoulement* should militate against treating refugees in exactly the same manner as other aliens. Furthermore, the most recent general comment from the Human Rights Committee indicates that the Committee may take a dim view of such restrictions, since it stipulates that migrant workers and visitors are entitled to protection of their cultural rights as a minority: General Comment 23[50], CCPR/C/21/Rev 1/Add 5. Implicitly, this attacks the notion that States have unfettered power to dictate the terms of entry.

99 Article 31(3) Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980. Note that although the "treaty on treaties" postdates the Refugee Convention and is not retrospective in effect, it is accepted that most of the provisions of the Vienna Convention simply codify customary international law and its provisions are used here for ease of reference.

100 *North Sea Continental Shelf* cases, n 50 above.

101 *Ibid.*

Protocol. The practice of rejecting refugees at the frontier has, however, drawn protest from States. This protest may evince agreement over the interpretation of the Convention, even though it is inherently self-serving as the protesting State may harbour fears that rejected asylum-seekers will reach its shores. Thus Goodwin-Gill concludes that State practice has extended the duty of *non-refoulement* to include non-rejection at the frontier:

[N]o consequence of significance can be derived from repeated reliance on the proposition that states have no duty to admit refugees, or indeed, any other aliens. 'No duty to admit' begs many questions; in particular, whether states are obliged to protect refugees to the extent of not adopting measures which will result in their persecution or exposure to danger. State practice attributes little weight to the precise issue of admission, but far more to the necessity for *non-refoulement* through time, pending the obtaining of durable solutions.¹⁰²

Goodwin-Gill also notes the number of non-binding resolutions dealing with the right to seek asylum which provide that asylum-seekers shall not be subjected to measures such as rejection at the frontier,¹⁰³ including the Declaration on Territorial Asylum.¹⁰⁴ As the ICJ found in the *Nicaragua* case, General Assembly Resolutions may be evidence of *opinio juris*.¹⁰⁵

Many jurists also accept that article 33 of the Refugee Convention has generated a customary norm of international law prohibiting *non-refoulement*. Stenberg undertakes a detailed analysis of the obligation of *non-refoulement* pursuant to the ICJ's test in the *North Sea Continental Shelf* cases.¹⁰⁶ He finds that there is State practice in support of the principle, even from the South-East Asian countries.¹⁰⁷ These countries have not acceded to the Refugee Convention, they are close to large refugee flows and have limited capacity to settle refugees. The South-East Asian countries are therefore most likely to avoid legal obligations. Yet, they have accepted duties of temporary refuge, and have even cited obligations to refugees as their reason for doing so. This indicates that *non-refoulement* is well entrenched in international law and that the Refugee Convention has been successful as more than a simple contractual treaty. The Convention has exercised the wider function of a legislative human rights treaty and has normatively influenced States' behaviour, breaking free, to some extent, from its origins in the general law relating to aliens and the strictures imposed by its framers.

However, because of the entrenched nature of the duty of *non-refoulement*, its extension to non-rejection at the frontier, the duties which the Refugee Convention and general human rights obligations impose, the potential for interim protection to become *de facto* asylum, and the size of the refugee problem today, States are now prepared to rely on strictly textual interpretations of the Convention. As UNHCR

102 Goodwin-Gill G, *The Refugee in International Law* (1983), p 75.

103 Ibid, p 76.

104 GA Res 2312 (XXII), GAOR Supp (No 16) 81, UN Doc A/6716 (1968). Adopted on 14 December 1967.

105 *Nicaragua* case, n 45 above.

106 Note 50 above.

107 Stenberg, n 34 above, p 275.

has noted, there is an increasing trend to automatically treat those who were once viewed as persecuted and worthy of humanitarian treatment as back-door immigrants.¹⁰⁸

The factual basis for the change in attitudes is difficult to gauge in some situations. For example in the case of Indo-Chinese refugees, all asylum-seekers leaving Vietnam were accepted as refugees without a determination per the Convention definition until 1989. In that year, it was decided to implement the Comprehensive Plan of Action (CPA) on the express basis that Vietnamese asylum-seekers were now predominantly leaving for economic reasons and were not Convention refugees.¹⁰⁹ As the *Nicaragua* case illustrates, redefinition of the facts or States' legal obligations is a fairly typical ploy where States wish to circumvent norms accepted as law of great importance.¹¹⁰ States will pay lip service to the rule, which the ICJ used as evidence of *opinio juris* in the *Nicaragua* case, but will find some way of redefining the rule or creating exceptions. States' current restrictive practices towards asylum-seekers focus on moving States' actions beyond their territories (as in interdiction) and/or choosing a practice which is close to the heart of sovereignty (such as the power to impose visa restrictions).

The base-line for arguments against these deterrence practices is the duty to observe treaties in good faith¹¹¹ and the principle that treaties shall be interpreted in good faith.¹¹² Some of these practices are fairly easily attacked on the basis of good faith. For example, blanket determinations that particular countries are safe ignore the fact that even countries with generally good human rights records may be guilty of persecution.¹¹³ Orderly Departure Programs (ODPs) are also open to question if their premise is that they are the only way in which a person may leave a country.¹¹⁴ But in the case of some of these practices, defining "good faith" is

108 UNHCR, *Note on International Protection*, UN Doc A/AC96/750 (1990), p 2.

109 Stenberg writes that "the policy of the ASEAN States in particular has been to maintain the...legal fiction that these people are not refugees but "illegal immigrants." Stenberg, n 34 above, p 275. Goodwin-Gill also writes that:

[a]s a matter of *fact*, anyone presenting themselves at a frontier post, port, or airport will already be within State territory and jurisdiction; it is for this reason, and the better to retain sovereign control, that States have devised fictions to keep even the physically present alien technically, legally, unadmitted.

Goodwin-Gill, n 102 above, p 75. See further analysis of the CPA below in Section III(D)(iii). See also the analysis in the *Mok* case of the effect of former Prime Minister Hawke's statement that the Cambodian asylum-seekers were merely "economic migrants" below in Section IV(A)(ii).

110 Note 45 above. The Court made reference to the fact that every State in violation of the prohibition on the use of force attempted to justify their actions as falling within exceptions to the prohibition.

111 Article 26, Vienna Convention on the Law of Treaties, n 99 above.

112 Article 31, *ibid*.

113 See also n 32 above.

114 The term "orderly departure program" is defined in n 33 above. Under the CPA, orderly departure is envisaged as becoming the only method of departure from Vietnam and Vietnam is encouraged to prevent illegal departures. See analysis below in Section III(D)(iii). Australia's decision to create a special class of immigration for

more complex, since the tension in the Refugee Convention between protection of human beings and control of State borders is more prominent. Thus the United States has justified its policy of interdicting Haitian refugees on the High Seas on the basis that the principle of *non-refoulement* is only of territorial scope.¹¹⁵ This interpretation should not be accepted because the territorial scope of the Convention cannot mean that States are allowed to reach out to exercise jurisdiction over refugees ensuring that they are returned to a place of persecution, violating the asylum-seekers' right to leave their countries and to seek asylum.¹¹⁶

The members of the European Union (EU) are negotiating a number of barriers to asylum-seekers¹¹⁷ which are less threatening to the fundamental purpose of the Refugee Convention than interdiction, but which still raise significant barriers for asylum-seekers and are more difficult to challenge. These measures include the adoption of uniform visa policies, penalties for carriers of undocumented aliens, agreement to compile a common information system, adoption of the principle of first asylum, or direct flight and allocation of responsibility for hearing asylum applications to the country of first asylum.

The textual justification for the barriers negotiated among EU States is that there is no right to entry in the Refugee Convention. For example, the practice of requiring asylum-seekers to apply for asylum in the first EU member State in which they arrive (the principle of the "country of first asylum" or the direct flight requirement),¹¹⁸ relies on the wording of article 31. Article 31(1) provides that contracting States shall not impose penalties for illegal entry in the case of refugees who come *directly* from a territory where there was a threat of persecution. The *travaux* confirm that expulsion is not a prohibited penalty under article 31¹¹⁹ while the terms of article 32 limit the prohibition on expulsion to refugees lawfully present. Thus a *prima facie* case for the principle of country of first asylum is established.

Cambodians suffering "hardship" could be regarded as a kind of orderly departure scheme. See n 17 above. The problem with ODPs is that it may be very difficult for the persecuted to access them, particularly in a situation where communication and transport has been decimated and there is ongoing violence: remarks of Bill Frelick, n 32 above. There has been one highly publicised incident of a Haitian who had been granted asylum by US immigration authorities in Haiti who was forcibly prevented from boarding his plane to the United States.

115 See n 30 above.

116 See the criticisms by Louis Henkin in the *Newsletter of the American Society of International Law*, September-October 1993, p 1 at 7.

117 See the Agreement Concerning the Gradual Abolition of Controls at their Common Borders, done at Schengen, 14 June 1985 (the "Schengen Convention"); the Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic, done at Schengen, 19 June 1990; and the Draft Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, done at Dublin, 15 June 1990 (the "Dublin Convention").

118 See n 31 above.

119 See the authoritative commentary on the *travaux*, Robinson N, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), p 153.

However, there are limitations on the principle of first asylum. The principle of *non-refoulement* requires that a State seeking to expel refugees who enter or seek to enter illegally must ensure that the State of first asylum will also ensure that *non-refoulement* is observed, otherwise the protection of *non-refoulement* is rendered meaningless. Thus Stenberg writes that the protection of article 32 should extend to persons whose status has not been determined, placing a duty on the State to make a determination and not to expel the person unless there is another State *obliged* to receive the person.¹²⁰ Hathaway takes a similar view. Citing the UNHCR's advocacy for the choice of the asylum-seeker as to country of asylum to be recognised and the undue burden on countries close to the source of the refugee flow which results from direct flight requirements, Hathaway says that a State has only a "right...to *defer* its duty to protect where a claimant has a pre-existing connection or close links with another state".¹²¹

The adoption by the European Community of the principle of the country of first asylum together with the allocation of responsibility for determination of status to the country of first asylum may ensure that member States conform to the construction of the Refugee Convention adopted by Stenberg and Hathaway. It could also have the positive effect of burden-sharing among EU States. But human rights advocates have argued that these measures, in the absence of a uniform determination system which conforms to the UNHCR handbook¹²² and a supranational forum for challenging determination procedures, risk errors in refugee status determinations without possibility of redress.¹²³

The practice of imposing visa restrictions and carrier sanctions, like interdiction, is complicated by the assumption that the Convention applies only within the territory of State parties. It is further complicated by the fact that the potential asylum-seekers may not even have progressed as far as the High Seas. They may be trapped inside the country of persecution, thus failing to qualify as a refugee under the Convention definition. Hailbronner argues that such restrictions are difficult to challenge on the basis that State practice supports them and is determinative.¹²⁴ In contrast, Stenberg argues that visa restrictions and carrier sanctions violate the principle of good faith, because they wilfully deny the ability of the persecuted to leave their countries. He also argues that the justification that these measures are aimed only at abusive asylum-seekers cannot be given too much weight because of the indiscriminate effect of the measures.¹²⁵

The conflicting arguments of Hailbronner and Stenberg illustrate the limitations on the use of State practice in interpreting the Refugee Convention.

120 See Stenberg, n 34 above, p 124.

121 Hathaway, n 1 above, p 46.

122 Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979).

123 See Melander, "Country of First Asylum Issues: A European Perspective" in Coll and Bhabha (eds), n 42 above, p 101 and Gamrasni-Ahlen, "Recent European Developments Regarding Refugees: The Dublin Convention and the French Perspective" in Coll and Bhabha (eds), *ibid*, p 109.

124 Hailbronner, "The Right to Asylum and the Future of Asylum Procedures in the European Community" (1990) 2 *International Journal of Refugee Law* 341 at 354.

125 Stenberg, n 34 above, p 292.

Given the problems inherent in State practice, it would be preferable to look to an authoritative international body for interpretation of the Convention. The one body which may fulfil that function is UNHCR. However, there are problems using UNHCR practice and pronouncements. UNHCR has a supervisory function under article 35 of the Convention, but it does not have the status of an authoritative treaty body like the Human Rights Committee. This means that the pronouncements of UNHCR's Executive Committee are merely *lex ferenda* or soft law which may be used to construe the Refugee Convention.¹²⁶ But as Sztucki notes, use of the conclusions of the Executive Committee is problematic where they are essentially a reaction to negative State practice.¹²⁷ The assertion that migration issues generally are within domestic jurisdiction creates problems for UNHCR substituting its own judgments as to what is required, particularly if States are likely to ignore UNHCR's recommendations as unrealistic. Furthermore UNHCR is limited by its administrative and funding structure,¹²⁸ which may render it subject to greater political influence than the human rights treaty bodies. Thus Clark maintains that the political nature and lack of independence of the Executive Committee means that the guidelines lack authoritative interpretative status.¹²⁹ In certain instances, Clark's criticism is valid. For example, the role of the UNHCR under the CPA has compromised UNHCR's ability to act on behalf of asylum-seekers and placed it in the position of helping to enforce national migration laws. In Hong Kong, UNHCR has publicly stated that it will work with Hong Kong authorities to make conditions of detention even worse than they currently are in order to encourage Vietnamese asylum-seekers to return home,¹³⁰ despite the fact that Executive Committee conclusion 44 provides that detention of asylum-seekers should be avoided, and despite the fact that the General Assembly has endorsed Conclusion 44 which gives it added legal relevance.¹³¹

In other instances, it appears that there are schisms within UNHCR on particular issues, rendering its pronouncements and practice inconclusive. This is particularly true of the UNHCR position on visa and carrier regimes adopted in Europe in response to "abusive" asylum-seekers. UNHCR has not been able to

126 See Sztucki, "The Conclusions on International Protection of the Executive Committee of the UNHCR" (1989) 1 *International Journal of Refugee Law* 285; Helton, "Judicial Review of the Refugee Status Determination Procedure for Vietnamese Asylum Seekers in Hong Kong: The Case of Do Giau" (1991) 17 *Brooklyn Journal of International Law* 263 at n 100.

127 Sztucki, *ibid.*, at 310.

128 Apart from a small allocation from the general United Nations budget for routine administration, UNHCR missions are funded by voluntary donations by UN members. See Section 20 of the Statute of the United Nations High Commissioner for Refugees, n 35 above.

129 Clark, "Human Rights and Expulsion: Giving Content to the Concept of Asylum" (1992) 4 *International Journal of Refugee Law* 189 at 191.

130 See MacMahon, "Tough new stance to send home boat people", *South China Morning Post* (23 March 1993), p 1.

131 See Sztucki, n 126 above, at 315. For the text of conclusion 44, see *Report of the 37th Session of the Executive Committee of the UNHCR Program* (No 44), 41 UN GAOR Supp (No 12A) at 31, UN Doc A/41/12 Add 1 (1986), Conclusion No 44, Comment b.

present a united front regarding these developments in Europe. The Lawyers Committee on Human Rights reports that in 1990 the Protection Division of UNHCR took a view which supported asylum-seekers in Europe, arguing that there was a tendency to assume that asylum-seekers fleeing civil wars could not have a *bona fide* claim for refugee status, while the then High Commissioner Stoltenberg supported the Governments' stance that asylum procedures were becoming over-burdened due to abusive asylum-seekers.¹³² I would argue that when States issue guidelines which are meant to interpret or clarify controversies left open by the Convention and which could have the effect of restricting their own sovereignty, the guidelines should be construed *contra proferentum*. Nevertheless, when UNHCR practice is divided on an issue or State practice is in opposition to Executive Committee guidelines, it is difficult to assert that UNHCR provides the sought-after authoritative mechanism for treaty interpretation.

The problems in interpretation of the Convention presented by increasingly restrictive State practice force the acknowledgment that holding States to the highest standards of protection for asylum-seekers may encourage them to ignore international law altogether, without even perfunctory lip-service. Accordingly, before returning to Australia's treatment of Cambodian asylum-seekers, it is necessary to scrutinise the rationales for deterrence and alternatives for stimulating cooperation to address root causes of the refugee problem. The rationales for deterrence of unauthorised arrivals must be examined on the basis that a shift in emphasis from the claimed absolute prerogative over entry to interdependence might lead to approaches to migration and the refugee problem which attack root causes, such as human rights abuse and underdevelopment. This is infinitely preferable to punishing people at the border, many of whom genuinely need refuge. The focus on impermeable borders discourages the recognition of a more cooperative model of power's potential to transform the transfrontier movements of persons into more manageable and beneficial proportions.

(D) Alternatives to deterrence: State responsibility, United Nations action and burden-sharing

It is evident from the discussion above that the refugee and asylum-seeker problem is not solved simply through a process of definition. As in the aftermath of World War II, States are again faced with the reality of forced migration on a grand scale.¹³³ The fact that the Convention definition is narrowly framed does not aid States in their efforts to control their borders. There are a number of interrelated problems which mean that the Convention definition has not closed the question of response to the refugee problem. These are as follows:

- (1) a response is required for persons who do not meet the Convention definition but have some moral claim for help;
- (2) States perceive that they have a limited absorptive capacity and that burden-sharing is not always forthcoming;

132 Lawyers Committee for Human Rights, *The UNHCR at 40: Refugee Protection at the Crossroads* (1991), pp 120-22.

133 See generally, UNHCR, *The State of the World's Refugees* (1993).

- (3) States perceive that some asylum-seekers are really migrants seeking to abuse the asylum system;
- (4) an approach which focuses on asylum for refugees is unrealistic for States if nothing is done to address root causes and, further, permanent asylum is not necessarily in the best interests of the refugee who may wish to return to her community if the problem of persecution can be tackled.¹³⁴

Attempting to eliminate opportunities for seeking asylum is not the answer to these problems since desperate people will always leave their countries. Gil Loescher writes that “[d]espite deterrent measures, the number of asylum applications in the West rose from 95,000 in 1983 to about 548,000 in 1990”.¹³⁵ But this evidence has not yet convinced States to take more positive measures.

Three models of action are canvassed below which could be used in conjunction with each other to attack the root causes of refugee flows, removing the perceived necessity for the restrictive measures discussed above. These are the State responsibility approach; collective intervention under UN auspices to address human rights problems within States; and strategies which focus on sharing the burden of asylum-seekers. Unfortunately, the very adoption of these suggestions requires a leap of political faith towards interdependence, loosening the tight grip which States now maintain over immigration policy. In addition, all three approaches have the potential to become mere containment strategies if the impulse to control borders overcomes humanitarian motives.

(i) *The State responsibility approach*

International human rights law by definition includes a component of responsibility on the part of the violating State and this responsibility may entail reparations or at least some kind of restitution to the victim.¹³⁶ Unfortunately, many refugee-generating States are not party to human rights treaties. They are still bound by the smaller body of customary international human rights law, but they have not agreed to treaty mechanisms of enforcement. Enforcement is therefore limited to unilateral measures such as trade sanctions, appeal to the political organs of the UN, or to the ICJ in the case of States which have

134 See Coles, “Approaching the Refugee Problem Today” in Loescher and Monahan, n 95 above, p 373.

135 Loescher, “Refugees and the Asylum Dilemma in the West” in Loescher G (ed), *Refugees and the Asylum Dilemma in the West* (1992), p 3. The Australian Department of Immigration admitted to the Joint Standing Committee on Migration that the effectiveness of deterrence measures was difficult to gauge. See “Rationales for Detention” in Crock (ed), n 24 above, p 21 at 23.

136 For example, article 2 of the ICCPR obliges States to provide an effective remedy in case of violation of any of the rights set out in the Covenant, while particular articles like articles 6 and 9 specify that compensation is required in certain cases. Furthermore, the requirement that local remedies must be exhausted, which is specifically included in the First Optional Protocol to the ICCPR and is a component of the law of State responsibility for injuries to aliens, indicates that reparations and restitution have always been an important part of international human rights law.

accepted the jurisdiction of the court.¹³⁷ Focussing on State responsibility for refugee flows may encourage the use of these mechanisms as it provides the incentive of reparations for the receiving State and refugees. This is recognised in the International Law Association's "Declaration of Principles of International Law on Compensation to Refugees".¹³⁸ The prospect of paying compensation may also provide an impetus for the improvement of the human rights record of the abusing State, creating the right conditions for successful repatriation of refugees. Divorced from their communities in resettlement countries, asylum-seekers are often unhappy. Removing the push factor of persecution and facilitating repatriation may create a counter-flow against any pull factors.

The State responsibility approach is also promising because it may give States new avenues for negotiating the complex problems of assertions by leaders in some States that oppression is culturally justified. States which receive asylum-seekers into their territories should focus on the human rights problems that refugee flows embody and the burden imposed on them by refugee flows in order to answer questions raised by refugee-generating States concerning the validity of the Refugee Convention or its application. Garvey claims that the rules of State responsibility provide a method for moving away from the problem of assertions of cultural inappropriateness of human rights altogether. Garvey points out that many large refugee flows are really mass expulsions of persons: situations where it is clear that the refugee-generating State is abusing its citizens to the point that it acquiesces in the departure of persons who will not cooperate with the regime.¹³⁹ In this context, he advocates

137 The customary international law of human rights may be the subject of an action before the ICJ. One consequence of the court's judgment in the *Barcelona Traction* case [1970] ICJ Rep 3, is that any State might have standing to obtain at least a declaratory judgment concerning violations of the customary international law of human rights in another State. However, securing attendance of the potential respondent depends on whether that State has filed a declaration accepting compulsory jurisdiction of the court under article 36(2) of the ICJ Statute. Particularly bad or major violations of human rights may be brought to the attention of the Human Rights Commission, or to the General Assembly as in the case of apartheid in South Africa. If the violations of human rights are so grave as to present a threat to international peace and security, they may be taken before the Security Council. States are also free to pursue unilateral measures in the form of trade or aid sanctions.

138 See principles 5 and 6. Compensation on this basis means that the refugee has a means of supporting herself, removing the burden from the receiving State. For the text of the ILA's declaration see International Law Association, *Report of the Sixty-Fifth Conference: Cairo* (1992). For analysis of the Declaration and its impact, see Lee, "The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications" (1993) 6 *Journal of Refugee Studies* 1; Lee, "The Right to Compensation: Refugees and Countries of Asylum" (1986) 80 *American Journal of International Law* 532.

139 Garvey, "Toward a Reformulation of International Refugee Law" (1985) 26 *Harvard International Law Journal* 483 at 485-86. The penalties imposed by abusive regimes on people who leave clandestinely does not contradict this proposition. Authoritarian regimes require a pronounced sense of loyalty to the State which results in severe punishment for those caught fleeing clandestinely, but may also result in

that rather than accusing refugee-generating States of abusing human rights, receiving States should point out that the asylum-seekers create a burden on them for which there has to be some reparation.¹⁴⁰ Thus, where the source State maintains that those leaving are criminals or traitors, there is some basis for seeking cooperation from the refugee-generating State with organs of the international community such as UNHCR. This ensures that the expulsion does not endanger the lives of the asylum-seekers.¹⁴¹

This argument overlooks the fact that the receiving State still has to show why it should bear the burden which the presence of the refugees entails. The source State may argue that the entity to be held responsible is the refugee; that the receiving State should punish the refugee or take exactly the same approach as the source State; that the refugee is leaving because of underdevelopment, not persecution. This invites deterrence measures like interdiction and closure of frontiers. In the final analysis, the receiving State must rely on human rights as the justification for its decision to bear the asylum-seeker burden. But there are two ways in which a focus on the burden for the receiving State may help that State tackle the arguments of the source State. First, the receiving State may point out that the way in which it organises its society is being affected by the actions of the source State: the receiving State has its own cultural conception of rights which are owed to both its nationals and foreign asylum-seekers. The danger of this approach is that it may paint human rights in too relative a light. The source State may respond that there is a terrible problem, but if neither State should alter the way it organises its affairs, outflows of asylum-seekers are unavoidable. The second approach is to take the universalist stance and to argue that the outflow of refugees indicates that the conception of political community claimed to prevail in the source State is in fact the focus of dissent. The burden on the receiving State provides a buttressing argument for imposing sanctions on the basis that human rights are obligations owed *erga omnes*. The second approach is more confrontational than the first, but it provides some scope for avoiding charges of cultural imperialism.

Regardless of the value of the State responsibility approach for negotiating the problems discussed above, it has to be acknowledged that a focus on State responsibility without a human rights component could easily lose the dissenting voice of the refugee. This simply encourages refugee-generating States to apply tighter exit controls. In addition, receiving States may apply more deterrence mechanisms. Refugees are then reduced to inanimate objects of State policy, much like the fumes of the Trail Smelter on which the principles of State responsibility

acquiescence to mass exoduses. In reality, the severity of the punishment for clandestine departure demonstrates that such regimes desire to “reform” their citizens rather than reform the system of government and are happy to see “traitors” vote with their feet.

140 Ibid, at 494–95.

141 Ibid, at 496.

in international environmental law were built,¹⁴² minus the advantage that States have realised noxious fumes cannot be turned around at the border.

If underdevelopment is contributing to the flow of refugees, the request for reparations is also unrealistic. In these circumstances, development aid should be made contingent upon an improvement in human rights observance. Again, the burden of refugees on the receiving State gives added clout to this strategy. However, it must be admitted that given that the right to development has not been translated into inter-State obligations, this all requires a degree of altruism and a perception of interdependence which has not yet been fully realised in the international society of States: the very same problem which the shift to State responsibility hopes to cure. And if the asylum-seekers are not Convention refugees but are leaving solely because of the problems of underdevelopment, then a focus on State responsibility does little to alleviate the problem.

A final problem with the State responsibility approach is that it still leaves the initial burden of interim protection where it lies: with the State to which the refugee flees. Two other models for tackling refugee flows focus on interventionist measures to prevent or staunch the flow of refugees, and burden-sharing. Intervention under UN auspices in internal situations likely to cause refugee flows is examined first, focussing on the Cambodian peace process. The Cambodian peace process is a special example of these UN activities, because it not only shows a new willingness to override the superficial barrier of sovereignty when human rights are at stake but it is an attempt to reconstitute the sovereignty of a "failed state"¹⁴³ in a form which is likely to ensure that there will be no further flows of refugees.¹⁴⁴ Other examples of UN intervention in internal situations, which are not strictly comparable with the Cambodian peace process because of its basis in the Peace Accords, include the establishment of safe-havens for Iraqi Kurds after the Gulf War,¹⁴⁵ and the humanitarian and/or peace-keeping/making¹⁴⁶ efforts in Yugoslavia,¹⁴⁷ Somalia¹⁴⁸ and Rwanda.¹⁴⁹ Most of

142 *The Trail Smelter Arbitration (United States v Canada)*, 3 *Reports of International Arbitral Awards* 1938 (1941).

143 A term used in Helman and Ratner, "Saving Failed States" (1992-93) 89 *Foreign Policy* 3.

144 For a compilation of the Cambodian Peace Accords, see Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, reprinted in (1992) 31 *ILM* 180. The Accords comprise four documents:

- (1) the Final Act of the Paris Conference on Cambodia;
- (2) the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict;
- (3) the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia; and
- (4) the Declaration on the Rehabilitation and Reconstruction of Cambodia.

145 SC Res 668 (1991), reprinted in (1991) 30 *ILM* 858.

146 This term is defined by the Secretary-General in "An Agenda for Peace: Report of the United Nations Secretary-General", A/47/277, S/24111, 17 June 1992, p 6: *Peacemaking* is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.

these operations have met with only mixed success and there is potential for them to become mere containment devices which are unable to resolve the crises.

(ii) *United Nations interventions to staunch refugee flows: The reconstruction of Cambodian sovereignty*

The internationally sponsored peace process in Cambodia, in which Australia played a crucial role,¹⁵⁰ is a positive step towards reconstructing the prevailing international conception of sovereignty which promises to help stem the refugee flow from Cambodia by re-establishing peace, reconstructing the country economically and establishing respect for human rights. The peace process presents a sharp contrast with the past international inaction on Cambodia that was engendered by political forces and, unfortunately, classical international legal concepts and norms. Previous UN passivity ensured that massive movements of people from Cambodia, mainly over the Thai border, continued unabated. Most of these people were classified as "displaced persons", detained and denied the opportunity to seek asylum in third countries.¹⁵¹ It is obvious, however, that "the displaced" created much the same problem for Thailand as those who are regarded as Convention refugees.

The Peace Accords mark a sea change in the UN response to the Cambodians' plight: a welcome refashioning of international legal concepts in order to deal with the internal situation within a country which otherwise would continue to have international ramifications in the form of threats to international peace and security, violations of human rights and refugee flows. The starting proposition of the peace process was that the State of Cambodia was no longer a viable political entity. The process then attempted to reconstruct Cambodia in a form which

147 SC Res 743,758,761,762 and 764 (1992).

148 SC Res 767, 775 and 794 (1992).

149 SC Res 872 (1993); SC Res 909, 912, 918, 925, 935 (1994).

150 Australia produced a blue print for the Cambodian peace process and was involved in many of the negotiations. See Department of Foreign Affairs and Trade, *Cambodia: An Australian Peace Proposal* (1990).

151 This situation arose because Thailand is not a party to the Refugee Convention or Protocol and therefore would not grant refugee status to the asylum-seekers. Furthermore, the prospect of resettlement abroad was denied to most of the Cambodian asylum-seekers in Thailand. Many of the Cambodian asylum-seekers in Thailand were originally situated on the *Cambodian* side of the Thai/Cambodian border. Eventually, hostilities ensured that they were pushed to the Thai side of the border. See Lawyers Committee for Human Rights, "Refugee Project" in, *Seeking Shelter: Cambodians in Thailand* (1987), p 29. Despite the fact that these asylum-seekers might well have met the Convention definition or the UNHCR statute definition, these asylum-seekers were not permitted access to resettlement abroad. The Thai Government, being strongly opposed to the Vietnamese-installed Government, encouraged asylum-seekers to support the coalition of the Khmer Rouge, Son Sann's faction and Prince Sihanouk's faction, and the border camps were largely controlled by the factions. Furthermore, the Thai Government was concerned that any prospect of resettlement from Thai camps would act as a magnet for more asylum-seekers. See *ibid*, p 25 and Lawyers Committee for Human Rights, *Refuge Denied* (1989), p 53. Only the asylum-seekers in Kao I Dang camp, which was run by UNHCR pursuant to the UNHCR statute, were permitted to be interviewed for resettlement. See *ibid*, p 52.

encompassed new respect for the human rights of Cambodians. The Accords aimed to achieve this by guaranteeing Cambodia's neutrality and ensuring its freedom from outside intervention;¹⁵² disarming the factions;¹⁵³ providing for free and fair elections;¹⁵⁴ and, more remarkably, by stipulating that the new Cambodia would be a pluralist, liberal democracy; that it would accede to and abide by international human rights conventions; and that it would adopt a comprehensive constitutional Bill of Rights.¹⁵⁵

Facing the reality that there was no properly functioning government in Cambodia, the Peace Accords created a repository for Cambodian sovereignty by pooling the four factions to create the Supreme National Council (SNC)¹⁵⁶ and establishing the United Nations Transitional Authority in Cambodia (UNTAC).¹⁵⁷ The SNC then delegated most of the administration of Cambodia to UNTAC in a guardianship arrangement never before undertaken with a UN member State.¹⁵⁸

The formation of the SNC was an innovative reformulation of a country's sovereignty designed to surmount problems both of legal form and the realities of power. Established UN practice regarding peace-keeping missions (which were not envisaged by the framers of the Charter and are not mentioned in the Charter)¹⁵⁹ requires consent of the fighting parties. This was even more necessary for an operation which was more akin to a peace-making mission and which envisaged UN administration of the country. The practice of gaining consent for peace-keeping missions is legally required by article 2(7) of the Charter which enshrines the concept of domestic jurisdiction and it is practically required because the workability of any peace-keeping or peace-making mission depends on the commitment of the parties.

As Ratner states in his examination of the Peace Accords, there is a certain casuistry or circularity in relying on the SNC for consent to UNTAC's authority since the SNC and UNTAC are given breath simultaneously in a symbiotic partnership.¹⁶⁰ Thus he says that the final base of sovereignty is popular

152 See the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, n 144 above.

153 Ibid.

154 Ibid, articles 12–14.

155 For the provisions regarding human rights see articles 15–17 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, n 144 above; for those regarding the new Constitution of Cambodia see article 23 and Annex 5 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, n 144 above.

156 See articles 3–7 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, n 144 above.

157 Ibid, article 2.

158 Ibid, article 6. For a detailed exposé of the Cambodian Peace Accords and the creation of the SNC and UNTAC, see Ratner, "The Cambodia Settlement Agreements" (1993) 87 *American Journal of International Law* 1.

159 The validity of peace-keeping missions was confirmed by the International Court of Justice in its advisory opinion in the case concerning certain expenses of the United Nations (advisory opinion), [1962] ICJ Rep 151.

160 Ratner, n 158 above, at 24.

sovereignty and that the Peace Accords aim at re-establishing this.¹⁶¹ However, there is also a circularity inherent in reliance on the concept of popular sovereignty. In trying to reach the voice of the Cambodian people, the UN preordained the new Cambodian political system through a bargain with the murderous Khmer Rouge. At least one commentator, besides the Vietnamese installed regime which was bound to protest that inclusion of the Khmer Rouge violated Cambodia's sovereignty, opined that the UN was engaging in neo-colonialism.¹⁶²

Cambodians should be free to exercise their right of political self-determination and to choose to implement human rights and democracy in the manner they determine appropriate. However, it was imperative for the sponsors of the peace process to impose a starting point for a process of reconciliation. Apparently, it was necessary to bargain with factions which had committed atrocities and oppression and to impose standards to ensure that these factions did not again defeat Cambodians' right of self-determination by committing further atrocities. While cultural sensitivity is essential and will help to avoid outside interventions into Cambodia's affairs on the basis of doctrines like the Reagan doctrine of "saving democracy", it would seem inversely imperialist to argue that a people which has suffered through genocide and is threatened on a daily basis by the presence of indiscriminately planted mines would not agree to fundamental protections for the human person.

The real fears behind the claims of neo-colonialism may not have been based on objections to the idea of democracy or human rights, but on distrust of the Khmer Rouge; fears that the Khmer Rouge would only use the peace plan as a

161 Ratner writes:

If sovereignty rests with a state's people and embraces human rights norms, a string of repressive governments have already undermined the sovereignty of the Cambodian people. The Peace Accords, by entrusting to UNTAC tasks that foster conditions for Cambodians to exercise their popular will, reverse this trend and start to resurrect Cambodia's sovereignty.

Ibid, at 24. The Australian proposal which was instrumental in the development of the Peace Accords also used this rationale in its advocacy of the Supreme National Council. The Australian proposal stated:

[T]o the extent that sovereignty reposes anywhere in the present, contested, situation, it may be regarded as residing with the Cambodian people, and it would be appropriate for the Cambodian Parties participating in the comprehensive settlement to agree to vest that sovereignty, for the transitional period [the period between the signing of the agreements and the establishment of a new government through elections], in a Supreme National Council especially created under the Comprehensive Settlement for that purpose.

Department of Foreign Affairs and Trade, n 150 above, at 12.

162 See Song, "A UN role in Cambodia must be limited", *Chicago Tribune* (18 February 1990) reprinted in, *Hearing before the Subcommittee on East Asia and Pacific Affairs of the Committee on Foreign Relations United States Senate* (1990), 101st Cong, 2nd Sess, p 129. For similar sentiments regarding the lack of Western knowledge about the causes of the Somalis' plight leading to the UN intervention to secure a safe environment for the delivery of relief supplies, see Simons, "Somalia: The blind rush in", *International Herald Tribune* (9 December 1992), p 4.

chance for consolidation of power; fears that the peace plan was a misguided attempt by outsiders who did not know enough about Cambodian history and who surely could not be trusted given their past disregard concerning the Cambodian genocide and their past support for the various factions. This sense of apprehension could only be worsened by the fact that neither the international system nor the UN operates democratically.¹⁶³

As Allott notes,¹⁶⁴ individuals, and I would add peoples, *are* disenfranchised by the international State system, where powerful States are encouraged to act in their perceived national interests rather than in what Allott terms the public interest. The fact is that the UN presence in Cambodia was based on a legal creature of convenience, the Supreme National Council, a vessel for the most powerful myth of the international legal order, sovereignty, and it was unclear whether this creature of convenience would deliver. Thus it may be unsurprising that the Peace Accords did not garner complete support.

Yet there may have been no other way forward given the intransigence of the four factions. The peace plan was based on the practical need for consent of the warring factions, and their backers, before the Cambodian population would get its day at the polls. It was hoped that the plan would become a process of reconciliation which, although it might begin with a dubious marriage of convenience between hostile parties, would gain momentum, carrying the four factions with it. This course of action might be preferable to the exclusion and humiliation of one of the parties. In the words of the UN Secretary-General:

Of course, the Supreme National Council embodies the sovereignty of Cambodia during the transitional period. But it should also become the framework and instrument for a genuine, deep-rooted national reconciliation, based on a concern for the best interests of Cambodia and for its long-suffering people.¹⁶⁵

163 Suggestions as to how the World Body could be made more representative are often made, however. For example, Igor Lukashuk claims that the international community is becoming increasingly united and that the UN will accordingly play a larger role in international law, but that it must become more representative. He suggests that:

[t]he creation of a parliamentary assembly within the UN system would greatly increase its representativeness. This assembly would be formed by states' parliaments which would take into account their population and a number of other factors. Acts adopted by such a body would have to be morally and politically binding and to be considered by all UN bodies and member states.

Lukashuk, "The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights" in Damrosch L and Scheffer D (eds), *Law and Force in the New International Order* (1991), p 143 at 155.

It is arguable that proposed changes to the composition of the Security Council are also designed to increase the representativeness of the UN, although it is readily apparent that the interests of those States nominated for permanent membership may be the only interests served.

164 Allott, n 47 above.

165 *Intervention of the Secretary-General before the Security Council*, UN Doc S/PV 3057, p 11 (28 February 1992).

It was envisaged by the Accords that repatriated asylum-seekers and “displaced” persons would play a part in the process of Cambodian reconciliation.¹⁶⁶ In particular, note the words of paragraph 2 of Annex 4:

[t]he task of rebuilding the Cambodian nation will require the harnessing of all its human and natural resources. To this end, the return to the place of their choice of Cambodians from their temporary refuge and elsewhere outside their country of origin will make a major contribution.

The process of repatriation was to be voluntary, which is always the case with persons recognised as Convention refugees. However, it is questionable whether the “displaced” in Thailand had any option. Superficially, the Accords gave displaced Cambodians a choice, which demonstrates a desire to achieve a voluntary process of reconciliation rather than a politically expedient containment device. But given that the displaced were generally denied access to the possibility of asylum in any event,¹⁶⁷ it is more likely that the criterion for repatriation was the reasonableness of the repatriation given the lack of other options. This is supported by the fact that the language used in the Accords is ambiguous, even contradictory, on this issue.¹⁶⁸

There are a series of interrelated and complex questions raised by the return of these displaced people. Is repatriation with an effort to reconstruct the community a complete alternative or a supplement to the right to leave and return later to the reconstructed community and who decides these issues—potential asylum States and their communities or asylum-seekers? What role is UNHCR playing in repatriation—is it contributing to the rebuilding of a community and representing the asylum-seekers or is it becoming an instrument for dubious policies developed by asylum States? Should greater efforts have been made by Western States to share Thailand’s burden? With these questions in mind, models of burden-sharing and the problems with them are canvassed next.

(iii) *Burden-sharing*

The most notable example of burden-sharing in practice is the Comprehensive Plan of Action for Indo-Chinese Refugees (CPA).¹⁶⁹ Under the CPA, Vietnam’s neighbours agree to act as countries of temporary refuge. They are to apply screening methods consistent with the Convention definition on the basis that traditional countries of resettlement will take responsibility for the asylum-seekers. Persons who do not meet the Convention definition will be repatriated.¹⁷⁰

The CPA has been subject to a great deal of criticism. A major point of controversy is the fact that no attention is paid to the improvement of Vietnam’s

166 See article 9, Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, n 144 above, p 183 and Annex IV of the agreement.

167 See explanation in n 151 above.

168 Compare the reference to the “right” to return in article 20(1) of the Comprehensive Settlement of the Cambodia Conflict, n 144 above, with the references to the idea that repatriation *should* be voluntary in article 20(2) and Annex 4 to the Agreement.

169 Comprehensive Plan of Action for Indo-Chinese Refugees, n 37 above.

170 *Ibid*, at 4–8.

human rights record. Instead, an orderly departure program is provided for¹⁷¹ and clandestine departures are to be discouraged by the Vietnamese Government.¹⁷² As Hathaway states in an article on the CPA:

[t]he formalization of immigration-based resettlement schemes from Vietnam as the “primary” and ultimately “sole” mode of departure is, of course, fundamentally at odds with the concept of a refugee, because the essence of refugee status is the autonomous *right* to disengage from an abusive society and to seek protection abroad.¹⁷³

The adoption of the Refugee Convention definition of “refugee” for screening purposes suggests that there is a human rights basis for the plan. Hathaway, however, correctly notes that the CPA is in fact based on the notion that those now leaving Vietnam are most likely to be economic migrants, not Convention refugees.¹⁷⁴ The new attitude that Vietnamese asylum-seekers are predominantly economic migrants has led to various faults in the CPA which have been subject to criticism by many non-government organisations.¹⁷⁵ These faults include the overly restrictive application of the Convention¹⁷⁶ and the use of detention as a mechanism of “humane deterrence”.¹⁷⁷ These problems indicate that although burden-sharing is a recognition of interdependence, it is still only a limited step forward from the insistence that migration is a matter for the discretion of each State. Burden-sharing under the CPA operates primarily as a recognition of States’ interests over the asylum-seekers’ interests in similar fashion to a focus on State responsibility which is divorced from human rights.

In another article, Hathaway outlines a different model of burden-sharing.¹⁷⁸ He suggests a new international regime for refugee protection in which the right of asylum-seekers to leave is retained as a tool of empowerment;¹⁷⁹ in which an international body removed from tight control of States, perhaps a revamped UNHCR, allocates responsibilities between the countries of first asylum and third States according to resources and absorptive capacities;¹⁸⁰ under which the preference of States to take “national or ethnic relatives” or persons otherwise affiliated with the State is taken into account;¹⁸¹ in which there is only a duty of

171 Ibid, at 3.

172 Ibid, at 3.

173 Hathaway, “Labelling the ‘Boat People’: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indo-Chinese Refugees” (1993) 15 *Human Rights Quarterly* 686 at 687.

174 Ibid.

175 See eg Lawyers Committee for Human Rights, *Hong Kong’s Refugee Status Review Board: Problems in Status Determination for Vietnamese Asylum-Seekers* (1992); and Lawyers Committee for Human Rights, *Inhumane Deterrence: The Treatment of Vietnamese Boat People in Hong Kong* (1989).

176 Hathaway, n 173 above, at 696–98.

177 Lawyers Committee on Human Rights, *Inhumane Deterrence*, n 175 above.

178 Hathaway, “Reconceiving Refugee Law as Human Rights Protection” in Gowlland and Samson (eds), *Problems and Prospects of Refugee Law* (1991), p 9.

179 Ibid, at 18.

180 Ibid, at 26.

181 Ibid, at 24. The “cultural relatives” basis for protection is prohibited by the Refugee Convention as it now stands. It would also be prohibited under the more general

temporary protection until conditions in the home country are such that return may be effected—a concept analogous to that of temporary refuge under the CPA which has been adopted by UNHCR for cases of mass exodus and which is again on UNHCR's agenda as a response to crises like those in Yugoslavia;¹⁸² in which the class of asylum-seekers who are eligible for such protection is based not on persecution, but lack of protection from human rights abuses;¹⁸³ and in which there will be a special fund for resource-sharing to meet the needs of refugees.¹⁸⁴

Hathaway believes his plan will eliminate restrictive measures which protect the prerogative over entry¹⁸⁵ such as interdiction and detention. This is absolutely necessary in order to ensure protection of the right to seek asylum and the human dignity of asylum-seekers once they have left their countries of origin. Hathaway's plan should mean that there is not the same perception of the need for deterrence measures on the part of States of first asylum or temporary refuge because there should be a ready supply of third States to take responsibility for interim protection, while an emphasis on repatriation should mean that eventually the flow of asylum-seekers from a particular country will stop. In addition, Hathaway's plan would shift the categories of States which are traditionally countries of temporary refuge and States which are traditionally countries of resettlement. All countries would have the potential to be countries of first asylum, and theoretically no country would be forced to act as a country of resettlement. This could mean that the perceived need for deterrence measures in the West is removed.

There are, however, potential problems with the plan. It may involve a great deal of bureaucracy for assessing claims by asylum-seekers, allocating responsibility for interim protection and moving the asylum-seekers. The element of international bureaucracy is always going to be a problem, just as the current decentralised approach is problematic. Unless the transfer of asylum-seekers is quick it could entail a great deal of uncertainty which, like detention, has an adverse effect on asylum-seekers' ability to fit into any community. During this time, States of first asylum might still perceive a need for detention despite the fact that they will not have to undertake longer term responsibility for the asylum-seekers and even though the emphasis on permanent resettlement has been removed. Under the CPA, for example, asylum-seekers have faced long periods of detention in countries of temporary refuge, despite the UNHCR's involvement and

norm of non-discrimination over migration. However, it has to be acknowledged that if States are going to undermine the Refugee Convention as they are beginning to now, protection which takes into account the preference for cultural relatives may be an incentive for States to continue to protect refugees.

182 Hathaway notes:

The major "cost" of this new system would be the notion of an unrestricted right of a refugee to access enduring asylum in the state of his or her choice. This loss is, however, more apparent than real, since all but a very small minority of refugees—predominantly young, male and mobile—either find protection in states adjoining their own, or are unable to escape at all,

Ibid., at 27. For UNHCR documentation regarding the concepts of temporary refuge/protection, see n 37 above.

183 *Ibid.*

184 *Ibid.*, at 25.

185 *Ibid.*, fig 3.

UNHCR's guidelines on detention which provide that detention is undesirable.¹⁸⁶ Detention is viewed by States as a useful ploy to keep the asylum-seekers, and the burden on States of temporary refuge, visible¹⁸⁷ and it is not an empowering experience for asylum-seekers but a long, discouraging waiting game.

Furthermore, Hathaway's plan contemplates a tolerance for different populations of asylum-seekers moving in and out of countries. This has not traditionally been forthcoming except under minimal conditions and, of course, it also depends on the success of the transformation of the home country. The problem still remains how to secure the cooperation of refugee-generating States in the improvement of human rights conditions and to secure the cooperation of refugee-receiving States in this enterprise through the application of sanctions, conditions on development aid and so on. It seems obvious that it is in the national interest of the refugee-receiving States to do this but it is very seldom perceived in this way by those States. Even where it has been so perceived, as in the case of the Australian effort in Cambodia, refugee-receiving States have still used deterrence mechanisms.

Australia has opted for detention of Cambodian asylum-seekers, despite the small numbers of asylum-seekers reaching Australian shores;¹⁸⁸ despite the fact that some of the asylum-seekers are Convention refugees and that prolonged detention is a further degradation; despite the possibility that humanitarian status for those asylum-seekers not meeting the Convention definition may be warranted; despite United Nations' involvement in Cambodia and the fact that the UN was prepared to underscore the responsibility of errant Cambodian factions such as the Khmer Rouge through the imposition of economic sanctions.¹⁸⁹ It is possible that Hathaway's plan would mean that States like Australia would only have to act as countries of temporary refuge, with some other State providing longer term interim protection. This could act as a disincentive for deterrence mechanisms in Australia. In the particular case of Cambodian asylum-seekers this seems unlikely, however, because Australia could be regarded as the country with most resources and highest absorptive capacity in the region. In addition, the argument about cultural relatives *should* run a little thin in a multicultural society like Australia, at least from the perspective of the supranational institution which Hathaway envisages.

There is still one major advantage of Hathaway's plan which could act as an incentive for deterrence mechanisms to be dropped. This is the fact that Australia would no longer be resettling thousands of refugees on a *permanent* basis. However, if change in the country of origin cannot be achieved, interim protection will, by force of circumstances, become *de facto* asylum. This may result in forced "voluntary" repatriations or deterrence measures. Australia detained Cambodian asylum-seekers, despite the fact that at the time of the Cambodians' arrival,

186 Note 131 above.

187 Lawyers Committee for Human Rights, *Seeking Shelter*, n 151 above, p 34.

188 As of June 1993, 600 boat people had arrived in Australia over a period of three years. Only 139 of them were recognised as refugees, which included 54 Cambodians. See Reuters, "Australia accepts 29 boat people, rejects 17" (18 June 1993) [available in LEXIS-NEXIS library non-US news file].

189 SC Res 792 (1992).

Australia was only prepared to guarantee temporary stay for any “onshore applicant” for refugee status or humanitarian status.¹⁹⁰ Indeed, if the situation in the home country takes a very long period to improve, the supranational body envisaged by Hathaway will need the power to allocate a state of resettlement, because the refugee cannot be left in a state of uncertainty. The idea of a special fund is a helpful beginning to the solution of these problems, but questions remain as to how to secure contributions to the fund and how to use the fund to combat the systemic problems which cause refugees. Hathaway states that the new institution would need authority to “intervene in relation to any instance of coerced migration stemming from threats to basic human rights”.¹⁹¹ Presumably, he means an intervention which goes beyond the mere provision of relief assistance to asylum-seekers such as the multilateral imposition of economic sanctions or the kind of UN operation that the Cambodian Peace Process represents.

The suggestion of these avenues highlights the two largest obstacles to implementation of Hathaway’s plan. The first problem is the capacity of even concerted interventionary measures to succeed in the face of the intransigent reliance on sovereignty by rights-abusing elites in refugee-generating countries. Witness the rocky progress of the Cambodian reconciliation process which threatens to become unstuck as the Khmer Rouge has, as feared, refused to cooperate with the elected government and which, in any event, was undertaken in the situation of a failed state. In addition, mechanisms to combat systemic violence and underdevelopment may be necessary, yet sanctions are not especially conducive to fine-tuning to ensure that innocent sections of the population are not hurt. However, sanctions have sometimes been effective in the past and it is questionable whether this concern alone feeds the inaction of the international community. The second problem is the lack of political will of the international community to adopt Hathaway’s new system for refugee protection, even though it seems so obviously in States’ national interest to take an approach which focuses on interdependence, and to commit themselves to using the communal mechanisms already available under the UN Charter in response to refugee flows.

The two major UN Reports¹⁹² dealing with refugee flows both displayed difficulty in dealing with these issues. Both reports, while making recommendations that systemic problems of violence and underdevelopment be tackled alongside the traditionally recognised problem of human rights violations, reveal that the fundamental problem is the anarchical tendencies of the international community. When dealing with human rights as a cause of refugee flows, the Group of Governmental Experts falls back on hortatory recommendations for governments to abide by human rights.¹⁹³ When addressing the systemic issues such as underdevelopment, the Group urges cooperation, and

190 See statement of the Hon Gerry Hand, Department of Immigration, Local Government and Ethnic Affairs, Media Release MPS 43/90 (10 December 1990).

191 Hathaway, n 178 above, p 26.

192 See Khan, n 41 above, and *Report by the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, UN Doc A/41/324 (13 May 1986).

193 Report by the Group of Governmental Experts, *ibid*, p 17, para (d).

indeed categorises international cooperation and peaceful settlement of disputes as duties recognised at international law.¹⁹⁴ However, the international community has only just begun to experiment with defining and responding to human rights abuses as threats to international peace and security and teething problems threaten to overwhelm these experiments. Moreover, the impetus to respond to human rights abuses has not compelled a re-examination of migration policy. The driving force behind Australia's adoption of deterrence mechanisms is its inward-looking perspective on immigration which has not been fully reconciled with its outward-looking contribution to the international community through the UN, particularly in Cambodia. Unfortunately, the rest of the West seems to share the same inward-looking perspective on immigration. In eliminating the element of permanent resettlement and concentrating on burden-sharing, Hathaway deals with the obstacle of the sense of national community, in the hope that this might convince States to be more cooperative as an international community.¹⁹⁵ But it is the same factors behind the sense of national community, the exclusionary attitudes in the face of human need, which lead to the failure to adopt measures to stop the need at its source and which may lead to refusal of even temporary shelter.

IV. Treatment of Cambodian Asylum-Seekers in Australia Appraised

It has been demonstrated above that Australia's efforts to restore stability and safety within Cambodia through the United Nations Cambodian Peace Plan may have substantially diminished the need to grant refugee or humanitarian status to Cambodian asylum-seekers. This has been achieved through a welcome refashioning of sovereignty to allow participation of the international community in Cambodia. However, it is important to recognise that the need for protection of Cambodian asylum-seekers may not have been completely removed. It should be recognised that the fact that the immediate context of the Cambodians' claims is a civil war and failed statehood does not eliminate the possibility of persecution. Although the Peace Accords envisage that Cambodians everywhere should have the opportunity to return home, they do not expressly address the question of obligations under the Refugee Convention towards asylum-seekers. For States party to the Refugee Convention, Convention obligations are paramount.

Australia's obligations under the Refugee Convention mean that it is not possible for Australia to declare Cambodia a safe country. Australia must make individualised determinations as to refugee status. Indeed, Cambodian asylum-seekers have had the opportunity to make claims for refugee and humanitarian status, and some have been granted this status. However, from the very first

194 *Ibid.*, n 258, p 17, para (e).

195 Hathaway states:

The proposal advanced here attempts to address structural concerns of this kind, in the hope that in so doing it may be possible to convince states simultaneously to move toward a more holistic conceptual standard of refugeehood as human rights protection.

Note 178 above, p 29.

arrivals of Cambodian “boat people”, the Australian Government adopted a hard-line stance towards them. The Government has taken a number of harsh measures that seem designed to deter the arrival of further Cambodian asylum-seekers but which have ramifications for all persons who arrive under similar circumstances, including, most notoriously, the requirement of mandatory detention under Division 6. A number of other measures taken by the Australian Government, such as the curtailment of judicial scrutiny of decisions regarding claims for asylum, are not so clearly directed at the Cambodians but have perhaps been prompted by their presence and also have ramifications for asylum-seekers in Australia generally. Many of these measures are of dubious value.

The premise of this case study is that the arrival of the Cambodians caused the Australian Government to place undue focus on the ability of undocumented asylum-seekers to evade border control mechanisms. Thus the Government, following the trends of restrictive practice examined in Section III(C) above, has cut back on judicial scrutiny for asylum-seekers and required their compulsory detention, failing to properly account for factors which militate against these actions. The Government has created an environment in which justice is not seen to be done. This affects public confidence, and the confidence of the asylum-seekers and their legal advisers in the refugee status determination system. Furthermore, this environment undermines other States’ faith in Australia’s commitment to the Refugee Convention’s regime of protection. In many cases, the Government’s actions have been taken as pre-emptive measures, cutting off legal options for the asylum-seekers just before or while they were being accessed. The legislature is entitled to make changes to schemes of rights,¹⁹⁶ but such action does nothing to encourage the fair application of the Refugee Convention by other parties, to encourage non-parties to join the Convention regime or to encourage burden-sharing. Finally, the Government’s measures, particularly prolonged detention, have been harmful to the well-being of the asylum-seekers.

These “side-effects” of the Government’s policy raise questions as to whether the Government has characterised the problem correctly. How long is it feasible to maintain the focus on protecting borders as a response to the problems of international migration in an increasingly geographically—if not yet politically—interdependent world? Australia has been quick to see through sovereignty in Cambodia and to argue that sovereignty rests with the Cambodian people, but its

196 Despite the fact that the High Court found that detention of the asylum-seekers prior to the passage of Division 6 could not be justified under any legislative provision and was therefore illegal (a fact which is worrying in itself and is returned to in Section IV(B)(ii)) the High Court found that Division 6 was not a bill of attainder because it would apply to all future boat people. See *Lim*, n 9 above, at 120 (Brennan, Deane and Dawson JJ with whom Mason CJ, Gaudron J concurred); 132 (Toohey J); 146 (McHugh J). However, for many lawyers, the decision to pass the legislation two days before the Federal Court was to hear the applications for release is uncomfortable. Although the legislation does indicate a determination to “get tough”, the quick passage of the bill, the strain evident in the drafting, and the heavy-handed addition of Section 183 indicate sheer panic rather than a calm attempt to balance the consideration of controlling Australia’s borders with humanitarian considerations regarding the treatment of the Cambodian asylum-seekers.

approach to the problems of migration indicate that Australia does not recognise that the whole international State system requires reworking to ensure an effective humanitarian response to the refugee crisis. As seen above, the international community has taken some measures to combat root causes of migration such as overpopulation, underdevelopment and human rights abuses, but it has not yet established effective burden-sharing regimes for refugees, let alone migration generally. Has the Australian Government fully considered the possibilities canvassed in Section III(D) for an outward-looking approach to migration that focuses on the root causes of the problems of migration and burden-sharing of the refugee problem? To what extent are the Australian Government's hands tied by the fact that all States must move to an outward-looking focus on migration problems before any one State will be prepared to give an inch of the well-guarded plenary power over immigration? To what extent is the Government's immigration policy simply driven by the inward-looking perspective on sovereignty and the same defensive attitudes regarding immigration that prevailed at the time of Federation? The answers to these larger questions are not reached here, but they inform the debate regarding treatment of the Cambodian asylum-seekers.

The narrower question of whether the Australian Government's measures to alleviate the problems posed by asylum-seekers are necessary and proportionate is examined in some detail. As mentioned,¹⁹⁷ one result of the doctrine of the absolute discretion over immigration is that national courts have held that due process of law is whatever the legislature concedes. I have argued that the exercise of the immigration power should be viewed like any other exercise of jurisdiction and that it is constrained by international law, particularly by the norm of non-discrimination.¹⁹⁸ Thus the decision-making process concerning entry should be fair and transparent and the full range of international human rights should be upheld while decisions are being made. These propositions are particularly true where the State considering the alien's application for admission is a liberal democracy like Australia, because they cohere with the community's concept of statehood, especially the notion of the rule of law which demands that the exercise of any governmental power be justified.¹⁹⁹ The treatment the Cambodian asylum-seekers received under Australia's refugee and humanitarian status determination procedures and the detention policy is examined accordingly.

(A) Fair and transparent refugee and humanitarian status decision-making: How the Cambodians fared

In most cases, justification of a decision concerning entry of an alien will simply turn on whether the alien meets nationally defined immigration criteria. In some

197 See analysis in Section III(B) above.

198 Ibid.

199 For similar arguments concerning the treatment of aliens as a reflection of the host community, see Henkin, "The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates" (1985) 27 *William and Mary Law Review* 11 and Brennan F, "Litigating the Rights of the Marginalised—An Australian Revolution in the Rights of Asylum Seekers and Indigenous Peoples" in, *Revolution by Lawful Means: The Law and Politics*, 1993 New Zealand Law Conference, 3 March 1993, Wellington (copy on file with author).

cases, however, there will be limits on those criteria imposed by international conventions (for example, racially discriminatory guidelines are not permitted) or, in the case of refugees, the criteria will be defined by international conventions. Furthermore, the manner in which the determination of refugee status is made should adhere to high standards of due process in light of the pressing interests involved in order for the claim that the refugee has on national communities other than her own to have meaning.

This approach is taken for three reasons. First, when dealing with a right “to seek” asylum, procedure is everything: without due process, the right means nothing. Second, the threat to life or liberty which results from *refoulement* if refugee status is incorrectly refused, demands that States accord a high degree of due process. It is on this basis that the UNHCR has issued its *Handbook on Procedures and Criteria for Determining Refugee Status*.²⁰⁰ Third, because the right to seek asylum is an incomplete right—a right which places an inchoate duty on the entire international community but which has not yet overcome the claims of absolute discretion over entry—and the duty of *non-refoulement* lies wherever it falls, it is necessary that each State shows good faith by observing the highest standards of process. Vertical, supranational enforcement would be a desirable back-up, but since the State system has not yet moved to allow stringent enforcement mechanisms in the case of refugee status decisions, good faith is essential for the Refugee Convention²⁰¹ to work. Thus, States should not be permitted to rely on maxims such as “due process is whatever the legislature concedes” nor should undue reliance be placed on actual State practice in interpreting what is required. This is not to say that unrealistically high standards of due process should be imposed—it has been cogently argued that trying to improve asylum adjudication procedures is like “navigating the coast of Bohemia”.²⁰² However, the dangers of using State practice to interpret the Refugee Convention bear repeating. State practice regarding due process owed to asylum seekers may not be practice which demonstrates “agreement”²⁰³ between the parties as to application of the treaty. Rather, it is practice which focuses on particular individuals’ applications for entry, divorced, by the doctrine of separation of powers and by dualist conceptions of the relationship between international obligations and national laws, from any sense of interdependence or obligation to other State parties.

The Australian procedures for determination of refugee status are examined here on the basis that the standard of due process for asylum-seekers should be very high. Particular attention is paid to the openness of the decision-making process and the possibility of political factors overriding the humanitarian character of the decision-making process.

200 Office of the United Nations High Commissioner for Refugees, n 122 above.

201 Article 26, Vienna Convention on the Law of Treaties, n 111 above.

202 Martin, “Reforming Asylum Adjudication: On Navigating the Coast of Bohemia” (1990) 138 *University of Pennsylvania Law Review* 1247.

203 Article 31(3) of the Vienna Convention on the Law of Treaties, n 99 above. See analysis at n 99 above and accompanying text.

(i) The Australian procedures

The Australian procedures in force at the time of the determination of the Cambodians' applications for refugee status, which were revised as of July 1993,²⁰⁴ were as follows. First, a case officer from the Determination of Refugee Status (DORS) branch of the Immigration Department made a determination based on the Convention definition and then made a recommendation to a delegate of the Minister for Immigration. The Minister was thus responsible for the final decision. If unsuccessful, the applicant for refugee status could apply for internal review of the decision by the Refugee Status Review Committee (RSRC). Three of the four members of the RSRC were from Federal Government departments, namely the Immigration Department, the Attorney-General's Department and the Department of Foreign Affairs and Trade (DFAT). If the decision of the RSRC was negative, the Minister could exercise her discretion to grant stay in Australia on humanitarian grounds, but access to this discretion was initially denied in the case of people detained under Division 6. Because determination of refugee status is a decision under the Migration Act, review of the decisions by the Federal Court could be obtained under the Administrative Decisions Judicial Review Act (ADJR Act)²⁰⁵ on several bases, including that the decision was unreasonable or it failed to accord natural justice.²⁰⁶ But the courts could not undertake a full merits review.

A number of deficiencies regarding the transparency of these procedures are apparent in the treatment of the Cambodians. Some of these may have been corrected by the implementation of the new procedures, but they may also have been offset by undesirable developments such as curtailment of judicial scrutiny. For a start, the procedures were set up by discretionary ministerial guidelines, rather than incorporated in the legislation, and were therefore not well known.²⁰⁷ Another deficiency in the procedures was the close connection of the RSRC to

204 Part 7 of the Migration Act, inserted by the Migration Reform Act, provides for the establishment of a new independent body, the Refugee Review Tribunal.

205 See the description of the judicial review process for immigration decisions in n 5 above.

206 See Sections 5 and 6, ADJR Act.

207 Provision for internal review and the final Ministerial discretion to apply the humanitarian grounds were found in Section 115 of the Migration Act (from 1 September 1994, Section 345). The refugee status determination procedures in force at the time of the Cambodians' claims and the structure of the RSRC were announced by the Minister for Immigration on 26 October 1990 (Media Release 55/90). The sources relied on for this paper are the practical experience of the author in presenting refugee status applications, the regulations and media releases as referred to, and the following internal Departmental documents:

Department of Immigration, Local Government and Ethnic Affairs, Ministerial Guidelines—Refugee Status Review Committee (RSRC); Department of Immigration, Local Government and Ethnic Affairs, Refugee Status Determination—New Procedure (internal training document); Determination of Refugee Status Branch, Refugee/Humanitarian Determination—Legal Framework (internal training document).

central organs of government.²⁰⁸ The Migration Reform Act has replaced the RSRC with a body of independent people who are appointed by the Governor-General and it has placed the entire system of refugee status determination into the Migration Act,²⁰⁹ which may help to eliminate the problems of lack of accessibility and the problems of bias.

(ii) The importance of judicial scrutiny

Despite the newly accessible documentation of the procedures, however, avenues for judicial scrutiny of the procedures have been diminished. This has been achieved in two ways. First, Division 6 ensures that when court proceedings concerning an asylum-seeker's application are in train, the immigration authorities are not held responsible for time the asylum-seeker spends in detention.²¹⁰ Thus, asylum-seekers are given a strong disincentive from instituting court proceedings. The second way in which judicial scrutiny may have been reduced is through amendments contained in the Migration Reform Act which purport to eliminate the application of the ADJR Act. The jurisdiction of the Federal Court regarding review of Refugee Review Tribunal decisions is now limited to grounds provided for in Section 476(1) of the Migration Act and Section 476(2) provides that review is not allowed on grounds that a breach of natural justice has occurred or that the decision involves an exercise of power so unreasonable that no reasonable person would have exercised it. Most importantly, reasonable apprehension of bias is no longer a basis for judicial review, only actual bias. The Immigration Department claims that the grounds for judicial review now set out in the Migration Act still "embody the principles of natural justice".²¹¹ This is disputed by human rights advocacy groups like the Immigration Advice and Rights Centre Inc who points out that the concepts of reasonableness and natural justice contained in the ADJR Act are much more elastic and that actual bias is almost impossible to prove.²¹²

Of course, there is a valid motivation for cutting down lengthy appeals processes in an effort to limit fruitless claims. Both the High Court in *Lim*²¹³ and the Joint Standing Committee expressed concern over the capacity of judicial scrutiny to add to the period of detention.²¹⁴ However, while it may be the case that the independent nature of the new Refugee Review Tribunal will mean that judicial review is less necessary, it should be noted that judicial scrutiny has

208 See eg Refugee Council of Australia, "Position Paper with Respect to Asylum Seekers and the Refugee Determination Procedures" (May 1992), p 11.

209 See n 204 above.

210 Section 182(3)(e) of Division 6 provides that in calculating whether a person has been in custody for longer than the 273 days prescribed by Section 182(1), the clock stops running where "court or tribunal proceedings relating to the application have been begun and not finalized".

211 Para 44, explanatory memorandum regarding the Migration Reform Act, cited in Immigration Advice and Rights Centre Inc, "A Discussion of the Migration Reform Act" (September 1993), p 25 (copy on file with the author).

212 Ibid.

213 Note 9 above. For analysis see Section IV(B) below.

214 See eg Joint Standing Committee on Migration, n 25 above, p 149.

proved vital in many refugee cases in Australia, including the most important case, the *Chan* decision, where it was revealed that the Convention definition had been incorrectly interpreted.²¹⁵ Judicial scrutiny helps to ensure the fairness and transparency of refugee status determination procedures. In the case of the Cambodians, the courts have heard a number of allegations of bias flowing from the context of the Cambodians' arrival: from the prejudicial public statement by former Prime Minister Hawke,²¹⁶ through the apparent fear of further arrivals of boat people, to the Australian involvement in the peace plan. The *Mok* case involved a successful allegation that public statements, particularly Prime Minister Hawke's statement that the Cambodians were economic migrants, had created a reasonable apprehension of bias.²¹⁷ In both the *Mok* and *Lek*²¹⁸ cases, the applicants also alleged that Australia's involvement in the peace plan and fear of further arrivals was creating a policy to reject Cambodians' applications for refugee status. Although the allegation was unsuccessful, the judges in both cases accepted that the Government was concerned about undermining the peace process and that it desired to deter further arrivals of boat people.²¹⁹ These findings bolster the claim that detention of Cambodians has been designed as a deterrent.

(iii) *Significance of the peace process for refugee status*

It is important to note in this context that the peace process is important background for the Cambodians' claims for refugee status and stay on humanitarian grounds which Australian decision-makers must take into account along with the prior history of genocide, civil war and human rights abuses. The importance of the peace process as part of the context for the Cambodians' claims for refugee status turns on whether the peace process has successfully erased the basis for a well-founded fear of return to Cambodia. This is one of the grounds for cessation of refugee status, provided for in article 1C(5) of the Refugee Convention. If material change has not occurred in Cambodia but asylum-seekers who would meet the Convention definition but for the finding of material change were returned, Australia would be in violation of its Convention obligations and would be guilty of using the Cambodian peace process as a containment device.

It may be that the subjective scars of some Cambodian applicants for refugee status should be the paramount consideration. The Convention contains an express exception to the cessation clauses for those who can invoke "compelling reasons arising out of previous persecution for refusing to avail [themselves] of the protection of the country of nationality".²²⁰ This exception is limited to refugees defined in article 1A(1)—the so-called "statutory refugees" covered by arrangements pre-dating the Convention. However, as Goodwin-Gill notes, this is perverse.²²¹ The UNHCR, *Handbook on Procedures and Criteria for*

215 *Chan v Minister for Immigration* (1988–90) 169 CLR 379 [hereafter "*Chan*"].

216 See n 3 above.

217 *Mok*, n 26 above, at 20, 45.

218 Note 14 above.

219 *Mok*, n 26 above, at 39; *Lek*, n 14 above, at 120.

220 See article 1C(5).

221 See Goodwin-Gill, n 102 above, p 254.

Determining Refugee Status provides that Convention refugees are also covered by this exception.²²²

In any event, Australian decision-makers have to determine whether circumstances in Cambodia have changed sufficiently to deny Cambodian asylum-seekers refugee status. Under the Australian legal interpretation of the Convention, a person's claim to refugee status is considered on the basis of facts existing at the time of the determination, rather than the facts existing at the time of flight followed by application of the cessation clauses. Nevertheless, some consideration is given to facts existing at the time the person fled so the effect is largely the same.²²³ In either case, the applicant for refugee status would have to show that she still had a well-founded fear of persecution and that the circumstances on which this fear was based had not materially changed. In *Mok*, Justice Keely found that the decision-maker had erred in law and made an unreasonable decision because the decision-maker simply failed to properly consider whether the applicant had a well-founded fear of persecution at the time of departure and whether there had been a material change in circumstances.²²⁴

A proper consideration of whether there has been a fundamental change of circumstances in Cambodia would take into account the following factors: the existence of the Peace Accords and the ongoing peace process, the repatriation of Cambodians in Thailand (which Foreign Minister Evans stressed was a strong reason for the repatriation of Cambodian asylum-seekers in Australia)²²⁵ and the elections and formation of the new government. None of these factors would necessarily be sufficient for a refusal of refugee status to an asylum-seeker who had a well-founded fear of persecution at the time of leaving Cambodia. What is required for the operation of the cessation clauses—or under the Australian interpretation of the Convention, for a fundamental change which means that the person cannot be recognised as a refugee in the first instance—is a true and effective change in the human rights situation.²²⁶

At the time of determination of the Cambodians' claims, UNTAC had arrived, but the elections were not held until mid-1993. Even now, only cautious optimism regarding the future for human rights in Cambodia is warranted. While the new Cambodian Government is responsible under the Peace Accords for the implementation of democracy and human rights norms, it must be remembered that the Cambodians are a people with no recent experience of either. The re-establishment of *any* Cambodian sense of national community is a challenging task given that genocide has taken not only people but part of Cambodian

222 Office of the United Nations High Commissioner for Refugees, n 122 above, para 136.

223 *Chan*, n 215 above.

224 *Mok*, n 26 above, at 73, 74.

225 Senator Evans announced that ethnic Vietnamese from Cambodia would not be returned given attacks on ethnic Vietnamese in Cambodia, but he stressed that other Cambodians could be safely returned. Agence France Presse, "Australia promises not to deport ethnic Vietnamese to Cambodia", *The Age* (1 April 1993).

226 Hathaway, n 1 above, p 200–01.

culture with those killed.²²⁷ The rule of law and respect for human rights in Cambodia is still not strong.²²⁸ Furthermore, the elections have not been accepted by the Khmer Rouge, which is now an outlaw fighting the newly elected government: a situation which may yet necessitate renewed troop deployment by the international community.

The safe return of Cambodians from the Thai border created a half-way house between the mere signing of the Peace Accords and the success of the Accords because of the unique guarantees for human rights which the Accords contain. Unlike repatriations which UNHCR has undertaken in other marginal situations such as El Salvador,²²⁹ UNTAC was responsible for administering the country and it placed civilian human rights monitors and police in the country. Furthermore, there are guarantees by important third countries of the neutrality of Cambodia and a commitment to its economic reconstruction. It might have been possible for Cambodian asylum-seekers to be returned to a part of Cambodia which was secured by UNTAC, just as asylum-seekers from the Thai border were being repatriated to such areas. Even for persons who would otherwise meet the Convention definition, the question of whether a part of the country could have provided a safe-haven before the person left for a third State may be a relevant consideration in the determination of refugee status.²³⁰ However, the temporary presence of UNTAC in Cambodia until elections were held is not enough to support the conclusion that material change had occurred.

227 The staff of the Subcommittee on East Asia and Pacific Affairs accurately note:

The toll of the Khmer Rouge days is most telling on the educated elite. The destruction of the education sector is typical: 60 percent of all primary school teachers murdered, 70 percent of all secondary teachers, 70 percent of university teachers. Of the total student population of 827,000 about 50 percent were killed. In the medical profession, of 500 doctors, only 40 remained after 1980. Among 70,000 Buddhist monks, 14,000 died. An estimated 189,000 public officials were killed...

UNICEF reports that the adult literacy rate is now at 70 percent (compared to a 1960 level of 31 percent) after two major literacy campaigns by the government but, lacking reading material, these "neoliterates" may be losing their newly required skill. Teachers have had little training; the Ministry of Education's textbook printing capacity is only 600,000 per year compared to a demand of over 2 million. There are also some indications of severe posttraumatic stress syndrome among adults being transferred to children with an increase in learning disabilities and other problems that augur poorly for the country's long-term recovery.

Staff Analysis of Cambodian Peace Talks (report) reprinted in, *Hearing before the Subcommittee on East Asia and Pacific Affairs of the Committee on Foreign Relations, United States Senate* (1990), 101st Cong, 2nd Sess, p 140 at 144-45.

228 See generally Donovan, "Cambodia: Building a Legal System from Scratch" (1993) 27 *The International Lawyer* 445. See also, Lawyers Committee for Human Rights, *Cambodia: The Justice System and Violations of Human Rights* (1992).

229 See Lawyers Committee for Human Rights, n 132 above, pp 64-68 and see this report generally for analysis of the problems inherent in repatriation. For further analysis of the problems of voluntary repatriation, see Goodwin-Gill, n 95 above.

230 Office of the United Nations High Commissioner for Refugees, n 122 above, pp 21-22.

(iv) Significance of the peace process for humanitarian status

UNTAC's establishment of safe-havens in Cambodia might have been relevant to the question of whether asylum-seekers who fail to meet the Convention definition should be returned. These asylum-seekers merit consideration for stay on humanitarian grounds. Stay on humanitarian grounds was contemplated by the framers of the Refugee Convention²³¹ and Hathaway notes it is a developing customary norm.²³² The question of humanitarian status might validly be considered according to Hathaway's criteria for interim protection, based on failure of the home State to adequately protect human rights, as opposed to persecution. Hathaway's test is that there is "no reasonable prospect that meaningful protection will be forthcoming in the state of origin".²³³ As with the consideration of whether there has been a change in fundamental circumstances, it is submitted that "meaningful" protection should equate with lasting protection. The creation of temporary safe-havens is not necessarily sufficient to achieve lasting protection. In addition, it should be noted that reports on the human rights situation in Cambodia of Amnesty International²³⁴ and the Lawyers Committee for Human Rights²³⁵ both show that UNTAC's ability to maintain havens free from human rights abuse and persecution (as opposed to places free from shooting) was not altogether successful.²³⁶

There were also several practical differences between the situation of Cambodians in Thailand and those in Australia which should have been a consideration in the assessment of claims for stay on humanitarian grounds. The majority of Cambodians in Thailand were never given the option of resettlement in Thailand or a third country.²³⁷ This fact is contentious in itself, but it indicates that repatriation even under less than ideal conditions might have been better than keeping this group of asylum-seekers in camps. There was also the consideration of physical danger for the asylum-seekers in the Thai camps. This danger resulted from the proximity of the camps to the border, their control by the fighting Cambodian factions and the usual problems of detention, particularly given the large numbers of detainees involved (there were approximately 350,000 asylum-seekers in the Thai camps at the time the Accords were signed).²³⁸ This last issue is one which Australian officials should bear in mind, particularly given the fact that as of June 1993 the total number of boat people arriving in a three and a half

231 See particularly recommendation E of the Final Act (accompanying the convention) which urges States to apply the Convention's protection to persons not covered by the definition.

232 Hathaway, n 1 above, p 26. But see Hailbronner, "Non-Refoulement and Humanitarian 'Refugees': Customary International Law or Wishful Thinking?" (1986) 26 *Virginia Journal of International Law* 807.

233 Hathaway, n 178 above, p 22.

234 Amnesty International, *1993 Annual Report* (1993).

235 Lawyers Committee for Human Rights, *Critique: Review of the US Department of State's Country Reports on Human Rights Practices for 1992* (1993).

236 See also Plunkett, "I was a Khmer Rouge Target! Confessions of the UN Special Prosecutor in Cambodia" (1994) 1(2) *Precedent* 49.

237 See explanation at n 151 above.

238 For analysis of the external and internal violence of the Thai camps, see Lawyers Committee for Human Rights, n 151 above.

year period was only 600.²³⁹ The dangers faced by Cambodians in the Thai camps indicate that repatriation was possibly a safer option than staying in the camps, since they could be returned to a relatively safe part of Cambodia whereas Cambodians in Australia were clearly safer in Australia. This fact should logically have formed part of the Australian authorities' deliberations as to whether to grant stay on humanitarian grounds. However, it appears that the Australian grounds for humanitarian status, which were not initially made available to persons detained under Division 6 in any event, were too narrow to allow for such considerations.

(v) Deficiencies in the grounds for humanitarian status and their application

Australia's grounds for stay on humanitarian grounds at the time of the Cambodians' claims, which were not intended to be exhaustive of all the considerations which might be taken into account, essentially required a sound basis for expecting a significant, individualised threat to the applicant's personal security on return to his/her country of origin as a result of targeted action by persons in the country of origin. The humanitarian grounds were not intended to address "broad situations of differentiation between particular groups or elements of society within other countries" and compassionate reasons including family difficulties, economic hardship or medical problems, were irrelevant.²⁴⁰ These humanitarian grounds did not provide much more scope for stay in Australia than the Convention definition, and the Attorney-General's Department publicly acknowledged that the humanitarian grounds were in fact tougher than the grounds for refugee status.²⁴¹ Given that access to the humanitarian criteria occurred as a matter of the Minister's discretion *after* a person had been *refused* refugee status, the criteria were a mere sop to humanitarianism providing little consolation to the Cambodian asylum-seekers. If Hathaway's criteria²⁴² were to be applied, however, humanitarian status might well be justified.

In fact, some of the Cambodians were denied access to humanitarian considerations completely. Until the *Lek* case,²⁴³ it was assumed that border claimants for refugee status were unable to apply for stay on humanitarian grounds because of the legal fiction that they had not entered the country. In *Lek*, Justice Wilcox found that Division 6 and the High Court's decision in the *Lim* case²⁴⁴ contemplated that the Cambodian asylum-seekers had entered Australia. Denial of access to the humanitarian grounds from "boat people" on the technical basis of non-entry was unsatisfactory. It discriminated between two classes of refugee status applicants: those who entered Australia with valid authorisation but then

239 See n 188 above.

240 The grounds were attached to Media Release 15/91 (1991).

241 Frank Brennan notes that the Attorney-General's Department admitted that "the criteria for judging humanitarian [status] was, in fact, tougher than the test for refugee [status]" 1992 CPD (Senate) 109; 5 May 1992, as cited in Brennan, n 199 above, p 15.

242 See text accompanying n 233 above.

243 *Lek*, n 14 above.

244 *Lim*, n 9 above.

applied for refugee status and those who arrived as “boat people” without valid authorisation. The rationale for this discrimination is unclear. It assumes that all those who enter lawfully and then apply for refugee or humanitarian status are *bona fide* applicants. Yet, there are approximately 80,000 cases of persons in Australia who have not observed the conditions of their visas while there are many *bona fide* refugees, or persons deserving of consideration for humanitarian status, who are forced to flee without valid documentation. As far as persons who meet the Convention definition are concerned, this fact is expressly recognised by the Refugee Convention in article 31 which stipulates that no penalties are to apply to refugees who enter a country illegally, and in article 28 which provides for the creation of documentation for those who have none.

In any event, despite Justice Wilcox’s decision that the Cambodians could gain access to the humanitarian criteria, the Immigration Minister announced that he would not even consider applying them to the 48 persons involved in the *Lek* case.²⁴⁵ The wisdom of this “decision not to make a decision” is dubious. It is submitted that a better course of action would have been to consider application of the humanitarian grounds and if they were found inappropriate to give a public justification of why this was so. Unfortunately, it appears that the Government has reacted badly to continued court challenges and allowed its frustration to guide policy. Australia displayed that it was intent on repatriating most Cambodians who were refused refugee status without considering whether humanitarian reasons required otherwise. It is easy to infer from this that deterrence of further arrivals has been uppermost in the Government’s mind and it will be seen below that deterrence, particularly of Cambodians, may also have been a motive for the decision to detain asylum-seekers pending determination of their applications for entry. Certainly, the tortuous progress of the Cambodians’ claims through the Australian administrative procedures and judicial system indicates a worrying propensity to shield the refugee status determination procedures from scrutiny which may allow unfair treatment of asylum-seekers to go unchecked.

(B) Detention under Division 6: Controlling Australia’s borders or bordering on punishment?

The dilemma at the heart of the detention²⁴⁶ of asylum-seekers who are unauthorised arrivals is the tension between the right to control entry and the

245 See text accompanying n 14 above.

246 For the purposes of the appraisal of Australia’s detention policy, the following definition of detention is adopted:

Detention consists of confining a person to a place which he is not allowed to leave. It implies restraints which prevent a person from living with his family or carrying out his normal occupational or social activities. It also implies close supervision by the authorities. The place where a person is confined may be a cell or building, a camp or even an island. The amount of space available to the person confined is of no importance, as long as he is not free to leave the place.

Takkenberg, “Detention and Other Restrictions on the Freedom of Movement of Asylum-Seekers: The European Perspective” Coll and Bhabha (eds), n 42 above, p 141.

refugee's need for protection. It will be demonstrated below that the Australian Government has decided that protection of borders takes precedence and it is argued that this an inappropriate policy for Australia to adopt which may be in contravention of various international legal standards relating to protection of refugees and human rights generally.

Unfortunately, these international standards could not be considered by the High Court in the challenge mounted to Division 6 because Section 186 states that Division 6 overrides all laws other than the Constitution. The High Court's discussion of the issue in *Lim*²⁴⁷ was therefore limited to whether the legislature had constitutional power to curtail the liberty of the asylum-seekers. Within that limited framework, the Court did discuss duties owed to aliens by the Australian community. Justices Brennan, Deane and Dawson, with whom Chief Justice Mason and Justice Gaudron concurred on this point, noted that there are certain obligations owed to aliens whether or not the alien is lawfully within the country:

Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw.²⁴⁸

According to their Honours, this meant that an alien cannot be arbitrarily arrested or detained. The meaning that the Judges gave to the concept of arbitrary detention in the case of aliens who, unlike citizens, are vulnerable to exclusion and deportation, was detention which has no basis in law,²⁴⁹ or which was not "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".²⁵⁰ The same test appears to have been adopted by Justice Toohey (who did not deal with the question explicitly but found Division 6 valid because it was designed to keep a person in detention until a decision as to entry is made)²⁵¹ and Justice McHugh (although his Honour seemed to oscillate between plain necessary and reasonably necessary).²⁵² According to the court, detention only becomes punitive if this threshold is exceeded. The limit set by the 273(plus) days was viewed as an important safeguard, demonstrating for the purposes of judicial review that the power of detention in the normal case was limited to what was necessary as an incident to a decision as to exclusion or deportation.

247 Note 9 above.

248 *Lim*, n 9 above, at 107.

249 Neither public official nor private person can lawfully detain [an alien] or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither *lettre de cachet* nor other executive warrant authorising arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision.
Ibid, at 107.

250 Ibid, at 118 (Brennan, Deane and Dawson JJ).

251 Ibid, at 129 (Toohey J).

252 Ibid, at 145 (McHugh J).

Construction of the detention of asylum-seekers as non-punitive permits the punishing effects of detention to be classified as side-effects of a legitimate policy. But the right to liberty is fundamental. Detention is imposed as a punishment in criminal cases not simply to protect the community but to deny the offender his liberty and the benefits of community. This should serve as a reminder to ask whether detention in immigration proceedings is always necessary, how long it should be permitted and what the conditions of detention should be like.

The Court did not ask these questions, leaving that role to the legislature. The only comments by the Court directed to such inquiry were made in connection with the fact that some of the asylum-seekers had been detained for over two years.²⁵³ Even then, the Court's consideration of proportionality was limited to the unwarranted conclusion that the asylum-seekers' detention was voluntary since they were pursuing judicial appeal and could elect to go home.²⁵⁴ This is despite the fact that the refusals of refugee status had been overturned on appeal. In turn, the Joint Standing Committee on Migration has essentially deferred to the Court, merely noting the arguments concerning international legal standards and policy made to it in many submissions, including those of government departments and, in passing, that the binding legal pronouncements as far as Australian authorities are concerned are those of Australian courts, particularly the High Court in *Lim*.²⁵⁵ Below, the various legal standards by which Australia's policy should be judged are set out, together with policy arguments which address the practical considerations of necessity and proportionality which underlie those standards.

(i) International standards relevant to detention of asylum-seekers

There are several sources of international law relevant to the issue of detaining asylum-seekers. They are the Refugee Convention and UNHCR guidelines; international and regional human rights conventions, guidelines and jurisprudence (particularly standards relating to children); and national legislation, practices and decisions concerning detention of asylum-seekers.

(a) The Refugee Convention and UNHCR guidelines. The 1951 Convention, though it was intended to deal with refugees who had entered the potential country of asylum, does recognise that the forced and spontaneous nature of refugees' flight may lead to irregular means of entry in article 31. This article provides that no penalties shall be imposed for illegal entry and that only *necessary* restrictions on freedom of movement shall be applied. The argument that detention is imposed to protect borders is used to limit the reach of article 31. While it should be the case that the obligation of *non-refoulement* applies to potential refugees or asylum-seekers at the border because a determination procedure is normally only possible if the asylum-seekers are allowed physically, if not legally, to enter a State's territory, States do not find the logic for extending the application of article 31 to asylum-seekers on the same

253 Some asylum-seekers have been held in detention for well over four years now.

254 *Lim*, n 9 above, at 199 (Brennan, Deane and Dawson JJ with whom Mason CJ and Gaudron J concurred); at 150 (McHugh J).

255 Joint Standing Committee on Migration, n 25 above, p 62.

principle compelling. Immigration authorities may believe that detention is necessary in order to prevent those who do not meet the definition of refugee and are seeking to enter illegally for reasons unrelated to persecution from absconding. Schmidt from the US Immigration and Naturalization Service, for example, maintains that the *travaux* to the Convention indicate that article 31 is limited in application to persons determined to be refugees, not asylum-seekers, and that detention of asylum-seekers is not imposed as a penalty but as a protective measure for the community while determination procedures are underway.²⁵⁶

While the *travaux* do indicate that the meaning of "penalty" was limited and is ambiguous on the subject of asylum-seekers who have not entered the country,²⁵⁷ present interpretation of the Refugee Convention, particularly by UNHCR,²⁵⁸ may have moved resolution of this issue beyond the answers which may be found in the *travaux*. The question is one of degree: is the detention necessary and reasonable in all the circumstances. The Executive Committee of UNHCR provides in its guidelines on detention that neither refugees nor asylum-seekers should be detained because of the detrimental effects on them, stating that they may be detained if necessary only for certain limited purposes. These purposes are to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.²⁵⁹ In a further clarification of the guidelines, the High Commissioner stated that asylum-seekers should not be detained automatically and that the guidelines do not "justify the detention of a person for the entire duration of a prolonged asylum procedure".²⁶⁰ The guidelines were meant to resolve the uncertainties surrounding article 31²⁶¹ and States party to the Convention should abide by them pursuant to their duty to cooperate with UNHCR under article 35 of the Convention. However, these guidelines may well be ignored since they go against the grain of much present State practice.²⁶²

(b) International and regional human rights instruments and guidelines.

The approach taken in relation to the question of entry under article 31 of the Refugee Convention should also apply to the provisions of the more general human rights instruments relevant to the issue. The members of the Human Rights Committee in their general comment on the position of aliens under the

256 Schmidt, "Detention of Aliens" (1987) 24 *San Diego Law Review* 305. Note that he also says detention must be used in a controlled and humane way and that he believes that US policies at the time he wrote the article conformed with the UNHCR guidelines.

257 See the commentary on the US policy of interdiction in n 30 above.

258 See the arguments concerning the legal status of UNHCR guidelines, nn 127-32 above and accompanying text.

259 Note 131 above.

260 Takkenberg, n 246 above, p 141. See also, UNHCR, n 108 above, p 4.

261 Takkenberg, n 246 above, p 138.

262 See analysis accompanying nn 126-32 above.

International Covenant on Civil and Political Rights (ICCPR)²⁶³ have confirmed that there is no right of entry. But States are not permitted to disregard fundamental provisions such as the prohibition on torture in article 7 of the Covenant or inhumane treatment of detainees in article 10 on the basis that the victim is an alien unlawfully within the country or detained at the border.²⁶⁴ Article 2 of the ICCPR provides that all persons within a State's "territory and jurisdiction" are protected. This suggests that unless the particular right is expressed to apply only to persons *lawfully* within the territory, such as article 12 which provides for freedom of movement or article 13 which limits expulsion, it applies even to those who have entered illegally. Indeed, the fact that the qualification "lawfully" is applied to the broader concept of freedom of movement while the provision on liberty is not so qualified would compel the conclusion, as a matter of treaty interpretation,²⁶⁵ that the protections of article 9 do apply to persons in immigration proceedings. This interpretation is confirmed by the Human Rights Committee's general comment on the prohibition of arbitrary detention in article 9 of the Covenant.²⁶⁶ The proposition that the question of entry cannot restrict the application of fundamental rights is also supported by the Human Rights Committee's construction of the words "territory and jurisdiction" in a couple of decisions against Uruguay involving the kidnapping of persons from the territory of other States. In these cases, the Committee held that the fact the kidnapping by governmental authorities occurred *outside* the territory of the State party was irrelevant.²⁶⁷ In other words, if a State reaches out to exercise jurisdiction over an individual it must abide by human rights standards. Exclusion proceedings constitute an exercise of jurisdiction even though it is forced on the State by the arrival of the alien.²⁶⁸

No mention of detention for the purposes of preventing illegal entry is made in article 9 of the ICCPR, but the comparable provision in the European

263 Note 87 above.

264 Of course, rights such as the right not to be tortured are customary international law and *jus cogens* and therefore non-derogable under any circumstances by any State even if the State is not party to the Convention Against Torture and Other Cruel and Degrading Treatment or Punishment (Done on 10 December 1984, entered into force on 26 June 1987) or the ICCPR.

265 Article 31 of the Vienna Convention on the Law of Treaties, nn 99 and 112 above, stipulates that treaties must be interpreted according to the "plain and ordinary meaning" of the words having regard to the context and placement of particular provisions.

266 General Comment 8[16], CCPR/C/21/Rev 1, 19 May 1989.

267 See Communication No R 12/52, concerning Delia Saldias de Lopez (author) and Sergio Ruben Lopez Burgos (victim) and Uruguay, *Report of the Human Rights Committee*, UN GAOR Supp No 40, p 176, UN Doc A/36/40 (1981). See also Communication No R 13/56, concerning Lilian Celiberti de Casariego and Uruguay, *Report of the Human Rights Committee*, UN GAOR Supp No 40, p 185, UN Doc A/36/40 (1981). The Committee noted that the words "territory and jurisdiction" were not to be interpreted narrowly as they were meant to avoid responsibility in situations such as military occupations where the occupied State was not necessarily responsible for human rights violations occurring on its territory.

268 See n 85 and accompanying text above.

Convention, article 5, makes this an explicit exception to the right to liberty.²⁶⁹ During the drafting of the ICCPR, the delegate from the Netherlands suggested that the list of exceptions to article 5 of the European Convention be included in article 9.²⁷⁰ This suggestion was rejected, but only because “[i]t was doubted...whether any such enumeration could be complete, or acceptable to all countries”.²⁷¹ Furthermore, article 9 is not an absolute protection. It protects only against *arbitrary* detention and detention which is not justified by a national law:

Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. (Article 9)

“Arbitrary” is a term capable of broad construction. The framers considered an arbitrary act to include “any act which violated justice, reason or legislation, or was done according to someone’s will or discretion, or which was capricious, despotic, imperious or uncontrolled”.²⁷² And while there is little jurisprudence of the Human Rights Committee concerning detention of asylum-seekers, the word “arbitrary” has been broadly defined by the Committee, most notably in the Communication by Hugo van Alphen against the Netherlands:

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.²⁷³

269 Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

270 UN Doc A/2910/Add 3 (1962).

271 UN Doc A/3824 (1962), para 44.

272 Ibid, para 49.

273 Communication No 305/1988, *Hugo van Alphen v The Netherlands* (Views adopted on 23 July 1990, at the thirty-ninth session). *Report of the Human Rights Committee*, UN GAOR, vol II, p 108. Supp No 40, UN Doc A/45/40 (1990). Note that there are at least two decisions concerning illegal aliens who applied for refugee status where the Human Rights Committee declared the communications inadmissible on the basis that no violation of article 9 could be shown, however, both these cases involved persons alleged to be involved in terrorist activities: see Communication No 296/1988, *JRC v Costa Rica* (Decision of 30 March 1989, adopted at the 35th session). *Report of the Human Rights Committee*, UN GAOR Supp No 40, p 293, UN Doc A/44/40 (1989); Communication No 236/1987, *VMRB v Canada* (Decision adopted on 18 July 1988 at the 33rd session). *Report of the Human Rights Committee*, UN GAOR Supp No 40, UN Doc A/43/40 (1988).

The Committee has also suggested that administrative detention (in a context other than immigration) is only permissible where a person constitutes a “clear and serious threat to society which cannot be contained in any other manner”.²⁷⁴ If the prerogative over entry means anything, States do have the power to detain persons to prevent illegal entry. But it is argued below that the question is one of degree, placing doubt on the validity of blanket policies of detaining suspected illegal entrants at the border for prolonged periods or for purposes other than ascertaining the identity of the person, or ensuring that the person does not pose a threat to the national community—for example, because she has committed serious crimes. Australia should be required to demonstrate exactly *what* it is protecting by detaining the Cambodian asylum-seekers and whether detention is *necessary* and *reasonable* in all the circumstances.

The jurisprudence of the European human rights organs is instructive on these points since the European Convention expressly envisages that detention for immigration purposes is allowed. One commentator has argued that the case-law under the European Convention supports an interpretation that detention of illegal entrants is only allowed where there is no other method of ensuring that the person will succeed in evading immigration authorities.²⁷⁵ It is clear that detention under article 5(1)(f) may be scrutinised for factors such as length, motive, necessity and proportionality. The European Commission held in the *Lynas* case that length of detention and the motive for detention may be taken into account.²⁷⁶ In the *Caprino* case, the Commission stated that it takes the view that detention under article 5(1)(f) must be necessary and proportionate.²⁷⁷ This suggests that the detention must be necessary and proportionate to prevent evasion of immigration authorities, not that detention can be required for the duration of a decision as to entry, regardless of whether the person is a threat to the community because he has committed serious crimes or because he is likely to abscond.

In weighing whether detention of unauthorised aliens is necessary and proportionate to prevent evasion of national immigration authorities, an important consideration is whether the asylum-seeker is a child. The Australian Government has recognised the importance of this consideration through the introduction of bridging visas for children asylum-seekers.²⁷⁸ There are various provisions in human rights instruments which pay particular attention to the issue of detention of children and the treatment of children asylum-seekers. Most importantly, the UN Convention on the Rights of the Child,²⁷⁹ to which Australia is a party, provides in article 37(b) that no child shall be deprived of his or her liberty unlawfully or arbitrarily, and that “[t]he arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.”

274 Communication No 66/1980, *David Alberto Campora Schweizer v Uruguay* (Views adopted on 12 October 1982). *Report of the Human Rights Committee*, UN GAOR Supp No 40, p 117 at para 18.1, UN Doc A/38/40 (1983).

275 Takkenberg, n 246 above, p 142.

276 *Lynas v Switzerland*, Eur Comm'n HR Dec and Rep 6, p 141 (10 June 1976).

277 *Caprino v United Kingdom* (1980), 4 EH RR 97.

278 See n 23 and accompanying text above.

279 GA Res 44/25, 20 November 1989, entered into force 2 September 1990.

Under article 2, State parties guarantee all children within their jurisdictions the protections of the Convention and this provision could therefore be relevant in immigration proceedings. In addition, article 22 provides for appropriate protection and humanitarian assistance to children refugees and asylum-seekers.

The preamble of the Convention on the Rights of the Child refers to articles 23 and 24 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 24 of the ICCPR states that children have “the right to such measures of protection as are required by his [sic] status as a minor, on the part of his family, society and the State.” The status of a child as a minor is important. While States seek to place responsibility for harsh treatment of asylum-seekers at the border on the asylum-seekers themselves, using the arguments that they have been drawn by pull factors and are seeking to abuse the asylum system, this argument cannot apply to children.

The special treatment required for children may also have important consequences for the parents of child asylum-seekers. Article 23 of ICCPR and article 10 of the ICESCR, recognise the importance of the family. Article 9 of the Convention on the Rights of the Child states that children should not be separated from parents. When combined with article 37(b) of the Convention, this suggests that neither children seeking recognition as refugees nor their parents should be kept in detention if at all possible, on the basis that the best interests of the child are paramount.²⁸⁰ In turn, the release of asylum-seekers on the basis that they have children with them reinforces the argument that no asylum-seeker who is not a threat to security or likely to abscond should be kept in detention for the duration of refugee status determination proceedings.

(c) National practices and decisions. Many States do maintain a practice of paroling refugee status applicants into the community.²⁸¹ Of course, given the problems with *opinio juris* generally and more particularly in the area of immigration where any State practice must be considered in the context of the plenary power, the weight which may be given to this State practice is equivocal. However, this practice demonstrates that detention is not viewed by those States as necessary or proportionate to prevent evasion of national immigration authorities. In turn, this supports the view that prolonged detention of asylum-seekers is generally implemented as a deterrence mechanism for further unauthorised arrivals.

More important than legislative and administrative State practice are the decisions of national courts holding that prohibitions on arbitrary detention either at customary international law or pursuant to treaties have been violated in relation to persons seeking immigration clearance. These decisions include cases in the United States where Cuban asylum-seekers were detained indefinitely because

280 Department of the Attorney-General, *Submission to the Joint Standing Committee on Migration's Inquiry into Detention Practices*, Submissions, vol 3, no 91, s 843, at s 858.

281 For European practice, see Takkenberg, n 246 above, pp 143–48.

they could not be deported²⁸² and a decision by a Hong Kong court where Vietnamese boat people were detained for a year and a half after a promise by Hong Kong authorities that their boat would be repaired and they would be free to sail on to Japan.²⁸³ In one sense, both fact situations concern the *purpose* of detention, rather than the factors of necessity and proportionality. However, in the US decisions, the question of purpose became relevant as the US Government wanted to detain the Cubans indefinitely until it became possible to return them, thus it was argued that the detention was no longer an incident of exclusion, but closer to a form of punishment. Furthermore, in the course of the Hong Kong judge's decision, the judge expressed doubts about the lawfulness of detaining those boat people who did wish to proceed through the refugee status determination procedures in Hong Kong, given the prolonged periods (two to three years) involved. Lower US courts, on the other hand, have consistently held that detention of persons waiting for a decision as to asylum is not arbitrary, suggesting that a blanket policy of detention in these circumstances is permissible under US law.²⁸⁴ The Australian High Court appears to have adopted the same approach as US courts and for much the same reason: the courts are reluctant to impinge on an area which involves "sovereignty". It is suggested below that the international standards indicate that a finer balance of relevant factors is required.

(ii) Application of the international standards, commentary and critique

It is possible that the characterisation of immigration as a matter of domestic jurisdiction would mean that international tribunals like the Human Rights Committee would leave States a fair margin of discretion to decide in the first instance whether detention of asylum-seekers is necessary and reasonable in their particular circumstances. It is argued here that specific aspects of the Cambodians' case mean it is likely that Australia has violated its international obligations and that sovereignty in relation to asylum-seekers should be opened to more searching scrutiny by international human rights tribunals where blanket policies of detention are concerned.

The High Court began its examination in the *Lim* case by asking whether the detention was justified by a legislative provision before the passage of Division 6. Under article 9 of the ICCPR this is an assessment of whether the detention is provided for "on such grounds and in accordance with such procedures as are established by law". The High Court found that the detention had been unlawful under Australian law until the passage of the new legislation.²⁸⁵ This means that it is likely that the Human Rights Committee would find a violation of article 9(1) of the ICCPR in relation to this two year period. In addition, the limitation of

282 *Jean v Nelson*, n 85 above; *Rodriguez-Fernandez*, n 85 above; *Garcia-Mir v Smith*, 766 F 2d 1478 (11th Cir 1985); *Fernandez-Roque v Smith* 567 F Supp 1115 (ND Ga 1983), rev'd 734 F 2d 576 (11th Cir 1984).

283 *Re Pham Van Ngo* (1991) 1 HKLR 499. For analysis of the case, see Samuels, "The Detention of Vietnamese Asylum Seekers in Hong Kong: *Re Pham Van Ngo* and 110 Others" (1992) 41 *International and Comparative Law Quarterly* 422.

284 See n 282 above.

285 *Lim*, n 9 above, at 110 (Brennan, Deane and Dawson JJ with whom Mason CJ and Gaudron J concurred); 127 (Toohey J); 143 (McHugh J).

compensation,²⁸⁶ is a likely violation of article 9(5) and the various articles in the ICCPR prohibiting discrimination and providing for equality before the law.²⁸⁷

As for the prospective effect of Division 6, although the test enunciated by the High Court²⁸⁸ is facially similar to that adopted by the Human Rights Committee in *van Alphen*,²⁸⁹ the Court did not itself examine whether detention of 273 (plus) days was necessary or proportionate. Even where the Court considered the excessive periods of detention in fact involved in the case of the Cambodians it preferred to put this down to the fact of judicial review.²⁹⁰ In further support of the legality of the detention, Justice McHugh made reference to the numbers of asylum-seekers in Australia.²⁹¹ This should be contrasted with the comments of Sears J in the Hong Kong case of *Pham Van Ngo*²⁹² who cast doubt on the legality of the length of detention for all 50,000 asylum-seekers in Hong Kong, despite noting the evidence of limited numbers of immigration officers and finances.²⁹³ Furthermore, it should be noted that the vast majority of the 23,000 applicants for asylum in Australia were not held in detention, having entered legally (for example, on student visas) and then having applied for refugee status. Approximately 20,000 of the asylum-seekers were Chinese students whose applications for temporary asylum were welcomed by former Prime Minister Hawke.²⁹⁴

The discriminatory basis of the detention, as in the denial of access to the humanitarian grounds, should give cause for concern. Why is it necessarily the case that aliens who do not have the correct documentation for entry into Australia will make bogus claims for asylum and therefore require detention? Technically

286 Section 184 of the Migration Act provides:

- (1) If: (a) a designated person was in immigration detention after 19 November 1989 and before commencement; and (b) that immigration detention was unlawful; no action lies, and no action is taken to have lain, in any court (including any court of a State or Territory) against the Commonwealth, an officer or any other person for damages or compensation in respect of the immigration detention, other than an action under Section (2).
- (2) If: (a) a designated person was in immigration detention after 19 November 1989 and before commencement; and (b) that immigration detention was unlawful; the designated person has, under this subsection, a right of action in a court of competent jurisdiction for compensation in respect of the unlawful custody.
- (3) The compensation that may be awarded to a designated person in an action under subsection (2) is to be \$1 for each day of the person's unlawful immigration detention.

287 See articles 2, 3 and 26 of the ICCPR.

288 See text accompanying nn 249–52 above.

289 See text accompanying n 273 above.

290 See n 254 above.

291 *Lim*, n 9 above, at 149 (McHugh J).

292 Note 283 above.

293 *Ibid*, at 508.

294 See *Masanauskas*, n 3 above.

legal entrants who still have a valid visa²⁹⁵ and apply for refugee status are not potential candidates for deportation and therefore not subject to detention. They have also been pre-screened at the visa stage. But this is not a fair point of comparison for many refugees who are forced to flee spontaneously. The Cambodians faced the additional hurdle that there was no Australian Consulate in Cambodia at the time of their departure. Furthermore, the availability of bridging visas,²⁹⁶ demonstrates that the Australian Government does not regard detention as necessary or reasonable in all situations. At present the Government has been content to adopt the Joint Standing Committee's recommendation that there be a discretion to consider the use of bridging visas for "boat people" and to make them available only in very limited circumstances.²⁹⁷ Thus, it appears that the prevailing assumption is still that unauthorised asylum-seekers make bogus claims for asylum and are likely to abscond.

In addition to the discriminatory application of detention, the possible deterrence motive also provides a basis for scrutiny. Parliamentary statements made during the passage of Division 6 certainly indicate that deterrence was a motivating factor, yet deterrence is not related to exclusion or deportation.²⁹⁸ Thus questions remain as to whether the continuing detention was fair, just and reasonable in all the circumstances under the test set out in the *van Alphen* decision.

It is submitted that Australia should adopt the suggestion of the Lawyers Committee for Human Rights that there should be a requirement of individualised determinations as to whether unauthorised asylum-seekers would be likely to abscond if released from detention as opposed to the blanket order for detention imposed by the Australian legislation.²⁹⁹ Provisions for release of immigration detainees are easily justified. Bail in criminal cases flows from the presumption of innocence and the detriment of incarceration to the individual. In the case of an illegal immigrant, a technical breach of the law has been committed, but it may be with good reason as contemplated by articles 31 and 28 of the Refugee Convention. If an asylum-seeker makes a claim which does not appear unfounded, shouldn't the community consider the rationale for bail in criminal cases to be equally applicable? In the case of someone later determined to be a refugee, the community can then be satisfied that it has complied with the spirit of the Refugee Convention as the protections of the Convention have been applied presumptively and the scars of persecution have not been exacerbated. The fear of abuse, which is

295 The introduction of Section 189 removes discrimination between asylum-seekers whose legal status has lapsed and those who have not yet received permission to enter. See n 20 above and accompanying text.

296 Note 21 above.

297 See n 23 above. See Joint Standing Committee on Migration, n 25 above recommendation 11.

298 See the statements of Mr Hand, House of Representatives, *Debates*, 5 May 1992, at 2372 and Dr Theophanous, *ibid*, at 2388. Deterrence could be regarded as an improper motive: see analysis of the *Lynas* case and the *Caprino* case, nn 276 and 277 and accompanying text, above.

299 Lawyers Committee for Human Rights, *The Detention of Asylum Seekers in the United States: A Cruel and Questionable Policy* (Briefing Paper, December 1989).

often merely used as a cover for governmental inefficiency, can be alleviated by ensuring that abusive applicants are deported.³⁰⁰ Yet, despite evidence submitted to the Joint Standing Committee by Arthur Helton, former head of the Refugee Project for the Lawyers Committee, about the success of a parole program piloted in the United States, the Committee focused on the limitation of the program in practice to asylum-seekers who have entered the United States.³⁰¹ It seems that the Committee implicitly accepted that unauthorised arrivals are less likely to have legitimate claims and are more likely to abscond than authorised arrivals, despite the evidence against these assumptions.³⁰² The limited availability of bridging visas for detained boat people following the entry into force of the Migration Reform Act, while going some way toward recognition of detention's effects on persons scarred by torture,³⁰³ confirms that the Government shares this view.

A final policy argument which again questions the characterisation of sovereignty in the area of immigration control is that sovereignty should be construed not simply as protection of borders, omnipotence over territory or maintenance of public order, but as part of the responsibilities of the State towards its existing citizens, including protection of their human rights. If this approach is taken, the question arises as to whether detention is cost-effective. The defence of sovereignty and the right to control borders depends heavily on the idea that those seeking entry have no moral claim on the community (unless they prove to be refugees); that the community has the right to share resources as it sees fit; and that the Government has the duty to ensure that resources are distributed equitably. In the case of Australia, there is convincing evidence that detention of asylum-seekers is a drain on resources. In 1989, the Australian Department of Immigration commissioned a report from the Australian Institute of Criminology to determine the resource implications of detaining asylum-seekers.³⁰⁴ It is reported that the Department refused to release the Institute's Report to the public because the Institute found that detention was a waste of resources.³⁰⁵ The Joint Standing Committee, however, was quick to pick up on costs not accounted for in the submissions supporting release (such as capital and maintenance costs) but did not pick up on costs inherent in detention which the Immigration Department neglected, such as the costs of flying in legal advisers to Port Hedland.³⁰⁶

300 Aleinikoff lends some support to this view. He argues that the large numbers of asylum-seekers cited by the US Government in defence of restrictions on due process for asylum-seekers are partially generated by bureaucratic inefficiency and that fair procedures combined with swift return of asylum-seekers who do not meet the criteria for stay in the United States is the best counter to any pull factors. See Aleinikoff, "Aliens, Due Process and 'Community Ties': A Response to Martin" (1983) 44 *University of Pittsburgh Law Review* 237.

301 See eg Joint Standing Committee on Migration, n 25 above, p 150.

302 See analysis in text following n 244 above.

303 See n 23 above, and accompanying text.

304 Fox, "Australia's Detention Policy" (1993) 2 *Human Rights Defender* 8.

305 De Mayo, "Desperate plight of Cambodian boat people", *The Canberra Times* (31 August 1992).

306 See eg Joint Standing Committee on Migration, n 25 above, p 152.

Again, international tribunals may accord great weight to the decisions which States have made as to what is the best use of their resources in this area. A rethinking of human rights is required so that scrutiny of a State's perception of national security and the allocation of resources towards preservation of national security becomes more acceptable. The undertakings clause of the ICESCR which refers to implementation of the rights in the Covenant according to a State's resources indicates that scrutiny of States' decisions as to use of resources is warranted under that treaty. Article 2 of the ICCPR could be used as the basis for such scrutiny under the ICCPR. The Human Rights Committee has the power to make searching inquiries about implementation of the Covenant when States submit their periodical reports under article 40. Indeed, Committee members have questioned the United Kingdom upon the submission of its report on behalf of Hong Kong about detention of Vietnamese asylum-seekers.³⁰⁷ In addition, human rights tribunals have not accepted arguments based on *lack* of resources to secure civil and political rights in other contexts.

The arguments set out above attack a conception of sovereignty which is very closely guarded by States. If international tribunals are not prepared to closely scrutinise this concept of sovereignty, detention as a deterrent will continue. Regardless of the findings of international tribunals, the Australian Government should change its policy. The Australian Government's exercise of the immigration power is driven by an obsession with one particular group of asylum-seekers. This approach provides a very shaky basis for policy and should be discarded.

V. Conclusion

The size of the migration and refugee phenomenon today puts terrible strain on the Refugee Convention which was designed for individual determinations of refugee status for a particular group of persons displaced in the wake of World War II. States continue to interpret the Refugee Convention in a manner that permits them to take deterrence measures, legitimising them with the cloak of sovereignty. The absence of interdependent cooperation in relation to migration generally may mean that international human rights tribunals such as the Human Rights Committee are prepared to accord a high level of deference to States' interpretations of what is necessary in the treatment of persons applying for entry. Does this mean that the world will gradually whittle away the right to seek asylum and the prohibition on *non-refoulement*, rather than make a concerted effort to deal with root causes of refugee flows?

States have adopted deterrence mechanisms as a means of retaining the plenary immigration power, which puts the international lawyer on the horns of

307 In the annual report for the 46th session, the United Kingdom's representative was asked whether the screening and detention procedures for Vietnamese asylum-seekers were compatible with article 14 of the Covenant. See *Report of the Human Rights Committee*, UN GAOR Supp No 40, p 99, UN Doc A/46/40. The United Kingdom's representative responded that article 13 of the ICCPR is only applicable to those lawfully within the country, while article 14 applies only to criminal process, which is not the situation with the boat people. See *ibid*.

Koskenniemi's dilemma. Must she choose between apologism or utopianism? If she remains true to the essentially voluntarist or consensual underpinnings of international law, the accumulation of negative State practice empties the well-established norms of *non-refoulement* and the right to seek asylum of practical content. The right to seek asylum and *non-refoulement* will still be on the books, but few will be able to access them, and those who do may be subjected to affronts to human dignity such as prolonged detention. Yet, there is a danger that States will simply ignore the lawyer who insists on high standards of treatment for asylum-seekers.

But it must be remembered that the whole corpus of international human rights law has been built despite rights-abusing States; that the violators are often brought to some form of justice; and that the cooperation of even abusive States has been achieved as very few States claim a right to wholesale abuse of human beings. International law is not merely consensual rather than coercive, but enabling³⁰⁸ and it has encouraged cooperation between States on many matters. Thus there is a third option that international lawyers may take which is to suggest that States seek some positive cooperative mechanisms such as those canvassed in this paper.³⁰⁹

International lawyers should also point out that while States implement deterrence measures because there are currently few cooperative mechanisms to ensure burden-sharing and the mechanisms for curing root causes, particularly human rights abuses, are weak, States are in a much better position than asylum-seekers to seek those cooperative measures and to use the human rights enforcement mechanisms already in existence. In the absence of complaints under article 41 of the ICCPR by States, or the effective use of new mechanisms such as the UN High Commissioner for Human Rights, asylum-seekers should not be punished for using the only meaningful option for them; voting with their feet. As long as there are human rights abuses, the right to seek asylum and to gain the protection of *non-refoulement* will be essential components of the canon of international human rights law. And as long as some States, despite the guarantees of formal equality inherent in the concept of sovereignty, are more equal than others in terms of political stability, economic security, and adherence to human rights, they should remember that they have special moral duties towards refugees and asylum-seekers.

International lawyers may take heart from the fact that the mere ability of the Cambodian asylum-seekers to access the Human Rights Committee has had political significance in Australia. The "anarchical society", because it is composed of societies in which the rule of law holds sway to various degrees, has created an instrument which has encouraged the Australian society, where the rule of law is generally strong, to re-examine its migration policy in light of humanitarian concerns. The threat of scrutiny comes from outside, so separation of powers and dualist notions of the relationship between international law and national law which are faced by national courts in the area of immigration are no comfort. The Joint Standing Committee's report, though in many respects a

308 See Slaughter Burley, n 51 above.

309 See Section III(D).

whitewash of government policy, recommended a slightly softened stance on detention of asylum-seekers and the Government has taken small steps towards a gentler approach. Much remains to be done, however. Australia should resist the current restrictive trends of State practice and seek to implement its legal obligations towards refugees and asylum-seekers with humanitarianism as the guiding principle for policy.

