THE ROLE OF LEGISLATIVE, EXECUTIVE AND JUDICIAL MECHANISMS IN ENSURING A FAIR AND EFFECTIVE ASYLUM PROCESS

Angus James Francis

A thesis submitted for the degree of Doctor of Philosophy of The Australian National University.

December 2008
DECLARATION

I, Angus James Francis, declare that except where acknowledged in the text, this thesis is my original work, undertaken under the supervision of Professor Penelope Mathew and Professor Kim Rubenstein. It has not been submitted for a higher degree at any other university or institution.

Angus James Francis

Australian National University College of Law
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I am very grateful to my supervisory panel, Professor Kim Rubenstein, Professor Penelope Mathew, Professor Peter Bailey, and J P Fonteyne. I am especially thankful for the encouragement and guidance of Professor Mathew during the early stages of this thesis. I also owe special thanks to Professor Rubenstein who agreed to act as my supervisor half-way through the writing process. She has expertly, diligently and patiently guided me to completion, as well as fostered my engagement with other experts in the field.

I am also heavily indebted to the assistance of other members of the academy over the course of this research. The general direction of the thesis benefited from the comments of participants at a seminar I gave while a Visiting Fellow at the Refugee Studies Centre, Oxford University, in 2003. Toward the other end of the process, I owe thanks to Professor James Hathaway for critical feedback on my central thesis at a seminar convened by Professor Rubenstein at the ANU College of Law in 2007.

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Chapter 5 is based on a paper that I delivered at the workshop, Untangling the national from the international and the public from the private: the complexities of
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Chapter 6 appears in article form in the International Journal of Refugee Law.** I owe my appreciation to Dr Jane McAdam and Professor Hathaway and the journal’s two referees for detailed feedback on the draft article. I was also lucky to have recourse to the editing skills of a retired English master, my father Dr Russell Francis. The discussion in chapter 6 also relies heavily on my submissions invited by the Senate Legal and Constitutional Legislation Committee as part of its inquiries into Australia’s offshore processing regime. I thank the Committee members for their thoughtful engagement with those submissions as reflected in the inquiry reports.***

The themes in chapter 7 are explored in two articles. The first article, entitled ‘Examining the role of legislators in the protection of refugee rights: toward a better understanding of Australia’s interaction with international law,’ is found in the Australian Journal of International Law.**** I express my thanks to the journal’s

---

* A revised version of the paper is due to appear as a chapter in Jeremy Farrall and Kim Rubenstein (eds) Sanctions Accountability and Governance in a Globalised World (CUP 2009 in press).


anonymous referee for his or her comments. The second article appears in the Melbourne University Law Review. This article is based on a paper I delivered at the Legislatures and the Protection of Human Rights conference, hosted by the Centre for Comparative Constitutional Studies, University of Melbourne, in July 2006. I am grateful to participants at the conference, as well as Professor Bryan Horrigan, for comments on my paper. I also thank the Melbourne University Law Review’s referees for their critical feedback on the revised article, as well as Claire Agius of the Editorial Board for excellent editorial assistance.

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Finally, my deepest gratitude to my wife, Jane, and my children, Clare and Robert, for loving support throughout this enterprise.
ABSTRACT

A good faith reading of core international protection obligations requires that states employ appropriate legislative, administrative and judicial mechanisms to ensure the enjoyment of a fair and effective asylum process. Restrictive asylum policies instead seek to 'denationalize' the asylum process by eroding access to national statutory, judicial and executive safeguards that ensure a full and fair hearing of an asylum claim. From a broader perspective, the argument in this thesis recognizes that international human rights depend on domestic institutions for their effective implementation, and that a rights-based international legal order requires that power is limited, whether that power is expressed as an instance of the sovereign right of states in international law or as the authority of governments under domestic constitutions.
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Imm AR  Immigration Appeal Reports (UK)
Inter-Am Ct  Inter-American Court of Human Rights
HR
INLR  Immigration and Nationality Law Reports (UK)
INS  Immigration and Naturalization Service (US)
IOM  International Organization for Migration
KB  King’s Bench (Law Reports) (UK)
OAS  Organization of American States
L Ed  United States Supreme Court Reports, Lawyers' Edition
MDR  German Monthly Law Magazine [Monatsschrift für Deutsches Recht]
NRSC  Nauru Reports Supreme Court
OJ  Official Journal
QB  Queen’s Bench (Law Reports) (UK)
Refugee  Convention Relating to the Status of Refugees
SCR  Supreme Court Reports (Canada)
S Ct     Supreme Court Reporter (US)

St Tr    State Trials (UK)

UDHR    Universal Declaration of Human Rights

UKHL    United Kingdom House of Lords

UNHCR   United Nations High Commissioner for Refugees

UNTS    United Nations Treaty Series

US      United States Supreme Court Reports

WLR     Weekly Law Reports (UK)
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force 3 September 1953) n 77, 81, 421, 420, 424, 430, 565, 604, 605

_Haiti-US, Migrants-Interdiction_, TIAS No 10241, 33 UST 3559 (23 September 1981) n 810, 819, 833


_Memorandum of Understanding between Australia and Nauru for Australian Development Assistance to Nauru and Cooperation in the Management of Asylum Seekers_ dated 20 September 2005 n 581, 770, 885, 920, 925, 926, 927, 929, 931

_Memorandum of Understanding between Australia and the People's Republic of China_ dated 25 January 1995 n 862


_Memorandum of Understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of the United States to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti_, entered into force 18 June 1994, KAV
Memorandum of understanding between the Government of the United States and the Government of Jamaica for the establishment within the Jamaican territorial sea and internal waters of a facility to process nationals of Haiti seeking refuge within or entry to the United States of America, entered into force 2 June 1994, KAV 3901, Temp State Dept No 94-153 n 771, 846, 852, 919, 939, 940, 997


Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), UN Doc A/C 3/SR 121 n 6, 264, 327, 354

States experiment with an array of restrictive asylum policies designed to prevent individuals from accessing protection. Visa requirements enforced by private carriers, expedited processes for 'manifestly unfounded' claims, interdiction and extraterritorial processing, expansive safe third country categories, restrictions on judicial review – all are examples of policies and practices that have made serious inroads into the opportunity of finding protection from persecution in today's world.

A common feature of many of those policies - as will become clearer as this thesis progresses - is the circumvention or erosion of national legislative, judicial and administrative mechanisms that provide the framework for asylum adjudication.

There is a growing propensity to use unfettered administrative discretion for

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determining the grant of protection, or for determining who can access asylum procedures set out in legislation and subject to statutory and constitutional avenues of independent review. At the core of this trend, is a ‘denationalization’\(^2\) or ‘deformalization’\(^3\) of the asylum process. By this I mean the process whereby states (governments) avoid the formal institutional constraints placed on immigration control that arise in the national framework by denying asylum seekers access to the breadth of domestic judicial, statutory and administrative mechanisms ensuring a fair and effective asylum hearing.

This thesis contests this trend toward arbitrary decision-making in the asylum arena. The central contention in this thesis is that a good faith reading of key international protection obligations requires that states implement appropriate national legislative, executive and judicial safeguards to ensure fair and effective asylum adjudication.

This thesis identifies a range of progressive and effective measures that states should employ to ensure that the expertise of judicial, administrative and parliamentary bodies is properly brought to bear on the asylum process. In light of this discussion, this thesis critically examines prominent restrictive asylum policies including visa requirements and carrier sanctions, interdiction and extraterritorial processing, and restrictions on the effective judicial scrutiny of asylum decision-making.

Calling for improved asylum procedures, as this thesis does, takes us into the heart of a polemic that ‘generates hard questions about our … recognition of human rights and

\(^2\) A term coined by Guiraudon in the European context to describe the trend whereby political actors responsible for immigration control increasingly engage policies and policy-making venues in order to avoid the judicial, parliamentary and intra-executive constraints that arise in the national framework: V Guiraudon, ‘European Integration and Migration Policy: Vertical Policy-making as Venue shopping’ (2000) 38 Journal of Common Market Studies 251, 252.

\(^3\) Harvey uses this term to describe what he sees as the steady rise of policies designed to undermine legality and the rule of law in the asylum arena: C Harvey, Seeking Asylum in the UK: Problems and Prospects (Butterworths, London, 2000) 191.
our willingness to give them practical effect ... the roles of state sovereignty and
borders ...4 Today, asylum procedures are increasingly buffeted by real or perceived
economic, social and political forces that lead policy-makers to prioritise immigration
control over humanitarianism.5 This thesis enters this discussion with some
trepidation, yet with a firm belief that the clear and concise enunciation of the legal
obligations of states has its own normative force; one that ought sustain the rights of
refugees above social unrest, economic cost, or short-term electoral gain. Ultimately,
this thesis expresses a commitment to an international refugee rights regime – and
more broadly, an international legal order - where the enshrinement of rights in
international law is matched by their enjoyment at the national level.

I THE GRANT OF ASYLUM AND THE ‘ASYLUM PROCESS’

At the outset, it is necessary to define what is meant by ‘asylum’ and the ‘asylum
process’. Historically, asylum referred in simple terms to the state’s grant of entry
and residence to foreigners seeking protection from political or religious persecution.
The traditional view in international law is that states enjoy the right to grant asylum;6

5 See generally, Gibney above n 1; Vedsted-Hansen, above n 1.
6 L Bolesta-Koziebrodzki, Le Droit D’Asile (Leyde, AW Sythoff, 1962) 80; O Kimminich, Asylrecht
(Berlin, Luchterhand, 1968), 46. Article 14 of the Universal Declaration of Human Rights (adopted 10
December 1948 UNGA Res 217 A(III) UN Doc A/C 3/SR. 121) declares that every individual shall
have the right to seek and enjoy asylum. However, these words are traditionally regarded as not giving
the individual a right to seek and be granted asylum. In discussions concerning the proposed draft of
the Universal Declaration of Human Rights, the words ‘to seek and to be granted’ asylum were rejected
in favour of ‘to seek and to enjoy’. Representatives considered that this change of wording
safeguarded the right of states to grant asylum in their territory. Efforts at the 1977 UN Conference on
Territorial Asylum to extend the institution of asylum as a binding obligation in international law
failed. See generally, A Grahl-Madsen, Territorial asylum (Stockholm, Almquist & Wiksell
thus, while a person may request asylum, a state decides whether to grant it. In other words, the traditional position in international law is that individuals have no right to asylum.

Today, however, the state has relinquished its discretion over central aspects of the traditional grant of asylum. Most importantly, the non-return of a person to a territory where they fear persecution, which historically was implicit in the grant of asylum, is now a ‘specific and fundamental’ international obligation. The non-refoulement obligation, as it is known, requires that states protect individuals against expulsion or return to territories in which they face (or are at risk of removal to) persecution on account of their race, religion, nationality, political opinion or membership of a particular social group, or torture or cruel, inhuman or degrading treatment or punishment. The non-refoulement obligation is not subject to

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9 Goodwin-Gill, above n 7, 3.

10 Professor Atle Grahl-Madsen observes that the word “refoulement” is used in Belgium and France to describe a more informal way of removing a person from the territory and also to describe non-admittance at the frontier: A Grahl-Madsen, Commentary on the Refugee Convention 1951, Articles 2-11, 13-37, Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, commentary on art 33(1), [2]. He also notes that the practice corresponds with the Anglo-American concepts of exclusion and refusal of leave to land: Ibid. See also, N Robinson, Convention relating to the Status of Refugees, Its History, Contents and Interpretation, A Commentary (Institute of Jewish Affairs, World Jewish Congress, New York, 1953) 161.

11 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (Refugee Convention), art 33, read together with the Protocol
reservation and applies irrespective of a person arriving without authorization at the frontiers of the state.\(^\text{12}\)

The degree to which the non-refoulement obligation has constrained the state’s traditional right to grant asylum is subject to ongoing debate. While the non-refoulement obligation is recognized as prohibiting states from returning a person by way of ejection from the jurisdiction to a frontier where he or she fears persecution, more controversial is the issue of whether the non-refoulement obligation also precludes the state from refusing admission to a person outside, or arriving at, the border.\(^\text{13}\) A further controversy is emerging with respect to the degree to which the state retains its traditional discretion to grant permanent residency as a component of asylum in circumstances where a person entitled to protection against refoulement cannot be sent to a third country.\(^\text{14}\) Thus, while it is common to talk about the ‘grant of asylum’ and the grant of protection against non-refoulement in the same breath, it

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\(^{13}\) P Weiss, ‘The International Protection of Refugees’ (1954) 48 The American Journal of International Law 193, 199; Hathaway, above n 1, 284, 301, 315-17.

is important to bear in mind that the extent to which the two are synonymous is hotly debated.¹⁵

While acknowledging this debate, this thesis uses the phrase ‘asylum process’ to refer to the procedures adopted by states for identifying persons who are entitled to protection from *refoulement* under various international rights instruments.¹⁶ This follows the current vogue.¹⁷ The use of the phrase ‘asylum process’ in this thesis is, however, not intended to obscure the fact that the asylum procedures of certain states fall short in identifying persons entitled to protection against *refoulement* under all relevant international instruments. It also must be remembered that in identifying an individual as a refugee for the purposes of the Refugee Convention, the individual becomes entitled to a range of rights designed to ensure their protection in light of their unique characteristics and circumstances – in addition to protection against *refoulement*.¹⁸

Taking into account these caveats, probably a less loaded expression – and one used interchangably with ‘asylum process’ in this thesis - is to refer to the ‘eligibility process’. Put simply then, an asylum or eligibility process refers to the procedures employed to determine an individual’s entitlement to protection under international rights instruments.

¹⁵ Harvey, above n 3, 44-46.

¹⁶ See the collection of treaty articles, cases and commentary cited above n 11.


II THE STATE’S UNFETTERED DISCRETION OVER ITS ASYLUM PROCESS – THE ORTHODOX VIEW

This thesis makes a case for a particular method of incorporation of states’ international obligations toward refugees in terms of the institutions and mechanisms they employ to determine an individual’s eligibility for protection. In making this argument, this thesis must confront the fact that international and regional rights instruments do not expressly set out any obligation requiring states to adopt a formal asylum or eligibility process, nor do they expressly prescribe the procedures that states should adopt.

The threshold requirement that states should instigate a process to determine who is entitled to protection is well-accepted. It is acknowledged that a state’s protection obligations engage irrespective of a formal determination of protection entitlement. This means that states are unable to disclaim their protection responsibilities by refusing to process asylum claims. Thus, states should put in place procedures that determine whether a person who is subject to the state’s exclusion or expulsion machinery is eligible for protection. The obligation to put in place procedures to determine eligibility in these circumstances cannot be seriously disputed.

A much more challenging issue is the extent to which states are bound in the way they design and deliver their asylum procedures. The orthodox view is that states retain

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19 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, [28] (1979) (‘A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee’). See also, J Hathaway and J Dent, Refugee Rights: Report on a Comparative Survey (York Lanes Press, Toronto 1995) 7.

20 EXCOM Conclusion No 28 (XXXIII) – 1982, (c); EXCOM Conclusion No 71 (XLIV) – 1993, (i); EXCOM Conclusion No 74 (XLV) – 1994, (i); EXCOM Conclusion No 81 (XLVIII) – 1997; EXCOM Conclusion No 82 (XLVIII) – 1997, (d)(ii); EXCOM Conclusion No 87 (L) – 1999, (j); EXCOM Conclusion No 105 (LVII) – 2006, (n).
the discretion to determine the nature of their eligibility processes. As part of this general discretion, the traditional view in international law is that states enjoy the freedom to determine the nature of the involvement of their national institutions in the development, implementation and scrutiny of the asylum process. The following discussion highlights evidence of the orthodox view in state practice, the work of international agencies, and in refugee law scholarship with a view to querying its continuing relevance in section III of this chapter.

A The orthodox view in state practice

The extent to which the orthodox view is reflected in state practice over time is open to debate. On the one hand, the orthodox view would appear to be reflected in the variety of asylum processing systems that states have historically employed. This has seen states experiment with a range of different legislative and administrative frameworks. For example, after entrenching a right of asylum in its constitution, the Federal Republic of Germany introduced a Ausländergesetz (law on immigrants) in 1965 that regulated in detail the procedures for determining eligibility for asylum.

In contrast, common law countries, such as the UK, Australia and the US, relied largely on administrative policy to decide asylum claims up to the 1970s and 1980s at which time they incorporated determination criteria into national legislation or binding rules.


23 Ibid 24.

24 See, below n 247 - and accompanying text.
The involvement of the courts in the asylum process has also varied across jurisdictions and across time. The courts in the Federal Republic of Germany and France enjoyed a role in reviewing asylum decisions from as early as the 1960s.\(^{25}\) This can be compared to the fact that the broad nature of administrative control over the eligibility process in the UK and Australia effectively excluded judicial review for much of the twentieth century.\(^{26}\) The courts in those jurisdictions seriously emerged as key players in the eligibility process only after the incorporation of eligibility criteria and procedures referred to above.\(^{27}\)

The well-documented trend in recent times toward restrictive asylum policies provides further evidence of the orthodox view in state practice.\(^{28}\) This has seen the steady instigation of practices designed to circumvent the financial and social costs associated with sophisticated asylum adjudication.\(^{29}\) Today, restrictive asylum policies rely on the understanding that states have the discretion to implement an abbreviated asylum adjudication system that limits access to the full range of judicial, legislative and administration protection safeguards that would otherwise be available within, or at the borders of, the state.\(^{30}\)

\(^{25}\) Grahl-Madsen, above n 22, 23.

\(^{26}\) See, below n 247 - and accompanying text.

\(^{27}\) Ibid.

\(^{28}\) See, below n 566 - and accompanying text.

\(^{29}\) See, eg, Asylum Adjudication, Hearings before the Subcommittee on Immigration and Refugee Policy of the Committee on the Judiciary United States Senate, below n 34, 4-11, Statement of Doris Meissner, Acting Commissioner, INS (referring to the range of measures proposed by the US administration to exclude access to the then recently introduced procedures found in the Refugee Act of 1980).

\(^{30}\) See, eg, Australia’s policy of processing asylum claims at processing centres in third countries under purely administrative procedures. See, in particular, the comments of the then Minister for Immigration, Mr Ruddock, when introducing legislation to facilitate the processing of asylum claims for persons arriving in Australia in third countries: Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 14 2001, Tuesday 18 September 2001, 30846 (justifying offshore processing – and the different standards applied therein – on the basis that asylum
On the other hand, the variety in the asylum procedures that states have utilized should not be overstated. Despite the differences between jurisdictions, the post-war developments in France and Germany, and the later initiatives in common law jurisdictions in the 1970s and 1980s, can be viewed as part of a cross-jurisdictional trend in asylum procedures toward ‘legality’ or the rule of law. This saw an area traditionally dominated by administrative discretion gradually come under the supervision of legal regulation and judicial control. Furthermore, as later chapters of this thesis attest, statutory and curial safeguards continue to resurface despite efforts to remove or circumvent them through restrictive asylum practices.

Whether states have considered themselves bound as a matter of international law to subject the asylum process to the rule of law is open to debate. It is possible to find statements by legislators emphasising that reforms to asylum procedures were necessary to meet states’ international protection responsibilities. Parliamentary committee reports and debates have also recognized the importance of rectifying the seekers arriving in Australia should not get a better ‘outcome’ than those processed by the UNHCR in third countries, such as Indonesia).

31 See generally, Harvey, above n 3, 145.

32 Harvey, above n 3, 145.

33 See, eg, the unsuccessful attempts to oust judicial review of asylum decisions, below n 1064 – and accompanying text.

34 See, eg, Asylum Adjudication, Hearings before the Subcommittee on Immigration and Refugee Policy of the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, First Session, How Do We Determine Who Is Entitled to Asylum in the United States and Who is Not?, October 14 and 16, 1981, Serial No J-97-66 (US Government Printing Office, Washington, US) 3 (Senator Edward M Kennedy approving the Select Commission on Immigration and Refugee Policy’s recommendations (see below n 35) on the basis that ‘these are guidelines that we should pursue in establishing an asylum policy that accurately reflects our humanitarian tradition of welcoming refugees, and that meets out responsibilities under the U.N. Convention and Protocol Relating to the Status of Refugees.’)
lack of statutory protections available to refugees historically in order to ensure that refugees are able to access and enjoy asylum.\(^5\)

But there are other statements in such reports and debates that preserve the state’s discretion to determine the composition of their asylum process, including the mix of administrative, legislative and judicial mechanisms, even while recommending greater regulatory and curial control.\(^6\) For instance, Osamu Arakaki observes that Japanese parliamentarians felt largely unconstrained by international or comparative precedents that might dictate the makeup of Japan’s asylum process when introducing new asylum legislation in the 1980s.\(^7\)

The formal espousal of the orthodox view, while following a cross-jurisdictional trend toward greater legal controls, is also apparent in national judicial decisions. In two decisions in the 1980s, the High Court of Australia expressly endorsed the orthodox view.\(^8\) At around the same time, the courts in the UK and the US endorsed the orthodox view as represented in the United Nations High Commissioner for Refugees

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Handbook on Procedures and Criteria for Determining Refugee Status. Recently, the orthodox view was restated by way of obiter dicta by a joint judgment of six members of the High Court of Australia.

Yet at the same time as the courts have formally espoused the state’s discretion to determine eligibility procedures they have also defended their own jurisdiction to review asylum decisions made by administrative officials. While these efforts bear the clear influence of international human rights, national courts have generally been unwilling to associate the right of asylum seekers to access judicial remedies with any limitations on the state’s discretion to determine the nature of its eligibility process in international law.

This brief overview of state practice thus shows evidence of the orthodox view that states are free to engage in different modes of asylum processing. On the other hand,

39 R v Secretary of State for the Home Department ex parte Bugdaycay [1986] 1 WLR 155, 163 (Neill LJ) (refusing to interfere to protect suspensive appeal rights – a procedural requirement in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status – on the basis that the appellant overstated the role of the Handbook, which ‘recognises that the practice to be adopted in various states will vary and the recommendations are clearly drafted in broad terms to cover many different situations and many different legal systems’); Bugdaycay v Secretary of State for the Home Department [1987] AC 514, 524 (Lord Bridge of Harwich) (considered the procedural requirements set out in the UNHCR Handbook of no binding force either in municipal or international law); INS v Cardoza Fonseca 480 US 421, 107 S.Ct 1207, 1217 Fn 22 (1987) (‘We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS … Indeed, the Handbook itself disclaims such force, explaining that “the determination of refugee status under the 1951 Convention and the 1967 Protocol … is incumbent upon the Contracting State in whose territory the refugee finds himself.”’) For the position in the Handbook see below n 48 – and accompanying text.

40 NAGV and NAGW of 2002 v MIMIA (2005) 222 CLR 161, 170 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ). See also, Yogathas v Secretary of State for the Home Department [2003] 1 AC 920, [22] (Lord Hope) (‘nor did [the Refugee Convention] attempt to set out the procedures to be adopted by the contracting states for granting and withdrawing refugee status.’)


it also shows a competing cross-jurisdictional trend in state practice toward legality and the rule of law. How these examples of state practice should be used to interpret the nature and scope of states’ obligations with respect to asylum procedures is another matter. This issue is discussed further in this introductory chapter in section IV, which summarizes the interpretative approach developed in later chapters of this thesis.

B The orthodox view in the work of international agencies

The United Nations High Commissioner for Refugees (UNHCR) is the international agency charged with the supervision of the Refugee Convention.\(^{43}\) The Executive Committee of the High Commissioner’s Programme (EXCOM) is the states’ body that supervises and directs the activities of the UNHCR.\(^{44}\) As part of its role, EXCOM develops conclusions that set international protection standards (EXCOM Conclusions).

The 1977 EXCOM Conclusion on Determination of Refugee Status recommended that states should satisfy certain basic procedural requirements in their asylum procedures.\(^{45}\) The 1977 Conclusion also requested UNHCR to consider issuing a handbook relating to procedures and criteria for determining refugee status for the

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\(^{43}\) Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(v), Annex, UN Doc A/1775 (1950), s 8; Refugee Convention, art 35.


\(^{45}\) EXCOM Conclusion No 8 (XXVIII)-1977, (e).
‘guidance’ of states.\textsuperscript{46} Pursuant to this directive, the UNHCR issued its \textit{Handbook on Procedures and Criteria for Determining Refugee Status} in 1979.\textsuperscript{47}

These initiatives, while espousing basic procedural standards, did little to displace the orthodox view that states retained discretion in relation to the composition of their refugee determination systems. First and foremost, the UNHCR Handbook expressly provides in relation to this issue that ‘[i]t is ... left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.’\textsuperscript{48} In addition, the general position is that EXCOM Conclusions\textsuperscript{49} and the UNHCR Handbook\textsuperscript{50} are not binding on states as a matter of international law, dictating that states retain the discretion to comply with the procedural requirements found therein.

Moreover, the procedural requirements in the 1977 EXCOM Conclusion on Determination of Refugee Status provided states with only minimal guidance so that ‘party states went on to develop different internal procedures in an effort to meet their

\textsuperscript{46} Ibid (g).
\textsuperscript{47} UNHCR Handbook, above n 19.
\textsuperscript{48} UNHCR Handbook, above n 19, [189] (‘It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’).
EXCOM continues to periodically remind states of the importance of providing access to a fair and effective asylum process, but without specifying procedural requirements in any greater detail.

EXCOM also has made repeated general appeals to states to ensure the effective implementation of the Refugee Convention through appropriate administrative and legislative measures, including national procedures for determining refugee status. However, those general conclusions stop short of recommending what form those measures or procedures should take; nor is it clear from the text of the conclusions whether the call on states to adopt ‘appropriate administrative and legislative measures’ derives from any particular international obligation/s.

EXCOM has provided greater guidance in relation to the minimum requirements of expedited proceedings where claims are ‘clearly abusive’ or ‘manifestly unfounded’. Yet that effort has done little to erode the orthodox view in state practice; instead, it has simply assured that states have discretion to implement abbreviated asylum procedures.

Greater focus on the specific make up of national asylum procedures has come about through the UNHCR’s follow up work on the Global Consultations on International Protection held in 2001. The Global Consultations were launched by UNHCR in an

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52 EXCOM Conclusion No 28 (XXXIII) – 1982, (c); EXCOM Conclusion No 71 (XLIV) – 1993, (i); EXCOM Conclusion No 74 (XLV) – 1994, (i); EXCOM Conclusion No 81 (XLVIII) – 1997; EXCOM Conclusion No 82 (XLVIII) – 1997, (d)(ii); EXCOM Conclusion No 87 (L) – 1999, (j); EXCOM Conclusion No 105 (LVII) – 2006, (n).

53 EXCOM Conclusion No 2 (XXVII) – 1976, (c); EXCOM Conclusion No 11 (XXIX) -1978, (h); EXCOM Conclusion No 14 (XXX) – 1979; EXCOM Conclusion No 29 (XXXV) – 1983, (g), (h); EXCOM Conclusion No 41 (XXXVII) – 1986, (g); EXCOM Conclusion No 49 (XXXVIII) – 1987, (d); EXCOM Conclusion No 57 (XL) – 1989, (a) – (d).

54 EXCOM Conclusion No 30 (XXXIV) – 1983.

55 See below n 597 – and accompanying text for criticisms of EXCOM Conclusion No 30.
attempt to engage states and other actors in a wide-ranging discussion on refugee protection. The Consultations led to a renewed appreciation of the importance of ‘the adoption and implementation of national refugee legislation and procedures for the determination of refugee status’.\(^{56}\)

Since the Global Consultations, the UNHCR has been active in strengthening the institutional capacity of certain states to deliver fair and effective asylum processes – focusing on incorporating asylum procedures through national legislation, providing access to effective remedies, and ensuring the quality of administrative decision-making.\(^{57}\) Furthermore, UNHCR has increased its calls for states that have not done so to accept responsibility for processing asylum claims within their jurisdiction – acknowledging that UNHCR ‘cannot substitute for national protection systems in any meaningful way.’\(^{58}\)

It is unclear to what extent these more recent endeavours make inroads into states’ traditional discretion in relation to asylum processing. While delegates to the Global Consultations reached broad agreement on the need for ‘basic common standards for refugee status determination procedures derived from the framework of international refugee law’, they also acknowledged the need for ‘flexibility’ so as to ‘take account


\(^{58}\) See, most recently, UNHCR, Statement by Ms Erika Feller, Assistant High Commissioner - Protection, at the fifty-ninth session of the Executive Committee of the High Commissioner’s Programme: ‘Protection makes a difference. It can mean the difference’, 8 October 2008, 6. See also, UNHCR, Note on International Protection, 30 June 2008, A/AC.96/1053, [25]; UNHCR, Note on International Protection, 29 June 2007, A/AC.96/1038, [18].
of national and regional specificities and domestic legal and administrative systems.\textsuperscript{59}

During the Consultations, the UNHCR identified a common set of procedural standards that could form the basis of a new EXCOM Conclusion on Asylum Procedures.\textsuperscript{60} Yet these standards were expressed as 'best practice' that were to be 'promoted' as examples of evolutions in state processing.\textsuperscript{61} Use of the term 'best practice' suggests that it was thought that states retain 'flexibility' in the implementation of asylum procedures. Resort to the notion of 'best practice' possibly reflects the expectation that states are likely to be resistant to a set of prescriptive (as opposed to aspirational) processing requirements. The delay in the formulation of the proposed EXCOM Conclusion on Asylum Procedures perhaps bears this out.

\textit{C The orthodox view in refugee law scholarship}

In the 1960s, the founding figure of modern refugee law scholarship, Professor Atle Grahl-Madsen, wrote that 'each Contracting State [to the Refugee Convention] is in every respect free to make its own eligibility determination.'\textsuperscript{62} While he drew attention to the beneficial effects of legislation, administrative decrees, and judicial decisions in translating a state's international protection obligations into binding municipal law,\textsuperscript{63} Grahl-Madsen did not imply that states were required as a matter of


\textsuperscript{60} UNHCR, \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001 [50]; EXCOM, Fifty-third session, Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee (Third Track), Report of the Second Meeting in the Third Track, 28-29 June 2001, [29].

\textsuperscript{61} UNHCR, \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001, [3], [50].

\textsuperscript{62} Grahl-Madsen, above n 22, 339.

\textsuperscript{63} Grahl-Madsen, above n 22, 24-27.
international law to employ any particular municipal measures (or combinations of such measures) when constructing their eligibility procedures.

In keeping with his general view, Grahl-Madsen did not suggest that states were obliged to incorporate their eligibility procedures in binding statutory provisions. He also did not suggest that states were required to engage any particular administrative measures in their asylum process. Moreover, Grahl-Madsen nowhere suggests in his treatise on the status of refugees in international law or in his draft commentaries on the Refugee Convention that states must ensure access to their courts for the purpose of allowing refugees to enforce the state’s international protection obligations, including the refugee’s entitlement to protection. Although he assumes at various places in his work that refugees will have access to municipal remedies to enforce their international rights, there is no indication in his writings that states were obliged to grant access as part of the eligibility process. Grahl-Madsen’s approach is characteristic of other early commentators on the Refugee Convention.

On this issue, refugee law scholarship over the years has largely followed the lead of early writers. Scholars who have addressed national asylum adjudication procedures have generally done so on the basis of salient principles of administrative law and constitutional due process or immigration control policy. Relatively few

64 Grahl-Madsen, above n 22.
65 Grahl-Madsen, above n 10.
66 Ibid 59.
scholars have rigorously analyzed the obligatory nature of asylum procedures under international law.\textsuperscript{71}

There is also a dearth of scholarship that systematically considers the issue of the obligatory role of national institutions in the asylum process. The major exception to this statement is the work of modern scholars who – in an apparent departure from earlier scholarship – argue that the courts should review asylum decisions as part of the state’s express obligations to provide persons seeking protection with access to the courts.\textsuperscript{72} Yet the literature to date has not seriously countenanced the possibility that other national mechanisms essential to a fair and effective asylum process might also be mandated as a matter of international law.

### III CHALLENGES TO THE STATE’S UNFETTERED DISCRETION TO DETERMINE THE NATURE OF ITS ASYLUM PROCESS

Given that the orthodox view permeates state practice and refugee law scholarship, one might expect that its foundations are well-established and explained. This is not the case. Nevertheless, it is possible to point to certain basic propositions and notions that inform and underly it. This section asserts that these are increasingly susceptible to challenge in light of the evolving understanding of international refugee and human


\textsuperscript{70} Hailbronner, below n 620 (supporting the application of visa requirements and other measures designed to restrict access to asylum procedures on the belief that asylum in Europe is an avenue of illegal migration and should be subject to immigration controls).

\textsuperscript{71} With some notable exceptions, see, eg, Hyndman, above n 21 (deriving core processing standards from the definition of refugee found in the Refugee Convention). See also, Legomsky, 2003, below n 855, 655 (arguing that unfair asylum procedures constitute a breach of art 33 of the Refugee Convention or, alternatively, a breach of the principle of fair process as a ‘general principle of law’ in international law).

\textsuperscript{72} See, eg, Hathaway, above n 1, 647-650.
rights law. As a consequence, this thesis seeks to re-examine the orthodox opinion that states are in no way bound in the way they compose their asylum procedures.

A Obligations of result and means

The basic proposition that informs the orthodox view is that there is no express requirement on states to implement an asylum process, nor is there any express obligation on states to employ particular processing mechanisms. A key notion that underlies this basic proposition is that international protection obligations are ‘obligations of result’. International rights instruments simply identify the ‘result’ expected of states, while leaving states to determine the means for their realization. By way of illustration, it might be argued that the ‘means’ employed by the state to safeguard against refoulement are irrelevant so long as the state achieves the ‘result’ of non-refoulement.

This is the basis of the belief that states do not need to impose internal limitations on officials so long as they do not, in fact, refoule. Employing this logic, Australia’s Attorney-General’s Department submitted in evidence to a Senate inquiry into Australia’s asylum process:

The government does not need to legislate to regulate its own behaviour. The government can simply undertake not to, and in fact not, refoule people . . . Where the obligation is only on the government, the government can simply undertake to fulfil that obligation without any law to compel it to do so.\(^74\)

\(^73\) See, eg, J Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 Harvard International Law Journal 129, 166, Fn 222 (‘State responsibilities under the Convention are in the nature of obligations of result, not obligations of conduct or means’).

The notion of ‘obligations of result’ furthermore feeds the false dichotomy between compliance with the Refugee Convention ‘in theory’ and ‘in practice’. On the one hand, official state reports express satisfaction that processing arrangements meet the particular state’s international obligations ‘in theory’, while on the other proposing the reform of asylum procedures to ensure that they facilitate ‘in practice’ the proper identification of persons in need of protection. While there has been a growing awareness among states that certain arrangements better facilitate the proper determination of refugee status, there is a general failure by states to acknowledge that the satisfaction of their international obligations depends on the pursuit of practically effective asylum procedures (as opposed to some ‘theoretical’ or ‘in principle’ compliance).

Whether the notion of ‘obligations of result’ that underlies the orthodox view ever accorded with the true object of international or regional human rights treaties is highly doubtful. In essence, the idea that protection obligations are ‘obligations of result’ reflects a traditional, but limited, understanding of civil and political rights. States, it is argued, are obligated to simply refrain from interfering to breach such a right. They are under no obligation to put in place measures to protect against breach of the right by state officials or private individuals or to ensure that individuals practically enjoy the right in question. Thus, for instance, the non-refoulement obligation is satisfied so long as the state does not actively seek out and exclude or expel refugees; the state is under no duty to adopt positive measures to ameliorate the effects of general immigration controls.

75 Ibid 51 (‘While the Committee is satisfied that the present arrangements meet Australia’s obligation under the Refugee Convention in theory, consideration should be given to whether the actual procedures that are in place to give effect to those arrangements, in practice, facilitate the proper determination of refugee status.’)

76 See below n 267 – and accompanying text.
B The importance of positive measures to the effective enjoyment of rights

This construction of civil and political rights is fundamentally at odds with the nature of the obligations imposed on states under human rights treaties. Human rights treaties require states to ensure the effective operation of rights within their jurisdictions through positive measures - mechanisms that ensure the practical implementation of states' international obligations.77 Rights embody both an obligation to refrain from direct action leading to an infringement, as well as an obligation to adopt mechanisms or means to ensure the practical enjoyment of the right.78 Thus, states are required to implement positive measures that ensure the practical enjoyment of a right even though the right contains no express mention of those measures.79

The application of positive measures in the context of a state's international protection obligations, such as the non-refoulement obligation in art 33 of the Refugee Convention, challenges the proposition that states have unlimited discretion in how

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77 See, eg, United Nations Human Rights Committee, General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004, UN Doc CCPR/C/21/Rev.1/Add.13, [8]; Dzemajl v Yugoslavia, CAT Case No 161/2000, Decision adopted on 21 November 2002, [9.6]: ('The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.') See also, the doctrine of positive obligations developed by the ECtHR, A v the United Kingdom, 23 September 1998, Reports, 1998-VI, 2699, § 22; Z and Others v the United Kingdom [GC], No 29392/95, §§ 73-75, ECHR 2001-V; (recognizing the positive obligations of Member States to put in place measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment); Golders v UK (1975) Series A No 18, and Airey v Ireland (1979) Series A No 32 (holding that art 6 of the ECHR imposed positive obligations on Member States to provide legal aid); Tysiac v Poland, Application No. 5410/03, 20 March 2007, [112] ('for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention'). See generally, A Mowbray, The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights (Oxford, Hart Publishing, 2004); C Dröge, 'Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention' ['Positive Obligations of States in the European Convention on Human Rights'] (2003) 159 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 379-392.

78 See below n 267 – and accompanying text.

they compose their asylum procedures. Increasing recognition is given to the fact that positive measures are required to safeguard the rights of refugees.\textsuperscript{80} International and regional rights bodies are increasingly petitioned to hold states to a positive obligation to protect individuals from exposure to foreseeable risks of violations of core rights in another jurisdiction caused by expulsion.\textsuperscript{81}

Significantly, this substantive obligation is accompanied by growing recognition of the importance of a corresponding procedural obligation on states to ensure the effectiveness of the non-refoulement obligation by providing an effective remedy prior to deportation.\textsuperscript{82} This requirement is imposed irrespective of the fact that there is no mention of an effective remedy in, for instance, art 3 of the CAT.\textsuperscript{83} There is no reason in principle why this same reasoning should not be applied to other administrative, legislative and judicial mechanisms needed to ensure a fair and effective asylum process. Such an approach recognizes that refugee law is a ‘dynamic body of law’ that is informed by the broad object and purpose of the Refugee Convention and by developments in human rights law.\textsuperscript{84}

\textsuperscript{80} See below n 386 -- and accompanying text.


\textsuperscript{82} See, eg, Agiza v Sweden, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005), [13.6] (‘The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention, while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach. In the Committee’s view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.’ [Footnotes omitted]).

\textsuperscript{83} Ibid.

\textsuperscript{84} See below n 346 -- and accompanying text. For the importance of forging the links between refugee law and international human rights law, see, Summary Conclusions: The Principle of Non-Refoulement, Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees.
In step with these initiatives, UNHCR’s recent *Notes on International Protection* expressly draw attention to the obligation on states to provide refugees with equal protection under the law and access to an effective remedy. Recent comments by the UNHCR on proposed changes to asylum procedures have drawn a similar link between abbreviated asylum procedures and the increased risk of *refoulement*.

These comments complement new EXCOM Conclusions calling upon states to implement gender-sensitive and child-sensitive asylum procedures, as well as procedures that cater for claims to complementary forms of protection under human rights treaties.

Moreover, the UNHCR is more vigilant in its insistence on the non-discriminatory operation of national asylum procedures. This has major implications in terms of the state’s discretion to deny certain groups of asylum seekers access to the general asylum procedures found in national legislation. In relation to Australia’s offshore processing of asylum claims, for example, the UNHCR made submissions to Australian Senate inquiries that the denial of access to onshore statutory and judicial asylum safeguards to certain groups of refugees was discriminatory and imposed a

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85 See, most recently, UNHCR, *Note on International Protection*, 30 June 2008, A/AC.96/1053, [34].


87 EXCOM Conclusion No 105 (LVII) – 2006, (m); EXCOM Conclusion No 107 (LVIII) – 2007, (c).

88 EXCOM Conclusion No 103 (LVI) – 2005, (q) and (r).

89 UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, [50].
penalty on those refugees due to the mode of their arrival. In another prominent example, the UNHCR recommended that EU states legislate to ensure the non-discriminatory application of the EU Asylum Procedures Directive (which seeks to ensure uniform asylum procedures in EU members states).

Putting aside for the moment the important issue of the binding nature of UNHCR and EXCOM views and comments, these actions indicate the scope of positive measures needed to properly observe the non-refoulement obligation. As such, they provide evidence of a fundamental challenge to the notion that the 'means' required to implement the non-refoulement obligation are inconsequential and discretionary – thereby questioning the traditionally passive expectation upon states when it comes to the construction of asylum procedures.

C The progressive realization of rights

Continued reliance on the orthodox view that states have free reign to construct their asylum procedures implies that international protection obligations are static. In accordance with the orthodox view, states are under no duty to utilize new mechanisms or measures or improvements (eg in administrative justice) that better ensure the identification of persons entitled to protection.

As an illustration, the Canadian Government’s refusal to offer asylum seekers independent merits review – an evolution in administrative justice – implicitly relies on the view that it is not obliged to take advantage of the benefits that such review would bring in terms of ensuring the consistency and reliability of refugee status.

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90 See, below n 955 - and accompanying text.

The Canadian Government instead maintains that initial determinations with a right to apply for leave to seek judicial review is sufficient to ensure that Canada’s asylum process complies with international law.\(^{93}\)

Conversely, the view that states have a wide discretion in the composition of their asylum procedures goes hand in hand with the proposition that states are not obligated to take positive steps to ameliorate the adverse impact that immigration control mechanisms may have on access to asylum procedures. Specifically, the non-refoulement obligation is interpreted not to require states to facilitate access to asylum procedures by developing protection safeguards that ameliorate new and sophisticated border control techniques.\(^{94}\)

Yet there is a fundamental conflict between this ‘static’ approach to key international protection obligations and how we understand human rights today. As discussed in chapter 3 of this thesis, states are obligated to progressively realize international human rights within their jurisdiction through evolving safeguards.\(^{95}\) The Refugee Convention and cognate rights instruments are to be regarded as living instruments that must be interpreted and applied in order to ensure their effectiveness today.\(^{96}\)

\(^{92}\) House of Commons, Canada, Safeguarding Asylum – Sustaining Canada’s Commitments to Refugees, Report of the Standing Committee on Citizenship and Immigration, May 2007, 39th Parliament, 1st Session, n 17 – 31 and accompanying text (recommending that the Minister of Citizenship and Immigration Canada immediately implement the Refugee Appeals Division as set out in the Immigration and Refugee Protection Act 2002 (Canada)). The Immigration and Refugee Protection Act received royal assent on 1 November 2001 and came into force on 28 June 2002. The Act created the Refugee Appeal Division – a merits review body. The Refugee Appeal Division was not instituted.

\(^{93}\) Government Response to the Fifteenth Report of the Standing Committee on Citizenship and Immigration, Safeguarding Asylum – Sustaining Canada’s Commitment to Refugees, [B – Refugee Appeal Division].

\(^{94}\) For a typical argument along these lines, see: Hailbronner, below n 620, 354. See further below n 566 – and accompanying text.

\(^{95}\) See below n 358 – and accompanying text.

\(^{96}\) R v Asfaw [2008] UKHL 31, [54]-[55] (Lord Craighead). See further below, n 358 – and accompanying text.
Accepting that states are free to languish or even regress to inferior and substandard protection safeguards denies the evolutionary quality of rights.

Fair and effective asylum procedures, it is argued in this thesis, should be defined in accordance with the dynamic evolutionary obligations they are designed to safeguard. ⁹⁷ They should therefore be pushed forward, not backward. This entails, for instance, taking advantage of improving standards of administrative justice, such as independent merits review. In this light, ‘best practice’ ⁹⁸ in asylum processing takes on an obligatory character, not because of prevailing state practice or as an instance of general principles of international law, but because of the overarching obligation upon states to ensure the progressive realization of key international protection obligations. The work of international agencies, regional courts and commissions, parliaments, national courts, law reform bodies and human rights agencies, as well as jurists, help define and develop our understanding of ‘best practice’.

D Separating national safeguards from international obligations

A final presumption underlying the orthodox view is the separation between the satisfaction of states’ international protection obligations and national mechanisms for ensuring the effectiveness of asylum procedures. It is not uncommon for state inquiries to base recommendations for greater procedural fairness in the asylum process on ‘domestic’ standards of procedural fairness, yet without linking those standards to states’ international obligations. ⁹⁹ This understanding can be contrasted

⁹⁷ See below chapter 4.

⁹⁸ UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [50].

⁹⁹ Refugee Status Determination Process, above n 36, 6 (‘The Task Force is of the view that the best method of avoiding these dangers [‘fragmented and discretionary decision-making’] is to ensure that
with a growing awareness of the importance of a ‘holistic’ approach to protection generally – one that engages a range of national safeguards.\(^\text{100}\)

This thesis embraces the importance of administrative and constitutional law principles as a means of checking unfettered discretion in asylum adjudication. However, the failure to clearly relate those principles to the satisfaction of states’ international protection obligations has meant that policy-makers have become adept at circumventing those municipal safeguards while at the same time espousing compliance with international law.\(^\text{101}\)

The failure to investigate the obligatory nature of asylum procedures has also left those procedures overly susceptible to domestic political forces. For instance, Martin - an influential figure in the development of US asylum adjudication - views the asylum process as a charitable act that goes beyond states’ international obligations because such procedures have traditionally encompassed the grant of asylum (the \textit{non-obligatory} act of granting permanent residence).\(^\text{102}\) At the same time, Martin fails to address the obvious fact that eligibility procedures (including in the US) deal with the determination of protection against \textit{refoulement} – a \textit{binding} international obligation. Thus, he sidesteps the task of examining the relationship between the

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our refugee determination procedures reflect Canadian standards of procedural fairness as they have become manifest in our general legal concept of a “fair hearing”\(^\text{\textquotedblright)}}).

\(^{100}\) A recent example is the UNHCR’s Strengthening Capacity Project commenced in 2006: UNHCR, \textit{Strengthening Protection Capacity Project, Protection Gaps Framework for Analysis Enhancing Protection of Refugees} (2nd edition, 2008).

\(^{101}\) See, eg, the Australian Government’s approach to processing standards under Australia’s now defunct extraterritorial processing scheme, discussed in chapter 6 of this thesis: below n 942 – and accompanying text. The Canadian Government has employed the same reasoning in refusing to instigate the Refugee Appeal Division: \textit{Government Response to the Fifteenth Report of the Standing Committee on Citizenship and Immigration, Safeguarding Asylum – Sustaining Canada’s Commitment to Refugees}, [B – Refugee Appeal Division].

asylum process and key international protection obligations. Other scholars have followed his lead.

Nevertheless, Martin considers himself beholden - because of the ‘fragile’ and ‘inconstant’ nature of asylum procedures – to ensure that the design of such processes ‘maximizes’ ‘domestic support’. This focus does not preclude Martin making insightful calls for reform to asylum adjudication, eg more and better trained and resourced asylum adjudicators. In another recent study of asylum adjudication in the US, the authors similarly make a number of useful reform proposals based on the perceived need to maintain ‘public support for the admission of genuine refugees’. On the other hand, the vague notion of ‘domestic support’ ultimately depends on the observer’s divination of the electorate’s demands. Martin responds to an electoral clamour in the US for control of ‘overflowing’ onshore asylum claims in the early 1990s, leading him to support various measures to deter non-genuine refugees through ‘speedy denials’. Vague characterisation of public concerns provides an easy

103 Ibid.
105 Martin, above n 102, 1257.
106 Ibid 1279, 1338-44, 1378.
107 Ramji-Nogales, Schoenholz, Schrag, above n 69, 306, 380 - 389 (after noting major disparities in decision-making at all levels of the US asylum adjudication system, the authors propose more rigorous hiring standards, better training, greater resource allocation, legal aid, a multi-panel independent appeal tribunal, and a greater role for the courts). See also, Legomsky, 2000, below n 774, 634 (arguing that asylum processing requirements should be based on ‘the substantive individual interests at stake and the practical value of the particular procedural safeguard at issue, but also on the public’s interest in dispensing with that safeguard. The latter encompasses the efficient use of government time and resources.’)
means for pushing the observer's own policy preferences. While such an approach may accord with crude notions of majoritarian democracy, it is hard to reconcile with a principled, rights-focused approach to asylum adjudication (or democracy for that matter).

These criticisms are not meant to suggest that 'non-legal' factors – including the numbers of asylum seekers accessing a system – should not be taken into account in the design and delivery of asylum procedures. But the fact that high numbers of asylum seekers are accessing an asylum process does not preclude creative and humanitarian solutions to backlogs and delays. A fair, effective and comprehensive asylum process is not necessarily inconsistent with maintaining some level of immigration control. If protection is to have any meaning, there must be principles that direct the design of asylum procedures other than electoral apprehensions (and miscomprehensions), resource concerns, or downright political opportunism.

The role of national institutions in the asylum process has significance for our broader understanding of the role of rights within the international legal order. It engages with recent scholarship which examines the nature of a 'rights-focused', integrated international legal order. 

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109 See, eg, Vaughns, above n 104 (considering that the grant of asylum, as a 'discretionary' matter of 'public policy', should be directed by the political branches and not the judiciary – without confining her suggestions to the process in the US governing the discretionary grant of asylum, as opposed to the mandatory withholding of deportation in cases where there is a finding that a person has a well-founded fear of persecution).

110 Martin, 'Interdiction', above n 108, 475-476.

111 See, eg, a discussion of Parliament's potential as a rights-focused institution, below n 1112 – and accompanying text.


113 Ibid 193.

to which such an order is ultimately dependent on the effective and practical operation of constraints on the exercise of government authority within the state. Expressed in terms of the sovereignty doctrine that permeates the asylum debate, this thesis highlights that fetters on the 'internal' sovereignty of government are essential to effective implementation of the limitations that rights place on the 'external' sovereignty of states.

In sum, there are strong reasons for reconsidering the orthodox view that states have unfettered discretion in relation to the composition of their asylum procedures. The next part of this introductory chapter summarizes the key proposition in this thesis that states should adopt appropriate legislative, judicial and administrative measures in order to ensure a fair and effective asylum process.

IV STRUCTURE OF THESIS

A The historical perspective – Chapter 2

As a starting point, the next chapter of this thesis seeks to place the role of legislative, administrative and judicial measures in the asylum process in historical perspective. This is important for a variety of reasons. Firstly, it highlights the longevity of the dispute over the propriety of arbitrary decision-making in the asylum arena and the proper role of the courts and parliament in the exercise of the state’s traditional right to grant asylum. In tracing this historical polemic, and especially the executive’s resistance to any incursions into its self-proclaimed role as the sole decider of which foreigners were to be granted or denied protection, we begin to understand some of the nuances involved in the role of national institutions in the asylum process today.

115 The distinction between ‘external’ and the ‘internal’ sovereignty is that between the power ‘inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws’ (droit public interne), and that ‘branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies (droit public externe)’: Wheaton, Elements of International Law, English ed. (1878) 28-29.
From a historical vantage point, it is also possible to appreciate the nature and ramifications of arbitrary decision-making with respect to the grant of asylum, as well as the potential benefits (and pitfalls) of legislative and judicial intervention.

Unfettered government power to grant asylum was, and perhaps remains, ‘Janus-faced’. While acting as a buttress against incursion from other states on the freedom of the state to grant protection, it was also applied arbitrarily and in a discriminatory way against certain political or religious groups in order to deny them asylum. What this suggests concerning the modern drift toward executive monopoly over the asylum process is that we should be concerned not solely by the fact that it is ‘government’ that exercises this power, but more by the degree to which that power is unchecked and unfettered by any meaningful constraints (judicial, legislative or administrative).

An additional point to note is that parliament’s and the courts’ role in this latter enterprise was not always innocent – early ‘aliens’ legislation actually facilitated the exercise of arbitrary executive power in order to ensure the speedy and untroublesome expulsion or exclusion of certain unwanted political refugees. Judicial decisions also all too readily deferred to the executive’s self-proclaimed role as the guardian of the state’s sovereign right to guard against outsiders. Thus, these observations give food for thought when considering the proper role of parliament and the courts and the potential benefits to be gained from parliamentary and judicial participation in the development or scrutiny of asylum procedures today.

B The scope of the good faith principle as a method of interpreting and applying states’ international protection obligations – Chapter 3

While these historical observations are interesting, the core normative force of this thesis rests on its ability to establish that states are bound as a matter of modern international law in the way they engage their legislative, judicial and administrative
mechanisms in the asylum process. The historical observations assist in that they provide background and illumination; but ultimately, the success of this thesis depends on the extent to which it maintains a sound legal argument based on an analysis of the text and context of key international protection obligations in light of the object and purpose of the treaties in which they are found.\footnote{Pursuant to art 31(1) of the \textit{Vienna Convention on the Law of Treaties} (opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)), a treaty should be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The interpretative method advanced in the Vienna Convention on the Law of Treaties has been adopted for the purposes of interpreting the Refugee Convention despite the fact that the Refugee Convention is an earlier treaty due its embodiment of the customary international law relating to the interpretation of treaties: M Foster, \textit{International Refugee Law and Socio-Economic Rights: Refuge from Deprivation} (Cambridge University Press, Cambridge 2007) 40-41.}

The first step in this legal argument must be to establish the proper principles that should guide the interpretation and application of those protection obligations. Here chapter 3 of this thesis sets out the cornerstone of the legal argument: the principle that states should interpret and apply their international treaty obligations in good faith. This is far from a new tactic in the asylum context;\footnote{G Goodwin-Gill and J McAdam, \textit{The Refugee in International Law} (3rd edn, Oxford University Press, Oxford 2007) 391; Hathaway, above n 1, 62-64.} not surprisingly, given that it is mandated by general principles of international treaty interpretation.\footnote{Article 31(1) of the \textit{Vienna Convention on the Law of Treaties}, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See above n 116.}

However, there is arguably still considerable scope for exploring the consequences of a good faith interpretation and application of core protection obligations, such as the obligation not to \textit{refoule}.\footnote{See, eg, the recent attempt in UNHCR, Amicus curiae brief in R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening) 17 \textit{IJRL} 427 (2005).}

In order to do so, this thesis first examines the scope of the good faith principle or \textit{pacta sunt servanda} that is recognized in art 26 of the Vienna Convention on the Law
of Treaties. 120 It observes that the good faith principle in the context of international human rights treaties translates into a trio of obligations - the obligations to respect, to protect, and to ensure (or fulfil) rights - that attach to individual political, civil, cultural, social and economic rights found in those conventions. 121 Most relevantly, the obligation to ensure (that is expressly set out in the main international rights instruments) demands that states proactively and positively develop and engage their judicial, legislative and administrative institutions and mechanisms in order to ensure the effective and practical enjoyment of any particular right within their jurisdiction. 122

This thesis argues that the obligation to ensure should also apply to the Convention relating to the Status of Refugees. 123 This argument is pressing given the fact that the Refugee Convention remains an essential source of the rights of refugees in addition to the protection offered under general international rights instruments. 124

Consequently, this thesis contends that states should utilize appropriate legislative,

120 Article 26 of the Vienna Convention on the Law of Treaties, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980,) provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'


124 Hathaway, above n 1, 5-6.
judicial and executive mechanism when ensuring the effective implementation of their protection obligations whether found in general international rights treaties or in the Refugee Convention.

C The Role of Legislative, Judicial and Administrative Mechanisms in Ensuring a Fair and Effective Asylum Process – Chapter 4

It is clear, however, that the good faith principle by itself cannot be a source of any requirements that might determine how a state goes about constructing and implementing its asylum process. While the good faith principle directs the performance of international obligations, it is not by itself a source of obligations where none would otherwise exist.125 In other words, the good faith principle is of an essentially accessory nature, which provides the means of a ‘systematic interpretation’ of state obligations.126 Recognizing this, chapter 4 examines to what extent a good faith interpretation of key protection obligations directs states towards a comprehensive, multi-faceted asylum adjudicative system that requires the use of appropriate statutory, executive and judicial safeguards.

D Applying this thesis to restrictive asylum policies – Chapters 5-7

In light of this discussion, chapters 5-7 of this thesis critically examine key restrictive asylum policies employed by states. The focus on the restrictive asylum policies of

125 In re Border and Transborder Armed Actions (Nicaragua v Honduras) [1988] ICJ Rep 69 [94]; In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) [1998] ICJ Rep 275 [39] (‘The principle of good faith is one of the basic principles governing the creation and performance of legal obligations ...; it is not in itself a source of obligation where none would otherwise exist.’)

states clarifies the normative implications of the core legal argument developed in this thesis. This general approach also seeks to follow the example of leading studies of asylum that recognize the ‘importance of testing the theoretical analysis of human rights standards against the hard facts of protection dilemmas on the ground.’

Chapters 5-7 examine only some of the restrictive asylum policies employed by states, but they serve sufficiently to illustrate the application and scope of this thesis. They include immigration controls at the ‘exported’ or ‘externalised’ border that attempt to prevent access to in-country asylum procedures (discussed in chapter 5); interdiction and extraterritorial processing of asylum claims that substitute in-country statutory, judicial and administrative safeguards with arbitrary decision-making (chapter 6); and restrictions on access to independent judicial scrutiny of asylum decision-making and procedures (chapter 7).

The analysis of these policies seeks to contribute to the ongoing debate over the relationship between immigration controls and asylum. In particular, the discussion critically examines recent UNHCR initiatives to encourage states to ‘sensitize’ the exported or externalized border. To what extent is it possible to ‘sensitize’ the exported border without sacrificing the benefits gained from in-country asylum adjudication? Should focus be on granting access to in-country asylum procedures, or

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127 Hathaway, above n 1, 10.

128 To borrow the language of officialdom, see, eg, Mr Dodd, Director, Border and Visa Policy, UK Home Office, Oral Evidence, House of Lords, European Union Committee, Home Affairs, FRONTEX Inquiry, 17 October 2007, 4 (‘one of the guiding lights of our philosophy of border control generally is to export the border as far away from the UK as possible ...’). See generally, A Kesby, ‘The Shifting and Multiple Border and International Law’ (2007) 27 Oxford Journal of Legal Studies 101.

129 EXCOM, Note on International Protection, Report by the High Commissioner, A/AC.96/1038, 29 June 2007, [30].

seeking to replace them with what are in effect purely administrative or private asylum ‘procedures’ at the exported border?

E Conclusion

The line of argument taken in this thesis obviously poses an ambitious and polemical challenge to the prevailing policy preference of developed states, which is to seek ways to minimize the social, economic and political costs perceived to be associated with complicated systems of asylum adjudication.\footnote{See, eg, the recent empirical study on the motivations and methods that have led to a gradual erosion of the US asylum adjudication process, and its consequences, by Ramji-Nogales, Schoenholtz, and Schrag, above n 69, 306. See also, the Canadian Government’s costs justification for refusing to establish the Refugee Appeal Division: The Canadian Government has employed the same reasoning in refusing to instigate the Refugee Appeals Division: Government Response to the Fifteenth Report of the Standing Committee on Citizenship and Immigration, Safeguarding Asylum – Sustaining Canada’s Commitment to Refugees, [B – Refugee Appeal Division].} Denial of direct access to the breadth of national safeguards is seen as a way of deterring future asylum seekers from arriving in developed states in search of a ‘migration outcome’\footnote{See, eg, the comments of the then Minister for Immigration, Mr Ruddock, when introducing legislation to facilitate offshore processing: Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 14 2001, Tuesday 18 September 2001, 30846.} thereby reducing the social, political and economic costs associated with sophisticated asylum procedures that engage different levels of adjudication. This thesis does not seek to downplay or dispute the various social, economic and political costs of comprehensive asylum procedures. But it does dispute the idea that those costs should outweigh the humanitarian objective of providing refugees access to fair and effective asylum procedures.

This thesis can be seen as part of an ongoing quest for determinacy and fairness in asylum decision-making. No doubt a degree of indeterminacy in the outcome of asylum adjudications will survive the best of efforts to eradicate arbitrary and biased decision-making in the asylum arena.\footnote{Legomsky, above n 4, 474.} Yet as one writer has said in another context,
'even if objectivity and determinacy [of legal rules] are elusive, we need not abandon that quest to arbitrariness.' As the same writer points out, '[i]mplicit in legal argumentation and constitutional discourse is a structure of self-imposed constraints, and an appeal – and even accountability – to an “interpretative community”.'

Perhaps the greatest potential of diverse institutional involvement in the asylum context is the ability to subject outstanding issues of controversy to debate, expose competing policy preferences, give voice to refugees, extend the scope of protection to those traditionally excluded from the ambit of asylum processes, entertain the views of international agencies, and point to areas that need reform and clarification.

In conclusion, this thesis suggests that the full reengagement of national institutions in the asylum process will depend on renewed co-operation between national institutions and greater engagement between national institutions and international agencies. In today’s environment of restrictive asylum policies, governments are more likely to be swayed by united pressure from international agencies, parliamentarians, national human rights bodies, and judges. This suggests a renewed effort is required to strengthen the national mechanisms available for the scrutiny of asylum processes and the links between national and international scrutiny bodies. From a broader perspective, this suggestion calls for utilization of the different mechanisms available for entrenching rights within states in accordance with the dictates of a rights-based, integrated international legal order.

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135 Darrow, above n 134, 115.
2 THE ROLE OF NATIONAL INSTITUTIONS IN THE ASYLUM PROCESS IN HISTORICAL PERSPECTIVE

I INTRODUCTION

This thesis asserts that a good faith reading of key protection obligations found in modern international rights instruments requires that states employ those legislative, judicial or executive measures that best ensure a fair and effective asylum process. The purpose of this chapter is to put this proposition in historical context. It does not allege that any such requirement or duty existed before the modern era of international rights instruments. The argument that states are bound in the way they construct their asylum procedures under modern international rights treaties is taken up in the next chapter. Nevertheless, it is possible to point to certain historical developments in the institution of asylum that support and explain the existence of such a duty in modern international law.

A central contention of this thesis is that comprehensive administrative, legislative and judicial mechanisms are essential to the realization of a fair and effective asylum process. Arbitrary decision-making should not decide the fate of persons whose lives and well-being may be in jeopardy. States should properly train and resource administrative officers charged with primary decision-making in the asylum process, as well as utilizing the expert functions of their parliaments and courts where these
can assist in the development, implementation, enforcement and scrutiny of fair and effective asylum procedures.

This argument contests the current direction of the asylum policies of developed states that seek to deny access to the protection offered by national asylum procedures or circumvent meaningful administrative, legislative or judicial safeguards. As becomes apparent from an indepth analysis of restrictive asylum policies in chapters 5 to 7 of this thesis, this trend toward the ‘denationalization’ or ‘deformalization’ of the asylum process significantly undermines its fairness and effectiveness.

This chapter uncovers a rich vein of historical thought that supports the contention that the ‘asylum process’ should not be constituted solely by unfettered and arbitrary administrative discretion. While scholars are right when they say that executive power dominated the grant of asylum throughout much of history – often with the aid of facilitative legislation and the acquiescence of the courts – this chapter also shows that historically there was a growing distrust and dissatisfaction with the use of unfettered administrative authority as the sole determinant of the grant of protection. At least since the eighteenth century parliamentarians have disputed the government’s claim to sole authority to decide whether or not to exempt refugees from exercise of the state’s sovereign right to exclude and expel aliens.

136 See, above n 2 - and accompanying text.

137 Harvey, above n 3, 191.

Even in this early period, legislative and judicial mechanisms were increasingly viewed as important checks and balances on the power of the government when it came to safeguarding asylum: a means of ameliorating the arbitrary, secretive and discriminatory decision-making that marked the traditional grant of asylum. It is this rival historical school of thought that championed the role of parliament and the courts in limiting the power of the executive to exclude or expel persons seeking protection that this thesis seeks to uncover.

From an historical perspective, the central contention of this thesis - that states today are bound in the way they devise and implement their asylum procedures by a good faith reading of core protection obligations – can be viewed as a continuation of the historical school of thought that sought to check arbitrary discretion in the asylum arena. The idea that legislative and judicial intervention in the asylum process could protect the individual interests of refugees has evolved slowly. This thesis contends that its fruition in modern international rights treaties should now be guaranteed through a progressive, good faith interpretation and application of key protection obligations.\textsuperscript{139}

Today, this means that governments should not be permitted to avoid their state’s international obligations by erecting a zone of arbitrary, unenforceable discretion within the state (as found in the restrictive asylum policies examined in later chapters of this thesis). In other words, checks on the state’s traditional sovereign right to exclude or expel aliens imposed by states’ international protection obligations must be accompanied by meaningful administrative, statutory and judicial mechanisms to ensure those limitations apply in practice domestically. At base, states should not disengage from the limitations on their ‘external’ sovereignty found in international

\textsuperscript{139} See, below n 267 - and accompanying text.
law by circumventing mechanisms that impose checks on the exercise of ‘internal’
government power within the state.

This chapter focuses on asylum as it developed in the UK and its colonies (including
its former colony, the US) in the context of wider European developments in the
concept of asylum. This approach gives unique insights into the dynamic between
institutions of the state in the asylum context due to the UK’s long history of
parliamentary involvement in the asylum debate, as well as the government’s
response to calls for judicial overview of the denial of protection. While the focus is
on the UK, the insights also serve to illuminate the modern role of the executive,
legislature and judiciary in the asylum arena in other jurisdictions (such as France,
Germany, and Japan) where the debate over the proper role of these institutions with
respect to asylum policy and procedures only gained pace in the last century with the
establishment of new demarcations of constitutional powers.

II ABSOLUTE ROYAL AUTHORITY OVER THE GRANT OF
ASYLUM

It is anachronistic to talk of the ‘asylum process’ in the context of the birth of the
modern institution of territorial asylum. There was no ‘process’; there was simply the
whim of monarchs. This section observes that the modern institution of territorial
asylum originated in Europe in the sixteenth and seventeenth centuries. At that time,
states claimed the right to grant asylum to religious refugees free from interference or
retaliation from other states. Yet as this section also points out, this same power
could be as easily used to deny protection to refugees on religious grounds. In the
UK, as we shall see, the unfettered scope of this power was given expression through
the absolute power of the monarch or ‘the Crown’.
The grant of asylum often depended on the religious affiliations of the monarch. Those refugees that were perceived to challenge the religious identification of the sovereign faced expulsion, exclusion, persecution, and sometimes death. The grant of asylum was generally not subject to any of the limitations imposed upon states in modern times either as a matter of international law or in terms of the internal checks and balances derived from parliamentary or judicial involvement. Not surprisingly, the grant of asylum was often discriminatory and failed to recognize that refugees enjoyed any right of equality before the law, including access to the courts or protection under statute.

At the same time, the historical observations in this section suggest that the issue of the scope of discretion in asylum procedures today should not be depicted solely as one of 'executive power' versus statutory or judicial authority. Executive power could be used (and still is, eg the discretion of Ministers to grant refuge after asylum processes have been exhausted) as a beneficial source of protection for refugees. The problem is best seen as a problem of arbitrary power that lacks substantive constraints of whatever nature. This power can too easily be turned against refugees to deny them refuge – a fact all too clear from the following historical discussion.

A The use of royal authority to grant asylum to religious refugees

The institution of state asylum (as distinct from the practice of church sanctuary or asylum) derived from the principle of *cuius regio, eius religio* [whose the state, whose the religion]. This principle developed in response to the religious wars that raged across Europe in the sixteenth and seventeenth centuries. According to the

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140 In England in the medieval period an enemy of the king could seek protection or refuge through the institution of church sanctuary. This aspect of church sanctuary came to an abrupt end in 1534 under Henry VIII: 26 Henry VIII (‘Traitors shall not have the benefit of sanctuary’).
The *cuius regio* principle informed the asylum policies of monarchs at the time. Protestant or Catholic princes granted protection as a means of asserting their authority over the religious settlement within their state. In England, Henry VIII granted denization\(^{142}\) to French Protestant Huguenots in 1544\(^{143}\) as part of his rejection of Papal control.\(^{144}\) Succeeding Tudor and Stuart monarchs, with the exception of the Catholic Mary,\(^{145}\) also received Protestant refugees despite pressure

\(^{141}\) The Peace of Westphalia of 1648, which was to provide the basis for future agreements between European powers (S Verosta, ‘History of the Law of Nations: 1648 to 1815’, in *Encyclopedia of Public International Law* Vol. II (Elsevier, North-Holland, 1995), 751), entrenched the right of sovereigns to provide protection to co-religionists by guaranteeing the formal equality of Protestant and Catholic states. See generally, L Gross, ‘The Peace of Westphalia, 1648-1948’ (1948) 42 *The American Journal of International Law*, 20-41, 21-22. Hugo Grotius, in his foundational work on international law, *De jure belli ac pacis*, stated his opinion that ‘it is not contrary to friendship [between States] to admit individual subjects who wish to migrate from one government to another’: Grotius, *De jure belli ac pacis*, Book III, ch. XX, art. xli, I.


from the Pope and Catholic monarchs in Europe.\textsuperscript{146} Elizabeth I’s grant of protection to Protestant refugees, for example, was undertaken despite a papal bull in 1570 that depicted Elizabethan England as a sanctuary and refuge for ‘the most pernicious of all men’.\textsuperscript{147} In the seventeenth century, Charles II and James II’s declarations of protection over the refugee communities on their coronation showed the Crown’s willingness to continue to protect many Protestant refugees from Europe.\textsuperscript{148} German Protestant refugees from the Palatinate in the eighteenth century also received royal protection.\textsuperscript{149}

B \textit{Absolute royal authority to deny asylum to religious refugees}

The flipside of the principle of \textit{cuius regio, eius religio} was that the sovereign could just as easily exclude or expel religious refugees who did not share the sovereign’s vision of the realm’s religious or political settlement.\textsuperscript{150} Sovereigns across Europe understood the principle as giving them license to engage in measures of persecution


\textsuperscript{150} Samuel Pufendorf (1632-94), an influential European writer on international law, considered that religious refugees should be expelled or accepted depending on whether the act of granting asylum to such persons diminished or furthered the prospect of religious and civil peace and harmony within the realm. Whilst recommending to sovereign’s that they accept and tolerate those who were of a different confession, Pufendorf stressed that this toleration only extended so far as ‘the tolerated Party has no Principles of Religion, which are contrary to the Peace and Safety of the State’: \textit{The Divine Feudal Law} (1695) (ed) S Zurbuchen (Liberty Fund, Indianapolis, 2002), 18-19. According to Seidler, this explains how Pufendorf could ‘approve of both Sweden’s restrictive, and Brandenburg’s liberal immigration policies toward Huguenot refugees’: M Seidler, ‘The Politics of Self-Preservation: Toleration and Identity in Pufendorf and Locke’ in T Hochstrasser and P Schröder (eds), \textit{Early Modern Natural Law Theories} (Kluwer Academic Publishers, Dordrecht, 2003) 227-255, 233.
or to exclude or expel natives or foreigners that would not conform to the official religion or threatened civic peace.¹⁵¹

In England, Tudor monarchs persecuted confessions or sects, especially Anabaptists, who they saw as undermining their religious and civil authority.¹⁵² A series of proclamations issued under Henry VIII¹⁵³ and Elizabeth I¹⁵⁴ ordered the exclusion or


¹⁵³ Proclamation of Henry VIII Ordering Anabaptists to Depart the Realm, March 1535, Hughes and Larkin, vol 1, above n 143, 227-228; Proclamation of Henry VIII Prohibiting Unlicensed Printing of Scripture, Exiling Anabaptists, Depriving Married Clergy, Removing St. Thomas à Becket from Calendar, 16 November 1538, Ibid 270. Henry VIII’s proclamation against the sect in 1535 followed reports of the Anabaptist uprising against the temporal authorities in Münster, as well as warnings of the sect ‘infecting’ the Low Countries, and the flight of many Anabaptist refugees toward England following persecutions and the subsequent fall of Münster to civil authorities: Calendars of Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII (HMSO, London, 1883, reprint 1965) vol 7, 317, 394, 397, 447, 479; Calendar of Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII (HMSO, London, 1885, reprint 1965) vol 8, 197-9, 475, 826. Henry VIII’s communications with the Smalcaldic League of Protestant princes within the Holy Roman Empire was evidence of the cooperation between England and European Protestant princes with regards to these matters. Henry VIII’s envoys to the League in 1535 exhorted them to seek agreement in Christian doctrine, noting ‘what evils spring from diversity of opinions, as in the case of the Anabaptists’: Calendars of Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII (HMSO, London, 1886, reprint 1965) vol 9, 1014. Later, in 1538, the Protestant princes passed on correspondence to Henry VIII purportedly providing evidence of aliens spreading Anabaptist views in England: Calendars of Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII (HMSO, London, 1893, reprint 1965) vol 13, 427. Henry VIII quickly established a royal commission ‘to search for and examine Anabaptists, receive back into the Church such as renounce error, hand over those who persist in it to the secular arm for punishment, and destroy all books of that detestable sect’: Ibid 498. The King also issued his second proclamation of 1538 expelling Anabaptist aliens from the realm. At the same time as championing the cause of Protestant refugees, Elizabeth I expressed concern to the Archbishop of Canterbury that some were ‘infected with Dangerous opinions, contrary to the faith of christs church as Anabaptists and such other Sectarys ...’: Yungblut, above n 146, 85. In 1560 Elizabeth moved to persecute Anabaptists, who at this time were largely foreign refugees, including the exclusion and expulsion of the sect from the realm. Her Privy Council

¹⁵⁴ Proclamation of Elizabeth I Ordering Deportation of Anabaptists, 22 September 1560, Hughes and Larkin, above n 145, 148. At the same time as championing the cause of Protestant refugees, Elizabeth I expressed concern to the Archbishop of Canterbury that some were ‘infected with Dangerous opinions, contrary to the faith of christs church as Anabaptists and such other Sectarys ...’: Yungblut, above n 146, 85. In 1560 Elizabeth moved to persecute Anabaptists, who at this time were largely foreign refugees, including the exclusion and expulsion of the sect from the realm. Her Privy Council
expulsion of Anabaptist refugees. The proclamations followed similar acts of persecution against Anabaptists elsewhere in Europe. Persecution and expulsions of religious dissenters in Europe continued throughout the seventeenth century, subject to very limited rights to religious worship and emigration in peace treaties.

Emerging notions of religious toleration in Europe during the seventeenth century at the very most created only an expectation, not a duty, that a ‘good’ prince would grant protection to religious refugees of all persuasions. For instance, the Catholic James likewise ‘frown[ed] on aliens who lacked the qualification of Protestantism, and in 1586 ordered the banishment of strangers “not being of any church or congregation” ...’: Gwynn, above n 147, 44.

Presumably on the basis of these precedents the prominent common lawyer Sir John Davies (1569-1626) (James I appointed Davies Lord Chief Justice of England in 1626 shortly before Davies’ death) declared that the English Crown possessed the power to exclude ‘such persons as come to corrupt Religion ... [and are therefore] not fit to enter in at the Gates of the Kingdome’: Sir John Davies, The question concerning impositions, tonnage, poundage, prizage, customs & c. fully stated and argued, from reason, law, and policy dedicated to King James in the latter end of his reign (Printed by S.G. for H. Twyford ..., and Rich. Marriot ..., London, 1656), Wing (CD-ROM, 1996)/D407A) 84-85.

European rulers regarded Anabaptism as heretical in the way it sought to undermine the necessity for temporal authority: Clasen, above n 151, 352-360, 374-375.

Alongside the principle of equality between all Protestant and Catholic states within the Holy Roman Empire, the Peace of Westphalia also sought to ensure limited safeguards for religious minorities: Gross, above n 141, 20-41, 21-22. Westphalia confirmed the right of states to favour a religion subject to the restoration of rights of public and private worship to religious minorities who held such rights as at 1 January 1624 – the date fixed as a compromise between the Catholic and Protestant parties as the religious ‘normal year’: IPO, V. 25-27. (I follow the convention of citing the Instrumentum Pacis Osnabrück as IPO, followed by the relevant clause and sub-clause numbers. The Latin, French and English text is found in C Parry (ed) The Consolidated Treaty Series, Vol. 1 (1648-1649) (New York: Oceana Publications, Inc, 1969), 119-269). The ‘right of emigration’ (ius emigrandi) restrained states from preventing persons from leaving their jurisdiction to seek asylum in another state: IPO, V. 28 and IPO, V. 30 respectively. In accordance with the right of emigration, religious dissidents could remove elsewhere voluntarily without difficulty or hindrance by their ruler: Ibid. The conferment of a right of emigration broke with the feudal notion that subjects could not exempt themselves from the power of their natural lords, effectively binding subjects to the personal jurisdiction of their prince even when outside the jurisdiction: For a discussion of emigration from the sixteenth to eighteenth century, see: G Butler and S Maccoby, The Development of International Law (Longmans, Green & Co, London, 1928), 341-342. Thus, the Peace of Westphalia was not a wholesale endorsement of the principle of cuius regio, eius religio as suggested by T Walker, A History of the Law of Nations (Cambridge, Cambridge University Press, Cambridge, 1899) 143 and A Nussbaum, A Concise History of the Law of Nations (The Macmillan Company, New York, 1954) 61.

In his essay ‘On the right of a Christian prince in religious matters’, Christian Thomasius, a disciple of Pufendorf, wrote that ‘the prince can accept as his subjects foreign peoples of a different religion ... He does not do well if he refuses to accept them as subjects for no other reason than difference of religion’: On the right of a Christian prince in religious matters, Christian Thomasius, in his Gemischte Philosophische und Juristische Händel [Mixed Philosophical and Juristic Essays] (Renger, Halle, 1724), translation by I Hunter, in I Hunter, T Ahnert, F Grunert (eds & trans) Christian Thomasius: Essays on Church, State and Politics (Liberty Fund, forthcoming) [73]. James I of England considered
II's grant of protection to French Protestant refugees following the revocation of the Edict of Nantes in 1685 was less evidence of a binding 'duty' to provide sanctuary based on principles of religious toleration and freedom, and more likely evidence of his intentions to use the Protestant dissenters in England as allies against the established church.¹⁵⁹

C Absolute royal authority to expel or extradite enemy aliens and political offenders

The monarch's absolute authority over the grant of asylum also extended to what today would be known as enemy aliens (foreign nationals of a hostile power).

Expulsion of enemy aliens was common. In a series of proclamations, Henry VIII ordered French aliens, including presumably the increasing number of French religious refugees in England, to become denizens or to leave the realm.¹⁶⁰ The proclamations, issued because of hostilities with France, stated that 'all Frenchmen not being denizens may and ought to be reputed and taken for his grace's enemies.'¹⁶¹ A subsequent proclamation, expressed to be 'by his gracious toleration', permitted them to remain.¹⁶²

The sovereign's power also included the power to exclude or expel aliens who today would be referred to as political refugees, but were then known as rebels or fugitives. In England, a number of examples exist from the medieval period of treaties entered

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¹⁶⁰ Proclamation of Henry VIII Ordering Alien French to Leave Realm, 16 May 1544, Hughes and Larkin, above n 143, 326; Proclamation of Henry VIII Ordering All French to Become Denizens or Leave the Realm, 19 July 1544, Ibid 336.

¹⁶¹ Ibid.

¹⁶² Proclamation of Henry VIII Permitting French to Remain, Hughes and Larkin, above n 143, 339.
into by the Crown that provided for the mutual expulsion of all rebels and fugitives. A typical provision was article 5 of the Treaty between Great Britain and Denmark of 1661, which stated that ‘neither of the foresaid Kings shall harbour, or suffer in His Kingdoms or Provinces, the enemies or rebels of the

163 See the examples collected from T Rymer (ed.), Foedera, conventiones literae inter reges Angliae et alios quos imperatorem (20 vols. 1704-1735), Vol 1, 50, in G Schwanenberger, ‘International Law in Early English Practice’ (1948) The British Year Book of International Law 52-90, 74-75, such as: the agreement between King Henry II and King Louis of France in 1177 AD, which included an undertaking to banish on request each other’s enemies from their dominions; the treaty in 1189 AD between Richard I and King Philip of France, which provided for the mutual expulsion of ‘wrongdoers’. See also: A Grahl-Madsen The Status of Refugees in International Law, Vol. II (A.W. Sijthoff, Leiden, 1972) 8.

164 Announcing the peace treaty with France in 1498, Henry VII’s royal proclamation declared that the terms of the peace included that the parties would not permit entry to foreigners who were ‘rebels, traitors, or other suspects persons of treason’, and the parties would deliver up such rebels and traitors within 20 days of receiving a request from the other party: Proclamation of Henry VII Announcing Peace Treaty with France, 23 August 1498, Hughes and Larkin, above n 143, 43. A similar statement is found in the Proclamation of Henry VII Announcing Alliance with Emperor Maximilian against Turks, 11 November 1502, Ibid 57-58. In 1568 Elizabeth I issued a royal proclamation, in support of treaties with Spain, that charged ‘all and every her officers and ministers … having office or charge in any her ports or creeks … that they suffer none of the [King of Spain’s] subjects in whom may be found any apparent suspicion of rebellion against the said King … to land in any place of her dominions …’: Proclamation of Elizabeth I Ordering Stay of Low Country Rebels in English Ports, 15 July 1568, Hughes and Larkin, above n 145, 296.

other, knowing them to be such.\textsuperscript{166} Charles II utilized these treaties to secure the return of the regicides, John Barkstead, John Okey and Miles Corbet.\textsuperscript{167}

During the first half of the eighteenth century, treaties of alliance entered into by Great Britain with other European powers likewise contained articles providing for the expulsion or exclusion of rebels and traitors. The house of Hanover used such treaties to eliminate the sanctuaries available to the Pretender and his followers. The first such article was included as 'an additional and secret article' attached to the Treaty of Alliance between the Emperor and Great Britain in 1716, which stated that the Emperor would within his hereditary estates in Germany and the Netherlands grant no 'hospitium, refugium vel transitum' [hospitality, refuge or passage] to his Britannic Majesty's rebels subjects, nor to the Pretender.\textsuperscript{168} In return, George I accepted a mutual obligation in relation to the rebel subjects of the Emperor.\textsuperscript{169}


\textsuperscript{167} The full and exact relation of the apprehension, arraignment, trial condemnation and execution of those three grand regicides, John Barkstead, John Okey, and Miles Corbet (London: printed for Nath. Brooke and Edw. Thomas, 1662), Wing (CD-ROM, 1996), F2277aa. Giving rise to concerns from the foreign Anabaptist churches in the Low Countries that prompted a memorial to the government seeking 'confirmation of privileges of liberty and estates ... hoping that ... what was once said in the praise of the Athenians, that they were a hiding place and comfort to all afflicted men everywhere, may be truly verified of the Hollanders ...': Anon., \textit{A Memorial Intended to be delivered to the Lords States, Monday 10 March, Stilo. Novo. To the High and Mighty Lords the States of Holland by the Forraign Anabaptist Churches, upon the apprehending and giving up Colonel Barkestead, Colonel Okey, and Mr Miles Corbet. To the English Resident} (London, 1662), Wing/M1690. The treaties were in the name of the King and made under the Crown's prerogative over war and peace: Treaty between Great Britain and Denmark, 13 February 1661, above n 166; Treaty of Friendship and Commerce between Great Britain and Sweden, 21 October 1661, above n 165. Peace treaties entered into during the period of the Commonwealth were the exception. They were in the name of Parliament (Treaty between England and the Netherlands, signed at Westminster, 5 April 1654, above n 165, Treaty between England and Portugal, 20 July 1654, above n 165), or the Protector (Treaty between England and Denmark, 15 September 1654, above n 165).


\textsuperscript{169} Ibid 464. Both sides agreed that they would expel any rebel within eight days of receiving an application for their expulsion from the other party: Ibid. A similar article is found in the Quadruple Alliance between the Emperor, France, Great Britain (and the Netherlands) entered into in 1718, which
Articles providing for the mutual denial of protection to rebel subjects were standard in peace treaties entered into by European powers, including Great Britain, up to the beginning of the nineteenth century.\textsuperscript{170} As discussed further in section III below, the practice was finally challenged with the emergence of the so-called ‘political offence exception’ in extradition treaties in the nineteenth century.

D The seeds of future constraints on state power and executive discretion with respect to the grant of asylum

Yet despite all this, the seeds were sown during this early period for future challenges to the state’s and the Crown’s unfettered authority over asylum. In particular, the same peace treaties that contained provisions excluding or extraditing ‘political offenders’ also recognized the liberty of movement of aliens generally. Today,

\textsuperscript{170} Typical examples include: the Treaty of Alliance between Brandenburg and Russia, signed at Koenigsberg, 22 June 1697, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 21 (1695-1697) (New York: Oceana Publications, Inc, 1969), 305, 310, art 3, which provided that neither party would harbour or protect rebel subjects of the other but would on the contrary apprehend and extradite them; the Treaty of Peace between the Empire and France, signed at Ryswick, 30 October 1697, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 22 (1697-1700) (New York: Oceana Publications, Inc, 1969), 5, 81, art 1, which included an agreement that neither party was to ‘receive, protect nor assist any of the Rebels, or refractory Subjects of either Party ...’; the Treaty of Peace between the Emperor and Turkey, signed at Carlowitz, 26 January 1699, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 22 (1697-1700) (New York: Oceana Publications, Inc, 1969), 219, 240, art 9, which provided that it was unlawful for either party to ‘give any Sanctuary or Support to wicked men, Rebels, or Malecontents ...’; the Definitive Treaty of Peace between France, Great Britain and Spain, signed at Paris, 10 February 1763, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 42 (1760-1764) (New York: Oceana Publications, Inc, 1969), 279, 322, art 1, which stated in general terms that no assistance or protection, directly or indirectly, was to be given to those who would cause any prejudice to the parties; the Definitive Treaty of Peace between France and Great Britain, signed at Versailles, 3 September 1783, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 48 (1781-1783) (New York: Oceana Publications, Inc, 1969), 437, 461, art 1, as in the peace treaty of 1763 (above); the Definitive Treaty of Peace and Friendship between Great Britain and the Netherlands signed at Paris, 20 May 1784, C Parry (ed) \textit{The Consolidated Treaty Series}, Vol. 49 (1784) (New York: Oceana Publications, Inc, 1969), 65, 75, art 1, as in the peace treaties of 1763 and 1784 (above).
refugee law scholars recognize the important precedent set by these early examples of ‘international aliens law’ for the establishment of the modern international refugee rights regime. Such provisions recognized the vulnerability of aliens and the willingness of states through bilateral and multilateral treaties to protect them.

The sixteenth and seventeenth centuries also saw the maturation of the other great development that would provide the basis for international human rights treaties – the natural rights doctrine. The natural rights doctrine, as espoused by John Locke and others, proclaimed that freedom of religious belief and political opinion were inalienable rights. Yet the natural rights doctrine did not find immediate application to refugees. The principal reason for this is that the natural rights doctrine that emerged in the seventeenth century was condemned by sovereigns who understood too well that it encapsulated a radical vision of ‘popular religious sovereignty’ and ‘popular political sovereignty’ that challenged their absolute authority.

The doctrine was so fiercely repressed in England, in particular, that it was not until the early twentieth century that we first see UK parliamentarians referring to inalienable ‘natural’ rights (as opposed to common law rights) in the asylum context – despite the obvious synergy between religious and political freedoms and asylum. Even then, government Ministers fiercely disputed the idea that the natural right to

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171 See below n 335 – and accompanying text.
172 Ibid.
175 See below n 214 - and accompanying notes.
religion or political expression formed the basis for the grant of asylum.\textsuperscript{176} Despite its suppression, the doctrine of fundamental religious and political freedoms was to prove an irrepressible force in international affairs, finally giving rise to the human rights instruments that serve as the context for asylum today.\textsuperscript{177}

III CHALLENGES TO THE CROWN’S AUTHORITY TO GRANT ASYLUM

This section traces the first involvement of parliament in the asylum arena. The following observations signal a caveat concerning the involvement of parliament in the asylum process today. They demonstrate that legislation can as easily facilitate the exercise of unfettered and arbitrary administrative discretion in relation to the asylum process as impose checks on it. Legislation does not by itself guarantee greater protection to refugees – this is abundantly clear in modern times from a number of restrictive asylum policies dealt with later in this thesis (e.g. legislation introducing carrier sanctions or legislation facilitating the offshore processing of asylum claims). What is essential is the beneficial protective intent or objective of the legislation.

On the other hand, it is important to look beyond the legislative record in order to appreciate the full significance of parliament’s initial foray into the asylum area. Alongside expressions of state sovereignty and Crown authority or prerogative, we see UK parliamentarians drawing on the common law method to construct arguments supporting the freedoms and liberties of refugees against the tyranny of unfettered executive power. The historical accuracy of these arguments is perhaps less

\textsuperscript{176} Ibid.

\textsuperscript{177} See below n 243 – and accompanying text.
important than the fact that parliamentarians made them. Significantly, they point to the willingness of legislators to construct rights-based limitations on the Crown’s traditional authority with respect to asylum. It is not being overly anachronistic to characterize these developments as an early challenge to arbitrariness in asylum decision-making.

**A Facilitative aliens legislation**

At the end of the eighteenth century, the French Revolution and the later wars between Imperial France and other European powers resulted in large numbers of refugees arriving in England. For the first time, the UK Parliament introduced legislation to deal with the refugees. The nature of the legislation was, however, counter-intuitive. The legislation was not intended to limit government authority over the grant of asylum or aliens; it was designed to entrench it.

Specifically, the purpose of the legislation was to ensure that the Crown – acting through its ministers and civil servants - possessed the power to exclude or expel French émigrés that sought to spread revolutionary ideals. With this overriding objective in mind, the series of Aliens Acts introduced in the UK between 1793 and 

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179 After noting the provision of asylum to French refugees (émigrés) in England at the time, Lord Grenville when introducing the Alien Bill of 1792 asked their lordships three questions - ‘would their lordships remove from that asylum those who had already found it? would they shut their doors against other unfortunate men, who might still come to seek refuge among them? would they suffer them, when here, to be precisely on the same footing with natural-born subjects of the king, with respect to privileges and rights?’: *Parliamentary History*, XXX, col. 157. He considered that their lordships would not want the unfortunates already in England, and those still to come, to be disappointed in their hope of finding asylum. However, in relation to the third question, he stated that ‘the safety of the state was not to be sacrificed to hospitality’: Ibid. Lord Grenville thus defended the legislation on the basis that it was a mechanism to ensure the exclusion or expulsion of French agents sent to England (under the guise of asylum) in the hope of raising an insurrection and overthrowing the government: *Parliamentary History*, XXX, col. 158.
1816 were intended to facilitate the Crown’s traditional powers or prerogatives with respect to the exclusion or expulsion of aliens and refugees noted in section II above.\(^{180}\) The Crown’s powers under the legislation were therefore largely unfettered.\(^{181}\) The nature and object of this body of legislation was replicated in a short-lived act of 1848 in response to the arrival of revolutionaries from Europe.\(^{182}\)

\(^{180}\) Before the introduction of the Alien Bill of 1792 the government sought advice from the Crown lawyers whether the Crown had the prerogative power, without act of parliament, to exclude or expel foreigners from the realm. The Crown lawyers appeared to be of the opinion that the Crown did possess the prerogative power to exclude or expel aliens, but due to the long abeyance of this power it was advisable to have recourse to an act of parliament: J Dinwiddy, ‘The Use of the Crown’s Power of Deportation Under the Aliens Act, 1793-1826’ (1968) 41 Bulletin of the Institute of Historical Research, 193-211, 193. The Foreign Secretary, Lord Grenville, subsequently introduced in the House of Lords the 1792 Bill ‘for establishing regulations respecting Aliens arriving in this kingdom, or residing therein in certain cases’: Parliamentary History, XXX, col. 146-147. With respect to the question of the prerogative, Lord Grenville stated ‘it was not to be doubted that the Crown possessed all the power with which this bill was to invest it’: Parliamentary History, XXX, col. 157. See also: Lord Loughborough (col. 167) and in the Commons, Mr Hardinge (col. 203); Mr Jenkinson (col. 206). Lord Grenville justified the legislation on the basis that the prerogative had been so seldom exercised there may be doubt about the means of exercising it: Ibid. During the debates over the Alien Bill of 1816, Lord Ellenborough maintained that the Crown possessed the prerogative of sending aliens out of the country: Parliamentary Debates, XXXIV, col. 1069. The government expressly confirmed its view that the bill was facilitative in nature. Lord Eldon, the Lord Chancellor, declared that ‘the Crown had at common law the prerogative of sending aliens out of the country, and that [the] bill was only necessary, in order to give proper facilities for the exertion of that prerogative’: Parliamentary Debates, XXXIV, col. 1144. Government members in the Commons also claimed the bill implemented the traditional prerogatives: e.g Mr Addington (Ibid col. 432-433). Chitty later concluded that ‘independently of the powers vested in it by the Alien Act’, the Crown retained the right ‘at common law, and by the law of nations’ to exclude or expel aliens: Chitty, above n 142, 49.

\(^{181}\) The Alien Act (1793) stated that the King had the power by proclamation, order in council, or order under his sign manual to exclude from the realm any alien ‘when and as often as his Majesty, his Heirs and Successors, shall think it necessary for the Safety or Tranquillity of the Kingdom:’ 33 Geo. III. c.4, Article VII. The King also had the power, ‘whenever deemed necessary for the Public Safety, to send out of this Realm any Alien’: Ibid Article XXIX. The Alien Act (1798) likewise empowered any of His Majesty’s secretaries of state to arrest any alien suspected to be ‘a dangerous person’, and to hold the alien ‘until his Majesty’s Pleasure be known’ or the alien was expelled: 38 Geo. III. c. 50, Article XVI. The Alien Acts passed between 1803 and 1816 contained similar powers: 43 Geo. III. c. 155; 54 Geo. III. c. 155; 55 Geo. III. c. 54; 56 Geo. III. c. 86.

\(^{182}\) With the end of hostilities the last of the Alien Acts modelled on the original Act of 1793, the Alien Act 1816 (U.K.), was repealed and replaced in 1826 with an act providing solely for the registration, and not the exclusion or expulsion, of aliens: 7 Geo. IV. c. 54. The registration requirements of the 1826 Act were further reduced by an Act of 1836: 6 & 7 William IV. c. 11. The next alien act providing for the exclusion and expulsion of aliens was introduced into Parliament in 1848: Removal of Aliens Act 1848 (U.K.), 11 & 12 Vict. c. 20. Similar to the earlier acts, the government believed the 1848 Bill was necessary to keep out those refugees arriving in England from the conflicts in Europe who sought to encourage radical republicanism in the domestic population and to ‘intrigue’ against the UK’s institutions: Hansard’s Debates, 1066-1918. 3rd Series. Parliamentary Debates 1830-1891. Vol. XCVIII, 1848 (April 7 – May 26) (1 May 1848) col. 560-561 (Sir G. Grey). See generally: P Shah, Refugees, Race and The Legal Concept of Asylum in Britain (Cavendish, London, 2000) 22; D Stevens, UK Asylum Law and Policy: historical and contemporary perspectives (Sweet & Maxwell, London, 2004) 27-28. The intention of the 1848 Bill was therefore ‘to arm the Government with a power
B The arbitrary and discriminatory implementation of broad powers

Due to the unfettered nature of the powers conferred on the Crown, the early UK aliens legislation lacked any substantive or procedural protection for refugees subject to exclusion or expulsion proceedings.\(^{183}\) As a result, administering agencies were free to apply the law arbitrarily. The Alien Office, established to administer the Alien Acts, exercised its powers in a secretive manner and in line with a very elastic interpretation of the ‘public good’ objective.\(^{184}\) The Office took strong measures to exclude and expel aliens, including émigrés, who held political views that were objectionable to the government, those suspected of being spies or agents of the French government, and those who were simply regarded as undesirable persons.\(^{185}\) Moreover, the government used such powers ‘freely’ and showed ‘very little regard for the liberties of the individual’.\(^{186}\)

C Parliament’s potential

similar to that which is exercised under the former Alien Act …’: Hansard’s Debates, 1066-1918. 3\(^{rd}\) Series. Parliamentary Debates 1830-1891. Vol. XCVIII, 1848 (April 7 – May 26) (1 May 1848) col. 561 (Sir G. Grey). The first section of the Removal of Aliens Act 1848 (UK) empowered the Secretary of State or Lord Lieutenant of Ireland to order aliens to depart out of the realm, when, upon information in writing, there was reason to believe that it was expedient to remove the alien for the preservation of peace and tranquillity of the realm: 11 & 12 Vict. c 20. In line with the relatively unfettered character of the powers in the legislation, there were no safeguards in place to protect aliens in genuine need of protection despite the acknowledgment that the bill was directed at French émigrés: Hansard’s Debates, 1066-1918. 3\(^{rd}\) Series. Parliamentary Debates 1830-1891. Vol. XCVIII, 1848 (April 7 – May 26) (11 April 1848) col. 137-8 (Marquis of Lansdowne). Whether the 1848 Act achieved its objective of protecting the realm was not known, as it was stated to lapse after a year (s 7) and was formally repealed by the Statute Law Revision Act 1875.

\(^{183}\) The extent of the recognition of asylum in the UK Alien Acts was a passage in the preamble to the Alien Act of 1798, which recognized the need to ensure the safety of ‘persons who either really seek Refuge and Asylum from Oppression and Tyranny’: 38 Geo. III. c. 50; repealed by 43 Geo. III. c. 155. However, the Preamble quickly moves on to make it clear that the Act was designed to ensure that asylum was not abused by foreigners ‘dangerous to the interests and safety’ of the Kingdom: Ibid.


\(^{185}\) Dinwiddy, above n 180, 195.

\(^{186}\) Polden, above n 184, 47, 41.
On the other hand, the full scope of Parliament's early involvement in the asylum arena illuminates the potential benefits to be had from the input of parliamentarians into the asylum process. A closer look at the historical record shows that Parliament was not solely a rubber stamp for the government’s unfettered authority over asylum. On the contrary, many parliamentarians were at the center of efforts to challenge the legislation that sought to entrench government authority over the grant of asylum. Parliamentarians sought to extend to refugees many common law rights that we now find in modern international human rights instruments, including: the freedom to be free from return or expulsion to a place of persecution, equality before the law, and freedom from arbitrary detention.

D Statutory and judicial safeguards

Parliamentarians also recognized that such rights that were necessary to safeguard refugees depended on statutory and judicial safeguards. The overwhelming concern among those opposed to the UK aliens bills was that such rights as freedom from expulsion, equality before the law etc, could not be safely guaranteed by delivery up of persons ‘who had sought refuge from persecution and oppression, to the sole discretion of the executive power.'

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187 This was expressed as an instance of the right of asylum or a liberty of movement within the state. According to Mr Harmer, asylum operated ‘when this country was disturbed by contests for the Crown’ and ‘when religious differences excited disturbances’, as well as when the Pretender was at large during the eighteenth century: Mr Harmer, Parliamentary Debates, XXXIV, col. 459. Lord Holland in the Lords also argued that the liberty of foreigners to reside in the kingdom was the basis for the grant of asylum to Protestant subjects of James II’s ally and friend, Louis XIV, after the revocation of the Edict of Nantes: Parliamentary Debates, XXXIV, col. 1067.

188 As stated by one member of the UK Parliament during the debates, ‘every man in England shall have the equal benefit of the laws of England, with no more distinction between the foreigner and the native, than between the peer and the peasant’: Mr Grant, Parliamentary Debates, XXXIV, col. 619.

189 Expressed as a right to habeas corpus: Mr Brougham, Parliamentary Debates, XXXIV, col. 434-436.

190 Earl of Guilford, Parliamentary History, XXX, col. 162.
While parliamentarians opposed to the aliens bills were unsuccessful in defeating the legislation, they did achieve symbolic victories. Most importantly, they successfully sponsored amendments that ensured a right of appeal from an expulsion order to the Privy Council. While the right of appeal was limited, it queried for the first time the government’s underlying view that an émigré was not entitled to the rule of law. The right of appeal brought into play in the asylum arena the idea of the legal equality of aliens that was beginning to surface in judicial decisions at the time. It also reflected that common lawyers had begun to use the courts to defend the liberty of refugees to speak out against their home government without fear of prosecution for libel.

E Towards greater statutory and judicial safeguards against the extradition of refugees – the political offence exception in extradition proceedings

The momentum toward greater legislative and judicial involvement in the asylum process continued to gather pace in England during the nineteenth century largely due to the emergence of the ‘political offence exception’ in extradition proceedings. The

191 54 Geo. III. c. 155, s 4; 56 Geo. III, c. 86, s 3.
192 An alien was not entitled to know the charge against him, to be defended by counsel, or to examine witnesses: Mr Mackintosh, Parliamentary History, XXXIV, 478, 629-630. Mackintosh unsuccessfully moved a motion to include an amending clause in the 1816 bill to remedy these procedural flaws: Ibid.
193 As expressed by Dicey, the rule of law embraces the idea of legal equality, an independent judiciary to uphold the rights of individuals in particular cases, and the exclusion of ‘arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government’: A. Dicey, Introduction to the Study of the Law of the Constitution (first published 1885, 8th edition, MacMillan and Co., London, 1927) 189, 191-193, 198.
194 Courts were beginning to recognize the rights of aliens generally before the courts: Sommersett's Case (1772) 20 St. Tr. 1. For a modern judicial statement of the importance of Sommerset's Case, see: Khawaja v Secretary of State for the Home Department [1984] 1 AC 74, 111-12 (Lord Scarman).
legally distinct from exclusions or expulsions under general immigration legislation, fostered the notion that legislative conditions and judicial mechanisms were important safeguards for religious, as well as political, refugees.

From the nineteenth century, refugees who were sought for political crimes found protection from extradition\textsuperscript{196} in England under bilateral treaty provisions\textsuperscript{197} incorporated by legislation into domestic law\textsuperscript{198} and overseen by judicial proceedings.\textsuperscript{199} Section II of this chapter observed that historically sovereigns had freely extradited political fugitives and rebels.\textsuperscript{200} However, from the nineteenth century onwards there was growing acceptance of the practice that states were entitled to deny an extradition request if it related to a fugitive accused of a political offence (the so-called ‘political offence exception’ to extradition requests).\textsuperscript{201} The political offence exception was an instance of the maturation of the principle of asylum.\textsuperscript{202}

\textsuperscript{196} Extradition refers to the centuries-old practice of states of the formal surrender, upon request by another state, of an individual accused or convicted of an offence in the requesting state: I. Shearer, \textit{Extradition In International Law} (Manchester University Press, Manchester, 1971) 12, 21.

\textsuperscript{197} See, eg, art 11 of the extradition treaty between England and Switzerland of 26 November 1880.

\textsuperscript{198} Extradition Act 1870 (U.K.), s 3(1).

\textsuperscript{199} \textit{Re Castioni} [1891] 1 QB 149.

\textsuperscript{200} See above n 164 – and accompanying text.


\textsuperscript{202} The first signs of the emergence of the so-called ‘political offence exception’ in extradition proceedings dates back to the UK Government’s refusal to countenance use of the Alien Acts 1793-1816 as a mechanism for expelling political fugitives at the request of France. In 1802, France supported its request for the expulsion of Bourbon émigrés in England by demanding that the U.K. government use its powers under the Alien Act to send them away: Note from M. Otto to Lord Hawkesbury, 17 August 1802, \textit{Parliamentary History}, XXXVI, col. 1271. In reply, the Foreign Secretary, Lord Hawkesbury, maintained that the Alien Acts were made for the purpose of excluding or expelling foreigners who threatened the internal peace of the King’s dominions, and would not be applied ‘upon the complaint of foreign governments’: Dispatch from Lord Hawkesbury to Mr Merry, 28 August 1802, \textit{Parliamentary History}, XXXVI, col. 1275. Lord Hawkesbury further wrote that although his Majesty had no desire for Bourbon émigrés to reside in his dominions, he nevertheless ’[felt] it to be inconsistent with his honour, and his sense of justice, to withdraw from them the rights of hospitality’: Dispatch from Lord Hawkesbury to Mr Merry, 28 August 1802, \textit{Parliamentary History}, XXXVI, col. 1276.
In England, the political offence exception found its way into statute as a result of the emergence of the convention at common law that an enabling act was required in order to implement an extradition treaty. The UK Government remained faithful to the political offence exception despite vigorous complaints by European powers which saw the UK as the safe haven for European revolutionaries. The involvement of the courts helped ensure that the application of the political offence exception stayed as independent as possible from foreign policy considerations.

Towards greater statutory and judicial safeguards against the exclusion and expulsion of refugees – exemptions from general aliens legislation

Meanwhile, parliamentarians' insistence on statutory conditions that restrained the government's discretion to exclude or expel refugees under general immigration laws finally came to fruition when the UK Government introduced an Alien Bill in 1904.

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206 Aliens Bill 1904, No. 147.
and 1905.\textsuperscript{207} The Bill was designed to exclude ‘undesirable’ immigrants from Europe.\textsuperscript{208} Many of those immigrants were in fact Jewish refugees fleeing anti-Semitism in Eastern Europe.\textsuperscript{209} The ‘dangerous person’ of the Alien Acts 1793-1816 had become the ‘undesirable alien’\textsuperscript{210} in the Aliens Act of 1905.\textsuperscript{211} The opposition justifiably feared that the wide discretion of the executive to exclude ‘undesirable’ aliens would be used to exclude refugees.\textsuperscript{212} Parliamentarians appealed to the ‘great tradition’ of asylum in the UK to make their case for amendments that ensured refugees enjoyed protection from exclusion or expulsion.\textsuperscript{213} Parliamentarians also debated whether rights to religious equality and political freedom supported the exemption of refugees from the Act.\textsuperscript{214} The Prime Minister at the time observed: ‘The two hon. Members who preceded him both talked of the immemorial right of asylum based on religious equality and political freedom; and he had pointed that that had no historic foundation whatever.’\textsuperscript{215}

\begin{itemize}
\item \textsuperscript{207} Alien Bill 1905, No. 187.
\item \textsuperscript{209} Sibley and Elias, above n 208, 129-130, 140-141.
\item \textsuperscript{210} Ibid 39.
\item \textsuperscript{211} 5 Edw. VII, c 13.
\item \textsuperscript{213} Mr Cripps (Parliamentary Debates, House of Commons, 10 July 1905. Hansard, Vol. CXLIX, col. 154).
\item \textsuperscript{214} Parliamentary Debates, Vol. 133, 1904, 25 April 1904, col 1085-1086, 1088 (Major Evans Gordon); Parliamentary Debates, Vol. 151, 1905, 13 April 1905, col. 712, 713 (Major Evans Gordon); Parliamentary Debates, Vol. 150, 1905, 10 July 1905, col. 156, 157, 159 (Mr Balfour, Prime Minister) cf Parliamentary Debates, Vol. 150, 1905, 10 July 1905, col. 154 (Mr Cripps), col. 159 (Mr Stuart Samuel).
\item \textsuperscript{215} Parliamentary Debates, Vol. 150, 1905, 10 July 1905, col. 159 (Mr Balfour, Prime Minister). 
\end{itemize}
On this occasion the opposition successfully forced amendments that exempted religious and political refugees from exclusion\(^{216}\) and protected those wanted for a political crime from expulsion.\(^{217}\) These provisions amounted to an early, imperfect expression of the obligation not to expel or exclude a refugee that is now found in the non-refoulement principle in modern international law.\(^{218}\) Irrespective of the historical accuracy of arguments supporting the exemptions, the fact they were successfully included in aliens legislation for the first time demonstrates the gradual maturation of the linkage between notions of religious and political freedoms and asylum.

Despite its limited scope and short life-span, the 1905 Act also evidenced growing awareness of the need to safeguard the rights of refugees through statutory and judicial safeguards. Limitations on the state’s right to exclude or expel refugees – derived from common law tradition and natural rights - found expression in the 1905 Act as a binding statutory limitation on executive discretion. There was also recognition that the courts should have some role in reviewing decisions to expel

\(^{216}\) 5 Edw. VII, c. 13, s 1(3) (‘an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief.’)

\(^{217}\) 5 Edw. VII, c 13, s 3 (1) (a) and (b). *Re Zausmer* (1911) 7 Crim. App. Rep. 41.

\(^{218}\) 5 Edw. VII, c. 13, s 1(3), s 3 (1) (a) and (b). ‘Imperfect’ because there was no right of non-expulsion based on claims to political or religious persecution for a refugee who fell within the categories for expulsion under the 1905 Act: D. Stevens, ‘The Case of UK Asylum Law and Policy: Lessons from History?’ in F. Nicholson and P. Twomey (eds) *Current Issues of UK Asylum Law and Policy* (Aldershot, Ashgate, 1998) 18. The 1905 Act only offered protection from expulsion to refugees who feared return to their home country because they were wanted for a political crime – a recognition of the long-standing ‘political offence’ exception in extradition proceedings: 5 Edw. VII, c 13, s 3 (1) (a) and (b). *Re Zausmer* (1911) 7 Crim. App. Rep. 41. The fact that there was no protection for refugees once resident in the country was a major flaw in the legislation given the increasing practice of European states at the time to expel economically and socially undesirable refugees from country to country without their having any chance of settling in a place of sanctuary.
political offenders. Calls for judicial review of decisions to exclude aliens also mounted.

IV THE IMPORTANCE OF RECOGNIZING THE DIVISIBILITY OF SOVEREIGN RIGHTS WITHIN THE STATE

The above observations have underlying significance for the role of parliament and the courts in the asylum process today. From a modern viewpoint, parliament’s intrusion into the executive’s traditional territory represents a deeper contest over the role of parliament and the courts in interpreting and applying international law within the state. Today, legislative and judicial control of the asylum process rests on the recognition that sovereign rights and obligations should be divisible within the state, ensuring that all institutions of the state are actively responsible for their translation and implementation. Restrictive asylum practices that seek to entrench unfettered administrative authority ignore this.

The importance of the recognition of the divisibility of sovereign rights within the state is apparent from the above debate over early aliens legislation in the UK. Obviously, in the eighteenth and nineteenth centuries the debate did not concern the role of parliament and the courts in interpreting and applying the rights of refugees in international law as we find them today. But the debate did revolve around a similar issue of parliament’s role in the interpretation and application of traditional principles.

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219. 5 Edw. VII, c 13, s 3 (1) (a) and (b). Re Zausmer (1911) 7 Crim. App. Rep. 41.
220. The opposition at the time unsuccessfully pushed for judicial determination of whether a person was an ‘undesirable’ immigrant, which included whether an alien fell within the asylum exception: Parliamentary Debates, Vol. 133, 1904, 25 April 1904, col. 1094 (Mr Asquith); col. 1103, 1104 (Mr Walter Long); col. 1108 (Mr Norman); col. 1146, 1147 (Mr Akers-Douglas). The judiciary also had no role under the 1905 Act in reviewing decisions of immigration officers or the board to refuse leave to land to ‘undesirable’ aliens, including the officer’s investigation of any claims made with respect to asylum. See generally: N Sibley and A Elias, The Aliens Act and the Right of Asylum (William Clowes & Sons Ltd, London, 1906) 43-80.
of international law, including the state’s right to exclude or expel aliens (as well as
the relationship between that right and the tradition of granting asylum).

During the introduction of the first UK aliens legislation, government ministers
argued that the unfettered right of the state to exclude or expel aliens in international
law gave the government unfettered authority within the state with respect to the
exclusion or expulsion of aliens. However, many prominent parliamentarians contested
this point of view. They argued that the existence of the sovereign right to exclude
and expel aliens did not support the authority of government to exercise this right
within the state without constraints imposed by legislative conditions or judicial
remedies. The opposition particularly disputed the government’s use of statements

221 During the debates over the UK alien bills 1792-1816, the government bolstered its argument in
support of an unfettered prerogative - and thereby the broad powers found in the legislation - by
reference to the law of nations and the sovereignty of the English ‘state’. Mr Jenkinson (Parliamentary
History, XXX, col. 206); Mr Addington (Ibid col. 432). The government placed particular reliance on
Blackstone, who cited Pufendorf in support of the proposition that ‘it is left in the power of all states, to
take such measures about the admission of strangers, as they think convenient ...’: Sir William
Blackstone, Commentaries on the Laws of England (first published 1765) vol 1, 259-260, citing
Pufendorf’s De jure naturae, et gentium book 3 chapter 3 paragraph 9. In a similar vein, Lord
Ellenborough cited the Swiss international law scholar, Vattel, as further authority for the proposition
that the Crown possessed the prerogative of sending aliens out of the country: Parliamentary Debates,
XXXIV, col. 1069. The relevant views of Vattel (and Grotius) are discussed at Grahl-Madsen, above n
163, 14-16. As Grahl-Madsen notes, although Vattel recognized the right of a person ‘to live
somewhere or other’ he also conceded that ‘if in the abstract this right is a necessary and perfect one ...
it is only an imperfect one relative to each individual country; for ... every Nation has the right to
refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it
serious trouble ... Hence an exile has no absolute right to choose a country at will and settle himself
there as he pleases; he must ask permission of the sovereign of the country; and if it be refused, he is
bound to submit’: Ibid 14. The US Government likewise cited Vattel and Blackstone in support of the
sovereign right of states to exclude or expel aliens, which the Government argued supported
Congress’s authority to grant the broad Presidential powers under the 1798 Act despite no clear
enumerated head of power under the US Constitution: S Legomsky, Immigration and the Judiciary:
Law and Politics in Britain and America (Oxford, Clarendon Press, 1987) 184; L Henkin, Foreign
Affairs and the Constitution (1972) 18. Cf: T Aleinikoff and D Martin, Immigration: Process and
Policy (1985) 16-17 (arguing that the overall structure of the U.S. Constitution implies an intent to
confer on the federal government powers customarily held by nations, including the power to exclude
aliens). See also: T Aleinikoff, ‘Federal Regulation of Aliens and the Constitution (1989) 83 American
Journal of International Law 862, 866.

222 Sir James Mackintosh (Parliamentary Debates, XXXIV, col. 469); Mr Brougham (Parliamentary
Debates, XXXIV, col. 435); Mr Grant (Parliamentary Debates, XXXIV, col. 620); Earl Grey
(Parliamentary Debates, XXXIV, col. 1070).

223 Ibid. Modern authors have highlighted the non sequitur in the reasoning of government lawyers
who sought to imbue the executive with what is in fact a sovereign right of nations to exclude or expel
aliens: C Thornberry, ‘Dr. Soblen and the Alien Law of the United Kingdom’ (1963) 12 International
of royal authority derived from European theorists who fashioned their notions of indivisible sovereignty around absolutist forms of government concentrated in a single royal or republic institution – notions seen as unsuitable for English parliamentarianism.\(^\text{224}\) Thus, the opposition’s case effectively based legislative and judicial involvement on an understanding of the divisibility of sovereign rights within the state.

The argument was not peculiar to the UK context. In the US at the time, US legislators were engaged in a similar debate in the context of the US’s constitutional framework. The debates occurred as the US government pushed through aliens legislation in 1798 that granted the President power to exclude or expel refugees...

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fleeing the troubles in Europe who he deemed to be a danger to the nation.\textsuperscript{225} US legislators opposed to the 1798 Act argued that the existence of the sovereign right to exclude or expel aliens in international law should be subject to the constitutional limitations placed on the law-making powers of Congress.\textsuperscript{226} In a characteristic statement, John Taylor of Virginia argued that the federal government possessed only enumerated powers and could not ‘at pleasure dip [its] hands into the inexhaustible treasures of the … law of nations’.\textsuperscript{227} Legislators argued that the Act was inconsistent with the Due Process and Equal Protection Clauses of the US Constitution, which they pointed out applied to all ‘person’, not just citizens.\textsuperscript{228} At the end of the day, US legislators won a limited right to the preservation of the property of aliens expelled under the US legislation.\textsuperscript{229}

The modern significance of this debate lies in the fact that parliamentarians recognized that divisibility of sovereign rights was a precondition for legislative and judicial intervention. The extent that this remains the case today in terms of the involvement of legislatures and the courts in the translation of sovereign obligations towards refugees is considered in later chapters of this thesis. This thesis goes on to argue that in modern times all state institutions have the role and responsibility of ensuring that the rights of refugees in international law are respected, protected and fulfilled within the jurisdiction of the state. This principle does no more than

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\textsuperscript{226} The opposition to the US 1798 Act queried the use of international law to justify the existence of a non-enumerated ‘inherent’ Congressional power: Cleveland, above n 225, 95.

\textsuperscript{227} Ibid 95.

\textsuperscript{228} Ibid 96-97.

\textsuperscript{229} Alien Act, ch. 58, 1 Stat. 570 (1798), s. 5.
recognize that the state’s international obligations are implemented by state institutions, not the legal fiction that constitutes ‘the state’ in international law.

V THE MODERN LEGACY OF ARBITRARY DECISION-MAKING IN THE ASYLUM ARENA

A The resurgence of unfettered discretion

The first half of the twentieth century saw the notion that meaningful legislative and judicial safeguards were necessary in order to protect refugees from exclusion or expulsion under general immigration laws fall into disuse. Unfettered discretion in relation to the grant of asylum was effectively restored following the repeal of the 1905 Act on the eve of the outbreak of war between the UK and German in 1914. The immigration legislation of that year replaced the substantive asylum protections found in the 1905 Act with general provisions that gave the Crown unfettered discretion to exclude, deport (the word ‘deportation’ appearing in UK aliens legislation for the first time), and to detain aliens. This led to refugees being excluded who were ‘undesirable in other respects.’ Lack of statutory protection for refugees also meant that there were no judicial remedies available to refugees under the 1914 Act.

230 4 & 5 Geo. V. c.12, s 1(1).

231 4 & 5 Geo. V. c.12, s 1(1).


233 The English Court of Appeal considered that the absence of any reference to asylum in the 1914 Act, in contrast to the 1905 Act, was an indication that it was entirely up to the executive’s discretion to take into account asylum claims during deportation proceedings: R v Home Secretary; Ex parte Due De Chateau Thierry [1917] 1 KB 922, 929 (Swinfed Eady LJ); 932-933 (Pickford LJ).
Unfettered executive authority became a feature of the grant of asylum in the UK,\(^{234}\) the US,\(^{235}\) and in other countries in Europe during the inter-war period.\(^{236}\) The grant of asylum largely depended on the unfettered and unchecked authority of government. The courts had little or no role in reviewing the legality of government decision-making in the asylum arena.\(^{237}\) Lack of judicial review was symptomatic of an often arbitrary, non-transparent, unreliable, and discriminatory process of identifying persons in need of protection.\(^{238}\)

Government appeals to the state’s right to grant asylum\(^{239}\) – an extension of the state’s traditional right to exclude and expel aliens at international law - became an excuse for government officials to deal with refugees how they liked. Such appeals were not dissimilar to the use of the state’s traditional right to exclude or expel aliens at international law to support unfettered administrative discretion, noted above. The state’s ‘right of asylum’ was a euphemism for the exercise of arbitrary exclusion and expulsion powers.

The lack of effective statutory and judicial safeguards had devastating consequences for the tens of thousands of victims of Nazi persecution, who struggled to find


\(^{238}\) Ibid 55, 60-61, 67, 70.

\(^{239}\) Hansard, Parliamentary Debates, 5th series, House of Commons, vol. 230, col. 603 (Mr Clynes).
permanent asylum because of the economic depression in countries of refuge.\textsuperscript{240} Those refugees were more often than not greeted by arbitrary and brutal government asylum policies and processes that placed economic and social factors above their protection needs.\textsuperscript{241} This lack of meaningful statutory or judicial safeguards undermined the efficacy of the emerging principle of \textit{non-refoulement} that was taking shape in multilateral treaties during the inter-war period.\textsuperscript{242}

B Emergence of external and internal constraints – human rights

Developments in the post-war period continued to highlight the adverse consequences of unfettered administrative power for the effective implementation of the rights of refugees found in international instruments. These developments demonstrate the importance of the normative and practical interdependence between restrictions on the powers of the state in international law and the mechanisms that implement those limitations and obligations in domestic law.

The entry into force of the Refugee Convention\textsuperscript{243} and the ICCPR,\textsuperscript{244} along with other cognate rights instruments, guaranteed refugees and other persons seeking

\begin{footnotesize}
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\item \textsuperscript{241} Holbom, above n 240, 10-23, 26, 29.
\item \textsuperscript{244} \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).
\end{itemize}
\end{footnotesize}
asylum the protection of international rights standards that constrained the state’s historically unbounded discretion in the asylum context. Most relevantly, those instruments recognized the inalienability of the right not to be expelled or returned to a place of persecution (the non-refoulement principle).

Despite the entry into force of international protection instruments, the legacy of executive control in relation to the grant of asylum continued to permeate policy in many states. This included the UK, Australia, and the US. The lack of any statutory safeguards in these jurisdictions also had the effect of largely negating meaningful judicial scrutiny of asylum decision-making.


246 See below n 386 – and accompanying text.


249 Namkung v Boyd 226 F. 2d 385, 388 (1955) (‘the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and ‘opinion’ of the Attorney General or his delegate’).

250 UK: The UK Court of Appeal confirmed that an alien possessed no right to be heard on claims to asylum before the making of a deportation order: R v Brixton Prison Governor; Ex parte Soblen [1963] 2 QB 243, 298 (Lord Denning, MR), 305-306 (Lord Donovan LJ), 316 (Pearson LJ). Aliens Order, 1953 (S.I. 1953 No. 1671), arts 8 (1), 20 (1), (2), 21 (4). See generally, R Thomas, ‘The Impact of Judicial Review on Asylum’ [2003] Public Law 479-510, 480; Grahl-Madsen, above n 22, 366-367. Australia: In R v Liveris; Ex parte da Costa, Andrade & Teixeira, involving the Australian government’s refusal to grant asylum to Portuguese Navy deserters, the court concluded that ‘political asylum’ was outside its jurisdictional competence and therefore ‘quite irrelevant to these proceedings’:
In many instances, this led to arbitrary and discriminatory eligibility determinations.

In Australia, for example, the Australian Government utilized broad executive authority confirmed by statute to exclude refugees on racial grounds. As far as the Australian Government was concerned, the asylum process could be as summary and arbitrary as it chose. In the Australian Government’s view, the right of the state to exclude and expel aliens and the right of the state to grant asylum gave it unfettered government authority to determine the manner in which it processed asylum claims.

This attitude undermined to a large degree the practical enjoyment of those rights under Australian law.

Nevertheless, the momentum for greater legislative and judicial involvement in the asylum process gathered force one again from the 1950s onwards. First published in 1966, Grahl-Madsen’s foundational treatise on The Status of Refugees in International Law highlighted the emerging impact of constitutional provisions, legislation and the courts on the asylum process in a number of European jurisdictions. This included judicial decisions, such as the judgment of the German courts in Majstorovic

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251 Australia’s education or ‘dictation test’ ensured the government retained the discretion to refuse admission to those refugees from abroad that did not meet the racial requirements for admission: Neumann, above n 138, 23-24. The government used this authority to relax the requirements of the Immigration Act to admit refugees from Asia fleeing the Japanese advance during the Second World War. Then, after the war, the government either arranged for repatriation outside the terms of the Immigration Act, or alternatively, reengaged the dictation test and deportation machinery under the Immigration Act to deport many of the refugees. This included the repatriation and deportation of Indonesians to Dutch controlled parts of the archipelago where they were at risk of persecution due to the fact that the Dutch regarded certain of them as ‘extremists or dangerous’: National Archives of Australia, A433, 1949/2/8187.

252 Neumann, above n 138, 57.

253 At the time of the 1956 Olympic Games in Melbourne, Australia, the Australian Government expressed the view high-level Cabinet documents that the state’s right to decide who to admit into its territory meant that its international obligations did not require Australia to process potential asylum requests from Iron Curtain athletes in any particular way: Ibid.

(upholding a claim to asylum and refugee status where reasons for the claim resulted from the actions of the claimant while in the country of refuge). Together, these reflected a cross-jurisdictional trend toward ‘legality’ in protection eligibility procedures – a gradual shift toward greater administrative, legal and judicial controls on the grant of protection.

In the UK and Australia, this trend toward legality in the asylum process followed later as part of a wider trend in administrative law reform in the 1970s and 1980s that saw greater statutory conditions and judicial control imposed on administrative discretion generally. In the asylum context, this led to the incorporation of the refugee definition into legislation in order to create binding conditions for the exercise of administrative discretion. This in turn led to greater judicial willingness to engage in scrutiny of asylum decision-making and asylum procedures.

255 9 BverfGE 174 (1959) and 1960 MDR 523.

256 Harvey, above n 3, 145.


258 UK: A new rule was inserted into the UK Immigration Rules providing that ‘[w]here a person is a refugee full account is to be taken of the provisions of the Convention and Protocol Relating to the Status of Refugees (Cmdn. 9171 and Cmd. 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom’s obligations under this Convention’: Proposals for revision of the Immigration Rules, November 1979, Cmdnd. 7750; Statement of Changes in Immigration Rules (1980) (H.C. 394); Statement of Changes in Immigration Rules (1983) (H.C. 169), paras. 16 and 96. Australia: Migration Amendment Act (No 2) 1980 (Cth), s 6.

In the US, laws were passed in the 1950s and 1960s authorizing the Attorney-General to withhold deportation of an alien upon a finding that the person would be subject to persecution in the country to which he or she was to be deported.\textsuperscript{260} The decision of the Attorney-General was subject to appeal to the Board of Immigration Appeals. However, the courts had only a small role due to the breadth of the Attorney-General's discretion.\textsuperscript{261} This changed with the Refugee Act of 1980, which incorporated a mandatory statutory duty upon the Attorney General to withhold deportation where persecution was threatened.\textsuperscript{262} As in the UK and Australia, the effect of codification was to give the courts a legal basis for intervention in refugee cases.\textsuperscript{263}

From an historical perspective, the significance of this trend toward legality was that it subjected the traditional right of the state to exclude or expel aliens and to grant asylum to both external \textit{and} internal constraints. The \textit{non-refoulement} obligation and other obligations found meaningful expression through practical implementation by statutory and judicial safeguards. However, almost as soon as these measures began to take hold, states began to experiment with restrictive asylum measures designed to circumvent the effective enjoyment of the rights of refugees under international instruments.

\textbf{C A counter-trend toward arbitrary decision-making}

\textsuperscript{260} Section 23 of the Subversive Activities Control Act of 1950, adding a new § 20(a) to the Immigration Act of February 5, 1917, 64 Stat. 1010; Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 214; § 10, 79 Stat. 918.

\textsuperscript{261} \textit{Namkung v Boyd} 226 F. 2d 385, 388 (1955).


From an historical perspective, the restrictive asylum policies of states that have emerged since the 1980s – discussed in later chapters of this thesis - are an attempt to reinvigorate traditional unfettered administrative control and authority in relation to the grant of asylum. The problem lies not so much in the fact that the trend is towards the executive as the dominant repository of authority in this area, but that the trend is toward unfettered administrative discretion. It is important to note in this respect that a key feature of the restrictive trend in asylum policy in recent years is that important administrative controls on the exercise of discretion, e.g. independent merits review of eligibility determinations, are also undermined or circumvented.

This thesis contends in the following chapters that this trend is fundamentally at odds with the modern duty on states to interpret and apply their international protection obligations in good faith. When applied in good faith, key international protection obligations require that states utilize fully their national judicial, parliamentary and administrative mechanisms to safeguard the rights of refugees to a fair and effective asylum process. Viewed in historical context, this approach adopts the mantle of the school of thought that has challenged arbitrary decision-making in the asylum arena for over three centuries.

VI CONCLUSION

This chapter has sought to show that the duties upon states to engage their national institutions in the asylum process, outlined in the following chapters, have historical precedent. The history of asylum is one of contest over the institutions responsible for its grant (or denial). Unfettered administrative discretion in the asylum arena has been disputed since at least the eighteenth century. And for good reason. As this chapter has also demonstrated, parliamentarians who contested the application of
arbitrary power to refugees did so in the full realization that such powers could not be trusted to preserve the sanctity of asylum and to protect those vulnerable to persecution upon return to their home countries.

The historical observations in this chapter also help deconstruct and contest government appeals to the ‘sovereignty’ doctrine to justify arbitrary powers in the asylum arena. The sovereign right to exclude or expel aliens, to grant asylum, or to maintain immigration ‘control’, as a traditional principle of international law, should not dictate as a matter of international law how that power should be exercised or implemented within the state. This thesis argues that the state’s traditional powers are now subject to clearly expressed limitations found in international human rights instruments that reach ‘inside’ the state.

In the next chapter, those instruments penetrating the veneer of state sovereignty to impose positive obligations on states to utilize judicial, legislative and executive institutions for the purpose of protecting citizens and foreigners alike are examined. From an historical perspective, the interpretative approach advocated in the next chapter and the remainder of this thesis represents a modern manifestation of the earlier developed notion that the protection of refugees should not be left solely to arbitrary power.
I INTRODUCTION

This thesis asserts that a good faith reading of core protection obligations requires that states employ appropriate legislative, judicial and executive mechanisms when they construct and implement an asylum process. The purpose of this chapter is to lay the foundations for this approach by examining the scope of the good faith principle when applied in the context of international human rights treaties and the Refugee Convention.

Section II examines the operation of the good faith principle within the international bill of rights (consisting of the Universal Declaration of Human Rights\textsuperscript{264} and the United Nations Covenants on Economic, Social and Cultural Rights\textsuperscript{265} and on Civil and Political Rights).\textsuperscript{266} It observes that the good faith principle translates into a trio of state obligations when applied to human rights treaties: a duty to respect rights; a duty to protect rights; and perhaps most importantly, a duty to ensure and fulfil rights through the use of judicial, executive and legislative mechanisms.

\begin{itemize}
  \item \textsuperscript{264} \textit{Universal Declaration of Human Rights} (adopted 10 December 1948 UNGA Res 217 A(III)) UN Doc A/C 3/SR. 121.
  \item \textsuperscript{266} \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976). See generally, Nowak, above n 126, xix.
\end{itemize}
Sections III and IV contend that this same trio of obligations applies to the Refugee Convention. Consequently, States Parties to the Convention are also under an overarching duty to engage appropriate legislative, administrative and judicial safeguards to ensure the effective operation of their protection obligations. The next chapter expounds on these interpretative principles in the context of individual protection obligations and the asylum process.

II THE GOOD FAITH PRINCIPLE IN THE CONTEXT OF INTERNATIONAL RIGHTS INSTRUMENTS

A The good faith principle

States are under a clear obligation under general principles of international law to interpret a treaty in good faith and in a way that ensures the effective achievement of its object and purpose. Thus, while the method of incorporation of a treaty may vary between different domestic legal orders, what matters is its effective and practical observance and implementation within the particular political and legal milieu of individual states. The obligation to ensure the effectiveness of a treaty applies equally to the Refugee Convention and cognate rights instruments.


268 Tomuschat, above n 275, 98.

269 Hathaway, above n 1, 62-64; Goodwin-Gill and McAdam, above n 117, 7-8, 387-390. States must implement the Refugee Convention in good faith to ensure its effectiveness in achieving its object and purpose: Hathaway, above n 1, 62-64; Goodwin-Gill and McAdam, above n 117, 391. The Convention ‘must be interpreted in a way that makes it practical and effective. It is only by adopting this approach that the commitment to human rights protection can be made meaningful’: Harvey, above n 3, 144. The Convention must be ‘able to function as part of a ‘complex and evolving legal environment’: Hathaway, above n 1, 65. The good faith obligation is concerned with ‘the practical effect of State action, not its intent or motivations’: Goodwin-Gill and McAdam, above n 117, 387.

270 In the context of the ICCPR, Christian Tomuschat observes: ‘It is the substantive criterion of effectiveness which the [Human Rights Committee] has employed as the guiding principle for its assessment of the different methods of implementation, rather than the formal criterion of incorporation …’: Tomuschat, below n 275, 98.
B The modern typology of state duties under international human rights treaties

The effective implementation of a treaty depends on the proactive and positive engagement of national institutions. In the human rights context this is clear when we examine the historical background to the drafting of international human rights treaties. Following the atrocities of the Second World War, the Commission on Human Rights decided that the best way to ensure practical and effective rights protection was through improving national laws and institutions, not replacing them.\textsuperscript{271} It was clear from the outset of its deliberations that the Commission on Human Rights envisaged that national laws and institutions would be the primary means of ensuring the effective realisation of human rights.\textsuperscript{272}

This principle found expression in international human rights law. According to Louis Henkin in his book, The Age of Rights, ‘[t]he law, politics, and institutions of international human rights ... do not replace national laws and institutions, they provide additional international protections for rights under national law.’\textsuperscript{273} International human rights law, Henkin reiterated, ‘parallels and supplements national law ... but it does not replace, and indeed depends on, national institutions.’\textsuperscript{274} In line with this duty, the work of human rights supervisory bodies, like the HRC and the

\textsuperscript{271} UN, Economic and Social Council, Official Records, First Year: Second Session, From the first meeting (25 May 1946) to the fifteenth meeting (21 June 1946), and annexes, Annex 4, Report of the Commission on Human Rights (document E/38), 226-227.

\textsuperscript{272} Ibid.


Committee against Torture, focuses on the implementation of rights within the domestic institutional context.\textsuperscript{275}

The principle is specifically reflected in the modern typology of state duties under human rights treaties. International human rights treaties recognize that states parties have three types of duties with respect to rights (more than one may apply to a single right or obligation): a duty \textit{to respect}, \textit{to fulfil} and \textit{to protect} human rights.\textsuperscript{276} The obligation \textit{to respect} human rights encapsulates a duty to refrain from state intervention, while the duty \textit{to protect} extends to the protection of individuals against human rights abuses by private persons.\textsuperscript{277}

The positive and proactive engagement of national institutions is principally envisaged by the third duty: the duty \textit{to fulfil} (or to ensure). The duty \textit{to ensure}, which applies regardless of the categorization of rights as civil, political, economic, cultural or social, ensures that states are under an \textit{obligation to fulfil human rights} by means of positive legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.\textsuperscript{278} The duty to ensure the enjoyment of rights recognizes a core element of the human rights creed, i.e. that "society must ensure these rights, must act as "insurer" for them; it must do what is necessary to see that such rights are in fact enjoyed."\textsuperscript{279}

\textit{C The duty to ensure the effectiveness of the ICCPR and CAT}

\textsuperscript{276} Nowak, above n 126, xx.
\textsuperscript{277} Ibid xxii.
\textsuperscript{278} Ibid.
\textsuperscript{279} Henkin, above n 273, 8.
The duty to ensure rights by positive and proactive utilization of judicial, legislative and administrative mechanisms is encapsulated in art 2 of the ICCPR. Article 2(1) obligates the states parties to respect all the rights in the Covenant and to ensure them to all individuals within their territory and subject to their jurisdiction. The obligation to respect entails that states parties must forbear restricting the exercise of rights in the ICCPR, whereas the obligation to ensure imposes a duty to take positive measures to protect and to fulfil ICCPR rights. The obligation to ensure imposes ‘affirmative obligations’ on the state; a duty of protection, as well as non-interference.

An example of the duty to ensure in operation would be the obligation on states to implement positive measures to reduce infant mortality and to eliminate malnutrition in accordance with the right to life in art 6. Another example of its operation is the right to a fair trial (art 14). When interpreted in light of art 2, art 14 calls for ‘institutional protection by providing procedural guarantees and implanting specific legal institutions.’ A further example in the asylum context is the obligation on states to provide access to an independent review of a decision to expel an alien in breach of the implied non-refoulement obligation under the ICCPR.

280 Nowak, above n 126, 38.


282 Tomuschat, above n 275, 96.


284 Ibid xxi.

285 Mohammed Alzery v Sweden, Communication No 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006), [11.8] (HRC expressed the view that ‘[t]he absence of any opportunity for effective, independent review of the decision to expel … amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.’)
The operation and scope of the obligation to ensure depends on the nature of the particular right, but is applicable to all the rights in the ICCPR. Thus, the ICCPR is now understood as containing a progressive obligation to adopt proactive measures to safeguard negative rights. Thus, the classic liberal idea that political and civil rights imposed negative obligations on governments has broken down as the jurisprudence of the United Nations Human Rights Committee (HRC) and other human rights supervisory bodies have interpreted traditional negative human rights ‘as entailing a broad range of positive State obligations’. The underlying imperative is to provide practical and effective protection for all civil, political, economic, social and cultural rights - and to recognize the pivotal role played by national institutions in securing that observance.

The obligation to ensure in art 2(1) of the ICCPR is reinforced by the requirement on States under art 2(2) to adopt such ‘legislative or other measures as may be necessary to give effect to the [Covenant] rights’. The words ‘to give effect to’ require not only the provision of a remedy for a violation of a right (expressly required under art 2(3))

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286 Nowak, above n 126, 38.
287 Ibid 37-38.
288 Despite the different wording in the ICESCR equivalent to art 2 of the ICCPR, there is no difference in the nature of the obligations under the two Covenants. Both recognize that states are under a progressive obligation to take positive steps to ensure the effective realisation of both negative and positive rights, whether political, civil, economic, social or cultural. The traditional distinction between the ICESCR and ICCPR rights, which depicted the former as positive obligations to be implemented gradually through positive measures and the latter as negative obligations to be guaranteed immediately through prohibitions on state conduct, has broken down with the evolution of the jurisprudence on both Covenants: M Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Intersentia, Antwerpen, 2002) 137, 155. The ICESCR is also recognized as containing both negative and positive rights requiring immediate and progressive implementation: Foster, above n 116, 170-173; R Cholewinski, ‘Economic and Social Rights of Refugees and Asylum Seekers in Europe’ (2000) 14 Georgetown Immigration Law Journal 709, 718-720, 724. See also, CESCR, General Comment 9: The domestic application of the Covenant, 3 December 1998, EC 12/1998/24, [6]-[7].
289 Sepulveda, above n 288, 137.
of the ICCPR), but also the adoption of measures that avoid or prevent the violation of a right.  

Article 2(2) may also require the adoption of measures other than legislation in order to ensure the effectiveness of rights. The measures adopted will depend on the right in question, but may include, for example, educational and information provision to inform individuals of their rights, affirmative action, or fostering institutions that remove barriers to the full enjoyment of rights.  

The obligation under art 2(2) is directly applicable and imposes an immediate international obligation to respect and to ensure the rights set out in the ICCPR. Yet this does not preclude the progressive realization of the rights set out in the ICCPR. As Nowak points out, the immediate obligation to respect and to ensure the enjoyment of rights does not prevent states from also being under ‘a progressive obligation to ensure these rights by all appropriate legislative, political, administrative, judicial, social, economic and other measures. Nowak gives the example that while any act of torture constitutes an immediate violation of art 7 of the ICCPR, ‘there remains plenty of possibilities in all States of the world to progressively improve the respective training of law enforcement personnel, to develop more effective measures for the prevention of torture, to raise the standards  

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291 Nowak, above n 126, 60.

292 Schachter, above n 290, 319. For example, Nowak gives the example of the training of prison personnel as being one measure that may be necessary for the prevention of torture: Nowak, above n 126, 60.

293 Nowak, above n 126, 62.

294 Ibid.
and conditions of detention, to investigate all allegations of ill-treatment, to bring the perpetrators to justice, to protect women against domestic violence, etc.\(^{295}\)

The general obligation to ensure and fulfil the rights found in the ICCPR is further spelled out in art 2(3). As already noted, art 2(3) expressly requires that states provide remedies to individuals for violations of Covenant rights. While art 2(3) does not preclude international remedies, it emphasizes the central role of domestic remedies.\(^{296}\) Article 2(3)(b) specifically recognizes the right to a remedy before a competent domestic authority, if possible, a court.\(^{297}\) Decisions by political or administrative organs do not satisfy paragraph 3(b).\(^{298}\) Paragraph 3(b) therefore imposes a progressive obligation to develop judicial remedies, not to take deliberate steps to remove or avoid those already in existence – a point of particular relevance in the asylum context given recent attempts to exclude the courts from reviewing asylum decision-making in many states.

In line with these observations, the work of the UN Human Rights Committee (HRC) focuses on reviewing the practice of states to ensure the effective implementation of Covenant rights through practical and accessible legislation, constitutional provisions, and judicial remedies.\(^{299}\) In general, it can be said that the HRC supports the

\(^{295}\) Ibid.

\(^{296}\) Schachter, above n 290, 325.

\(^{297}\) Nowak, above n 126, 63.

\(^{298}\) Ibid 64.

\(^{299}\) Tomuschat, above n 275, 98 ff. This same approach is reflected in the relaxation by regional rights bodies of the requirement that petitioners prove the exhaustion of domestic remedies. Pursuant to Inter-American human rights mechanisms a petitioner is not required to prove exhaustion of domestic remedies before bringing a complaint before the Inter-American Court of Human Rights if domestic legislation does not ‘afford due process of law for protection of the right or rights that have allegedly been violated’: American Convention, art 46(2); Commission Rules, art 31(2)(a). See generally, B Lyon and S Rottman, ‘The Inter-American Mechanisms’, in J Fitzpatrick (ed) Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons, A Guide to International Mechanisms and Procedures (Transnational Publishers, Inc. Ardsley, New York) 457. This has been extended by the Court to include ‘the total ineffectiveness’ of the judiciary: Velásquez Rodríguez Case,
imposition of a progressive obligation upon states to ensure the effective enjoyment of
the rights found in the ICCPR by all appropriate legislative, political, administrative,
judicial, social, economic and other measures.\textsuperscript{300}

In a similar way, the equivalent art 2(1) of the CAT has been interpreted by the
Committee against Torture as obliging state parties ‘to take actions that will reinforce
the prohibition against torture through legislative, administrative, judicial, or other
actions that must, in the end, be effective in preventing it.’\textsuperscript{301} The Committee against
Torture has reminded states that the obligation in art 2 is ‘wide-ranging’ and imposes
an evolving ‘baseline’ of effective measures that states should employ.\textsuperscript{302}

The ‘baseline’ identified in the Committee’s 1998 general comment on the
implementation of art 2 illustrates the scope of measures that states should employ
under rights treaties. The ‘baseline’ encompasses: the elimination of legal obstacles
that impede the eradication of torture; the review and improvement of relevant laws in
response to comments by the Committee; making the offence of torture punishable as
an offence under criminal law; establishing an official register of detainees; ensuring
the right of detainees to be informed of their rights; providing a right to receive
independent legal advice; putting in place mechanisms for inspecting detention
centres; and ensuring the prompt investigation of allegations of torture and ill-
treatment and the availability of judicial and other remedies that guarantee the prompt


\textsuperscript{300} Sohn, above n 273, 21.

\textsuperscript{301} Committee against Torture, \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 (Implementation of Article 2 by States Parties)}, CAT/C/GC2/CRP.1/Rev.4, [2].

\textsuperscript{302} Ibid [3]-[4].
and impartial examination of allegations and the capacity to challenge the legality of
detention or treatment.\textsuperscript{303}

A further illustration of the scope of the duty to ensure under the CAT is the
requirement that states ensure that individuals have the right to an effective remedy
for breach of their rights even where the CAT does not expressly set out a remedy for
particular breaches.\textsuperscript{304} An example is the \textit{non-refoulement} obligation in art 3.\textsuperscript{305} In
the case of \textit{Agiza v Sweden}, the Committee against Torture observed that ‘the right to
an effective remedy for a breach of the Convention underpins the entire Convention,
for otherwise the protections afforded by the Convention would be rendered largely
illusory.’\textsuperscript{306} Thus, the Committee considered that the prohibition on \textit{refoulement}
contained in art 3 of the CAT encompassed a remedy for its breach even though it did
not contain a remedy on its face.\textsuperscript{307}

III THE HUMANITARIAN OBJECTIVE OF THE NATIONAL
PROTECTION OF REFUGEES

From the above discussion, it is clear that the core purpose of international human
rights instruments is to safeguard the rights of persons seeking protection through the
progressive development of positive legislative, administrative and judicial measures.

This section argues that this purpose is evident in the Refugee Convention, which
remains at the core of the international refugee protection regime. This section begins
by highlighting evidence of this humanitarian purpose in the preparatory work leading
up to the Refugee Convention’s promulgation.

\textsuperscript{303} Ibid [2]-[14].
\textsuperscript{304} \textit{Agiza v Sweden}, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005), [13.6].
\textsuperscript{305} Ibid.
\textsuperscript{306} Ibid.
\textsuperscript{307} Ibid.
The Refugee Convention should be interpreted in ‘good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ This demands a holistic or combined approach to interpretation so that the ordinary meanings of the words in the Refugee Convention are ‘not to be determined in a vacuum removed from the context of the treaty or its object and purpose.’ The drafting history of the Refugee Convention is a starting point for analysis of its treaty and purpose.

Analyzing the drafting history of the Refugee Convention is an important step in this thesis. The concept of national protection envisaged by the drafters of the Refugee Convention is often depicted as predominantly a ‘real politic’ attempt to wrest back state control over the protection process for the purposes of furthering state interests. If this is the case, the focus of the Refugee Convention shifts dramatically toward the preservation and pursuit of state interests – including immigration control. As the historical record in chapter 2 shows, the surest way for states to engage in immigration control is to rely on arbitrary and unfettered administrative powers. If, on the other hand, the national protection of refugees under the Refugee Convention was primarily for humanitarian purposes, there is much greater scope for calling on states to engage a range of institutional measures that protect refugees.

A The transition to refugee assistance and protection at the national level

309 Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 253 (McHugh J).
310 The articles of the Refugee Convention should be interpreted ‘in light of the object and purpose appearing in the preamble and the operative text and by reference to the history of the negotiation of the Convention’: Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 231 (Brennan CJ). Reference to the Convention’s preparatory work is both necessary and desirable to provide a contemporary interpretation of the Refugee Convention that is based on evidence of the true meaning of the Convention’s text ‘construed purposively, in context, and with a view to ensuring its effectiveness’: Hathaway, above n 1, 59.
As a starting point, the drafting history shows a clear propensity toward an international refugee regime built firmly on assistance and protection offered by states. Although the ‘refugee problem’ was acknowledged from the outset of the UN Economic and Social Council’s deliberations on the issue to be ‘international in scope and nature’ (and therefore mandating an internationally co-ordinated response through international bodies), it was clear that states retained ultimate responsibility for providing assistance and protection to refugees even where they delegated the protection function to an international organization.

This is clear from the fact that following the post-war repatriation and resettlement work of the International Refugee Organization (IRO), asylum states generally agreed with the IRO that assistance to refugees should revert to a primarily national function. As the delegates to the UN Economic and Social Council recognized, if assistance once more became a national function, ‘protection must follow suit.’

Practically, this meant that states would perform many of the key functions previously done by the IRO, including undertaking the core function of safeguarding against expulsion or return of refugees to places of persecution by determining eligibility for protection and facilitating proper travel documentation. In keeping with this progression toward national protection, the French and Belgian delegates to the UN Economic and Social Council put forward the proposal for a new international

311 UN, Economic and Social Council, Official Records, First Year, First Session, From the first meeting (23 January 1946) to the fourteenth meeting (18 February 1946) and annexes, Creation of a Special Committee on Refugees and Displaced Persons: Draft Resolution proposed by the Delegation of the United States of America, Document E/15, 99.


314 Ibid.
convention on refugees ‘to settle the details of the measures which national authorities would have to put into effect.’

B The humanitarian purpose of national protection

The national protection principle was principally driven by humanitarian concerns, not state interests. Much attention is devoted to the Cold War undercurrents flowing through the work of the UN Economic and Social Council during this period with the result that too often the birth of the modern refugee regime is portrayed as simply an instance of ‘real politic’. This characterisation can lead to a restrictive reading of the Refugee Convention based on the misleading assumption that because the Convention was drafted against the background of the Cold War the states that participated in the drafting of the Convention ‘had no commitment to basing the Convention in the protection of human rights.’

Contrary to this assertion, the drafting history supports the sincerity of the French and Belgian insistence that their proposal for a new convention on refugees was ‘prompted much more by humanitarian motives than by consideration of politics or self-interest.’ While it was acknowledged that the refugee problem could be a cause of tension between states, it is clear from the drafting history that ‘the problem’ was humanitarian in nature and demanded a humanitarian response. Significantly, both the Eastern Bloc and Western states viewed the refugee problem as essentially a

315 Ibid 620.
316 See, eg, Minister for Immigration v Ibrahim (2000) 204 CLR 1, [139] (Gummow J).
317 Ibid.
humanitarian one; the disagreements arose when each side accused the other of playing politics with it.  

Consistent with these observations, in recent times the judgments of leading courts have stressed the importance of adopting a humanitarian and evolving interpretation of the Refugee Convention. The fact that Cold War tensions that lingered in the background of the drafting of the Refugee Convention have long since abated while the proclaimed humanitarian objective of the Convention lives on bears witness to the durability of the true purpose and spirit within which the Convention was drafted. It would be contrary to that objective, as well as the Convention’s claim to universality, to chain its provisions to the transient political distrusts and suspicions of post-war Europe.

C The humanitarian purpose of national protection – the Preamble

The humanitarian object and purpose of the Convention is also evident from its preamble. The Refugee Convention’s Preamble is the principal indicator of the Convention’s object and purpose. The Preamble to the Refugee Convention begins with a clear affirmation of the principles of the UN Charter and the Universal Declaration of Human Rights and the imperative of assuring to refugees ‘the widest possible exercise’ of fundamental rights and freedoms. While the Preamble also


320 Harvey, above n 3, 181.


322 According to Judge Weeramantry, a treaty’s preamble is a ‘principal and natural source from which indications can be gathered of a treaty’s objects and purposes even though the preamble does not contain substantive provisions’: Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) [1991] ICJ Rep 53, 142.
extols states parties to ensure that they prevent the ‘problem from becoming a cause of tension between States’, this is expressly subject to the recognition of the humanitarian nature of the refugee problem. Thus, while states addressed the ‘refugee problem’ with an eye to reducing tensions between states, the ‘problem’ was conceived in humanitarian terms.

D The humanitarian purpose of national protection – context

A further reason for seeing the shift to national protection in a humanitarian light is the wider human rights context of the Refugee Convention. The Refugee Convention’s Preamble clearly places the Convention within the international bill of rights. In the words of Brennan CJ of the Australian High Court:

By invoking “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination” and by speaking of the United Nations’ “profound concern for refugees” and its endeavour “to assure refugees the widest possible exercise of these fundamental rights and freedoms”, the preamble places the Convention among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms.

As noted in section II above, a critical force at the time of the instigation of the Refugee Convention in the UN Economic and Social Council was the work of the

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323 Foster, above n 116, 44.

324 Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 231-232 (Brennan CJ), 296-297 (Kirby J); NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 29 [108], [109] (Kirby J); R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629, 639 (Lord Steyn); Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982, 1024 (Bastarache J); J McAdam, Complementary Protection in International Refugee Law (Oxford University Press, Oxford 2007) 29-30; Foster, above n 116, 49; Hathaway, above n 1, 4-5.

325 Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 231 (Brennan CJ).
Commission on Human Rights. There was significant cross-pollination between the two enterprises. The International Refugee Organization’s involvement in the work of the Commission ensured that the Universal Declaration of Human Rights contained articles of special application to refugees and displaced persons, including the right of emigration (art 13), the right to seek asylum (art 14) and the right to a nationality (art 15).

Ideas and principles flowed from the Commission’s draft covenant on human rights into the preparatory work of the Refugee Convention. This was consistent with a guiding principle of the Economic and Social Council at the time that ‘pending the adoption of an international bill of rights … international treaties involving basic human rights … shall conform to the fundamental standards relative to such rights set forth in the [UN] Charter.’ Turning to the operative provisions of the Refugee Convention in the next part, we find the same focus on securing the national protection of rights as espoused by the Commission.

E The humanitarian purpose of national protection – operative provisions

The Refugee Convention’s operative provisions contain the same stress on national protection that is present in other human rights instruments. The Convention was a bold step forward in refugee protection because it was ‘an attempt to establish an


328 McAdam, above n 324, 29-30.

329 UN, Economic and Social Council, Official Records, First Year: Second Session, From the first meeting (25 May 1946) to the fifteenth meeting (21 June 1946), and annexes, Commission on Human Rights, Resolution adopted on 21 June 1946 (documents E/56/Rev.1 and E/84, paragraph 4, both as amended by the Council, 401.

330 See above n 271 and accompanying text.
international code of rights of refugees on a general basis.\textsuperscript{331} Many provisions in the Refugee Convention are designed to ensure that refugees have access to the same beneficial treatment accorded to aliens or nationals under domestic law in the Contracting State. Article 7.1 provides, for example, that ‘[e]xcept where this Convention contains more favourable provisions’ states must ‘accord to refugees the same treatment as is accorded to aliens generally.’ There are a number of other provisions that require a Contracting State to extend to refugees the same treatment or protection afforded under its domestic law to aliens,\textsuperscript{332} most-favoured foreign nationals,\textsuperscript{333} or nationals.\textsuperscript{334}

Many of these rights derive from developments in international aliens law, which sought to overcome the vulnerability of persons outside the protection of their own state.\textsuperscript{335} International aliens law shares an underlying humanitarian object with refugee protection.\textsuperscript{336} As noted by Hermann Mosler, many of the rights found in international aliens law are considered to apply regardless of nationality, eg access to the courts and tribunals, freedom from humiliating treatment and forced labour, and prohibition of arbitrary deprivation of liberty and property.\textsuperscript{337} By including many of these protections, the Refugee Convention similarly aims to ensure that refugees have access to national protection.

\textsuperscript{331} Robinson, above n 10, 6.
\textsuperscript{332} Article 13 (movable and immovable property); art 18 (self-employment); art 19 (liberal professions); art 21 (housing); art 22(2) (public education); art 26 (freedom of movement).
\textsuperscript{333} Article 15 (right of association); art 17 (wage-earning employment).
\textsuperscript{334} Article 14 (artistic rights and industrial property); art 20 (rationing); art 22(1) (public education – elementary); art 23 (public relief); art 24 (labour legislation and social security); art 29 (fiscal charges).
\textsuperscript{335} Hathaway, above n 1, 79.
\textsuperscript{336} H Mosler, \textit{The International Society as a Legal Community} (Sijthoff & Noordhoff, Alphen aan den Rijn 1980) 56.
\textsuperscript{337} Ibid.
Even where the Refugee Convention imposes obligations on Contracting States that apply to refugees irrespective of the domestic measures applicable to other groups, there is a clear understanding that national laws and institutions are essential to the carrying out of those duties. The right of access to the courts (art 16) and administrative assistance (art 25) under the Convention are important and obvious reminders that the drafters of the Convention recognized the fundamental importance of ensuring that refugees had access to the protection offered by national institutions.

Most significantly, as will be argued further in the next chapter, the core non-refoulement obligation in art 33 of the Convention, while silent on the procedures for determining a putative refugee’s entitlement to protection, nevertheless is understood as imposing a responsibility on states to implement fair and effective asylum procedures. It is argued further in the next chapter, that a good faith interpretation and application of this obligation necessitates that states exploit to the fullest extent possible their array of judicial, legislative and administrative protection safeguards.

This argument holds true irrespective of UNHCR involvement in asylum processing in certain states. It is important to view the long-standing involvement of the UNHCR in refugee status determinations in light of the High Commissioner’s repeated calls for states to bear the responsibility and function of determining refugee status. The UNHCR position is indicative of the fact that it is states that assume responsibility to protect aliens and refugees within their jurisdiction.

By reiterating this position, the UNHCR also acknowledges that it is incapable as a matter of practice of providing the same level of protection as that available within the

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338 UN, General Assembly, Executive Committee of the High Commissioner’s Programme, Note on International Protection, A/AC.96/1038, 29 January 2007, [18].

framework of state legal and institutional structures. The UNHCR position therefore acknowledges the practical need for a robust and diverse national institutional framework for protection. As noted by Colin Harvey, it is "[t]he institutions and structures of protection [that] shape the practical implementation of legal standards in [the asylum] area."^341

F National protection and regional developments

To date, regional refugee rights regimes have at least formally aimed at supplementing, not replacing, national protection systems. The EU’s gradual move towards the Common European Asylum System (CEAS) has focused on overcoming the difficulties that have arisen from inconsistent application of the Convention between EU Member States. Developments thus far have been formally aimed at unifying substantive and procedural mechanisms within Member States, rather than replacing them with a supranational structure.343

The formal objective of EU asylum integration accords with the ongoing state responsibility of individual member states under international law. EU member states remain separate entities for the purposes of international law and each member is therefore responsible for promoting universal respect for, and observance and protection of, international human rights.344

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340 Statement by Ms Erika Feller, Assistant High Commissioner – Protection, Fifty-eighth session of the Executive Committee of the High Commissioner’s Programme, Agenda Item 5(a), 9.

341 Harvey, above n 3, 153.

342 See, eg, Convention governing the Specific Aspects of Refugee Problems in Africa, opened for signature 10 September 1969, 10011 UNTS 14691 (entered into force 20 June 1974), arts II(1) and V.


Although formally preserving the role and responsibility of member states, it is open to debate whether the development and implementation of the CEAS has eroded the involvement of national institutions. For instance, chapter 5 of this thesis examines whether the recent extraterritorial operations of the EU’s new border control agency, FRONTEX, are in practice undermining the access of asylum seekers intercepted outside the physical borders of the EU to statutory and judicial rights and remedies available within Member States.\(^{345}\)

In summary, the transition to a national protection model in the international refugee rights regime should be seen in broadly humanitarian terms. A key aspect of the transition to national protection was the imperative to ensure the effective realisation of refugee rights through access to national protection safeguards. If national protection is essential to safeguarding the rights of refugees, the issue arises to what extent States Parties to the Refugee Convention and cognate rights instruments are obligated to provide putative refugees with access to the full scope of national protection safeguards, including legislative, judicial and administrative measures?

**IV THE OBLIGATION TO ENSURE THE EFFECTIVENESS OF THE REFUGEE CONVENTION**

Asylum procedures stand to benefit from widespread improvements in administrative justice in the last fifty years. They include improvements in administrative decision-making, statutory conditions and duties directing administrative discretion, as well as judicial scrutiny of the asylum process. Denying the application of those developments to asylum procedures substantially deprives refugees of recourse to safeguards that, it will be argued in the next chapter, provide an essential framework

\(^{345}\) See below n 627 – and accompanying text.
for a fair and effective asylum process. It effectively returns asylum to the historical
tradition of arbitrary, discriminatory and secretive decision-making observed in
chapter 2 of this thesis. This is precisely the tradition that constituted the mischief
that the Refugee Convention and cognate rights instruments were designed to cure by
ensuring that rights were observed and enforced as a matter of practice. The adverse
legacy of the tradition of arbitrary decision-making in the asylum context is all too
apparent in the modern, restrictive asylum policies examined in chapters 5 to 7 of this
thesis.

There are sound reasons to apply to the Refugee Convention the typology of duties
found in general international human rights instruments, including the progressive
obligation to ensure the effective observance of rights and obligations. These reasons
derive from an interpretation of the Refugee Convention that is contextual and which
accords with its object and purpose. As summarized by leading experts at the Global
Consultations on Protection in 2001 (and endorsed by EXCOM), "[r]efugee law is a
dynamic body of law, informed by the broad object and purpose of the 1951 Refugee
Convention and its 1967 Protocol, as well as by developments in related areas of
international law, such as human rights law ..." This basic approach is in
accordance with the growing linkages between international agencies and norms in
the areas of international refugee law and international human rights law.\(^{346}\)

A Context

\(^{346}\) Summary Conclusions: The Principle of Non-Refoulement, Adopted at the expert roundtable
organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research
Centre for International Law, in the context of the Global Consultations on International Protection
(University of Cambridge, Cambridge, 2001). See also, EXCOM Conclusion No 103 (LVI) – 2005,
(c).

\(^{347}\) UNHCR, Note on International Protection, 30 June 2008. A/AC.96/1053, [60]; EXCOM
Conclusion No 95 (LIV), 2003, (k), (l). See also, EXCOM Conclusion, No 50 (XXXIX) – 1988, (b);
EXCOM Conclusion No 62 (XLI) – 1990, (a)(ii); EXCOM Conclusion, No 65 (XLII) – 1991, (u);
EXCOM Conclusion No 68 (XLIII) – 1992, (x); EXCOM Conclusion, No 71 (XLIV) – 1993, (cc),
(ee); EXCOM Conclusion No 103 (LVI) – 2005 (c).
When interpreted in the context of other rights treaties, the good faith obligation that applies equally to the Refugee Convention implies the same requirements as found in art 2 of the ICCPR and CAT. As pointed out by Professor Tomuschat, the stipulations found in art 2 of those treaties reflect the basic nature of the good faith obligation (or *pacta sunt servanda*). They simply serve as a ‘useful reminder’ that compliance with human rights treaties require proactive steps to protect rights. The requirements in art 2(1) of the ICCPR and CAT (and art 2(1) of the ICESCR) codify the good faith principle that is equally applicable to the Refugee Convention despite the absence of a similar provision.

Given the acknowledged linkages between refugee law and human rights law, it would be implausible to permit the Refugee Convention to be used as a tool for denying the scope and degree of protection afforded to individuals under the ICCPR, CAT or other human rights treaty. States are obligated to ensure the contemporary relevance of the Refugee Convention. States must ensure that the mechanisms available for satisfaction of the obligations in the Convention continue to evolve alongside developments in international human rights law. This is especially important given that despite the substantial overlap between the Refugee Convention and the ICCPR, CAT, and ICESCR, which also apply to non-nationals, the Refugee

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348 Tomuschat, above n 275, 104.
349 Ibid.
351 *Suresh v Canada* [2002] 1 SCR 3; Hathaway, above n 1, 64.
352 Nowak, above n 126, 41-42; Cholewinski, above n 288, 717.
Convention still offers significant additional protection to refugees that is sometimes not granted to those who benefit from subsidiary or complementary protection.\textsuperscript{353}

\textbf{B Object and purpose}

In addition to its context, the Refugee Convention’s object and purpose also mandates the application of the modern typology of state duties under human rights treaties – including the obligation to ensure the progressive realization of the rights of refugees. The Convention’s Preamble cites expressly to the Universal Declaration on Human Rights, which exhorts all individuals and organs of society to strive ‘by progressive measures, national and international, to secure … universal and effective recognition and observance’ of human rights.\textsuperscript{354}

The Convention’s Preamble, as noted above, also gives expression to the human rights purpose of the Convention that guarantees that states parties will give refugees the \textit{widest} possible enjoyment of rights.\textsuperscript{355} Consequently, the purpose of the Refugee Convention, as evident also in art 5, is to ‘grant refugees as many rights as possible, not restrict them.’\textsuperscript{356} Consistent with this aim, the Refugee Convention not only establishes a minimum set of rights for refugees, but also obligates states to grant more liberal rights ‘whenever they exist at present or this is possible.’\textsuperscript{357}

\begin{footnotes}
\footnotetext[353]{UNHCR, UNHCR’s Response to the European Commission’s Green Paper on the Future Common European Asylum System, September 2007, 7.}
\footnotetext[354]{\textit{Universal Declaration of Human Rights} 1948 (adopted 10 December 1948 UNGA Res 217 A(III)) UN Doc A/C 3/SR 121, Preamble.}
\footnotetext[355]{\textit{Applicant A v Minister for Immigration and Multicultural Affairs} (1996) 190 CLR 225, 231-232 (Brennan CJ), 296-297 (Kirby J); \textit{NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs} [2005] HCA 29 [108], [109] (Kirby J); \textit{R v Immigration Appeal Tribunal; Ex parte Shah} [1999] 2 AC 629, 639 (Lord Steyn); \textit{Pushpanathan v Canada (Minister of Citizenship and Immigration)} [1998] 1 SCR 982, 1024 (Bastarache J); McAdam, above n 324, 29-30; Foster, above n 116, 49; Hathaway, above n 1, 4-5.}
\footnotetext[356]{Robinson, above n 10, 79.}
\footnotetext[357]{Ibid 9.}
\end{footnotes}
Moreover, the humanitarian object of the Refugee Convention requires that states do justice to the contemporary relevance of the Convention as a humanitarian instrument in an evolving legal and political environment.\(^{358}\) This acknowledges that human rights are in a state of ‘dynamic evolution’.\(^{359}\) States should adopt an ‘evolutionary approach’ to the interpretation of international human rights instruments and the Refugee Convention that pays due regard to the fact that ‘their object is to protect the rights and freedoms of individual human beings generally or falling within a particular description’.\(^{360}\) As stated by Lord Craighead in the recent House of Lords’ decision of \(R\ v\ Asfaw\), ‘a generous interpretation should be given to the wording of the articles [in the Refugee Convention], in keeping with the humanitarian purpose that it seeks to achieve and the general principle that the Convention is to be regarded as a living instrument’.\(^{361}\)

In line with this general object and approach, contracting states to the Refugee Convention should exploit the regulatory tools available to them to ensure the effectiveness of protection. The law should facilitate fair and effective protection, not act as an exclusionary tool.\(^{362}\) This requires, in the asylum context, that states give due regard to the ‘enabling aspects of law’.\(^{363}\) The enabling power of national legislative and administrative measures has found repeated recognition in EXCOM conclusions.\(^{364}\) Specifically, EXCOM has urged states to ensure the effective

\(^{358}\) Harvey, above n 3, 144.
\(^{359}\) Sepulveda, above n 288, 156.
\(^{360}\) \(R\ v\ Asfaw\) [2008] UKHL 31, [34]-[55] (Lord Craighead).
\(^{361}\) Ibid [55].
\(^{362}\) Harvey, above n 3, 145.
\(^{363}\) Ibid.
implementation of the Refugee Convention through appropriate administrative and legislative measures, including national procedures for determining refugee status.\(^{365}\)

As will be seen from this thesis’s examination of certain restrictive asylum policies, the enabling or facilitative aspect of the law is ‘a neglected area in the asylum context’.\(^{366}\) The importance of laws that facilitate restraints on executive power in the asylum context, as opposed to laws that facilitate the unbridled exercise of that power, is clear from the historical perspective taken in chapter 2 of this thesis.

In addition, the humanitarian object and purpose of the Refugee Convention demands that states also be proactive in removing or ameliorating legal, political and other obstacles to the effective realisation of refugee rights.\(^{367}\) The law in the asylum area all too often functions in an exclusionary way.\(^{368}\) Where legal (or political, economic or social) regimes frustrate the objective of the Convention, states are under an obligation to ensure that the Refugee Convention is effective within host countries ‘as presently constructed’.\(^{369}\) Recognizing this, an interpretation of the Convention’s provisions, or a practice or policy not expressly prohibited under the Refugee Convention but that frustrates the object and purpose of the Convention, will amount to a breach of the Convention.\(^{370}\)

\(^{364}\) EXCOM Conclusion No 2 (XXVII) – 1976, (c); EXCOM Conclusion No 11 (XXIX) -1978, (h); EXCOM Conclusion No 14 (XXX) – 1979; EXCOM Conclusion No 29 (XXXIV) – 1983, (g), (h); EXCOM Conclusion No 41 (XXXVII) – 1986, (g); EXCOM Conclusion No 49 (XXXVIII) – 1987, (d); EXCOM Conclusion No 57 (XL) – 1989, (a) – (d).

\(^{365}\) Ibid.

\(^{366}\) Harvey, above n 3, 145.

\(^{367}\) EXCOM Conclusion No 57 (XL) – 1989 (‘Invited States also to consider taking whatever steps are necessary to identify and remove possible legal or administrative obstacles to full implementation’).

\(^{368}\) Harvey, above n 3, 145.

\(^{369}\) Hathaway, above n 1, 63.

C Operative provisions

Lastly, the application to the Refugee Convention of the progressive obligation to ensure the effectiveness of rights, as part of the trio of State obligations applicable to all human rights, also gains support from an examination of the nature and development of some of the Convention’s core provisions. This argument is taken up further in the next chapter.

V UNDERLYING REASONS TO ENSURE EFFECTIVE PROTECTION – AN INTEGRATED INTERNATIONAL LEGAL ORDER

This thesis essentially seeks to establish a nexus between municipal protection safeguards and the international refugee protection regime. The justification for this nexus ultimately rests on the normative structure of an integrated international legal order. While the obligation to ensure the protection of rights at the national level derives from international instruments, it signifies the interdependence of the international and domestic legal orders. The rights doctrine is at the core of this relationship. Rights do not simply represent a restraint on a state’s external sovereignty, but to be effective must also act as a restraint on the internal sovereignty of political institutions within the state.³⁷¹

In accordance with this general understanding of the dual function of rights, it can be observed that refugee rights set limits to the scope of discretionary power whether discretion is understood as an expression of the state’s external authority or as a particular form of decision-making by national institutions. Together with other

internal safeguards, rights in this context manifest as an external and an internal restraint on national institutions in their dealings with refugees. Thus, national asylum law operates at the intersection of national, regional and international legal orders.

This discussion has profound implications for the place of refugee rights within the domestic sphere. As observed in the previous chapter, the historical authority of the UK government (or Crown) to act as it pleased with respect to refugees in part depended on the internal marginalisation of the rights doctrine as a legitimate force in the political ordering of the state. Yet, as the discussion in this chapter indicates, the convergence of substantive and procedural protection safeguards at the national level should be viewed in terms of the maturation and realization of the rights agenda in international law and as a doctrine of political ordering within states. International human rights symbolize a triumph of the idea of divisible and limited internal sovereignty based on the Lockean notion of inalienable natural rights.

The international protection regime also extends the rights doctrine to non-members of the political community and sees the convergence of the rights doctrine with equally long-standing notions and practices of international aliens law and the rule of law. Moreover, the international protection regime moves beyond a classical liberal

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373 Harvey, above n 3, 136.

374 See above n 173 – and accompanying text.

understanding of the scope of negative rights. States are now under an obligation to adopt positive and progressive measures in order to fulfil their protection obligations – an obligation that signifies a limitation on the discretion of the state in international law as well as on the internal organs of the state.

It is no longer possible, or desirable, for governments to create two normative spheres: the ‘external’ in which state discretion is bound by international rights, and the ‘internal’ where discretion is unfettered because the necessary substantive and procedural checks and balances are missing or circumvented. Attempts to reject or circumvent the application of refugee rights within the municipal milieu are objectionable as a matter of international obligation: ‘States must abide by their duties. They are not authorized to restrict the substance and scope of their commitments by opting for methods of implementation which seem to be less onerous than others.’

The international protection regime reflects that international law acts to prevent the ‘abuse of power in all spheres’. National, regional and international legal institutions and laws are interdependent. Tying them together is an international value system – human rights. The power of human rights is to transcend traditional boundaries between international and national law, imposing fundamental limitations on the power of the state and the authority of governments.

It is imperative for the effective implementation of rights at the national level that the legislative, judicial and administrative arms of the state are engaged in the translation

376 Tomuschat, above n 275, 93.
379 Ibid 75.
process. As was evident from the discussion in chapter 2 of this thesis, the involvement of all organs of the state in the translation of international norms into the domestic sphere is the recognition of the divisibility of the sovereign order within the state. State organs must be encouraged to operate both within the national and international legal communities. In the asylum arena, this entails governments accepting that legislatures and the courts have an equal role in applying the state’s international protection obligations.

VI CONCLUSION

In conclusion, the international treaties that contain a state’s protection obligations require that states utilize evolving legal and institutional mechanisms to ensure the progressive realization of the rights of refugees. This proposition symbolizes a broader and deeper commitment to an integrated international legal order that sees international, regional and municipal institutions united by core human rights standards that direct their actions.

380 Ibid 75.
THE ROLE OF LEGISLATIVE, JUDICIAL AND ADMINISTRATIVE MECHANISMS IN ENSURING A FAIR AND EFFECTIVE ASYLUM PROCESS

I INTRODUCTION

Thus far, this thesis has provided a historical context for comprehensive asylum procedures. In addition, the previous chapter put forward a doctrinal case for an expansive good faith interpretation and application of states' international protection obligations. This requires that states ensure the effective implementation of their international protection obligations through progressive and positive legislative, administrative and judicial measures.381

This chapter addresses these principles to asylum adjudication. Any obligation/s upon states to embrace progressive and positive mechanisms and techniques of asylum adjudication must flow from specific international protection obligations. The good faith principle provides the framework for our understanding of the scope of the modern typology of state duties, including the duty to ensure the fulfilment of rights. However, the good faith obligation is ‘accessory’ in character in the sense that it

381 See above n 280 – and accompanying text.

It is not itself a source of obligations where none would otherwise exist.\footnote{\textit{In re Border and Transborder Armed Actions (Nicaragua v Honduras)} [1988] ICJ Rep 69 [94]; \textit{In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)} [1998] ICJ Rep 275 [39] (‘The principle of good faith is one of the basic principles governing the creation and performance of legal obligations ...; it is not in itself a source of obligation where none would otherwise exist.’)}

This distinction can be hard to sustain. It becomes difficult to maintain that the good faith principle does not create ‘obligations’ when it effectively requires a particular course of action that is not apparent from the face of the text, eg to provide a remedy for breach of the \textit{non-refoulement} obligation,\footnote{\textit{Agiza v Sweden}, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005), [13.6].} or to train prison guards as to what is, and what is not, torture.\footnote{See, eg, Conclusions and recommendations of the Committee against Torture, United States of America, UN Doc CAT/C/USA/C/2 (2006), [19]; United Nations Human Rights Committee, \textit{General Comment No 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)} 10/03/92, [14].} Nevertheless, the distinction is important because it ensures that we find a specific duty (to train prison guards) in a good faith reading of a specific obligation (the obligation not to torture).

Applying this approach, this chapter seeks to derive institutional requirements relating to a state’s asylum process from a good faith reading of core international protection obligations. The core rights and obligations examined include the \textit{non-refoulement} obligation, the obligation to provide access to the courts, the right of non-discrimination, the right of equality before the law, and the right of refugees not to be penalized for illegal entry.
Based on a good faith reading of those rights and obligations, this chapter adopts an expansive view of the judicial, legislative and executive safeguards that should underpin the construction and implementation of an asylum process. It highlights a number of measures that states can, and should, use to improve the delivery of asylum adjudication. This discussion is meant to highlight the importance of a comprehensive array of institutional measures, and does not purport to exhaustively set out or define asylum procedures.

Important administrative measures include: the training of asylum decision-makers; the allocation of appropriate resources and materials for asylum decision-makers to make informed and unhurried decisions; internal quality reviews of decision-making; and independent merits review. Legislative measures include: statutory incorporation of eligibility criteria and the non-refoulement obligation and other rights where incorporation is necessary to translate international obligations into practically enjoyable rights; and the incorporation of binding procedural safeguards (eg the right to reasons for rejection of an asylum application and the right to an effective remedy).

Legislative and administrative measures can also facilitate access to judicial safeguards by providing a right to legal assistance on appeal, non-suspensive appeal rights, and reasonable time limits. The judiciary, meanwhile, contributes to fair and effective asylum processing through inclusive interpretation of eligibility criteria, and anxious scrutiny of the fairness of administrative decision-making and procedures.

The final section of this chapter sets the scene for the remainder of this thesis. It examines how restrictive asylum policies that have gained ground in developed states seek to separate the asylum process from the benefits afforded comprehensive legislative, judicial and administrative safeguards. The remaining chapters of this
thesis then go on to critically examine attempts to isolate asylum from meaningful national safeguards.

II THE NON-REFOULEMENT OBLIGATION

A Elements

The non-refoulement obligation is described as the cornerstone of the Refugee Convention. It prohibits the return of refugees to a place where they have a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership of a particular social group. Furthermore, art 3 of the CAT prohibits expulsion, return or extradition of a person to a place where they would be in danger of being subject to torture. A corresponding implied prohibition against refoulement is found in the ICCPR, which prevents states from returning a person to another state where they face torture, cruel, inhuman or degrading treatment (art 7), a threat to the right to life (art 6) or, in principle, any other deprivation of an ICCPR right. A modern legislative statement of the non-refoulement principle is found in the Canadian Immigration and Refugee Protection Act 2002.

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387 Refugee Convention, art 33(1).


389 Section 115(1) of the Immigration and Refugee Protection Act provides:

Principle of Non-refoulement

A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a
Consistent with the trio of obligations applicable to all human rights treaties, the non-refoulement obligation has different facets. First, it encompasses a duty to respect the right of a person not to be refouled. Thus, States are prohibited from taking active measures to refoule, such as ejection from the jurisdiction or forced repatriation. Second, the non-refoulement obligation encompasses a duty to protect. This requires, for example, that states protect persons from refoulement by non-state actors.

Third, the non-refoulement obligation encompasses a duty to ensure or to fulfil the obligation by way of positive measures. Those measures include legislative, administrative, judicial and other regulatory tools. States should adopt such measures that avoid or prevent the violation of a right. When applied to the non-refoulement obligation, this requires that states implement measures that reduce the risk of refoulement to the greatest extent possible. This follows from the fact that 'the nature of refoulement is such ... that an allegation of breach of that article relates to a future expulsion or removal.' Compliance depends on the means adopted to ensure the

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390 See above n 276 – and accompany text.

391 EXCOM, No. 102 (LVII) – 2005 (j) (‘Recalls its Conclusions No. 6 (XXVII) and 7 (XXVIII), as well as numerous subsequent references made in its other Conclusions to the principle of non-refoulement; expresses deep concern that refugee protection is seriously jeopardized by expulsion of refugees leading to refoulement; and calls on States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of non-refoulement.’)

392 Hathaway, above n 1, 287, 318-319.


result of non-refoulement. As Penelope Mathew observes, non-refoulement is 'both an obligation of result and an obligation of conduct'.

The duty to ensure the effective operation of the non-refoulement obligation is reflected in the requirement that states ensure the fairness and effectiveness of asylum procedures. As a limitation on the orthodox view that states have the discretion to determine what procedure will govern the asylum process, states are obligated to take positive steps to adopt a fair and effective asylum process in order to reliably and accurately identify those in need of protection.

**B The right to a remedy for a breach of the non-refoulement obligation**

The duty to ensure the effectiveness of the non-refoulement obligation also requires a right to a remedy for its breach. An appeal should have suspensive effect, i.e., an asylum seeker should not be deported prior to his or her appeal being finally determined. In a recent complaint under the Optional Protocol, the HRC observed that 'article 2 of the Covenant, read in conjunction with article 7, requires an effective

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396 EXCOM Conclusion No 28 (XXXIII) – 1982, (c); EXCOM Conclusion No 71 (XLIV) – 1993, (i); EXCOM Conclusion No 74 (XLV) – 1994, (i); EXCOM Conclusion No 81 (XLVIII) – 1997; EXCOM Conclusion No 82 (XLVIII) – 1997, (d)(ii); EXCOM Conclusion No 87 (L) – 1999, (j); EXCOM Conclusion No 105 (LVII) – 2006, (n); UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [4]-[5].
397 Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290, 294 (Gibbs CJ), 300 (Mason, Deane and Dawson JJ), 305 (Brennan J); Goodwin-Gill and McAdam, above n 117, 533.
remedy for violations of the latter provision ... The HRC observed that due to the nature of *refoulement*, 'effective review of a decision to expel ... must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.'

As noted in the previous chapter, the Committee against Torture has similarly found that the *non-refoulement* obligation in art 3 of the CAT contains procedural requirements. In the case of *Agiza v. Sweden*, a case involving the *refoulement* of an asylum seeker in contravention of art 3 of the CAT, the Committee began by observing that 'the right to an effective remedy for a breach of the Convention underpins the entire [CAT], for otherwise the protections afforded by the Convention would be rendered largely illusory.' The Committee went on to state that 'the prohibition on refoulement contained in article 3 should be interpreted ... to encompass a remedy for its breach, even though on it may not contain on its face such a right to remedy for a breach thereof.'

### III OTHER OBLIGATIONS

* Article 16 of the Refugee Convention

Article 16 of the Refugee Convention provides the right to a remedy for a breach of the *non-refoulement* obligation under art 33 of the Convention. Art 16 imposes a duty on Contracting States to ensure that refugees have free access to the courts in the territory of all Contracting States. Early commentary on art 16 did not appreciate its

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401 Ibid.


403 Ibid.

404 Ibid.
potential application to the asylum process. Following the trend toward legality in asylum procedures noted in earlier chapters, the application of art 16 has since broadened to meet the expanded role of the courts in the asylum process. Article 16 ensures that refugees have access to the courts to dispute not only civil matters, but also any adverse determination of refugee status. This right should now be recognized as essential if a putative refugee is to have the opportunity of establishing his or her status as a refugee and the resultant entitlement to non-refoulement and other Convention rights.

The application of art 16 has also benefited from the cross-pollination of human rights instruments, evident in the increased willingness of courts and commentators to read the provisions of the Refugee Convention in the context of cognate international rights instruments. James Hathaway, for example, observes that art 14 of the ICCPR offers support for the expanded scope of the right of access to the courts in art 16 of the Refugee Convention by ensuring that the right of access to the courts is matched by subject matter jurisdiction of the courts to review an adverse eligibility determination.

The effect of art 16 of the Refugee Convention when read with art 14(1) of the ICCPR, is to ensure that putative refugees also have access to the courts to challenge the legality of the decision. Nowak observes that art 14(1) of the ICCPR deems that ‘most decisions of administrative authorities, which determine individual rights, need to be subject to full judicial review by an independent and impartial tribunal ...
in line with the obligation of States under art 2(3)(b) of the Covenant to “develop the possibilities of judicial remedy against any violation of Covenant rights.”

An implied requirement of arts 16 and 14(1) is that states adopt a statutory and constitutional framework that ensures that courts have jurisdiction to rule on the legality of an adverse eligibility claim. As pointed out in later chapters, restrictive asylum policies that rely on government action or legislative measures to circumvent judicial review of asylum decision-making fail to comply with a good faith reading of arts 16 and 14(1). Extraterritorial processing of asylum claims, discussed in chapter 6 of this thesis, is a controversial example of states adopting purely administrative, extraterritorial asylum procedures that frustrate the practical enjoyment of arts 16 and 14(1).

B Article 3 of the Refugee Convention and Article 26 of the ICCPR

Article 3 provides that Contracting States shall apply the Convention’s provisions to refugees ‘without discrimination as to race, religion or country of origin’. The question arises whether art 3 applies to eligibility procedures given that they are not expressly mentioned in the Convention. The preferred opinion is that although art 3 applies ‘only to matters that are regulated by the Refugee Convention,’ it applies to procedural matters not expressly dealt with in the Convention if it can be shown that the lesser standards heighten the risk of rejection of a claim to protection and therefore refoulement.

410 Nowak, above n 126, 318.
411 See below n 965 – and accompanying text.
412 R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1, [43] (Lord Steyn).
413 Hathaway, above n 1, 252-253.
Furthermore, when read in light of the Refugee Convention’s object and purpose, art 3 affirms the principle of non-discrimination in the UDHR\(^{414}\) and therefore should be read together with art 26 of the ICCPR.\(^{415}\) Article 26 provides in terms that extend to all aliens\(^{416}\) that ‘all persons are equal before the law and are entitled without any discrimination to equal protection of the law.’ Over time it has become clear that the application of the principle of non-discrimination in art 26 is ‘not limited to those rights which are provided for in the Covenant.’\(^{417}\) Article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities.\(^{418}\)

In line with this contextual reading, art 3 and art 26 obligate States Parties to implement any measures employed to realise the full enjoyment of the Refugee Convention or ICCPR rights in a non-discriminatory manner. The discriminatory application of refugee status determination processes as between different groups of refugees would therefore contravene the prohibitions in art 3 and art 26. This prevents Contracting States depriving certain groups or classes of refugees access to the standard of protection available to other refugees under their jurisdiction.\(^{419}\)

\textit{C The right to an effective remedy before a national authority under regional instruments}

A right to an effective remedy in the asylum context is further guaranteed for asylum seekers in the Council of Europe by a combined reading of arts 3 and 13 of the

\(^{414}\) Grahl-Madsen, above n 10, 8.

\(^{415}\) Hathaway, above n 1, 257.

\(^{416}\) UN Human Rights Committee, General Comment on the status of aliens, 15/27, §§ 2, 7, 9.

\(^{417}\) UN Human Rights Committee, General Comment No. 18: Non-discrimination’ (1989), UN Doc HRI/GEN/1/Rev. 7, 12 May 2004, 146, [12].


\(^{419}\) See, eg, the practice of processing of asylum claims according to lower standards of adjudication under extraterritorial processing schemes: see below, chapter 6, n 938- and accompanying text.
Cases such as *East African Asians v. United Kingdom* and *Lukka v. United Kingdom* recognized for the first time substantive and procedural limitations on a state’s power to exclude and expel non-citizens where deportation could lead to an infringement of art 3 of the ECHR.\(^{421}\)

Article 13 of the ECHR provides that ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority …’ As stated by the ECtHR in *Kudla v Poland*, art 13 gives ‘direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishing an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.’\(^{422}\) Sedley LJ in *R v Camden and Islington Health Authority ex parte K* likened art 13 to the ‘long-standing principle’ of the common law that ‘where there is a right there should be a remedy’.\(^{423}\) Article 13 requires that persons must have access to effective remedies in order to prevent expulsion in violation of art 3 of the ECHR.\(^{424}\) Traditional grounds of judicial review of the exercise of executive discretion in asylum proceedings – illegality, irrationality, procedural impropriety - are able to accommodate art 3 considerations so as to constitute an effective remedy for the purposes of art 13.\(^{425}\) However, the

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422. 26 October 2000, [152].

423. [2001] EWCA Civ 240. Although Article 13 was not incorporated into Schedule 1 to the HRA, courts in the UK have regarded themselves as bound as a matter of international law to accommodate Article 13 in to the fashioning of traditional remedial measures: Ibid.


425. *Soering v UK* (1989) 11 EHRR 439. The European Court followed *Soering* in the decision of *Vilvarajah v UK*, where it stated that ‘While it is true that there are limitations on the powers of the courts in judicial review proceedings the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of
court’s examination of the existence of a real risk of ill-treatment under art 3 must be a rigorous and consider the underlying factual material to determine if it discloses a risk of inhuman or degrading treatment.  

The body granting the remedy should be a court, or a quasi-judicial body composed of impartial members that enjoy safeguards of independence, that has the competence to determine the existence of the conditions laid down by art 3 and to grant appropriate relief.  

The appeal should also include procedural safeguards, including reasonable time limits for exercising the appeal, practical accessibility (e.g. legal aid), and scrutiny of the allegations that return will lead to a violation of human rights.  

The appeal should also have suspensive effect.  

Access to a court must also comply with the due process requirements of art 6 of the ECHR.

the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13': (1991) 14 EHRR 248, [126].

Committee of Ministers, Recommendation (No. R (98) 13), On the right to effective remedy for rejected asylum seekers against the evictions in the context of Article 3 of the European Convention of Human Rights, 18 September 1998, [2.1], [2.2].

Committee of Ministers, Twenty guidelines on forced return, On May 4, 2005, Principle No. 5.


A right of access to the courts is also found in art XVIII of the American Declaration of the Rights and Duties of Man, which provides that every person has the right to ‘resort to the courts to ensure respect for ... legal rights’ and to have to access to a ‘simple, brief procedure whereby the courts’ will protect him or her ‘from acts of authority that ... violate any fundamental constitutional rights.’ Further, in accordance with art II of the Declaration, ‘all persons are equal before the law and have the rights and duties established in this Declaration ...’ These rights apply equally to aliens as a founding principle of the Declaration was to assure ‘the equal protection of the law to nationals and aliens alike ...’\(^{431}\) The Commission has also found that art XVIII is not confined to persons accused of crimes, but also extends to asylum claimants seeking to vindicate their rights.\(^{432}\)

According to the Inter-American Commission on Human Rights, the effect of the right of access to the courts and right of equal protection is ‘to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required.'\(^{433}\) The Commission further stated that ‘implementation of the overarching objective of the Declaration – ensuring the effectiveness of the fundamental rights and freedoms set


forth – necessarily requires that judicial and other mechanisms are in place to provide recourses and remedies at the national level.\textsuperscript{434}

In the context of asylum procedures, the Commission has noted the importance of these rights to the realization of other core rights in the Declaration.\textsuperscript{435} The Commission observed that ‘the right particularly at issue in the refugee context is to seek asylum with the corresponding guarantees, as set forth in Article XXVII of the Declaration. Those guarantees are themselves a means to safeguard the fundamental rights to, inter alia, liberty, integrity and life recognized in Article 1 of the Declaration.’\textsuperscript{436} The Commission further observed:

A procedural framework that is adequate to make those rights effective is one which provides mechanisms which effectively establish whether a person meets the applicable standard of risk. In the refugee context, this requires procedures effective in establishing the relevant facts, and interpreting and applying the relevant norms.\textsuperscript{437}

\textbf{IV THE IMPORTANCE OF ADMINISTRATIVE, STATUTORY AND JUDICIAL MECHANISMS TO A FAIR AND EFFECTIVE ASYLUM PROCESS}

\textit{A The trend toward legality in asylum procedures}

In examining the recent development of asylum, Colin Harvey describes ‘an evolutionary movement towards legality …’ in the asylum arena.\textsuperscript{438} According to Harvey, this saw an area dominated by administrative discretion gradually come

\textsuperscript{434} Ibid.\textsuperscript{435} Ibid [104].\textsuperscript{436} Ibid.\textsuperscript{437} Ibid.\textsuperscript{438} Harvey, above n 3, 145.
under the influence and control of legal regulation. Harvey’s analysis accords with the observations in the second chapter of this thesis. As observed in that chapter, legislative measures designed to safeguard asylum seekers against exclusion and expulsion disappeared with the onset of the world wars as unfettered administrative decision-making again dominated in the UK as elsewhere. However, the post-war period gradually saw greater control over the determination process by parliament and greater oversight of individual asylum determinations by the courts and other independent tribunals and scrutineers (tribunals, human rights commissions, ombudsman).

The shift to legality in the asylum area was symptomatic of the extension of administrative law principles to immigration decisions in many states during this period. In the US, for instance, Motomura observed that the ‘flowering’ of due process protections in immigration cases in the US during the 1970s and 1980s owed ‘much of its growth to the “due process revolution” of the 1970s, which greatly expanded constitutional scrutiny of procedural protections in civil matters generally.’

In the asylum arena, this general shift toward legality saw the evolution of key protection safeguards. They included: the incorporation of a legislative basis for the

439 Ibid.
441 Ibid.
443 Motomura, above n 442, 1632.
grant of refugee status, usually accompanied by the incorporation of the definition of refugee in art 1A of the Refugee Convention; the establishment of a statutory procedure to determine the grant of asylum; the instigation of merits review of adverse asylum determinations by independent tribunals; the oversight of the administration of laws by the Ombudsman and human rights agencies; and a newfound willingness of courts to review the legality of protection decisions.

In large part, these reforms were driven by a growing concern that government should not be sole arbiter of the grant of protection, with no statutory procedural

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447 Hyndman, above n 138, 725.

448 UK: Bugdaycay v Secretary of State for the Home Department [1987] AC 514; R v Secretary of State for the Home Department Ex p. Singh [1987] Imm AR 489; R v Secretary of State for the Home Department v Thirukumar [1989] Imm AR 402. Australia: Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290; Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; Azemoudeh v Minister for Immigration and Ethnic Affairs (1985) 8 ALD 281; Johnson, above n 68, 51. New Zealand: Benipal v Ministers of Foreign Affairs and Immigration (29 November 1985) High Court Auckland A993/83 Chilwell J (exposing unfairness in refugee status procedures). US: Motomura, above n 442, 1673-1675 (discussing the Orantes-Hernandez litigation filed in the US in 1980: Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D.Cal.1982) (preliminary injunction); Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. 1988) (permanent injunction), aff’d sub nom. Orantes-Hernandez v. Thornburgh, 919 F. 2d 549 (9th Cir. 1990). The litigation was brought on behalf of all Salvadorans in INS detention who were eligible to apply for asylum, but who were summarily removed before they could file asylum claims. In the process, the INS failed to advise claimants of their right to apply for asylum and failed to grant claimants access to volunteer legal counsel. In 1988, Judge Kenyon issued a permanent injunction prohibiting many of these practices. Judge Kenyon held that the INS unlawfully impeded the Salvadorans' access to asylum 'with a summary removal process, usually carried out by the INS with little or no regard for procedural or substantive rights:' Orantes, 541 F. Supp. at 354.)
requirements for decision-making and no right of appeal to an independent authority. Arbitrariness in asylum decision-making was seen as unfair. Asylum decision-making should be governed by the rule of law.

Supporters of the Swiss Asyl Gesetz of 1979, for example, argued for statutory control of the asylum process on the basis that ‘the institutions of the state must abide by norms and the substantial content of these norms cannot be based on instructions and departmental guidelines, but must be anchored in clear formal laws.’ These were essentially the same concerns that drove parliamentarians to contest the domination of arbitrary power in the asylum arena in the 18th century. Now, however, these concerns were heightened by the existence of modern day limitations on state discretion in international law (e.g. the non-refoulement obligation).

B How to make use of progressive developments in asylum procedures

It is debatable whether the trend toward legality in the asylum policies of states during the post-war period amounts to ‘state practice’ for the purposes of interpreting the Refugee Convention and cognate rights instruments. According to art 31(3)(b) of the Vienna Convention on the Law of Treaties, treaties are to be interpreted in the light of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’ However, it is far from clear

449 See, eg, W Wilson, ‘Report to the Rt Hon WF Birch, Minister of Immigration, on the Process of Refugee Status Determination’ (Wellington, 1992), 10 (The NZ ‘procedures were changed ... because of the perception that it was unfair that Government was the sole arbiter, with no right of appeal to an independent authority’), cited in Arakaki, above n 37, 103.

450 Steiner, above n 444, 31.

451 See above n 187 – and accompanying text.

that such practices were motivated by the necessary sense of legal obligation (*opinio juris*).\(^{453}\)

In any event, the better approach is to use these evolving practices as evidence of ‘effective measures’ that states should employ in order to enhance the fairness and effective of their own eligibility procedures. This follows the general approach of the HRC, the Committee Against Torture, and the CESCR, which discern the existence of ‘effective measures’ that direct states’ implementation of their obligations under international rights treaties.\(^{454}\)

These supervisory bodies derive evidence of ‘effective measures’ through the review of successive reports from states, the examination of individual communications, and the monitoring of developments.\(^{455}\) In terms of the general obligation on states to


\(^{454}\) Committee against Torture, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 (Implementation of Article 2 by States Parties)*, CAT/C/GC2/CRP.1/Rev.4, [4], [12] (‘[4] ... States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications ... the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution ...’); CESCR, *General Comment 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, (‘[5] ... Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party ...’). But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant ‘...’).

\(^{455}\) Committee against Torture, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 (Implementation of Article 2 by States Parties)*, CAT/C/GC2/CRP.1/Rev.4, [12]; Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007,
ensure the domestic implementation of treaties (under art 2 of the ICCPR, ICESCR and CAT) and to build upon specific articles in rights treaties, these bodies then make recommendations for specific actions designed to enhance each state’s capacity to effectively implement measures that are necessary and appropriate to prevent the breach of human rights. The requirements spelt out by these supervisory bodies amount to an evolving ‘baseline’ of compliance.

In this way, evidence of evolving human rights practices and standards define states’ progressive and positive obligations to ensure the practical and effective implementation of their protection obligations. This ensures that progressive human rights practices are able to evolve ‘upwards’ from the national to the international and regional level, filtering out those practices that are regressive rather than progressive. They are then utilized as evidence of ‘effective measures’ that states should utilize in the context of their own domestic framework where they enhance the protection of rights.

This approach allows for a principled use of emerging national practices, rather than seeking to establish them as ‘state practice’ (an inherently unreliable and difficult task

(HRC deriving a series of baseline measures necessary to safeguard the right to equality before the courts and tribunals from the HRC’s views as expressed in individual communications).

Committee against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 (Implementation of Article 2 by States Parties), CAT/C/GC2/CRP.1/Rev.4, ('[4] ... the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution ... [13] The Committee’s recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive ... [14] Experience since the Convention came into force has enhanced the Committee’s understanding of the scope and nature of the prohibition against torture, of the methodologies of torture, of the contexts and consequences in which it occurs, as well as of evolving effective measures to prevent it in different contexts. For example, the Committee has emphasized the importance of having same sex guards when privacy is involved. As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999, or new approaches to public education or the protection of minors) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.'

See above n 349 – and accompanying text.
when undertaken in the context of multilateral human rights treaties). It also allows for the evolution of standards of protection. Human rights treaties are ‘living instruments’ so that while their ‘meaning does not change over time [their] application will." The reach of the Refugee Convention and other relevant international and regional rights treaties are not fettered to the intentions of those who framed them. States should ‘afford continuing protection for refugees in the changing circumstances of the present and future world.’ Thus, states should take advantage of improvements in national legal and institutional mechanisms that enhance the fairness and effectiveness of the asylum process, rather than circumvent their application.

Implementing ‘effective measures’ at the national level involves comparison and understanding of how those mechanisms are best employed within the legal and constitutional context of each country. While the exact configuration of asylum procedures will differ between states, a common element should be that they are designed and implemented in accordance with the humanitarian object of protection.

As stated recently by the Assistant High Commissioner – Protection, UNHCR:

States have a flexible margin of discretion to design and implement a national procedure that is appropriate to their national context. All procedures must, however,
serve the humanitarian object and purpose for which they were intended – here, the effective identification and protection of the rights of refugees.\textsuperscript{462}

It follows that mechanisms that improve the fairness and effective of asylum procedures should not be seen as simply evidence of ‘best practice’,\textsuperscript{463} but as ‘effective measures’ that states are obliged to apply where they enhance the fairness and effective of asylum procedures within their own jurisdictions.

The following discussion seeks to identify administrative, judicial and legislative mechanisms that amount to ‘effective measures’ that are capable of general application by states. By highlighting how these mechanisms contribute to a fair and effective asylum process, this chapter serves to illustrate ways in which states should make use of those mechanisms in their asylum procedures. The following discussion makes use of a range of sources, including general UNHCR documents\textsuperscript{464} and UNHCR comments on the asylum procedures of states,\textsuperscript{465} the views and comments of the HRC and the Committee against Torture, and the effective measures identified in regional and national inquiries and reports.


\textsuperscript{463} UNHCR, \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001, [3], [50]. See, also, the use of the notion of ‘best practice’ in Professor Legomsky’s UNHCR-sponsored study on safe third country practices: UNHCR, \textit{Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection}, February 2003, PPLA/2003/01, 52.


C Administrative mechanisms and practical measures that contribute to a fair and effective asylum process

The first instance stage of national asylum procedures usually involve administrative decision-makers and tribunals. Key administrative measures that are essential to effective first instance decision-making include: the establishment of one central authority to determine protection claims; training of decision makers; the allocation of proper resources to first instance decision-making processes; the use of suitably qualified and impartial interpreters; and the creation and maintainance of a reliable country of origin information base. As the following discussion demonstrates, these administrative measures are essential components in reducing the risk of *refoulement* and safeguarding protection by ensuring the timely\(^\text{466}\) and accurate identification of persons in need of protection. They also seek to ensure the non-discriminatory treatment of asylum seekers by providing a common baseline of good and unbiased decision-making.

The body responsible for examining and deciding asylum applications in the first instance should be a single, specialized authority.\(^\text{467}\) The existence of **one central authority** to determine protection claims focuses the specialist expertise and knowledge required to determine claims to protection under various international rights instruments into one organization.\(^\text{468}\) It follows that decisions on asylum should

\(^{466}\) Feller, above n 462, 6.

\(^{467}\) EXCOM Conclusion No 8 (XXVIII)-1977, (e)(iii); *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](i).

not be made by border officials, but should be referred to the competent authority.\textsuperscript{469}

To be effective, this requires that border officials be required to act in accordance with the \textit{non-refoulement} obligation and to refer claims to the competent authority.\textsuperscript{470}

A case study of where this requirement has been undermined is the recent EU Asylum Procedures Directive.\textsuperscript{471} As noted by the UNHCR, the EU Asylum Procedures Directive arguably threatens the efficacy of the requirement by allowing a wide range of exceptions to the general rule that Member States designate one central authority for determining asylum claims.\textsuperscript{472} This increases the risk of \textit{refoulement} by exposing asylum seekers to decision-making by authorities that are of lesser quality due to a lack of appropriate expertise and experience or access to relevant country information.\textsuperscript{473} One could add, the decision-making of border control officials in such cases as \textit{Gebremedhin v France} (discussed further below)\textsuperscript{474} indicates that border officials are also more likely to unduly preference immigration control over protection.

\textbf{Training and selection} of decision-makers ensures that officials properly apply the refugee definition and other eligibility criteria to include all persons entitled to

\begin{itemize}
\item \textsuperscript{469} EXCOM Conclusion No 8 (XXVIII)-1977, (e)(i) (‘to refer such cases to a higher authority’) cf \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001 [50(i) (‘an applicant not be rejected or denied admission without reference to a central authority’).
\item \textsuperscript{470} EXCOM Conclusion No 8 (XXVIII)-1977, (e)(i) (‘The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might me within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.’)
\item \textsuperscript{473} Ibid.
\item \textsuperscript{474} \textit{Gebremedhin v France}, ECHR, No 25389/05, 27 July 2007; see below n 604 – and accompanying text.
\end{itemize}
Decision-makers are required to exercise considerable expertise and skill in determining an asylum application. A recent study of the US asylum adjudication system has highlighted the importance of training for both officials responsible for the initial determination and officials or tribunal members responsible for reviewing the merits of first instance decisions. As noted above, border officials who refer claims to the competent authority should also receive training in identifying possible claims to protection.

Given the nature of asylum applications, there should be inter-cultural training that safeguards against discrimination. Training should be provided to enable the sensitive handling of claims involving applicants with special needs, including applicants who have suffered torture and trauma. States should also ensure that officers are trained and operate in gender-sensitive and child-sensitive asylum procedures. There should also be regular updates on changing country conditions in key refugee-producing countries and regions. Decision-makers should be selected who possess a base set of skills and qualifications that enable them to perform the challenging task of collating country information, forming judgments as to the veracity of the applicant’s claim, and weighing complex legal eligibility criteria.

**Resources** must be adequate to enable decision-makers to properly perform their role in accurately identifying persons in need of protection. In an examination of Australia’s refugee status determination system, the Senate Legal and Constitutional

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475 *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](j).
476 Ramji-Nogales, Schoenholtz, Schrag, above n 69, 381.
477 *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](j).
478 *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](n).
479 EXCOM Conclusion No 105 (LVII) – 2006, (n); EXCOM Conclusion No 107 (LVIII) – 2007, (c); *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](n).
480 *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001 [50](j).
References Committee observed that as ‘decision-makers play a critical part in the fulfilment of the [non-refoulement] obligation, consideration should be given to whether they are well enough resourced to assist them in identifying ‘refugees’.\textsuperscript{481}

The Senate committee subsequently recommended that ‘the Government ensures decision-makers are well enough resourced to facilitate proper assessment of claims for refugee status in accordance with the Convention definition of ‘refugee’’.\textsuperscript{482} As noted by Canada’s Standing Committee on Citizenship and Immigration, the number of decision-makers must also be equal to the task of dealing with applications.\textsuperscript{483}

**Interpreter and translator services** are also essential to the proper communication between the asylum claimant and the asylum claimant’s legal adviser and the decision-maker. Accurate information is critical to the eligibility determination process. Asylum claimants must be able to understand their rights and obligations and the basis on which their claims for asylum will be accepted. Access to interpreters (and translators) is ‘critical since it is generally the medium by which such communication takes place’.\textsuperscript{484} Poor interpretation can create ‘an almost insuperable obstacle to the clear presentation of a claim’.\textsuperscript{485} Interpreters therefore should be competent.\textsuperscript{486} They should also be impartial.\textsuperscript{487} The claimant should also perceive the interpreter to be impartial – as trust is essential between claimant and

\textsuperscript{481} Senate Legal and Constitutional References Committee, above n 74, [2.40].

\textsuperscript{482} Ibid [2.42].

\textsuperscript{483} House of Commons, Canada, *Safeguarding Asylum – Sustaining Canada’s Commitments to Refugees*, Report of the Standing Committee on Citizenship and Immigration, May 2007, 39\textsuperscript{th} Parliament, 1\textsuperscript{st} Session, n 49 - 71 – and accompanying text (recommending boosting the numbers of decision-makers to alleviate the backlog in refugee status applications).

\textsuperscript{484} Senate Legal and Constitutional References Committee, above n 74, [3.31].

\textsuperscript{485} *Refugee Status Determination Process*, above n 36, 27.

\textsuperscript{486} EXCOM Conclusion No. 8 (XXVIII)-1977, (e)(iv).

\textsuperscript{487} UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, [50].
interpreter if the claimant is to divulge sensitive information through the interpreter. For example, the situation should be avoided where an interpreter is from an ethnic group that has historically persecuted the applicant’s ethnic group.

Prompt access to legal advice and assistance upon the entry of an asylum seeker into the jurisdiction of a state is essential to ensuring that an asylum claimant is able to clearly present his or her claim to protection.\(^{488}\) The importance of this requirement is reflected in the report of the Canadian Task Force on Immigration Practices and Procedures, which noted that there was no right to legal advice during the initial interview by the port of entry interviewing officer under the Canadian system at the time.\(^{489}\) This was considered to be detrimental to the applicant because anything that was said at the initial interview could later be used by the Refugee Status Advisory Committee.\(^{490}\) Statements that the applicant made in ignorance of the applicant’s rights could thus be used against them. The Task Force also alluded to the importance of having a legal representative available in order to avoid suggestions of official intimidation, including hostile interrogations and threats of deportation.\(^{491}\) The Task Force recommended that a potential refugee claimant should have a right to counsel immediately upon indication of his intention to ask for refugee status and should be informed of this right.\(^{492}\)

\(^{488}\) UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [50](g).

\(^{489}\) Refugee Status Determination Process, above n 36, 21.

\(^{490}\) Ibid.

\(^{491}\) Ibid.

\(^{492}\) Ibid.
The right to legal assistance and representation should apply to all stages of asylum adjudication. The notion that departmental and tribunal review processes can be set up so that applicants do not need legal advisers to prepare or pursue their claims fails to acknowledge the legal complexity of the refugee definition and the associated procedural steps required to establish the merits of a claim.

An equally disingenuous notion is that because decision-makers bear the burden of ensuring that the state does not breach its international obligations, there is 'no need for the applicant, either through advice or individually, to have a thorough knowledge of refugee case law ...' This assertion fails to appreciate that the 'particular vulnerability of some applicants and their language difficulties, combined with a lack of experience of [local] administrative processes make it difficult for them to lodge a high quality application.' It is naïve to believe that the lack of legal assistance will not adversely impact on the chances of a successful claim. People who are trying to prove that they are refugees 'should not be required to compile supporting affidavits and make highly technical legal arguments without professional advocates, when the consequences of losing may be deportation in which they face

\[...

493 UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [50](g).
494 See, eg, the policy of Australia’s Department of Immigration and Multicultural Affairs on legal assistance as indicated in evidence before the Senate Legal and Constitutional References Committee: Senate, above n 74, [3.12] ('Departmental and review tribunal processes, especially those relating to refugee claimants, have been carefully set up with the explicit aim of ensuring that applicants do not need legal advisers to prepare or pursue their claims.')
495 This point was acknowledged by the Senate Legal and Constitutional References Committee in its report, above n 74, [3.34].
496 See the evidence of Australia’s Department of Immigration and Multicultural Affairs before the Senate Legal and Constitutional References Committee: Senate, above n 74, [3.15].
497 Senate, above n 74, [3.40].
498 Ramji-Nogales, Schoenholtz, Schrag, above n 69, 384 (observing a 'gap between the unrepresented affirmative asylum applicants in immigration court who win at a rate of 16% and the represented applicants who win at a rate of 46%.')
imprisonment, torture, and death. Providing legal assistance can contribute to the initial determination stage and on appeal by ensuring that the relevant information is placed before the decision-maker in a timely and comprehensible fashion.

The claimant should also be given the opportunity to present his or her entire claim, including any relevant evidence and country background information. The claimant may well have country information that is not available to or known by the decision-maker. The claimant should be entitled to a personal interview based on a thorough assessment of the circumstances of his or her case. This should include a written decision deciding the claim so that the applicant knows why his or her claim has been rejected. Moreover, decision-makers should take into account all facets of the non-refoulement obligation, not only under the Refugee Convention, but also under the ICCPR and the CAT.

There should be a right of appeal to an authority different from and independent of that making the initial decision. This should be a tribunal or committee with the authority to engage in a full de novo hearing of the case. Independent merits review ensures greater consistency and reliability in the determination process.

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499 Ramji-Nogales, Schoenholtz, Schrag, above n 69, 384.
500 Senate, above n 74, [3.37].
501 Refugee Status Determination Process, above n 36, 28-29; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [43], [50].
503 UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001 [50](b).
504 Ibid [50](o).
505 Ibid [50](e).
506 Ibid [43].
507 Safeguarding Asylum — Sustaining Canada’s Commitments to Refugees, above n 483, n 17 – 31 and accompanying text (recommend ing immediate implementation of the Refugee Appeals Division as set out in the Immigration and Refugee Protection Act 2002 (Canada) based on the benefits of merits review).
importance of appeal on the merits to an independent body means that internal review before an officer of the same government department that made the original determination of refugee status is no longer satisfactory.\textsuperscript{508} For example, the UNHCR recently queried the lack of independent merits review under Australia’s offshore processing policy (as well as the access to legal advice and judicial review).\textsuperscript{509} Canada’s Standing Committee on Citizenship and Immigration raised similar concerns in relation to the Canadian Government’s reluctance to implement the Refugee Appeals Division as provided for in the \textit{Immigration and Refugee Act 2002} (Canada).\textsuperscript{510} An integral aspect of an appeal is that the applicant should be permitted to remain in the country until his or her claim is decided and the applicant has exhausted all avenues of appeal.\textsuperscript{511}

\textbf{D Legislative mechanisms that ensure a fair and effective asylum process}

Since the 1980s, the UNHCR has recognized the importance of incorporation of the Refugee Convention into domestic law, particularly as regards asylum procedures, as a principal means of ensuring the Convention’s effectiveness.\textsuperscript{512} In most

\begin{flushleft}
\textsuperscript{508} Ibid. Cf EXCOM Conclusion No. 8 (XXVIII)-1977, (e)(vi) (‘If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system’ [emphasis added]).

\textsuperscript{509} UNHCR, Migration Amendment (Designated Unauthorised Arrivals) Bill, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Committee, 22 May 2006, [21].

\textsuperscript{510} \textit{Safeguarding Asylum – Sustaining Canada’s Commitments to Refugees}, above n 483.

\textsuperscript{511} EXCOM Conclusion No 8 (XXVIII)-1977, (e)(iv).

\textsuperscript{512} EXCOM Conclusions No 29 (XXXIV) – 1983 (h) (‘Noted with satisfaction that further States have adopted national measures to ensure the effective implementation of the provisions of the 1951 Convention and the 1967 Protocol, particularly as regards procedures for the determination of refugee status, and stressed the importance for States to establish such procedures to ensure fair and equitable decision-making in line with the conclusions adopted by the Executive Committee at its twenty-eighth [No. 8] and thirty-third sessions [No. 28]’), No 46 (XXXVIII) – 1987 (r) (‘Welcomed the recent adoption by a number of States of national administrative and legislative measures to implement effectively the provisions of the international refugee instruments, including the establishment of appropriate procedures for the determination of refugee status.’)
\end{flushleft}
jurisdictions, statutory measures are essential to the enforceability of the requirements guaranteeing a full and fair asylum hearing. This is because they ensure the operation of the principle of legality of government action - the rule of law - in the asylum process. The rule of law 'requires that there be statutory authority for acts of the executive that impinge on citizens and other private persons.'

By incorporating the requirements for a fair and effective asylum process by way of legislation, there is more likelihood that the requirements will be observed by governments. The existence of binding statutory duties to grant protection to a person who meets the definition of a refugee or some other form of complementary protection provides a legal and institutional framework for the exercise of administrative decision-making during the asylum process. These legislative measures grant the courts the opportunity to step in to scrutinize the legality of asylum decision-making and procedures.

In the US, for example, the passage of the Refugee Act of 1980 was intended to eliminate arbitrary and discriminatory treatment of asylum seekers based on race and nationality. This practice was evident in the INS's use of summary administrative removal practices to effectively deny access to the asylum process to Salvadorans.

When granting an injunction to prohibit those practices, Judge Kenyon relied on the fact that 'Congress passed the Refugee Act to rectify the discriminatory treatment of refugees under then-existing immigration law.' The passage of the Refugee Act

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514 Harvey, above n 3, 151.
515 Motomura, above n 442, 1674 n 259.
516 Ibid 1672-1675.
was also interpreted by the courts as giving rise to other substantive and procedural rights as part of the asylum process,\textsuperscript{518} eg stowaways being granted access to an exclusion hearing where they could make asylum claims,\textsuperscript{519} or asylum claimants having access to adequate translation facilities.\textsuperscript{520}

The significance of statutory protections is further apparent on the facts of the Australian High Court case of \textit{Minister for Immigration and Ethnic Affairs v Mayer}.\textsuperscript{521} That case concerned the then recently introduced s 6A of the \textit{Migration Act 1958} (Cth), which incorporated the refugee definition found in the Refugee Convention into Australian law for the first time.\textsuperscript{522} Mayer was from the Indonesian province of Irian Jaya. It was accepted by the Australian authorities at the time that he had been imprisoned for a period of time by the Indonesian authorities due to his opposition to Indonesian control of Irian Jaya. He fled to Papua New Guinea but was unable to obtain citizenship of that country. Arriving in Australia, Mayer made an application for refugee status to the Minister under the then s 6A of the \textit{Migration Act 1958} (Cth). The Minister rejected the application without providing reasons for his decision contrary to recently introduced legislation in Australia that required, amongst

\begin{itemize}
  \item \textit{Fernandez-Roque v Smith} 567 F Supp 1115 (ND Ga 1983) (INS in violation of due process clause by not providing detained excludable Cuban aliens with a fair hearing).
  \item \textit{Haitian Refugee Center v Smith} 676 F 2d 1023 (5th Cir 1982) (alien seeking political asylum may invoke due process guarantees).
  \item \textit{Augustin v Sava} 735 F 2d 32 (2d Cir 1984). See generally: Legomsky, 1987, above n 221, 212 (observing that then recent asylum and immigration cases, including \textit{Augustin v Sava} and \textit{Chun v Sava}, were making inroads into the traditional plenary power doctrine that marked judicial deference to the executive in immigration matters).
  \item (1985) 157 CLR 290.
  \item That section provided that an entry permit would not be granted to a non-citizen after his or her entry into Australia unless stipulated conditions were fulfilled. One condition (para (c)) was that the non-citizen held a current temporary entry permit ‘and the Minister has determined, by instrument in writing, that he has the status of refugee’ within the meaning of the Refugee Convention.
\end{itemize}
other things, that government officers must provide reasons for a decision made under an enactment.\textsuperscript{523}

The High Court held that the fact that the power to determine refugee status was exercised pursuant to statutory authority ensured the Minister’s power to determine refugee status was reviewable by a court of law, and consequently, that the Minister’s international obligation to determine refugee status was compellable in a court of law.\textsuperscript{524} Thus, the incorporation of the definition of refugee under the Refugee Convention into Australian law (via s 6A of the \textit{Migration Act 1958} (Cth)) was instrumental in ensuring that Mayer was entitled to reasons for the decision denying his claim to protection. The act of incorporation overcame the Minister’s argument – reflecting the orthodox view discussed in chapter 1 - that ‘[a]ny determination made by the Minister is not made under the Act or given any efficacy by it. It is entirely a matter of domestic administrative procedure, the international Convention being silent as to how refugee status is to be declared’.\textsuperscript{525}

Since the decision in \textit{Mayer}, the Australian Parliament has passed legislation that establishes a ‘code of procedure’ for dealing with protection visa applications (along with applications for visas of other classes and subclasses) ‘fairly, efficiently and quickly’.\textsuperscript{526} These set out steps that the Minister and a visa applicant must follow.\textsuperscript{527}

They include a number of basic procedural rights: the right to make written or oral

\textsuperscript{523} As part of the general trend toward more accountable administrative decision-making, the \textit{Administrative Decisions (Judicial Review) Act} (Cth) (AD(JR) Act) had been enacted in 1977. Section 13(1) of the AD(JR) Act entitled persons affected by a decision which could be reviewed under the grounds set out in s 5 of the Act to seek reasons for that decision. The effect of the wording in s 13(1) was that the decision had to be under the enactment.

\textsuperscript{524} (1985) 157 CLR 290, 301 (Mason, Deane and Dawson JJ).

\textsuperscript{525} The Commonwealth argued that s 6A(1) did not confer power on the Minister to determine refugee status, but merely referred to an existing system devised by the executive: (1985) 157 CLR 290, 300.

\textsuperscript{526} \textit{Migration Reform Act} 1992 (Cth); Subdivision AB of Pt 2, Div 3 of the \textit{Migration Act 1958} (Cth).

\textsuperscript{527} \textit{Minister for Immigration and Multicultural Affairs v A} (1999) 91 FCR 435, 441 (Merkel J).
submissions to the decision-maker;\textsuperscript{528} the right to have all submitted material considered by the decision-maker;\textsuperscript{529} the right to provide additional information before the making of a decision;\textsuperscript{530} and the right to comment on relevant information held by the decision-maker if the information was not provided to the decision-maker by the applicant.\textsuperscript{531}

It is relevant to note at this point that the importance of statutory protections is further apparent when we consider the results of government attempts to circumvent them. The ongoing discriminatory treatment of Haitian refugees in the 1980s and 1990s under the US interdiction policy, discussed in chapter 6 of this thesis, occurred intentionally outside the territorial scope of the US asylum statutes and regulations. As further elaborated in chapter 6, this seriously undermined one of the benefits of statutory protection - the elimination of the prejudgment of asylum claims based on nationality.\textsuperscript{532} Similarly, chapter 6 records that the Australian interdiction and extraterritorial processing policy that operated between 2001-2008 also effectively prevented many asylum seekers from accessing and enjoying the procedural safeguards found under Australian law – leading to asylum procedures that were arbitrary, unreliable and non-transparent.

\textsuperscript{528} Migration Act 1958 (Cth), s 54(3).

\textsuperscript{529} Migration Act 1958 (Cth), s 54.

\textsuperscript{530} Migration Act 1958 (Cth), s 55. The Minister is however not required to delay making a decision because the applicant might give, or has told the Minister of an intention to give, further information.

\textsuperscript{531} Migration Act 1958 (Cth), s 57. Section 65 provides that, after considering a visa application, if the Minister is satisfied that the criteria for the visa are satisfied, the Minister is to grant the visa, and if not so satisfied, the Minister is to refuse the visa. Section 69 provides that non-compliance by the Minister with subdivision AB does not mean that a decision to grant or refuse a visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

\textsuperscript{532} Orantes-Hernandez v. Smith, 541 F. Supp. 351, 380 n 37 (C.D.Cal.1982) (‘it is this prejudgment of the claims based on nationality which Congress specifically intended to eliminate by passing the Refugee Act’) cited in Motomura, above n 442, 1674 n 259.
There is also growing recognition of the need for states to incorporate international obligations under the CAT and ICCPR into domestic law where that is necessary for the effective enforcement of those obligations.\textsuperscript{533} A Senate inquiry into Australia’s asylum process shared the concern of submissions that argued that the failure to incorporate the non-refoulement obligation under the ICCPR and the CAT into Australian law meant that there was ‘no mechanism that is subject to the rule of law, which provides a safeguard against people being returned to countries in circumstances which are contrary to Australia’s obligations under treaties other than the Refugee Convention.’\textsuperscript{534} The Senate inquiry recommended that the relevant government departments ‘examine the most appropriate means by which Australia’s laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR into domestic law.’\textsuperscript{535}

\textbf{D Effective judicial remedies}

The involvement of the judiciary in asylum adjudication is a fundamental safeguard. Judicial review injects substantive and procedural principles into the asylum process. Ultimately, the need for an independent judiciary to enforce a state’s protection obligations rests ‘upon pragmatic recognition that the effective protection of rights commonly requires that judicial intervention resolve conflicts of interests, or set limits to the scope of discretionary power, in accordance with the rule of law’.\textsuperscript{536}

Appropriate legislative and administrative measures are important to the effective involvement of the courts in asylum adjudication. The provision of legal assistance,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{533} See generally, Tomuschat, above n 275, 98.
\item \textsuperscript{534} Senate, above n 74, [2.64].
\item \textsuperscript{535} Ibid [2.65].
\item \textsuperscript{536} Goodwin-Gill, above n 344, 145.
\end{enumerate}
\end{footnotesize}
for example, often determines whether an asylum claimant can access judicial proceedings in a meaningful way.\textsuperscript{537} Time limits on appeals should be reasonable and where enforced courts should have a discretionary power to waive time limits in exceptional circumstances, e.g. the negligence of legal advisers. Interpreter and translation services are also essential to the effective enjoyment of judicial remedies. As noted previously, appeals should also have suspensive effect.\textsuperscript{538}

One of the principal benefits to asylum adjudication from court involvement is that it assists in the effective identification of persons entitled to protection. Effective identification depends on an inclusive approach to interpretation of key eligibility criteria. Not only are courts able to remedy defective interpretations in individual cases, but they can also develop a body of international jurisprudence that guides asylum decision-making by officials. The courts (as well as other asylum decision-makers) have displayed an increasing willingness to engage with jurisprudence on the refugee definition from other jurisdictions.\textsuperscript{539} This encourages a rights-focused interpretation in keeping with the broad and inclusive humanitarian object and purpose of the Refugee Convention, the ICCPR, CAT and other rights instruments.\textsuperscript{540}

This consequence of judicial involvement was not necessarily a given. As a matter of strict common law orthodoxy, for instance, it was open to the courts in common law jurisdictions to view the various terms constituting the definition of refugee as matters

\textsuperscript{537} HRC, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, [10].

\textsuperscript{538} See above n 399 – and 429 – and accompanying notes.

\textsuperscript{539} Rawlings, above n 41, 391; Crock, above n 41, 57-58; Thomas, above n 250, 485; Foster, above n 116, 22.

\textsuperscript{540} See, eg, cases expanding the meaning of a ‘particular social group’, such as Chen Shi Hai \textit{v} Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 (the High Court of Australia recognized that second children born in contravention of China’s one child policy were a ‘particular social group’ for the purposes of the refugee definition; \textit{R v Secretary of State for the Home Department ex p Shah and Islam} [1999] 2 AC 629 (the UK House of Lords held that women from Pakistan constituted a ‘particular social group’).
of fact that were not subject to judicial review. However, because the purpose and scope of the definition is to protect appellants from human rights abuses, the courts strained ‘to extend the Convention’s shield to offer succour.’ The courts have generally done this by carefully constructing the interpretation of the refugee definition as an instance of their traditional interpretative function.

Furthermore, judicial decisions can extend the refugee definition to capture a range of persecutory conduct not contemplated fifty, twenty or even ten years ago. An inclusive approach to the definition of refugee ensures the contemporary relevance and effectiveness of the Refugee Convention. In this way, judicial involvement can help avoid ‘[a] technical consideration of the elements of the Convention definition of refugee, [that] can rapidly turn an examination of a living instrument into an anatomical dissection of a dead one.’ The courts are ideally placed ‘to join the elements together to achieve the purposes envisaged by the Convention’s drafters; not to find technical reasons for refusal.’

A second major benefit of judicial scrutiny is that it ensures that asylum processes are fair. In common law countries, the courts’ heightened scrutiny of refugee status processing is based on a potent connection between traditional modes of judicial

542 Ibid.
543 Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 412 (Gaudron J) (‘In the exercise of judicial power there is a natural tendency to invest an expression such as “well-founded fear” with some degree of specificity. And it is inevitable that a court, in considering the exercise of administrative powers involving the application of that expression, will seek to invest the expression with some specific content.’)
545 Ibid.
546 Ibid.
547 Feller, above n 462, 4-5.
review and human rights. As stated in the House of Lords’ decision in
*Bugdaycay*, the common law courts subject refugee status determinations to a
‘differing intensity of review’ because such decisions involve ‘situations where what
are at stake are fundamental rights of the individual’. In the words of Bridge LJ in
*Bugdaycay*, courts should subject refugee status decisions involving threats to human
rights to ‘the most anxious scrutiny.’ In a series of decisions after *Bugdaycay* the
courts in the UK intervened to impose procedural fairness requirements on Home
Office asylum decision-making. The Human Rights Act 1998 (UK) subsequently
entrenched the rigour of judicial review of asylum decisions.

Other common law jurisdictions have in the main followed this trend. In Canada, a
watershed decision in 1985 of the Supreme Court of Canada held that the failure to
afford an asylum claimant a hearing before deportation was in breach of the right to
‘life, liberty and security of the person’ set forth in section 7 of the Canadian Charter

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549 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514.
550 H Woolf, ‘Judicial review – the tensions between the executive and the judiciary (1998) 114 *Law Quarterly Review* 579-593, 589. See, e.g. *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (Bridge LJ); *Chan v The Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (amendments requiring consideration of the Refugee Convention precipitated both the requirement for reasons of a decision to refuse refugee status, as well as exposing decision-makers to judicial review on the traditional common law grounds that the decision was ‘so unreasonable that no reasonable person could have exercised the power’).
551 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (Bridge LJ). See generally, Harvey, above n 3, chapter 4 (highlighting the heritage of the *Bugdaycay* decision in recent asylum cases in the UK).
552 *R v Secretary of State for the Home Department Ex p. Singh* [1987] Imm AR 489; *R v Secretary of State for the Home Department Ex parte Yemoh* [1988] Imm AR 595; *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402.
553 *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] Imm AR 229, CA, modified by *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, and *R (on the application of Sumaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139; cf for statutory appeals *B v Secretary of State for the Home Department* [2000] Imm AR 478, CA.
of Rights and Freedoms and the right to a fair hearing found in section 2(e) of the Bill of Rights. At around the same time, the High Court of New Zealand similarly found that failure to provide an oral hearing prior to removal of an asylum seeker constituted a breach of the rules of natural justice. As noted above, decisions of the High Court of Australia in the 1980s extended the procedural rights of asylum seekers in Australia. More recently, the Australian High Court has upheld the right to a fair hearing in a series of asylum cases.

In performing this function, the courts can ameliorate and supplement statutory or administrative procedural codes to ensure that the idiosyncracies of individual asylum cases are acknowledged. For example, in the High Court case of Miah the applicant for a protection visa successfully argued that the decision-maker failed to invite the applicant to provide additional information or comment on a change in circumstance of the country of origin - the elections in Bangladesh - that the decision-maker considered materially affected (adversely) the applicant's claim to protection. In coming to this decision, the High Court found that the procedural 'codes' in the Migration Act 1958 (Cth) did not exclude the particular requirement of procedural fairness to offer the applicant an opportunity to respond to material that came into

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555 Benipal v Minister of Foreign Affairs and Immigration (26 November 1985), Auckland, New Zealand, No. 878/83, 993/83, 1016/83 (High Court) [unreported].


557 Re Minister for Immigration and Multicultural Affairs; ex parte Miah (2001) 206 CLR 57; Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425.

558 Re Minister for Immigration and Multicultural Affairs; ex parte Miah (2001) 206 CLR 57.
existence after the date of the application and which the decision-maker believed was adverse to the applicant's claim.\textsuperscript{559}

The High Court also considered in \textit{Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka}\textsuperscript{560} whether Part 7 of the \textit{Migration Act 1958 (Cth)} (dealing with merits review by the Refugee Review Tribunal) amounted to a code excluding further considerations of procedural fairness. In \textit{Epeabaka}, a decision of a member of the Refugee Review Tribunal was challenged on the grounds of denial of procedural fairness because the member had published a provocative discussion of his work on his home page on the Internet. Although the challenge failed on the merits, the High Court rejected the Minister's submission that Part 7 excluded requirements of procedural fairness, in particular, the requirements concerning bias.\textsuperscript{561}

As in the Australian case of \textit{Miah}, in \textit{R v Special Adjudicator ex parte S} the UK courts were willing to imply fairness where there was a shortfall in the protection offered by the procedural rules.\textsuperscript{562} In contrast, the majority of the House of Lords in \textit{R v Secretary of State, ex parte Abdi and Gawe}\textsuperscript{563} held that the Home Office was under no duty to disclose information to an applicant that was contrary to its case that a particular third country was safe. A principal consideration in the decision of the

\textsuperscript{559} As held by Gleeson CJ and Hayne J in \textit{Miah}: "[T]here is a difference between a code of procedure for dealing with visa applications and a comprehensive statement of the requirements of natural justice. For example, the requirements of natural justice include absence of bias, actual or apparent, on the part of the decision-maker. Subdivision AB says nothing about that subject. It does not contain "plain words of necessary intendment" which exclude the rule against bias. It is improbable in the extreme that Parliament intended that bias on the part of a delegate would not vitiate the delegate's decisions. The description of the provisions as a code of procedure is significant, but its significance should not be overstated (footnotes omitted)'\textsuperscript{:} (2001) 206 CLR 57, [46].

\textsuperscript{560} (2001) 179 ALR 296 ('Epeabaka').

\textsuperscript{561} See also, \textit{Re Refugee Review Tribunal; Ex parte H} (2001) 179 ALR 425 (in H the applicant successfully sought relief from the High Court where the Refugee Review Tribunal member did not give the applicants an opportunity to present their claims without repeated interruptions from the Tribunal affirming its lack of belief in the applicant's claims, signifying apprehended bias).

\textsuperscript{562} [1998] INLR 168.

\textsuperscript{563} [1996] 1 WLR 298.
majority was the fact that 1993 Procedure Rules did not contain any requirement to serve an explanatory statement of facts in such cases. However, later cases recognize significant qualifications to the decision in *Abdi and Gawe*. Commentators have also suggested that the House of Lords decision in *Abdi and Gawe* may be decided differently today in light of developments in the common law, most notably in *ex parte Simms*, and cases on art 6 of the ECHR, that suggest that 'where a state without good cause prevents an applicant from gaining access to materials helpful to the Applicant, a right to a fair hearing will be violated'.

In summary, there a range of administrative, judicial, legislative and practical measures that states should employ to ensure the fairness and effectiveness of their asylum processes. The next part of this chapter introduces some of the restrictive asylum policies examined in more detail in chapters 5-7 of this thesis, which undermine the engagement of these 'effective measures'.

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564 On the basis of these later decisions it has been stated that breach of the Secretary of State’s obligation to not knowingly mislead in the material he places before the Adjudicator or the IAT would found judicial review on the basis of denial of procedural fairness: *Cindo, R (on the application of) v Immigration Appeal Tribunal* [2002] EWHC 246 (Admin) (14th February, 2002) [11] (Kay J); *R v Special Adjudicator, ex parte Kerrouche* [1998] INLR 88 (CA), 95 (Lord Woolf MR) ('While [that] approach must be the starting point for the consideration of this issue, there are limits to the approach…indicated in that case. The decision would not justify the Secretary of State knowingly misleading the Special Adjudicator. The objection of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must either know or ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied.‘); *Konan v SSHD* (CA, 20 March 2000), [24] (Simon Brown LJ) (‘... the Secretary of State’s obligation in a full asylum appeal like this may well be higher than in cases like Kerrouche and … Abdi and Gawe, cases concerned with safe third country appeals’).

V RESTRICTIVE ASYLUM POLICIES – DIVORCING THE ASYLUM PROCESS FROM NATIONAL INSTITUTIONS

Commentators have documented the recent emergence of restrictive measures employed by states to limit the access of asylum seekers to protection.\textsuperscript{566} Measures examined in this thesis include: the imposition of carrier sanctions and visa requirements; the use of naval and coast guard vessels to interdict refugees on the high seas and then remove them to another country for processing; and limitations on judicial review.

The rise of restrictive asylum policies is largely testament to the fact that governments have been willing to ignore the importance of the rule of law to the realization of human rights within their jurisdictions, including protection against \textit{refoulement}. As will be seen from the discussion in this section, a common effect of these measures is to deter, restrict, or deny asylum seekers access to the protection of national laws and institutions in destination states. This has involved denial of access to legislation setting out the duties of executive officers when determining the grant of asylum and measures intended to substitute administrative discretion for normal asylum procedures.

Scholars have referred to the general trend in immigration law as a ‘denationalization’ – not a loss of state (government) control, but of meaningful administrative, judicial and legislative intervention.\textsuperscript{567} In Colin Harvey’s words, ‘there is a “de-formalisation” process in operation in refugee and asylum law’ whereby states are ‘making use of questionable concepts with the aim of undermining legality as it

\textsuperscript{566} Gibney, above n 1, 19-21; Helton, above n 1, 213; Hathaway, above n 1, 998; J Hathaway and R Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection’ (1997) \textit{10 Harvard Human Rights Journal} 115-211, 122; Loescher, above n 1, 7-8.

\textsuperscript{567} Guiraudon, above n 2, 252.
applies in this area. As a result, there has been a substantial regression in access to, and enjoyment of, fair and effective asylum procedures in developed states.

This trend runs counter to the progressive obligation on Contracting States, discussed in chapter 3, to interpret and apply the Refugee Convention and cognate rights instruments in a way that ensures the effective implementation of their protection obligations. More broadly, the restrictive asylum policies increasingly employed by states contradict the underlying normative basis of the progressive obligation to ensure the effectiveness of international rights within the domestic legal order.

A Carrier sanctions and visa requirements

Most ubiquitously, carrier sanctions and visa requirements prevent many asylum seekers reaching the territory of destination states because of the obvious fact that refugees are unlikely to be able to obtain valid travel documents from their country of origin. Although visa requirements and carrier sanctions have legitimate objectives of immigration control and civil aviation security, they have all too often been introduced and implemented for the purpose of preventing asylum seekers from arriving in the territory of destination States. If putative refugees cannot make it to destination states then 'this avoids concerns about the procedures of the determination process.'

568 Harvey, above n 3, 191.
569 See above n 297 - and n 355 – and accompanying text.
570 See above n 371 – and accompanying text.
571 Feller, above n 370, 56.
572 Ibid 50.
573 R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1, [28] (Lord Bingham); R v Secretary of State for the Home Department, ex parte Hoverspeed [1999] INLR 591, 594-595 (Simon Brown LJ).
574 Harvey, above n 3, 155.
The rise of external migration control measures is a threat to effective protection. Carrier sanctions and visa requirements deny many asylum seekers protection under the national laws and institutions of destination States by extending and privatising the State’s ‘virtual’ or ‘exported’ border. The UNHCR’s view is that ‘[i]nternational protection can only be provided if individuals have access to the territory of States where their protection needs can be assessed properly.’\(^ {575}\) The basis of the UNHCR’s concern is quite rightly that there is little point in constructing a high quality asylum system within States if putative refugees do not have access to it.\(^ {576}\)

Most recently, the European Commission’s Green Paper on the Future Common European Asylum System flagged the issue of access measures as an important area for further study and consideration in the lead up to the Common European Asylum System (CEAS):

What further measures could be taken to ensure that protection obligations arising out of the EU acquis and international refugee and human rights law form an integral part of external border management?

How might national capacities to establish effective protection-sensitive entry management systems be increased ...?\(^ {577}\)

In response to these issues posed in the Green Paper, the UNHCR called for access to protection to be made an essential part of the CEAS.\(^ {578}\) In particular, the UNHCR enjoined States to commit to the UNHCR’s ‘10 Point-Plan’, which sets out protection

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\(^ {576}\) Ibid.


safeguards in the migration regulatory context. These and other proposals are considered in more detail in Chapter 5 of this thesis.

B Interdiction and offshore processing

The interdiction programs employed by the US and Australia (and mooted in the EU) are further examples of the trend to downplay the importance of a range of national safeguards to the effective enjoyment of Convention rights. The US interdiction program began in the 1980s to deter the arrival of Cuban and Haitian refugees by boat. Following the US pattern, the Australian interdiction program began in 2001 with the arrival of Iraqi and Afghan asylum seekers by boat from Indonesia. Both interdiction schemes involve the use of naval or Coast Guard vessels to intercept refugees at sea and then to transfer those asylum seekers to a place purportedly outside the physical and ‘legal’ jurisdiction of the destination state where they are processed for refugee status and or repatriated or resettled. In 2003, the UK and Denmark unsuccessfully proposed that the EU embrace an interdiction program containing essentially the same elements.

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The key rationale of interdiction is to deter asylum seekers from travelling to destination states by denying them direct access to the onshore refugee status determination process in the destination State/s. Instead, asylum seekers are repatriated to their country of origin or a transit state (eg Indonesia, where they are processed by UNHCR under the Australia-Indonesia MOU). Alternatively, they are transferred to a third country for processing by officers from the sending state.

To date, the processing undertaken offshore has applied procedural standards devoid of statutory conditions or judicial or tribunal remedies. Both the US and Australia have at time sought to satisfy their non-refoulement obligation under the Refugee Convention and cognate rights instruments by employing an ‘international’ standard of protection – that used by the UNHCR to process claims under its mandate when a country cannot or will not undertake processing.  

The UNHCR has expressed the view to the Australian Parliament that its own processes are a poor substitute for an asylum process embedded in national laws and institutions and opposed the Australian Government’s adoption of an ‘international’ standard. In particular, the UNHCR expressed the view that Australia’s offshore processing increased the risk of refoulement by removing the important safeguards provided by the courts (and one could add, legislative conditions). Moreover, the UNHCR suggests that Australia’s offshore processing policy discriminated against

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583 Press Briefing by William Gray, Special Advisor to the President on Haiti, 5 July 1994, The American Presidency Project; Establishing the basis for a successful conclusion to the crisis in Haiti, US Dept. of State Dispatch, 27 June 1994, 6; Australian Department of Immigration, Offshore Protection Interim Procedures Advice, Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons taken to Declared Countries, No. 16 (September 2002) [10].

584 UNHCR, Migration Amendment (Designated Unauthorised Arrivals) Bill, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Committee, 22 May 2006, [19].

585 Ibid.
offshore asylum seekers who were processed against lower procedural standards than used to process asylum seekers given access to Australia’s onshore asylum process.\footnote{UNHCR’s views on Australia’s scheme are included in the indepth discussion of extraterritorial processing in Chapter 6 of this thesis.}

C Restricting access to the courts

A key feature of the Australian and US interdiction programs is that they remove the ability of asylum seekers to access meaningful judicial remedies in national courts.\footnote{Both schemes rely upon the traditional unwillingness of the courts to entertain actions on behalf of aliens outside the territorial jurisdiction, while simultaneously relying on doctrines of sovereign state immunity to circumvent the courts in the third countries that host their respective offshore processing centres. In this way, interdiction is characteristic of earlier attempts by governments to exclude the courts from the onshore asylum process.}

Both schemes rely upon the traditional unwillingness of the courts to entertain actions on behalf of aliens outside the territorial jurisdiction, while simultaneously relying on doctrines of sovereign state immunity to circumvent the courts in the third countries that host their respective offshore processing centres. In this way, interdiction is characteristic of earlier attempts by governments to exclude the courts from the onshore asylum process.

Western governments have persistently sought ways of preventing asylum seekers from accessing the courts since the courts first became involved in reviewing refugee status determinations in the 1980s.\footnote{The UK and Australian governments have taken the lead, introducing repeated amendments to their migration legislation aimed at reducing or removing the available grounds for judicial review of asylum decision-making, eg excluding common law grounds of natural justice or unreasonableness or the use of a privative or ouster clause.} The UK and Australian governments have taken the lead, introducing repeated amendments to their migration legislation aimed at reducing or removing the available grounds for judicial review of asylum decision-making, eg excluding common law grounds of natural justice or unreasonableness or the use of a privative or ouster clause.\footnote{Plaintiff SI175/2002 v Commonwealth (2003) 211 CLR 476; D Stevens, ‘The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?’ (2004) 67 Modern Law Review 616; D Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 Modern Law Review 207; D Stevens, ‘The Immigration and Asylum Act 1999: A Missed Opportunity’}
Restrictions on judicial review have been driven by the executive’s perception that there had been an unwarranted judicial innovation and intrusion into the traditional administrative function of determining the grant of asylum. Limitations on judicial review have gone hand in hand with legislative amendments designed to expand the non-reviewable scope or subject matter of administrative decision-making in the asylum arena. These developments threaten to rob putative refugees of the checks and balances placed by the courts and Parliament on the procedural aspects of the administrative decision-making process in the asylum arena, including the evolving transnational judicial expertise on the scope of the refugee definition.

The erosion of judicial review rights has also occurred as a consequence of the practice of classifying asylum claims according to whether the claimant is from a safe third country or safe country, or whether an asylum claim is ‘manifestly unfounded.’ Where the claim is determined to fall within a particular class, the applicant is subject to an abbreviated asylum procedure involving, in most instances, no independent review of the decision to classify the claim as ‘manifestly unfounded’ etc.


590 Rawlings, above n 41, 390; Harvey, above n 3, 157.

591 Rawlings, above n 41, 391; Crock, above n 41, 57-58; Thomas, above n 250, 485.

In the EU, the Asylum Procedures Directive marks the entrenchment of the lack of appeal rights for asylum seekers arriving in Europe according to this classification approach. While the Directive recognizes a general right to an effective remedy for asylum seekers in art 39, the Directive allows the denial of an appeal with suspensive effect where an asylum claim is determined by administrative decision-makers to be ‘manifestly unfounded.’ At the same time, the Directive adopts an expansive view of what amounts to ‘manifestly unfounded’ thereby greatly extending the potential scope of abbreviated procedures.

Rosemary Byrne links the erosion of appeal rights under the Asylum Procedures Directive to EXCOM’s Conclusion No 30 (XXXIV) – 1983, ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’. EXCOM Conclusion No 30 sanctioned the abbreviation of appeal rights where claims were determined to be ‘manifestly unfounded’ (defined in the Conclusion as ‘those which are clearly fraudulent or not related to the criteria for the granting of refugee status.’)

While not sanctioning no review of manifestly unfounded decisions, the problem with EXCOM Conclusion No 30 says Byrne is that it has been the thin edge of the wedge.

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595 Byrne, above n 594, 72 (observing that ‘[o]ne of the main critiques of the Procedures Directive is that this right to suspensive effect is now not even guaranteed for any asylum claim, in accelerated or full procedures. The protection risks of allowing for premature deportations of applicants prior to decision on appeal are amplified, however, for those asylum seekers whose claims may be expedited within the abridged procedures in the Directive.’)

596 Ibid 81.

597 Byrne, above n 594, 75.

598 EXCOM Conclusion No 30 (XXXIV) – 1983, (d), (e) (iii).
for the abbreviation or denial of procedural rights to asylum seekers where their claims are classified as belonging to a particular ‘class’. As Byrne points out, this classification approach effectively leaves it to the discretion of immigration officers and border staff whether a claim can access full asylum procedures. According to Byrne, this ‘presumes that legal criteria can be faithfully and uniformly interpreted by first instance decision makers, and moreover, accurately applied to all asylum claims, hence eliminating the risk of refoulement that accompanies a deportation prior to an appeal determination.’ Byrne further argues that this classification approach is fundamentally at odds with E CtHR jurisprudence recognizing the right to an effective remedy with suspensive effect for persons facing deportation in circumstances where they are at risk of torture etc. The same could be said for the EU member states’ equivalent obligation under the ICCPR and CAT.

Byrne’s concerns have been vindicated in part by the 2007 decision of the E CtHR in Gebremedhin v. France. The E CtHR in that case decided that France’s practice of denying an appeal with suspensive effect from a decision that an asylum claim is ‘manifestly unfounded’ constituted a breach of art 13 of the ECHR. In a recent report commissioned by the European Parliament’s committee on Civil Liberties, Justice and Home Affairs, Professor Hailbronner concludes that Gebremedhin v.
France ‘requires … a suspensive effect until a judge has passed a decision on the lawfulness of the authorities’ decision to execute a decision due to its manifest unfoundedness in a preliminary protection procedure.’ Hailbronner proposes a redrafting of art 39 to make it compatible with the case.

Despite this, Gebremedhin left untouched the basic classification approach by which the French administrative authorities had almost unfettered discretion to determine whether a claim was ‘manifestly unfounded’ and thereby denied access to the comprehensive asylum procedure found in the code de l’entrée et du séjour des étrangers et du droit d’asile. The decision thus leaves open the discriminatory practice of treating asylum seekers arriving at the border differently according to the classification of the merits of their claim.

Chapter 7 of this thesis examines in greater depth the role of judicial scrutiny in the asylum arena. It examines judicial review in the context of scrutiny by all organs of the state – the courts, parliament and administrative agencies.


607 Ibid.

608 This included: an application to the l’Office français des réfugiés et apatrides (OFPRA) [French Office of Refugees and Stateless Persons] for refugee status or subsidiary protection, which entitles the applicant to present evidence in support of an application (arts L. 721-1, L. 713-1 and L. 721-2, L. 723-2 and L. 723-3); appeal from the OFPRA to the Appeal Board for Refugees (art L. 731-2), including the right to make submissions to the Appeal Board and to legal counsel and an interpreter (arts L. 731-2, L. 733-1); and an appeal from the Commission to the Conseil d’Etat.

609 Parliamentary Assembly, Resolution 1471 (2005), Fast-track procedures in member states of the Council of Europe, adopted on 7 October 2005, [8.4.1]-[8.4.2] (calling on Member States to ensure that ‘in accordance with the principle of non-discrimination, that all asylum seekers are registered at the border and have the opportunity to apply for refugee status; and to ensure that all asylum seekers, whether at the border or inside the country enjoy the same principles and guarantees for their application for refugee status’).
VI CONCLUSION

The increasing involvement of the courts and legislatures has led to conflict with the pragmatic political, economic and social rationales underlying restrictive asylum policies. It was no coincidence that in states like the US, UK and Australia, restrictive asylum policies followed hard on the heels of the extension of legislative and judicial protections to refugees. Administrative law reforms secured a greater role for the legislature and judiciary in asylum matters – the legislature in imposing statutory conditions on the executive’s determination of refugee status, and the judiciary in reviewing refugee status determinations. In part, the controls imposed on governments in the asylum area were internal to individual states, involving a ‘transfer among institutions of the state – from the executive towards the judiciary’ rather than a ‘transfer from the state to the transnational arena.’

Governments responded to the loss of control over the asylum process engendered by increasing legislative and judicial incursion into a traditionally executive-dominated forum by taking steps to lessen the impact of legislation on executive decision-making. As we have seen, this involved excluding the courts from reviewing refugee status determinations, circumventing legislative conditions or restrictions on discretion, and employing mechanisms to prevent asylum seekers from reaching the ‘zone’ of protection afforded by legislative and judicial guarantees of due process.

However, this has not been the end of the story. As the following chapters show, the courts, and increasingly legislatures, have responded in many cases with a clearer articulation of state obligations than that found in government policy. A few key examples bear this out. In the UK, leading figures in the judiciary, civil society, and

Parliament successfully contested the Government’s intention to introduce an ouster clause removing judicial review of asylum decisions on the basis that the clause breached common law liberties and human rights.\(^{611}\) Similar recourse to human rights and the rule of law characterized the Australian High Court’s reading down of a similar privative clause designed to remove the courts’ jurisdiction over immigration decisions, including refugee eligibility determinations.\(^{612}\)

The courts and Parliament have also emerged as forums for the contestation of key features of the US and Australian interdiction regimes.\(^{613}\) In the Australian case this actually led to Government MPs crossing the floor to vote against Government introduced legislation that sought to extend the geographic reach of the Australian scheme – a precursor of the newly elected Labor Government’s disbandment of offshore processing in third countries. There is therefore hope that the courts and legislatures themselves will take up the challenge of ensuring that protection applicants receive a full and fair hearing of their asylum claim, irrespective of the government’s immigration control imperative.

\(^{611}\) Rawlings, above n 41.


I INTRODUCTION

The following chapters of this thesis critically examine key restrictive asylum policies in light of the obligations identified in chapters 3 and 4. It becomes clear from the discussion in these chapters that asylum is being gradually denuded of the national institutional mechanisms (judicial, legislative and administrative) that provide the framework for a fair and effective asylum hearing. In this sense, there is an ongoing 'denationalization'614 or 'deformalization'615 of the asylum process. This chapter critically examines one of the linchpins of this trend: the erection of pre-entry measures at ports of embarkation in order to prevent asylum seekers from physically accessing the territory of the state.616

Pre-entry measures comprise the core requirement that foreigners possess an entry visa granting permission to enter the state of destination. Visa requirements are

614 See above n 2 – and accompanying text.
615 Harvey, above n 3, 191.
increasingly implemented by immigration officials posted abroad or by officials of transit countries pursuant to bilateral agreements (so-called ‘juxtaposed’ immigration controls). Private carriers, which are subject to sanctions if they bring persons to a country who do not have permission to enter, also engage in a form of de facto immigration control on behalf of states. These measures constitute a type of ‘externalized’ or ‘exported’ border that pushes the immigration boundaries of the state as far from its physical boundaries as possible.

Pre-entry measures have a crippling impact on the ability of asylum seekers to access the territory of states to claim asylum. In effect, states have ‘externalized’ asylum by replacing the legal obligation on states to protect refugees arriving at ports of entry with what are perceived to be no more than moral obligations towards asylum seekers arriving at the external border of the state. Simultaneously, states are shifting the emphasis from in-country asylum processing to measures designed to deal with refugees in their regions of origin or in transit (eg extraterritorial or transit processing schemes, third country agreements, and resettlement quotas). In short, states seek to exert control over the access of refugees to their territory, while denying legal responsibility for protecting refugees subject to their jurisdiction.

This chapter proposes that new methods and measures must be sought to alleviate the adverse impact that pre-entry measures have on the ability of asylum seekers to access protection. It begins, in section II, with a discussion of the general nature and effect

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617 EXCOM, Note on International Protection, Report by the High Commissioner, A/AC.96/1038, 29 June 2007, [30].

618 To borrow the language of immigration officials, see, eg, Mr Dodd, Director, Border and Visa Policy, UK Home Office, Oral Evidence, House of Lords, European Union Committee, Home Affairs, FRONTEX Inquiry, 17 October 2007, 4 (‘one of the guiding lights of our philosophy of border control generally is to export the border as far away from the UK as possible ...’). See generally, A Kesby, ‘The Shifting and Multiple Border and International Law’ (2007) 27 Oxford Journal of Legal Studies 101.

619 Mr Dodd, above n 618, 4.
of external boundaries. Section III then analyzes the rationale of pre-entry measures in order to understand why states are reluctant to acknowledge the application of their international legal obligations at the exported border. The remaining sections argue for greater efforts to remove barriers to asylum seekers seeking to negotiate ubiquitous immigration controls, while also highlighting the practical difficulties faced when devising effective protection safeguards operable outside the territory of the state of asylum.

II THE EXPORTED BORDER

Pre-entry measures threaten to leave the international refugee protection regime behind at the border post. Proponents of pre-entry measures argue that states’ international legal obligations to refugees do not follow these external forms of immigration control— a position that has potentially devastating consequences for the institution of asylum given the pervasive quality of pre-entry measures today. Consequently, state responsibility and obligation are chained to the physical border, while unfettered experimentation with new techniques of control occurs abroad.

Such an approach arguably turns a blind eye to the new realities of externalized immigration control. As Kesby points out, ‘[a]ccompanying the geographical or territorial border are invisible borders which reflect policy decisions and distinguish between people, whether on the grounds of race, class or nationality.’ There are, in short, ‘multiple’ borders. The function, effect, and location of the modern border is

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621 Kesby, above n 618, 102.

622 Ibid 113.
different from group to group and individual to individual.\textsuperscript{623} The border for some may be experienced within a foreign state’s territory at the port of entry, whereas for others it may be experienced in a transit country or even within the individual’s own country.\textsuperscript{624}

Increasingly, states officially endorse the traditional territorial definition of external borders while operating outside those borders to prevent the arrival of unwanted asylum seekers and irregular migrants. In the EU context, for example, the Schengen Borders Code defines external borders as the ‘Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.\textsuperscript{625} A similar definition is found in the regulations establishing FRONTEX, the European agency charged with the management of the operational cooperation at the external borders of EU Member States.\textsuperscript{626}

Yet despite the territorial definition of its external borders, a recent ECRE study on the access of asylum seekers to the EU noted that FRONTEX was active in ‘extending controls from the external borders outwards towards the high seas and onto the territory of third countries.’\textsuperscript{627} At the same time, the report observed that the ‘projection of the EU’s border controls away from the EU’s physical borders does not have any clear legal basis and seriously obstructs the creation of a consistent

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{623} Ibid.
\item \textsuperscript{624} Ibid.
\item \textsuperscript{627} European Council on Refugees and Exiles (ECRE), Defending Refugees’ Access to Protection in Europe, December 2007, 9.
\end{enumerate}
\end{footnotesize}
understanding of what the EU external borders are. In practice, FRONTEX acts outside those borders beyond any effective modes of accountability and transparency in the way it exercises its immigration functions, especially with respect to asylum seekers.

EU Member States make full use of this new immigration control artifice. Although not a formal member of the Schengen Framework, the UK government for example readily co-operates with FRONTEX in order to facilitate the exportation of its border. As stated recently by the Home Office’s Director of Border and Visa Policy before the House of Lords EU Select Committee’s inquiry into FRONTEX, ‘one of the guiding lights of our philosophy of border control generally is to export the border as far away from the UK as possible and hence FRONTEX is part of that process.’

Thus, on the one hand, states formally adhere to the traditional territorial conception of the border in international law, while allowing their authorities and agents to act beyond the physical border to exercise the power of admission and exclusion. Simultaneously, they implicitly deny that their international legal obligations to refugees – that traditionally restrained the exercise of the state’s right of immigration control at the physical border – have any relevance to new techniques of externalized control. In order to appreciate this last point fully, we need to understand the nature and rationale of pre-entry measures.

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628 Ibid.
630 Mr Dodd, above n 618, 4.
631 As Kesby observes (see above n 618, 102) this is a border with a ‘clear geographical threshold between interior and exterior. It denotes the physical territory over which a state’s sovereignty is exercised, in particular, the sovereign right to admit and exclude.’
III GOVERNMENT ‘REMOTE CONTROL’ OVER THE ARRIVAL AND ENTRY OF ASYLUM SEEKERS

States are attracted to pre-entry measures because of their capacity to control the arrival of asylum seekers without (it is erroneously assumed) engaging international legal obligations. Paradoxically, ‘exporting the border as far away as possible’ does not entail the relinquishment of state control over asylum. The ‘denationalization’ phenomenon that lies at the heart of restrictive asylum policies maintains state control while seeking to deny state responsibility. This rationale of pre-entry measures becomes abundantly clear in the following discussion of visa requirements and carrier sanctions.

Visa requirements imposed on the nationals of refugee-producing states and enforced by carrier sanctions are the classic tool of so-called non-arrival or non-entree policies. The requirement that a person has a valid visa before boarding a boat or plane, when enforced by the carriers responsible for bringing the person to the destination state, makes it almost impossible for asylum seekers to seek protection in a destination state without false travel documents. A typical example of this tool is found in s 229(1)(a) of the Australian Migration Act 1958 (Cth), which provides that ‘[t]he master, owner, agent, charterer and operator of a vessel on which a non-citizen

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633 See the argument in support of the imposition of international obligations at the exported border, below n 661 – and accompanying text.

634 As noted previously, this term is coined by Guiraudon (see above n 2, 252) in the wider context of immigration regulation in Europe.

635 Hathaway, above n 1, 291.

636 EXCOM, Note on International Protection, UN GAOR, 48th Session, UN Doc A/AC.96/882 (1997); Feller, above n 370, 56.
is brought into Australia ... are each guilty of an offence against this section unless the non-citizen, when entering Australia is in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia.'

Visa requirements and carrier sanctions ostensibly pursue legitimate objectives of general immigration control and civil aviation security. Looking more closely, the true purpose of such measures in many instances is simply to prevent asylum seekers from arriving in the territory of destination states. Preventing the arrival of putative refugees in destination states 'avoids concerns about the procedures of the determination process.'

Rather than seek to explain or justify such measures by reference to the origins (and supposed economic motives) of asylum seekers from the global 'south', recent scholarship views non-entrée policies as primarily a response to the increasing internal constraints placed on government treatment of asylum seekers. In particular, scholars observe that the evolution of constitutional and administrative justice principles in liberal-democratic states led to the reduction of the arbitrary and discretionary powers of immigration bureaucracies. Restraints on discretionary

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637 Feller, above n 370, 50.
638 R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1, [28] (Lord Bingham); R v Secretary of State for the Home Department, ex parte Hoverspeed [1999] INLR 591, 594-595 (Simon Brown LJ).
639 Harvey, above n 3, 155.
641 Guiraudon, above n 2, 253-4.
powers also derived from the gradual development of a human rights culture within destination states that has had important ‘spill over effects for non-citizens.’

Paradoxically, it has also been observed that the development of the administrative apparatus supporting the modern liberal-democratic state spawned greater and more sophisticated tools to prevent asylum seekers from accessing its benefits, including enhanced data processing and sharing capacities and visa control mechanisms.

Moreover, the bureaucratisation of the modern state, with its concentration on proper and orderly processes and results, has fostered an immigration control ethos within government departments seeking to deliver an immigration programme that achieves clearly quantified targets.

The ‘primacy of the bureaucracy’ has been extenuated in Europe through the Schengen framework, which has led to diminished parliamentary and judicial scrutiny of refugee and immigration policies in favour of inter-ministerial agreements that codified key non-entrée policies. Since the Schengen framework emerged in 1985, the use of visa requirements and carrier sanctions (required by art 26 of the Schengen Agreement) has increased significantly. Today, the EU has a common list of over 120 countries whose nationals are subject to a visa requirement for entry.


645 Ibid 522.


647 Shacknove, above n 644, 522. See generally, Lavenex, above n 632, 331.
into EU countries, including many refugee-producing countries, including Afghanistan, Iraq, Somalia, and the Sudan.\textsuperscript{648}

The same trend toward inter-governmental policy development is also apparent among other destination states, eg the activities of the Inter-Governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia (IGC). The IGC has played host to officials sharing ideas on the development of non-entée policies – a process that occurs with little transparency and beyond domestic scrutiny. Rather than breakdown borders, internationalisation in this context has had the opposite effect of strengthening the autonomy of governments by establishing an immigration control arena ‘shielded from the pluralistic domestic arena’, including different sections of the bureaucracy, parliament, and the courts.\textsuperscript{649}

Visa requirements and carrier sanctions allow governments to control the numbers of asylum seekers arriving in the state. They place asylum seekers within the paradigm of irregular migration as part of an ‘official drive to rein in, to control, to constrain, to render orderly and hence manageable’ their arrival.\textsuperscript{650} Armed with new and sophisticated means of border control and a control ethos to match, immigration officials have insisted on instigating and maintaining a form of ‘remote control’ over the entry of asylum seekers.\textsuperscript{651} By employing visa requirements to ‘export the

\textsuperscript{648} Council Regulation (EC) No 539/2001 (15 March 2001), listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (replacing Council Regulation (EC) No. 574/1999, 12 March 1999), OJ L 81, 21.3.2001, 1, art 4.

\textsuperscript{649} Lavenex, above n 632, 331; Guiraudon, above n 2, 252.


states pre-empt arrival and access to national asylum procedures by ‘shifting the locus of control further afield.’ These measures have been given added energy by multilateral anti-trafficking initiatives requiring states to apply carrier sanctions.

From this discussion it becomes clear that non-entrée policies in many instances are designed to circumvent access to in-country asylum procedures in destination states. This is profoundly threatening to the rights of refugees in light of the discussion in chapter 4 of this thesis, which highlighted the essential contribution in-country administrative, statutory and judicial mechanisms make to the operation of a fair and effective asylum process. By creating a zone of arbitrariness outside the state, governments frustrate the potential contribution of these institutional safeguards inside the state. The remaining sections of this chapter present a case for bringing pre-entry measures within the fold of international legal obligation and the rule of law, while also highlighting the practical challenges faced in ensuring the effective implementation of international obligations at the exported border.

IV RECOGNIZING THE APPLICATION OF KEY PROTECTION OBLIGATIONS AT THE EXPORTED BORDER

The non-refoulement obligation is the core international obligation at issue at the exported border. As observed in chapter 4 of this thesis, the non-refoulement obligation requires that states ensure that individuals are not expelled or returned to

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\(^{652}\) See, eg, Dodd, above n 618, 4.

\(^{653}\) Lavenex, above n 632, 334.

\(^{654}\) J Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (2008) 49 *Virginia Journal of International Law* 1, 31 (noting that ‘States Parties to the Trafficking Protocol agree specifically to require transportation companies to carry out document screenings of persons to be transported, enforced by carrier sanctions, and more generally to take steps to “strengthen[] cooperation among border control agencies.”’)

territories in which they face (or are at risk of removal to) persecution on account of their race, religion, nationality, political opinion or membership of a particular social group, or torture or cruel, inhuman or degrading treatment or punishment. The following discussion examines the relevance of the non-refoulement obligation in the context of pre-entry measures.

Implicit in the following discussion is the view that a good faith reading of the Refugee Convention and cognate rights instruments requires that states take positive steps to ensure the effective application of their protection obligations. The notion that states are under no obligation to take positive steps to exempt asylum seekers from general immigration controls, and are thus free to fence off their territory so that no foreigner, refugee or not, can set foot on it, contradicts the central purpose of protection, which is to act as an exception to the immigration control norm.

A Recognizing the extraterritorial reach of the non-refoulement obligation in art 33 of the Refugee Convention

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655 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (Refugee Convention), art 33, read together with the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 3 (CAT); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) (ICCPR). The ICCPR contains an implied prohibition against the expulsion or return of a person to a territory where they face a real risk of a violation of their rights, such as a threat to the right to life (art 6) or torture or other cruel, inhuman, or degrading treatment or punishment (art 7): UN Human Rights Committee, General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, UN Doc HRI/GEN/1/Rev.7, 10 March 1992, [9]; UN Human Rights Committee, General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, [12]; ARJ v Australia, Communication No 692/1996, 11 August 1997, UN Doc CCPR/C/60/D/692/1996, [6.8]-[6.9]; R (on the application of Ullah) v Special Adjudicator [2004] All ER 153, [21]-[24] (Lord Bingham). There is also an implied obligation not to deport a person where the person concerned, if deported, faces a real risk of being subject to treatment contrary to art 3 of the ECHR: NA v UK, application no 25904/07, Judgment, Strasbourg, 17 July 2008, [109].

656 See above n 349- and n 386- accompanying text.

657 Hailbronner, above n 620, 354.

658 Grahl-Madsen, above n 10, commentary on art 33(1) [3]; Robinson, above n 10, 163.
An underlying justification for targeting non-entée measures at asylum seekers is that the non-refoulement obligation does not apply to such measures because they are enforced against refugees abroad. This rationale has the support of the traditional position in the scholarship that the non-refoulement obligation does not apply to refugees who are outside the physical territory of the state. This view also has the support of the US Supreme Court in Sale, which held that the non-refoulement obligation did not apply to Haitian refugees interdicted on the high seas.

The preferable position, as expressed by the UNHCR (and supported by modern commentators), is that the non-refoulement obligation prevents states from reaching beyond their borders to return a refugee, directly or indirectly, to a place where he or she has a well-founded fear of persecution. Compelling arguments are put forward to support the extraterritorial reach of the non-refoulement obligation based on an interpretation of the Refugee Convention that accords with ‘the object and purpose appearing in the preamble and the operative text and by reference to the history of the negotiation of the Convention.’

Beginning with the ordinary meaning of ‘refouler’, the English translations of ‘refouler’ include to ‘repulse’, ‘repel’ and ‘drive back’ - indicating that the term is not

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650 Grahl-Madsen, above n 10, commentary on art 33(1) [3]; Robinson, above n 10, 163.


663 *Applicant A v Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 231 (Brennan CJ).
limited to expulsion from within the territory of a Contracting State. A contextual reading of art 33 also supports its extraterritorial reach given that surrounding Convention obligations explicitly require a territorial nexus between the refugee and the country of refuge. The drafting history of the Convention confirms this reading.

Most importantly, the extraterritorial reach of the non-refoulement obligation in the Refugee Convention is consistent with the Convention’s humanitarian object and purpose. Domestic courts have stressed the importance of adopting an evolving and humanitarian interpretation of the Refugee Convention. The overarching aim must be to ensure the continued effectiveness of the Refugee Convention in achieving its humanitarian object and purpose, as expressed in the Preamble, of assuring to refugees ‘the widest possible exercise’ of fundamental rights and freedoms.

Recognition of the extraterritorial operation of the non-refoulement obligation ensures its continued relevance in the context of novel and sophisticated tools of immigration control that we have begun to examine in this chapter. The Convention must be able to effectively perform its task by preventing states operating beyond their borders to force refugees back to a place of persecution. In light of the current trend toward pre-entry measures and other non-entrée practices, recognition of the extraterritorial

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664 UNHCR, above n 661, 13.
665 Articles 2, 4 and 27 require presence of a refugee within the asylum country. Articles 18, 26 and 32 stipulate that the refugee must be ‘lawfully in’ the territory of the Contracting States. Articles 15, 17(1), 19, 21, 23, 24 and 28 cover refugees ‘lawfully staying’ in the asylum state.
666 UNHCR, above n 661, 14-15.
668 Ibid.
669 Hathaway, above n 1, 163, 337.
reach of the *non-refoulement* obligation is essential to safeguard refugees’ access to fair and effective in-country asylum procedures.\(^{670}\)

The wider human rights context of the Refugee Convention – discussed further below in the context of the scope of the *non-refoulement* obligation under general international rights instruments - also supports the extraterritorial application of the *non-refoulement* obligation. The Refugee Convention’s Preamble places it in the context of international instruments designed to protect the equal enjoyment by every person of fundamental human rights.\(^{671}\) This calls for an interpretation of the Refugee Convention that takes account of the evolving understanding of the extraterritorial application of human rights instruments.

**B The extraterritorial reach of the non-refoulement obligation under international and regional human rights treaties**

An extraterritorial application of the *non-refoulement* obligation is also demanded where it is found in general international rights treaties.\(^{672}\) In order to ensure the effective implementation of the ICCPR, the UN Human Rights Committee has recognized that the ICCPR imposes obligations upon states to respect and ensure Covenant rights to anyone ‘within the power or effective control of that State Party, even if not situated within the territory of the State Party’.\(^{673}\) The extraterritorial applicability of the ICCPR was confirmed by the International Court of Justice.

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\(^{671}\) * Applicant A v Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 231 (Brennan CJ).

\(^{672}\) Lauterpacht and Bethlehem, above n 662, 110-111; UNHCR, Advisory Opinion, above n 661, 16-18.

The Committee against Torture has similarly expressed the view that the non-refoulement obligation found in art 3 of the Convention against Torture applies outside the territory of the state to persons under the ‘effective control’ of the state party. It follows that the non-refoulement obligation in the CAT and the implied non-refoulement obligation found in the ICCPR are engaged where a person falls within the power or effective control of a state. This is confirmed by the fact that the Human Rights Committee expressly mentions refugees and asylum seekers when defining the extraterritorial application of the ICCPR. Given the similar nature of the non-refoulement obligations and the object and purpose of human treaties and the Refugee Convention, it also follows that the non-refoulement obligation found in the Refugee Convention is similarly concomitant with the exercise of extraterritorial authority and control. Similar reasoning should be applied to the implied non-refoulement obligation in the ECHR, which adopts the same concept of ‘jurisdiction’ found in public international law.

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675 Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, UN Doc CAT/C/USA/CO/2, 25 July 2006, [15].

676 UN Committee on Human Rights, General Comment No 31: The nature of the general obligation imposed on states parties to the Covenant (2004) UN Doc HRI/GEN/1/Rev 7, 12 May 2004, 192, [10] (‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory...’)


678 Issa v Turkey, application no 31821/96, Judgment, Strasbourg, 16 November 2004, [67].
C Applying the non-refoulement obligation to immigration controls outside the territory of the state

It is evident from this discussion that the application of the non-refoulement obligation to immigration controls outside the territory of the state will depend on whether a person subject to those controls falls within the effective control or authority of the state responsible for those controls. In order to determine whether this is the case, the guiding principles should be the notions of ‘effectiveness’ and ‘competence’ that underpin the extraterritorial scope of human rights treaties.

The notion of ‘effectiveness’ is implicit in the Human Rights Committee’s general comment on the extraterritorial reach of ICCPR rights. The Committee expressly bases the extraterritorial reach of the ICCPR upon art 2, which imposes a duty to respect and ensure the rights found in the ICCPR. Article 2 requires states to refrain from conduct that would breach ICCPR rights and to engage in positive conduct in order to ensure the effective and practical enjoyment of ICCPR rights.

Acknowledging the first component of art 2, the Human Rights Committee expresses the view that allowing a state to commit violations on the territory of another state that it could not perpetrate on its own territory would be unconscionable. By relying on art 2, the Committee’s position also demands that states should take positive steps to ensure the effective enjoyment of rights to individuals outside their territory where it is within their power to offer protection.

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681 Tomuschat, above n 275, 96; Nowak, above n 126, 38.
This reasoning is supported by the ICJ’s discussion of the extraterritorial application of the ICCPR. The ICJ observes that the ICCPR’s object and purpose and drafting history supported the Human Rights Committee’s view that the treaty applies to persons outside the state who are within the jurisdiction of the state. Implicit in the ICJ’s discussion of the drafting history is that individuals should not be prevented from asserting ICCPR rights against a state where those rights fall within that state’s competence.

It follows that a state’s obligation to protect will engage where it possesses the power and competence to ensure to an individual the practical and effective enjoyment of a particular right. A state should therefore take steps to ensure that its external immigration controls do not result in the *refoulement* of an individual where this is within its power and competence. Where the state has the power to ensure that its immigration officials or agents acting abroad do not commit acts of *refoulement*, it should do so. The very existence and implementation of externalized border controls provides evidence of that capacity.

This approach is at odds with the view that derives ‘effective control’ from the nexus between the immigration official posted abroad and the location in which a person seeks protection. By focusing on the destination state’s sovereign control over that locality, this view ignores the same state’s obvious power to change their own domestic laws and policies that direct the official’s conduct. The immigration official’s authority to issue a visa or entry clearance is clearly within the jurisdiction...
of the destination state in the same way that the issue of a passport by the Uruguayan consulate in Germany was within the jurisdiction of Uruguay.\textsuperscript{686} Thus, generally the non-refoulement obligation will apply whether an immigration official is stationed at a consulate or embassy, posted to a port of embarkation, acting at a point in transit, or intercepting boats on the high seas.

D The applicability of the non-refoulement obligation to immigration controls within the country of origin

An exception is where the asylum seeker confronts the exported border within their own state. Increasing use of the exported border makes it more likely that asylum seekers will confront a foreign border before ever leaving their country of origin. In those circumstances, governments may seek to deny that asylum seekers are entitled to protection under the Refugee Convention as they are not outside their country of nationality, and therefore do not satisfy the ‘alienage’ requirement of the refugee definition in art 1A(2).\textsuperscript{687}

While in accordance with the text of the Convention, this approach is at odds with the true rationale of the alienage requirement. The alienage requirement is not a means of limiting a state’s obligations under the Refugee Convention to the situation where a refugee is within the territory of the destination country; rather, it signifies the capacity of the international community to offer protection to refugees outside their country of origin. This understanding is in keeping with the fact that territorial sovereignty historically was the premise for the state’s right to grant asylum, not a reason to deny obligations. As observed by Hathaway, the alienage requirement

\textsuperscript{686} Pereira Montero v Uruguay, UN Doc CCPR/C/18/D/106/1981, 31 March 1983, [5].

\textsuperscript{687} See, eg, R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1 [18] (Lord Bingham).
recognizes the intersection between the ‘ought’ and the ‘can’ of international refugee protection: the international community should offer protection to refugees outside the borders of their country of nationality because it can.\textsuperscript{688} Thus, the alienage requirement represents a duty and capacity to protect, rather than an excuse to erect barriers to protection.

Nevertheless, in the face of the express wording of the Refugee Convention, Hathaway argues that this shortfall in protection is best remedied by recourse to the right of emigration found in art 12(2) of the ICCPR.\textsuperscript{689} The right of emigration, or \textit{ius emigrandi} as it was traditionally known, is the other side of the asylum coin - allowing asylum seekers to leave their country in search of protection. In accordance with the right of emigration, destination states are under an obligation not to prevent asylum seekers leaving their country of nationality. The right to leave any country, including one’s own, may only be subject to restrictions necessary to protect national security, public order, public health or morals or the rights and freedoms of others.\textsuperscript{690} Where the restrictive measure is not in conformity with these permissible limitations on the right to leave, then it will be in breach of art 12(2).\textsuperscript{691} It is unlikely that the control of illegal immigration is in conformity with these permissible limitations.\textsuperscript{692}

In support of these observations, the UN Human Rights Committee has expressed its concern that asylum laws and procedures that impose carrier sanctions and other pre-

\begin{footnotes}
\item[688] Hathaway, above n 1, 353.
\item[689] Hathaway, above n 1, 312-313.
\item[690] ICCPR, art 12(3).
\item[692] Nowak, above n 126, 279.
\end{footnotes}
frontier arrangements may affect the right of a person to leave a country, including his or her own, in violation of art 12(2).  

In addition, other rights can be employed to restrain the use of immigration control measures designed to prevent a certain group from seeking asylum. In particular, asylum seekers within their country of origin who are subject to immigration controls that are targeted at their race, ethnicity or nationality also have recourse to the prohibition against non-discrimination found in art 26 of the ICCPR. Article 26 guarantees to all persons ‘equal and effective protection against discrimination on any ground such as race, culture, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ In support of this analysis, the UK House of Lords held that the use of immigration officials posted at Prague airport to prevent the travel of Roma asylum seekers to the UK breached art 26 of the ICCPR and the racial non-discrimination prohibitions found in the Race Relations Act 1976 (UK).

V OUTSOURCING OF THE IMMIGRATION CONTROL FUNCTION TO PRIVATE CARRIERS

Assuming that states are under an obligation to ensure their external immigration controls do not result in refoulement, shifting the locus and function of immigration control places significant barriers in front of asylum seekers wanting to enforce this obligation. Before considering this issue in section VI, it is first necessary to highlight the role of private carriers. As Guiraudon has identified, ‘denationalization’ of migration control not only embraces extraterritoriality, but also the use of private

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693 UN Human Rights Committee, Concluding Observations on Austria (CCPR/C/79/Add.103, 19 November 1998).

694 R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1 [98]-[104] (Baroness Hale of Richmond).
Carriers to perform traditional state functions. Carrier sanctions, by stipulating that sea, air or land carriers must not permit a person without valid travel documents to travel to the destination state, effectively enable a state to control immigration into its territory without establishing a physical presence in the states of embarkation.

A State responsibility for a carrier’s enforcement of visa requirements

The strategic use of private enterprises to perform key governmental functions outside the borders of the state is not unique to the asylum context. ‘Privatization … has gone global.’ International law has struggled to keep pace with this trend. The International Law Commission has taken decades to codify the rules on state responsibility governing, *inter alia*, the devolution of state functions to ‘parastatal’ entities. However, it is now clear from art 5 of the articles on the Responsibility of States for internationally wrongful acts that international law recognizes that the ‘conduct of a person or entity which is not an organ of the State … but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law …’

In the present context, a key issue is whether destination states are responsible for the actions of private carriers charged with administering their visa requirements. The International Law Commission’s commentary on the articles on the Responsibility of States for internationally wrongful acts expressly provides that art 5 extends to the

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696 Hathaway, above n 1, 311.


699 Ibid.
situation where ‘private or state-owned airlines may have delegated to them certain powers in relation to immigration control …’⁷⁰⁰ The justification for attributing to the destination state the conduct of private carriers is the fact that the law of the destination state has conferred on the carrier the exercise of an element of governmental authority.⁷⁰¹ As there is no need under art 5 to demonstrate that the carrier’s conduct was in fact carried out under the control of the state, state responsibility attaches to the carrier’s conduct irrespective of the level of independent discretion or power to act enjoyed by the carrier.⁷⁰²

Consistent with this position, scholars have reasoned that the non-refoulement obligation applies ‘to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State.’⁷⁰³ An act of refoulement undertaken by a private carrier will therefore engage the responsibility of the relevant state.⁷⁰⁴ This is in keeping with jurisprudence on art 2 of the ICCPR, which clarifies that a state bears responsibility for violations of rights committed by its agents in the territory of another state.⁷⁰⁵


⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ Lauterpacht and D Bethlehem, above n 662, 109.

⁷⁰⁴ Ibid 109-110.

⁷⁰⁵ Delia Saldias de Lopez v Uruguay, Communication No 52/1979, UN Doc CCPR/C/OP/1/88/1984, [12.3] (‘Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it’). See also, in the context of the ECHR: Cyprus v Turkey (1976) 4 Eur Comm HR 482.
B The role and responsibility of carriers

There is much sense in holding states solely accountable for the abuses of human rights that flow from their extraterritorial immigration controls. States create visa controls; they should therefore be responsible for preventing any abuses of human rights that flow from their enforcement. Any talk of assigning accountability to other entities or agencies, it might be argued, merely detracts from what is a failure of state protection, creating a ‘diversion for States to avoid their own responsibilities’.\(^{706}\)

Pursuing this line of argument, the enforcement of visa controls should be one case where corporations are not called upon to replace governments in their legitimate and primary responsibility for the protection of human rights. This point of view accords with the typical NGO position on carrier sanctions, namely that ‘[a]irline employees should not be expected to act as an immigration police force, making decisions which put people’s lives in danger; that is the duty of governments.’\(^{707}\) It also reflects the position of civil aviation staff, who object to being the state’s frontline against unwanted asylum seekers.\(^{708}\)

Moreover, the view that states alone should bear responsibility for ensuring that immigration controls do not impact adversely on asylum seekers also fits with the orthodox vision of international human rights law, namely that it ‘generally binds only states because it is principally designed to protect individuals from the excesses


\(^{708}\) International Transport Worker’s Federation, Resolution Concerning the Improper Involvement of Aviation Employees by their Employers in Violations of the Rights of Refugees and Asylum Seekers (1992).
of state power.\textsuperscript{709} As a result, `where infringements are caused by abuse of private power, it is still the state that will be held vicariously liable at international law, if any legal entity is to be held liable at all.'\textsuperscript{710} In accordance with the orthodox position, transnational corporations do not have direct responsibilities under international human rights instruments.\textsuperscript{711}

Granted that states bear responsibility for human rights violations flowing from immigration controls, the issue remains whether carriers should be involved in ensuring that human rights breaches do not occur. As a pragmatic matter, this may be unavoidable. Carriers occupy a unique position with respect to asylum seekers, often being the only means of escape or rescue for asylum seekers stranded within their country of origin or floundering in an unseaworthy boat. While a private institution, the carrier role is a conduit for the enjoyment of a number of public international law rights. Thus, it may be necessary to involve carriers to ensure the effectiveness of any extraterritorial protection safeguards.

The special position of private carriers has been at least implicitly recognized by states through EXCOM (the Executive Committee of the High Commissioner’s Programme). In the context of interception measures generally, EXCOM has expressed the view that `State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international law, all appropriate steps in the implementation of interception measures ...'[emphasis


\textsuperscript{710} Ibid.

added]. Specifically, EXCOM has called on both states and carriers to be alert to the human rights implications of the visa enforcement function.

While perhaps stopping short of imposing a direct protection responsibility on carriers, these developments are in keeping with a growing expectation that transnational corporations will take steps to ensure the protection of human rights within their spheres of activity and influence. Transnational corporations are increasingly expected ‘to promote, secure the fulfilment of, respect, ensure respect of and protect human rights’, including ‘the rights recognized by ... international refugee law ...’. In accordance with the general principles of the UN Global Compact, corporations are called upon to ‘make sure their own corporations are not complicit in human rights abuses’. Thus, while states bear responsibility for their immigration controls, there is also an expectation that private carriers will be alive to the impact of immigration controls on the human rights of their passengers.

VI THE PRACTICALITY OF EXTERNAL ‘SAFEGUARDS’

So far this chapter has proposed that states should ensure that immigration controls operating at the exported border do not lead to direct or indirect refoulement.

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712 EXCOM Conclusion No. 97 (LIV) – 2003, [(a)(ii)].
713 Ibid.
Moreover, as the vehicle for seeking protection, carriers should be sensitive to protection issues. That said, the current framework of externalized and devolved immigration controls places major obstacles in the face of asylum seekers wanting to enforce the obligations of destination states outside that state. This is evident from the following discussion of current safeguards implemented or mooted at the exported border.

A The inadequacy of current protection safeguards at the exported border

The protection safeguards used or proposed to date in the immigration control context are underdeveloped and underutilised. The principal safeguard (where any at all) is the exculpatory provision that exempts carriers from fines where a carrier has reason to believe that a passenger without proper documentation is a refugee.\(^{717}\) The idea of an exculpatory provision is that states should not sanction carriers that have ‘knowingly brought into the State a person who does not possess a valid entry document but who has a plausible claim for refugee status or otherwise needs international protection.’\(^{718}\)

In conjunction with exculpatory provisions, proposals have called for greater training of official and private border staff in protection matters. EXCOM requires that ‘[a]ll persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection


\(^{718}\) UNHCR, UNHCR Position: Visa Requirements and Carrier Sanctions, 1 September 1995, 2.
needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR [emphasis added].

In the EU context, ECRE has called for a portion of the expanding EU External Borders Fund (1.82 billion Euros) to be employed to help Member States incorporate ‘protection-sensitive’ measures into the regulation of the EU’s external borders. As part of this, ECRE calls for training of staff involved in border control activities ‘on the refugee and human rights implications of preventing access to the territory’, and raising the awareness of carriers on protection issues. There is already a precedent in the high level of training provided by states to carrier personnel in relation to the recognition of fraudulent travel documents.

While these initiatives are a welcome move in the right direction, arguably it is not enough to rely solely on exculpatory provisions and the goodwill of private carrier personnel. The practice of waiving a carrier sanction for a passenger later recognized as a refugee may waive the carrier’s financial burden, but this is little comfort to refugees who fail to reach the destination state because their papers are not in order or because they are relying on forgeries that are not sufficiently expert to evade detection by the carrier.

Over reliance on private carrier personnel also raises the issue of the respective roles of immigration officials and carrier personnel. Further moves toward the use of exculpatory provisions and the training of carrier personnel only reinforces a fundamental problem underlying carrier sanctions, namely, that they oblige carriers to

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719 EXCOM Conclusions No 97 (LIV) – 2003, [(a)(viii)].
720 ECRE, above n 627, 10.
721 Ibid.
722 Cruz, above n 717, 65; Nicholson, above n 677, 592.
723 Nicholson, above n 677, 600.
take on greater discretionary immigration powers.\textsuperscript{724} As Frances Nicholson has remarked, ‘the act of making the imposition of a fine dependent or even discretionary on the basis of the outcome of an asylum application has the effect of making carriers assess the validity of a potential asylum application as well as the validity of that person’s papers.’\textsuperscript{725}

While some level of engagement between carriers and asylum seekers would appear inevitable given the unique position of carriers, carrier personnel will likely remain resistant to protection issues. While training would potentially boost the ‘protection sensitivity’ of carrier personnel, they are still likely to be comparatively inexperienced in protection matters and not necessarily motivated by humanitarian considerations.\textsuperscript{726} Carrier personnel ‘are not and will never become competent immigration officers nor, even, refugee sympathisers.’\textsuperscript{727} Carriers have a powerful economic incentive to avoid the risk of sanctions on bringing an asylum seeker to the destination state where they are determined not to have protection needs.\textsuperscript{728} Problems may further arise from the fact that carrier personnel often act as agents for other carriers.

B Greater state and international agency involvement

These criticisms point to the need for greater state and international agency involvement in the protection afforded to asylum seekers at the exported border. Yet it is difficult to foresee how this can occur within the current carrier sanction regime, which even with exculpatory provisions in place inevitably shifts the protection obligations of states onto private carriers. Greater state and agency involvement

\textsuperscript{724} Ibid 606.
\textsuperscript{725} Ibid 601.
\textsuperscript{726} Feller, above n 370, 57.
\textsuperscript{727} Cruz, above n 717, 79.
\textsuperscript{728} Ibid 66-68, 79; Nicholson, above n 677, 601.
would require new levels of co-ordination between private carriers, destination and transit states, and international agencies, including the creation of independent mechanisms for the monitoring and supervision of official and carrier personnel. The growing role of FRONTEX in coordinating the immigration operations of EU Member States would also need to be taken into account in the European theatre.

In a recent move, the European Commission established a 'Forum on Carrier Liability,' made up of carriers, officials and humanitarian groups, to consider ways to safeguard protection. Yet while recognizing that protection is an issue, dialogue is premised on the continuation of the carrier sanction regime. On the other hand, a more positive development is the recent initiative between states, international agencies, and sea carriers, involving the rescue of asylum seekers at sea. The initiative aims at ensuring that asylum seekers rescued at sea without proper documentation are disembarked at a place of protection. These efforts perhaps provide a precedent for further co-ordinated efforts to make explicit the roles and responsibilities of destination states, transit states, and carriers with respect to the protection of asylum seekers at the exported border.

UNHCR is the logical agency to lead this dialogue given its supervisory role under art 35(1) of the Refugee Convention. While the UNHCR’s '10 Point-Plan of Action'

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729 ECRE, above n 627, 10.
732 ECRE, above n 627, 29.
733 UNHCR, Proposals for an Executive Committee Conclusion on Rescue at Sea, 16 January 2007, 2.
734 Ibid.
735 The UNHCR’s international protection mandate includes '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and
highlights the need for greater co-operation and co-ordination between ‘key actors’ in addressing protection within mixed migratory flows, \(^{736}\) it not clear whether the safeguards contained in it apply to the exported and privatized border. Notably, it is silent on the question of the role of states vis-à-vis private carriers, referring to the ‘key actors’ only as the ‘affected states, governmental bodies, regional and international organizations with relevant mandates’ and NGOs.\(^{737}\)

C Preserving access to internal protection safeguards

Extraterritorial safeguards should be concerned solely with ensuring access to fair and effective eligibility procedures.\(^{738}\) Where necessary this should involve the waiver of carrier sanctions and the referral of asylum claimants to the central authority in the country of destination. Officers or agents at the port of embarkation should be obligated to permit putative refugees and other persons in need of protection access to the asylum application procedures at the port of entry (the current position in most states is that asylum claims can be made only at the port of entry – thereby denying any duty on officers to identify potential protection claims\(^{739}\)). Meanwhile, eligibility determination should take place onshore by the central authority charged with this

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\(^{736}\) UNHCR, Refugee Protection and Mixed Migration: A 10 Point Plan of Action, January 2007, Rev. 1, 2.

\(^{737}\) Ibid.

\(^{738}\) EXCOM Conclusion No. 74 (XLV) – 1994 (i) (‘Reiterates the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection are identified and granted such protection’); EXCOM Conclusion No. 82 (XLVIII) – 1997 (d) (ii) (‘Reiterates, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects: access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs.’)

\(^{739}\) Nicholson, above n 677, 597.
function. This suggestion is in keeping with other observers who have proposed that the assessments of asylum claims should take place at the port of entry (rather than the port of embarkation), and that there should be a right of appeal to an independent tribunals or court in the destination state.

At the same time, the difficulty of ensuring that officers and agents of the destination state exercise their discretion in an appropriate manner must be acknowledged. As it stands, the UNHCR’s 10-Point Plan is unclear on the extraterritorial operation of protection safeguards at ports of embarkation. Its ‘protection-sensitive entry systems’ simply apply ‘in-country, at borders and at sea’. Consequently, the 10-Point Plan does not explicitly address the issue of whether protection safeguards are practicable in the context of immigration controls administered outside the territory of destination states and with private carrier assistance. The Plan largely falls back on the notion of improved training and ‘clear instructions’ in protection matters for border guards and immigration officials without any indication whether carrier personnel are included in this reference.

The 10-Point Plan also does not address the question of what accountability and enforceability mechanisms are available at the exported border to provide a framework for the exercise of discretion by fully trained and instructed officers. Awareness raising and information sharing are welcome. However, they must also be accompanied by mechanisms to ensure such training and instructions are in fact

741 Ibid 490.
743 Ibid.
exercised in a manner beneficial to asylum seekers, including ensuring them access to fair and effective in-country asylum procedures in destination states.

VII RIGHTS AND SOVEREIGNTY

A Circumventing international obligations by avoiding internal constraints

This chapter has observed that visa requirements and carrier sanctions seek to ‘denationalize’ asylum control by denying persons access to in-country asylum procedures. The effect of such non-entrée policies is to circumvent the state’s protection obligations by avoiding internal constraints on government authority. Non-entrée measures extend the reach of arbitrary government power beyond the state, effectively dividing and circumventing the effective operation of external and internal restraints on the state’s traditional unfettered authority over immigration control.

By re-instigating a form of unfettered government ‘remote’ control over the asylum process – that prevents access to in-country asylum procedures and the associated legislative and judicial safeguards that remove government control – states seek to re-instigate their traditionally unfettered right of immigration control through the circumvention of the domestic enforceability of protection obligations. European confederation adds another layer between the person seeking protection and the in-country asylum procedures essential to their enjoyment of protection in the territory of EU Member States.

B Disingenuous appeals to external sovereignty

This analysis makes appeals to the state’s traditional sovereign right to control immigration as a justification for externalizing asylum appear disingenuous. Appeals to sovereignty in this context have an empirical and legal element. Empirically, it is claimed that the state’s ‘[e]ffective control of admission requires general restrictions
Underlying this is the belief that today's asylum seekers are largely the new 'economic' refugees from the developing world who pursue asylum as a path of irregular migration and are difficult to deport when determined not to be entitled to protection.\(^{745}\)

These empirical observations conveniently slip into a normative legal justification for the application of remote control policies to asylum seekers: better to prevent arrival of asylum seekers, than deal with the social and economic costs of processing and deportation. In the UK, for instance, the initial extension of visa controls to refugee producing countries and the imposition of liability on carriers in 1987 were clearly 'complementary measures intended to stem the flow of applicants for asylum.'\(^{746}\) The then UK Home Secretary, Mr Douglas Hurd, made it clear in his second reading speech to the bill introducing carrier sanctions in 1987 that it was 'intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned.'\(^{747}\)

Yet even if the above empirical claims are correct, they do not sustain the normative conclusion urged by some states and commentators, namely, that the Refugee Convention and cognate rights instruments are not applicable where it would mean sacrificing the state's right to control immigration. An example of this approach is found in Hailbronner's argument that the non-refoulement obligation found in art 33 of the Refugee Convention is not applicable in the context of entry and transport

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745 Hailbronner, above n 620, 342-343.

746 R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1 [28] (Lord Bingham); R v Secretary of State for the Home Department, Ex parte Hoverspeed [1999] INLR 591, 594-595 (Simon-Brown LJ).

747 Cited at R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2005] 2 AC 1 [28] (Lord Bingham).
regulations because it would have far-reaching consequences for immigration control.\footnote{Hailbronner, above n 744, 115; Hailbronner, above n 620, 354.} In this respect, Hailbronner’s analysis evidences a worrying trend to conflate refugee flows with ‘large migration movements’, providing states with a justification for the unfettered restriction of the ‘uncontrolled access of foreigners to their territory.’\footnote{Hailbronner, above n 744, 115.}

The response of the EU’s new migration agency, FRONTEX, to the arrival without proper documentation of Iraqi asylum seekers, is typical of this trend.\footnote{ECRE, above n 627, 12.} Between January and September 2007, 18.4\% of asylum applications in Europe were lodged by Iraqis. The fact that there was a 90\% success rate in Sweden and a 74\% success rate in Austria suggests that most of the protection claims were genuine. Yet rather than ensure Iraqi asylum seekers continued to enjoy access to protection, FRONTEX’s response was to view the ‘illegal’ immigration of Iraqi nationals as a potential threat to Member States of the EU.\footnote{FRONTEX, Public Bulletin, September 2007, Reference Number: 9566/14.09 2007, 15, cited in ECRE, above n 627, 12.} Consequently, FRONTEX engaged in a risk analysis of the ‘illegal’ arrival of Iraqis, focusing solely on ‘threats of human trafficking, forgery of travel documents and possible abuse of asylum seeking procedure.’\footnote{ECRE, above n 627, 4.}

\begin{center}
\textit{C A higher right?}
\end{center}

Ultimately, this type of practice rests on the belief that the sovereign right to exclude ‘irregular’ migrants is a ‘higher’ right than the right to protection from refoulement.\footnote{See, eg, C Dauvergne, ‘The Dilemma of Rights Discourses for Refugees’ (2000) 23 UNSWLJ 56, 57.}

The core non-refoulement obligation is read down according to an ‘overriding’ state
prerogative to control immigration. This reasoning fails to grapple with the fact that states accepted an intrusion into their traditional sovereign right to control immigration when they agreed to the binding provisions of the Refugee Convention and cognate rights instruments. While there is no obligation on a Contracting State under the Refugee Convention or cognate rights instruments not to introduce or continue a system of immigration control, the limits that the state may pursue its own interests at the expense of the rights of refugees are clearly set out in the Convention. None of them refers to 'general immigration control'.

Second, this reasoning effectively entertains the circumvention of national protection safeguards. As this thesis has sought to establish, a number of the core obligations in these instruments, especially the non-refoulement obligation, depend for their effectiveness upon a tapestry of national institutions, laws and principles. Non-entée policies unravel this. There is no point in states endorsing rights that refugees cannot access or enjoy.

Thus, while the UNHCR recognizes that states have a right to control irregular immigration into their territory, immigration controls should not interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries. As stated by the European Commission on Human Rights,

754 UNHCR, above n 718, 1.

755 Refugee Convention, art 1F (exclusion of entitlement to protection of persons who have committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime, or is guilty of acts contrary to the purposes and principles of the United Nations), art 32 (expulsion of persons on grounds of national security or public order in accordance with due process of law), art 33(2) (persons whom there are reasonable grounds for regarding a danger to the security of the country, or convicted of serious crime constitutes a danger to the community of the asylum country).

756 UNHCR, above n 718, 1.

757 Ibid 2.
immigration controls must be exercised in accordance with a state’s human rights obligations.\textsuperscript{758}

Refugee status, by its very nature, is a "trump card" that can be played in order to avoid the usual rules of migration control.\textsuperscript{759} It is a needs-based recognition of the inherent implausibility of managed migration in circumstances where the need to flee is both ethically and pragmatically more powerful than the usual rules of immigration control.\textsuperscript{760} Non-\textit{entrée} policies fail to acknowledge this fundamental premise of international protection.

The ‘migration management’ paradigm currently gripping inter-governmental dialogue does not alter this fact:

\begin{quote}
[M]igration management must take due account of international refugee protection obligations, including the importance of identifying people in need of international protection and determining appropriate solutions for them …

[M]easures taken to curb irregular migration, whether by land, sea, or air must not prevent persons who are seeking international protection from gaining access to the territory and asylum procedure of countries where protection can be found.\textsuperscript{761}
\end{quote}

In particular, immigration control must cater for the non-refoulement obligation. It is not enough to argue, as Hailbronner does, that applying the non-refoulement obligation ‘to facilitate access to the territory and to grant exemptions from generally

\textsuperscript{758} Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, [59].

\textsuperscript{759} Hathaway, above n 1, 354.

\textsuperscript{760} Ibid.

applicable entry and transport regulations means a completely new dimension. It is inadequate to discount the application of the non-refoulement obligation to immigration controls on this basis. The need to extend the non-refoulement obligation to these measures is new because the sophisticated and targeted application of them to asylum seekers is new. To permit states to erect a novel and complex exported border, then disown its adverse consequences for refugees, is inconsistent with the obligation to ensure the Refugee Convention, as well as other international rights treaties, operate effectively in today’s legal and social environment. The exported border must bend to a state’s international protection obligations, not vice versa.

While states may not be under an obligation to seek out refugees, it does not follow that states are not under an obligation to remove barriers to refugees accessing protection. The non-refoulement obligation, as argued in chapter 4 of this thesis, does not simply impose negative restrictions on a state. The non-refoulement obligation also requires states to take positive steps to prevent refoulement, eg the obligation to ensure that refugee determination processes are fair and effective. The positive obligations imposed by the non-refoulement principle should also extend to the removal of barriers to accessing those procedures if the non-refoulement obligation is to have any relevance in an age of ubiquitous immigration controls.

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762 Hailbronner, above n 744, 115.
763 Cruz, above n 717, 64.
764 R v Secretary of State for the Home Department, ex parte Adan [2001] 2 AC 477, 500 (Laws LJ); Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 292 (Kirby J).
765 See above n 386 – and accompanying text.
766 See above n 396 – and accompanying text.
Hence, visa requirements and carrier sanctions legislation must be re-examined in light of the general obligation to interpret treaties in good faith and the Refugee Convention’s object of assuring refugees the widest possible exercise of their rights. In accordance with this overarching obligation, Feller concludes that a Contracting State which ‘legislates for carrier sanctions limiting the access of refugees to status determination procedures, as well as to the rights and protections of the [Refugee Convention] is … broadly in breach of its Convention obligations.’ It follows that ‘a State wishing to obstruct the movement of those who seek asylum are thus limited by specific rules of international law and by the State’s obligation to fulfil its international commitments in good faith; and that in pursuing the “legitimate purpose” of immigration control a State must act within the law.’

VIII CONCLUSION

Visa requirements, carrier sanctions and other non-entée policies divide external obligations and the internal mechanisms necessary for their successful implementation and enforcement, disempowering both. In this way, non-entée policies signify an assertion of unlimited sovereignty of the state in international law and the unfettered exercise of internal sovereignty (or public power) within the state. In the process, states undermine the necessary interdependence between international and national constraints on the traditionally unfettered authority of the state and government in the asylum arena. Practical protection safeguards should be instigated in the visa requirement and carrier sanction context that aim at ‘renationalizing’ the

767 Feller, above n 370, 66, 59.
768 Ibid 59.
769 UNHCR, Amicus curiae brief in R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening) 17 IJRL 427 (2005), 436.
international refugee protection regime by facilitating the access of asylum seekers to fair and effective eligibility procedures.
I INTRODUCTION

The previous chapter of this thesis argued that a good faith reading of key protection obligations required states to ensure that asylum seekers had access to an equivalent level of protection at the exported border or, if this was not practicable, access to the asylum process in the state of destination. This chapter examines the scope of a good faith reading of key international obligations in the context of another manifestation of the ‘exported border’: extraterritorial processing schemes.

Extraterritorial processing schemes generally comprise the interception and transfer of asylum seekers to a third country where the intercepting state retains exclusive or principal control over the asylum process. Such schemes have been employed by Australia, the US, and are under consideration in the EU as part of the Hague Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues dated 11 October 2001.

Memorandum of understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of the United States to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti, entered into force 18 June 1994, KAV 3906, Temp State Dept No 94-158 (Turks and Caicos Islands agreement); Memorandum of understanding between the Government of the United States and the Government of Jamaica for the establishment within the Jamaican territorial sea and internal waters of a facility to process nationals of Haiti seeking refuge within or entry to the United States of America, entered into force 2 June 1994, KAV 3901, Temp State Dept No 94-153 (US-Jamaica agreement).
Programme adopted by the European Council. Extraterritorial processing schemes and proposals have come under increasing scrutiny by the UNHCR and commentators. Most recently, in a major policy reversal, the newly elected Australian Government disbanded the country's offshore processing facilities and announced the end of the practice of transferring asylum seekers arriving in Australia to a third country for processing. In this period of uncertainty over the future of extraterritorial processing, the operation of the US and Australian extraterritorial processing schemes call for close examination and analysis.

Section II of this chapter begins by recapping the key international obligations (non-refoulement, access to the courts, non-discrimination, non-penalization, safe third country safeguards) that require states to make use of an array of legislative, judicial and administrative measures in order to ensure a fair and effective asylum process. In light of this discussion, sections III and IV identify the flaws in the protection offered under the US and Australian extraterritorial processing schemes both during the interception and transfer processes and after transfer of an asylum seeker to an extraterritorial processing centre (EPC). Finally, section V examines the reasons for

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775 Senator Chris Evans, Minister for Immigration and Citizenship, ‘Last refugees leave Nauru’ (Press Release, 8 February 2008).
Australia’s recent disbandment of its EPCs and the lessons this may have for other jurisdictions.

In brief, the chapter observes that extraterritorial processing schemes are designed to prevent and deter access to statutory, administrative, and judicial measures that guarantee a fair and effective asylum process in the country responsible for the interception and transfer of asylum seekers to a third country. In line with this objective, the US and Australian governments have adopted interdiction practices, and a supposed ‘international’ standard of processing at EPCs, that are deliberately isolated from the national legal and institutional protections within either the intercepting state or the third country where processing occurs.

The impetus for the disbandment of Australia’s EPCs was the effective realisation that the processing of claims at EPCs negated national safeguards fundamental to the satisfaction of Australia’s international obligations. Australia’s policy reversal sends a timely message to other countries who may be considering implementing such practices that extraterritorial processing schemes have proven unworkable as a matter of international law.

II RECAPPING THE KEY OBLIGATIONS IN THE CONTEXT OF INTERDICTION AND EXTRATERRITORIAL PROCESSING

A The good faith principle

It is useful at this point in this thesis to recap the core legal argument that informs the following critique of extraterritorial processing. The starting point is art 31(1) of the Vienna Convention on the Law of Treaties,\(^7\) which confirms the principle that a

treaty should be interpreted in ‘good faith in accordance with the ordinary meaning to
be given to the terms of the treaty in their context and in the light of its object and
purpose.’ In the case of the Refugee Convention, as expressed in its preamble, this
overarching obligation means interpreting and applying the Convention by reference
to the object and purpose of assuring to ‘refugees the widest possible exercise’ of
fundamental rights and freedoms. The Refugee Convention’s preamble affirms the
principles of the UN Charter and the Universal Declaration of Human Rights, making
clear that the Convention should be interpreted and applied in light of its place
‘among the international instruments that have as their object and purpose the
protection of the equal enjoyment by every person of fundamental rights and
freedoms.’

The overarching obligation to interpret a treaty in good faith in light of its object and
purpose should also incorporate the duty to interpret and apply a treaty so as to ensure
its effectiveness. Applied to the Refugee Convention, the duty to ensure the
effectiveness of the Convention requires that states ensure that the rights and
obligations set out in the Convention operate effectively within their evolving legal,
political and social environment.

Thus, the duty to ensure the effectiveness of a treaty simply represents the basic rule
of pacta sunt servanda that, when applied to human rights treaties, requires proactive

777 A treaty's preamble is the key indicator of its object and purpose: Arbitral Award of 31 July 1989
778 Applicant A v Minister for Immigration and Multicultural Affairs (1996) 190 CLR 225, 231
(Brennan CJ).
779 H Lauterpacht, The Development of International Law by the International Court (London: Stevens
& Sons Ltd, 1958), 304. See, above n 267- and accompanying text.
780 Hathaway, above n 1, 63-67.
steps to protect rights. Human rights treaties not only impose negative prohibitions on states, but also impose a duty on states to fulfil their obligations by means of ‘positive legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.’

Underlying this duty is the understanding that international human rights law ‘parallels and supplements national law … but it does not replace, and indeed depends on, national institutions.’

B The non-refoulement obligation

This thesis argues that when interpreted and applied in good faith, key international protection obligations require states to exploit statutory, judicial or administrative protection measures and safeguards in order to ensure persons enjoy a full and fair asylum hearing. The most important of these obligations is the non-refoulement principle.

The non-refoulement obligation in art 33 of the Refugee Convention, which is described as the cornerstone of the Convention, imposes an obligation on states not to expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. Non-refoulement obligations, complementing the non-refoulement

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781 Tomuschat, above n 275, 104.
782 Nowak, above n 126, xxi.
obligation in art 33 of the Refugee Convention, are also found in other international human rights instruments.\textsuperscript{785}

Chapter 4 of this thesis argued that the \textit{non-refoulement} obligation is in essence a negative prohibition guaranteed by positive measures.\textsuperscript{786} Those measures, it is argued, should be directed at reducing the risk of \textit{refoulement} to the greatest extent possible. States should employ those legislative, judicial and administrative measures that best reduce the risk of \textit{refoulement} by ensuring the effective and practical enjoyment of those substantive and procedural requirements that are recognized as constituting a fair and effective asylum process.\textsuperscript{787}

A central observation of this thesis, based on an historical analysis of the development of asylum policies in a number of states, is that practical enjoyment of those requirements will be best assured by well-resourced administrative procedures guaranteed by statutory rights, e.g. a statutory right to legal assistance or to reasons for a decision refusing asylum status. A further requirement is that those statutory rights and procedures must be capable of enforcement in a court of law.

\textsuperscript{785} Art 3 of the CAT contains an express prohibition against the expulsion, return or extradition of a person to a place where they would be in danger of being subject to torture: \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). The ICCPR contains an implied prohibition against the expulsion or return of a person to a territory where they face a real risk of irreparable harm, such as a threat to the right to life (art 6) or torture or other cruel, inhuman, or degrading treatment or punishment (art 7): UN Human Rights Committee, \textit{General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)}, UN Doc HRI/ GEN/1/Rev.7, 10 March 1992, [9]; UN Human Rights Committee, \textit{General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant}, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, [12]; \textit{ARJ v Australia} (Communication No 692/1996 11 August 1997, UN Doc CCPR/C/60/D/692/1996), [6.8]-[6.9]; \textit{R (on the application of Ullah) v Special Adjudicator} [2004] All ER 153, [21]-[24] (Lord Bingham).

\textsuperscript{786} See, above n 396 - and accompanying text.

\textsuperscript{787} The UNHCR has identified certain core processing requirements, including: a right of review before an independent body, a right to legal assistance and representation, access to independent interpreters, a personal interview, an opportunity to present a case, reasons for the decision, and consideration of whether any claim to protection is warranted under the ICCPR or other rights instrument: UNHCR, \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001, [43], [50]. See, above n 464 - and accompanying text.
In addition, the duty to ensure the effectiveness of the non-refoulement obligation means that a state cannot avoid its obligation not to refoule by attaching a legal designation to a place or person. Domestic categorizations will not change the nature and scope of the state’s obligations under international law to an individual falling within its jurisdiction. Thus, Australia’s creation of ‘excised areas’ as part of its extraterritorial processing scheme cannot circumvent its international obligations.

The duty to ensure the effectiveness of the non-refoulement obligation also demands its extraterritorial operation, which is of crucial concern in the context of extraterritorial processing schemes. These, by definition, operate outside the territory of the state responsible for the interception and transfer of asylum seekers.

Although the US Supreme Court in Sale v Haitian Centers Council held that the non-refoulement obligation only applies to a refugee in the territory or territorial waters of a state, the better view as expressed by the UNHCR’s amicus brief in Sale and by leading commentators, is that the non-refoulement obligation applies wherever a state acts.

A compelling argument in favour of this construction is the fact that art 33 of the Refugee Convention, unlike other obligations found in the Convention, is not subject to any requirement of territorial attachment. The extraterritorial application of art 33,

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788 Goodwin-Gill, above n 7, 89.

789 See above n 660 – and accompanying text.


791 Reproduced at 6 IJRL 85 (1994), 100-02. See also: UNHCR, above n 661.

792 Goodwin-Gill and McAdam, above n 117, 244-53; Hathaway, above n 1, 335-342; Lauterpacht and Bethlehem, above n 662, [67].

793 When considering the US Haitian interdiction scheme, the Inter-American Commission on Human Rights expressly endorsed the UNHCR’s position that the non-refoulement obligation applied extraterritorially - rejecting the approach of the US Supreme Court in Sale: Haitian Interdiction, Case 10.675, Report No 51/96 [United States], IACHR 1996 Annual Report 550 (March 13, 1997), ¶¶ 183-188, [156]-[157].
as well as the *non-refoulement* obligations under other rights instruments, is also consistent with the views and decisions of international and regional human rights bodies recognizing a state's responsibility for violations of rights wherever individuals are under their jurisdiction and control.\textsuperscript{794}

*C Access to the courts, non-discrimination, non-penalization*

Other relevant obligations include access to the courts, the obligation not to discriminate between refugees, and the obligation not to penalize refugees due to their mode of arrival. Article 16(1) of the Refugee Convention and article 14 of the ICCPR ensure that asylum seekers have free access to the courts of law on the territory of all contracting states, including legal representation, interpretation and translation facilities, waiver of costs and fees, and due process.\textsuperscript{795} Article 16(1) is not limited to private civil law proceedings, but recognizes the right of refugees to enforce their rights under the Refugee Convention in the courts of any contracting state.\textsuperscript{796}

When article 16(1) is read together with article 14 of the ICCPR it guarantees asylum seekers a right of judicial appeal to challenge the legality of a decision determining their entitlement to protection.\textsuperscript{797} Judicial oversight of the asylum process strengthens compliance with the Refugee Convention ‘by establishing, through considered interpretation of the Convention’s terms, the parameters of [a state’s] international

\textsuperscript{794} UN Human Rights Committee, General Comment No 31: the Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, [10] and the cases discussed in Lauterpacht and Bethlehem, above n 662, 110-111 and UNHCR, Advisory Opinion, above n 661, 16-18.

\textsuperscript{795} UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, [6].

\textsuperscript{796} Hathaway, above n 1, 644-647.

\textsuperscript{797} Ibid 647-656.
obligations. Similarly, the procedural safeguards elaborated by the courts enhance and help ensure the fairness of asylum processes.

The non-discrimination provision also requires that states provide all asylum seekers with access to the same protection measures. The non-discrimination provision in art 3 of the Refugee Convention applies to procedural matters not expressly dealt with in the Convention if it can be shown that the lesser standards heighten the risk of rejection. When read in light of the Refugee Convention’s object and purpose, art 3 affirms the principle of non-discrimination in the Universal Declaration of Human Rights and therefore should be read together with article 26 of the ICCPR. Read together, article 3 and article 26 prohibit discrimination in law or in fact in any field regulated and protected by public authorities, including arguably the discriminatory application of different processing standards between asylum seekers.

Furthermore, denying asylum seekers access to statutory or judicial protection measures because they arrive without authorization will amount to an imposition of penalties in contravention of art 31 of the Refugee Convention. This is reading ‘penalties’ in art 31 in a way that ‘takes into account the [humanitarian] object and

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798 UNHCR, 2005 Reform Bill submission, above n 795, [8].
799 Ibid.
800 Hathaway, above n 1, 252-253.
801 Grahl-Madsen, above n 10, 8.
802 Hathaway, above n 1, 257.
804 UNHCR, above n 584, [25].
purpose of the [Refugee Convention], as well as the interpretation of the term ‘penalties’ incorporated in other human rights treaties.\textsuperscript{805}

\textbf{D Safe third country safeguards}

Extraterritorial processing schemes also trigger a discussion of safe third country safeguards designed to protect asylum seekers transferred between states. While transfer to a safe third country is not prohibited under the Refugee Convention or related rights instruments, the transferring state must take steps to ensure that an asylum seeker transferred to another state will in practice not be deprived of the rights found in the Convention and cognate rights instruments. This includes all art 2-34 rights in the Refugee Convention.\textsuperscript{806} The transferring state must also ensure the satisfaction of its obligations under other rights instruments.\textsuperscript{807}

The reason for this requirement is that refugees transferred to a third state have come under the jurisdiction of a state party and hence have acquired a number of core rights under the Convention, including the right to access the courts to remedy a denial of a right.\textsuperscript{808} States should therefore assess whether transfer to a third country deprives a refugee of a right under the Convention, including a means of enforcing that right.\textsuperscript{809}

This assessment should include whether the third state offers an equivalent or comparative level of processing of asylum claims. This necessitates not only an assessment of that jurisdiction’s interpretation of the refugee definition, but also a


\textsuperscript{806} Hathaway, above n 1, 331-2.


\textsuperscript{808} Hathaway, above n 1, 332.

\textsuperscript{809} Ibid.
practical appraisal of the effectiveness of legislative, judicial and administrative measures that constitute the asylum process in that country. States should not transfer a person to a third state where the risk of *refoulement* is increased due to the lack or weakness of such measures. Australia’s transfer of asylum seekers to Nauru and the US transfer of asylum seekers to Caribbean states for processing raise the question whether states have taken adequate steps to protect against such a deprivation of rights.

In light of these obligations, the next two sections of this article examine the operation of the US and Australian extraterritorial processing schemes. As a necessary starting point, section III considers the protection of asylum seekers during the interdiction and transfer processes, which are the precursor to the processing of claims outside the territory of the interdicting or intercepting state.

**III FAILURE OF PROTECTION DURING THE INTERDICTION AND TRANSFER PROCESSES**

A preliminary component of extraterritorial processing schemes is the interdiction or interception of asylum seekers and their transfer to a third country. Contrary to their international obligations, the following discussion highlights that in order to deter future arrivals the US and Australian governments have sought to assert exclusive executive discretion over the interdiction and transfer of asylum seekers so as to exclude access to statutory and judicial safeguards that enable asylum seekers to enforce and enjoy their right to a fair and effective asylum process.

*A Obstruction and deterrence*
The US extraterritorial processing scheme has its roots in the interdiction of Haitian asylum seekers under a 1981 bilateral agreement between the US and Haiti.  

Haitian asylum seekers were interdicted on the high seas, subject to a rudimentary screening process on the high seas to determine whether they should be given access to the statutory asylum process on the mainland, and then either brought to the mainland or repatriated directly to Haiti depending on the outcome of the screening process.

The various guises of the US extraterritorial processing scheme since that time have retained the basic deterrence objective of its early policy. It is clear from the policy pronouncements of the day that the objective of interdiction and screening on the high seas was to prevent and deter unauthorized asylum seekers from gaining direct access to the statutory and judicial processes offered on the US mainland. As observed by Justice Stevens in the US Supreme Court, ‘the interdiction program … has prevented [asylum seekers] … from reaching our shores and invoking … [statutory] protections.’

Similarly, the Australian Government’s extraterritorial processing scheme, which operated between 2001 and February 2008, and which witnessed the transfer of over 1600 asylum seekers to the Republic of Nauru and Papua New Guinea for processing, was also promoted as a deterrent to future unauthorized asylum seekers because it

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810 Haiti-US, Migrants-Interdiction, TIAS No 10241, 33 UST 3559 (23 September 1981); President Proclamation No 4865, 46 FR 48, 107 (29 September 1981); EO 12324, 46 FR 48109 (29 September 1981) (revoked by EO 12807, 57 FR 23134 (24 May 1992)).


812 66 No 23 Interpreter Releases 649 (19 June 1989), 650 (‘James L. Buck, INS Deputy Commissioner, testified [before the House Judiciary Committee’s Subcommittee on Immigration, Refugees, and International Law] that the government instituted the policy of interdicting and detaining Haitians after the Mariel and Haitian boatlifts of 1980. The purpose, Mr. Buck said, is to deter more boat arrivals of undocumented aliens.’)

denied asylum seekers direct access to the onshore refugee determination process.\textsuperscript{814}

The same deterrence objective drove the British and Danish governments' proposals in 2003 and 2004 to instigate an EU extraterritorial processing scheme in line with the US and Australian ‘models’.\textsuperscript{815}

The symmetry between the deterrence objectives of the US, Australian, UK and Danish examples derives from the contemporary and historical influence of the US scheme. An informal arrangement entered into in April 2007 between the US and Australian governments to exchange asylum seekers held at each other’s EPCs signalled the depth of similarities between the two operations.\textsuperscript{816} Furthermore, while the UK and Danish proposals are generally traced back to similar proposals put forward in the mid-1990s,\textsuperscript{817} the genesis of the UK’s robust support for extraterritorial processing can also be traced to its 1994 agreement to permit the US to establish an EPC in the Turks and Caicos Islands, a UK dependency.\textsuperscript{818} The similarity between proposals in the EU context and the Australian and US schemes is explored further in section 5.

B Exclusive government discretion as a means of controlling access

In line with the deterrence objective, both the US and Australian governments have insisted on asserting their exclusive executive discretion to determine whether an interdictee may access onshore asylum procedures. In the 1980s, the US Government

\textsuperscript{814} Migration Amendment (Excision from Migration Zone) Bill 2001, Explanatory Memorandum, 2; Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, [21].

\textsuperscript{815} Noll, above n 582, 304, 320, 324, 329; UK Government, New Vision for Refugees, March 2003, [1.2], [6.4].


\textsuperscript{817} Noll, above n 582, 311-312.

\textsuperscript{818} Turks and Caicos Islands agreement, above n 771, art II.1(i); United Kingdom, Hansard, House of Commons, Written Answers to Questions, 20 June 1994, Column 10.
asserted its exclusive discretion to determine access to the onshore asylum process through screening on the high seas. This was made possible by a Presidential Executive Order that authorized the Attorney-General to exercise sole discretion as to the manner in which the US would satisfy its international obligations, including whether interdictees were to have access to the onshore asylum process. Before the courts, the US Government successfully resisted challenges to its exclusive authority to determine whether an interdicted asylum seeker was permitted access to in-country processes.

The decision to screen asylum seekers at Guantanamo Bay following increases in the number of illegal boats from Haiti in the early 1990s ensured that the deterrence objective of the US interdiction policy remained intact by preventing direct access to the mainland asylum process. The use of Guantanamo Naval Base for screening was an ‘administrative convenience’ designed to bolster an overburdened system of extraterritorial screening on the high seas. As with the screening process on the high seas, only asylum seekers who satisfied the ‘threshold standard’ for protection

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819 Haiti-US, Migrants-Interdiction, TIAS No 10241, 33 UST 3559 (23 September 1981); President Proclamation No 4865, 46 FR 48, 107 (29 September 1981); EO 12324, 46 FR 48109 (29 September 1981) (revoked by EO 12807, 57 FR 23134 (24 May 1992)).
820 EO 12324, 46 FR 48109 (29 September 1981) (revoked by EO 12807, 57 FR 23134 (24 May 1992)).
821 Haitian Refugee Center, Inc v Gracey, 600 F Supp 1396 (DDC 1985); Haitian Refugee Center, Inc v Gracey, 809 F 2d 794 (DC Cir 1987).
824 P Virtue, INS General Counsel, Legal Opinion: INS Authority to Operate an Overseas Facility to Maintain Interdicted Aliens, 1 September 1998, reproduced in 76 No. 13 Interpreter Releases 529 (2 April 1999), Appendix III, 5.
were to be brought to the US so that they could file an application for asylum under
US statute.\textsuperscript{825}

In a similar way, the Australian Government asserted its exclusive discretion over
interdiction as a means of controlling access to the onshore asylum process.\textsuperscript{826} It
entrenched this authority by attaching legal designations to places and persons that
assigned certain asylum seekers fewer rights than others.\textsuperscript{827} As illustrated further
below, this component of the Australian scheme seeks to circumvent international
obligations by domestic categorisations. In doing so, it ignores the general principle
of international law that imposes state responsibility for all individuals falling within a
state’s jurisdiction.\textsuperscript{828}

Thus, new provisions introduced in 2001 at the commencement of the Australian
scheme gave the executive government wide powers of interception, detention,
removal and expulsion largely free from substantive statutory conditions or judicial
interference.\textsuperscript{829} The Immigration Minister also was granted the exclusive discretion to
decide whether an intercepted asylum seeker was granted access to the in-country
statutory asylum processes\textsuperscript{830} or instead faced transfer to an EPC situated in a third
country.\textsuperscript{831} The amendments furthermore included a bar on legal proceedings

\begin{footnotes}
\textsuperscript{825} Haitian Centers Council, Inc v McNary, 969 F 2d 1326, 1335 (2nd Cir 1992).
\textsuperscript{826} Ruddock v Vadarlis (2001) 110 FCR 491.
\textsuperscript{827} The legislation prohibits an ‘offshore entry person’ (a non-citizen arriving at an ‘excised offshore
place’ without a valid visa) from making a valid application for a visa unless the Minister determines
that it is in the public interest that such a person should be able to make a valid visa application:
Migration Act 1958 (Cth), s 46A(1), (2), s 5(1). Since 2005, an ‘excised offshore place’ includes all
islands north of Carnarvon, Mackay and Darwin, i.e. all islands off Australia’s vast northern coastline:
Migration Amendment Regulations 2005 (No 6) SLI 171.
\textsuperscript{828} Goodwin-Gill, above n 7, 89.
\textsuperscript{829} Migration Act 1958 (Cth), s 189(3), (4), s 198A(1)-(3), s 245F(9), (9A), (9B), s 245FA, s 245FB, s
7A.
\textsuperscript{830} Migration Act 1958 (Cth), s 46A(1), (2), s 5(1).
\textsuperscript{831} Migration Act 1958 (Cth), s 198A(1), (2), (3).
\end{footnotes}
challenging the exercise of powers in relation to asylum seekers intercepted under the provisions.\textsuperscript{832}

At the time of writing, the 2001 amendments remain in force. However, as discussed further in section V, there is cause for their repeal following the Australian Government’s recent disbandment of its offshore processing policy.

C No fair and effective protection determination before direct repatriation to country of origin

The exclusivity of executive authority under the US interdiction scheme resulted in rudimentary asylum screening on the high seas during the 1980s that failed to satisfy the US’s international obligations. Under the 1981 Haiti-US agreement, which expressed the US Government’s intention not to return Haitians who were found to be refugees,\textsuperscript{833} immigration officials assigned to Coast Guard vessels were merely instructed to be ‘watchful’ for any indication that a passenger on an interdicted vessel may qualify for refugee status.\textsuperscript{834} If the official discerned an indication, an additional interview was held. If the interviewee indicated bona fide claims to refugee status, then the official was required to take the person to the US to present his or her claim.\textsuperscript{835}

Screening on the high seas, which effectively supplanted the onshore asylum process, failed to satisfy the requirements of a fair and effective determination process.

\textsuperscript{832} Migration Act 1958 (Cth), s 494AA.

\textsuperscript{833} Haiti-US, Migrants-Interdiction, TIAS No.10241, 33 UST 3559, 3560 (23 September 1981).

\textsuperscript{834} INS Role in and Guidelines for Interdiction at Sea, 2 October 1981, directive from the Associate Attorney General to the Acting Commissioner of the INS, cited in Haitian Refugee Center, Inc v Gracey, 809 F 2d 794, 797 (DCCir 1987).

\textsuperscript{835} Ibid.
Contrary to those requirements, there was no right of review before an independent body, no right to legal assistance and representation, no opportunity to present a case, and no reasons given for the decision to deny access to the onshore asylum process. There was also no right of judicial appeal to challenge the legality of the decision.

The critical shortcomings in the process was reflected by the fact that of the 1800 or more Haitians interdicted from 1981 to 1986 the Government reported that none had presented a bona fide claim to refugee status. All were returned directly to Haiti with no opportunity to seek a review of their decision. Denying interdicted Haitians access to the rights, processes and remedies available to asylum seekers on the US mainland was clearly discriminatory, imposed a penalty on Haitians due to the unauthorized mode of their arrival contrary to art 31(1) of the Refugee Convention, breached the right to resort to the courts, and substantially increased the risk of refoulement.

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836 UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, [50].
837 Haitian Refugee Center, Inc v Gracey, 600 F Supp 1396 (DDC 1985); Haitian Refugee Center, Inc v Gracey, 809 F 2d 794 (DCCir 1987).
838 Haitian Refugee Center, Inc v Gracey, 809 F 2d 794, 797 (DC Cir 1987).
839 Ibid.
840 Haitian Refugee Center, Inc v Gracey, 600 F Supp 1396 (DDC 1985); Haitian Refugee Center, Inc v Gracey, 809 F 2d 794 (DCCir 1987).
841 Refugee Convention, art 3; ICCPR, art 26; American Declaration of the Rights and Duties of Man, art II. Haitian Interdiction, Case 10.675, Report No 51/96 [United States], IACHR 1996 Annual Report 550 (March 13, 1997), ¶¶ 183-188, [177]. See generally, Legomsky, above n 587, 693.
842 Refugee Convention, art 16; ICCPR, art 14; American Declaration of the Rights and Duties of Man, art XVIII. Haitian Interdiction, Case 10.675, Report No 51/96 [United States], IACHR 1996 Annual Report 550 (March 13, 1997), ¶¶ 183-188, [180] (the Inter-American Commission on Human Rights found that the Haitian interdictees ‘were unable to resort to the courts in the United States to vindicate their rights because they were summarily interdicted and repatriated to Haiti without being given an opportunity to exercise their rights’).
In 1992, screening was done away with altogether. In that year, President Bush authorized the direct repatriation without screening of Haitian asylum seekers.\textsuperscript{844} The Clinton Administration continued the policy of direct repatriations without screening, arguing successfully before the US Supreme Court in Sale v. Haitian Centers Council, Inc that neither international law nor domestic law placed any limit on the President’s authority to repatriate without hearings aliens interdicted beyond US territorial waters.\textsuperscript{845}

The Government’s argument in Sale contradicted the Government’s earlier (and later) policy of extraterritorial screening for asylum claims. In particular, given the Clinton Administration’s subsequent acceptance of its obligation to process the asylum claims of those interdictees it transferred to a third country under bilateral agreements,\textsuperscript{846} the Government’s argument in Sale appears less like a statement of principle, and more like a convenient and strategic move to bolster its own discretion to deal with interdictees independent of statutory or judicial constraints.

In pursuing this line, the US Government also went against the widely accepted view that the non-refoulement obligation has extraterritorial operation, noted in section 2 above.\textsuperscript{847} Most importantly, the extraterritorial reach of the non-refoulement obligation is required by an interpretation and application of the Refugee Convention that guarantees its overall effectiveness as an instrument intended to assure to

\textsuperscript{844} EO 12807, 57 FR 23134 (24 May 1992) (as amended by EO 13286, 68 FR 10619 (28 February 2003)).


\textsuperscript{846} Turks and Caicos Islands agreement, above n 771, art II.1 (iii); US-Jamaica agreement, above n 771, art 3(A).

\textsuperscript{847} UNHCR, Advisory Opinion, above n 661; Hathaway, above n 1, 335-342; Lauterpacht and Bethlehem, above n 662, [67]; Goodwin-Gill and McAdam, above n 117, 244-53.
refugees the widest possible exercise of their rights. The US Government’s exercise of its extraterritorial executive authority while denying any obligations attaching to its actions, contravened its overarching obligation to ensure the effective operation of the non-refoulement obligation.

In further contravention of its non-refoulement obligation, US officials extended the automatic repatriation policy to aliens interdicted within US territorial waters as a matter of policy. The direct return policy ended only when Haiti’s president-in-exile, President Aristide, announced his intention to abrogate the 1981 readmission agreement in light of the practice. The Clinton Administration subsequently announced in May 1994 that it would grant interviews at sea on board naval vessels to interdicted Haitians.

D Lack of safeguards before transfer to a third country under the US scheme

Following the change in policy, the US Government began using EPCs situated in other third countries in the Caribbean. In the mid-1990s, the Clinton Administration concluded an agreement with Jamaica that allowed the US Government to anchor a ship in Kingston Harbor in order to process interdicted Haitians. At the same time, the US Government also entered an agreement with the UK and its dependency, the

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849 71 No 11 Interpreter Releases 381 (21 March 1994).
850 71 No 14 Interpreter Releases 481 (25 April 1994).
851 71 No 18 Interpreter Releases 627 (9 May 1994).
852 US-Jamaica agreement, above n 771, arts 3(A), 4 and 5.
Turks and Caicos Islands, permitting the US Government to establish and operate an EPC on Grand Turk Island.\textsuperscript{853}

Yet despite clear international standards for the protection of asylum seekers transferred to third countries, the US Government failed to provide any protection safeguards to asylum seekers before their transfer to EPCs. In particular, there was no good faith empirical assessment of whether transferees would in practice enjoy the rights found in the Refugee Convention and related rights instruments in the third country.\textsuperscript{854} This included no individualized assessment of whether it was safe to transfer an asylum seeker to the third country, which commentators regard as an essential safeguard under safe third country practices.\textsuperscript{855} As a result, there was no assessment of whether the third country was likely to provide a fair and effective asylum process.

Presumably, the US Government considered that providing interdictees with a right to an individualized assessment of whether a third country was ‘safe’ before transfer would create direct access to statutory and judicial processes that interdiction and offshore processing were designed to circumvent. Yet this position turns a blind eye to the lower processing standards enjoyed by asylum seekers processed at EPCs, identified in section IV below. It also failed to apply (perhaps intentionally in light of the poor processing standards at EPCs) protection criteria for third countries that

\textsuperscript{853} Turks and Caicos Islands agreement, above n 771, art II.1(i); United Kingdom, Hansard, House of Commons, Written Answers to Questions, 20 June 1994, Column 10.

\textsuperscript{854} Michigan Guidelines on Protection Elsewhere, above n 807, 2.

emerged soon after in the US safe third country provision, especially its requirement that a third country provide a full and fair procedure for determining a claim to asylum.  

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The shortcomings in the US Haitian interdiction scheme were exposed by the Inter-American Commission on Human Rights in the Haitian Interdiction Case.  

857 The Commission found the US Haitian interdiction policy in violation of art I of the American Declaration of the Rights and Duties of Man in relation to those ‘unnamed Haitian refugees identified by the petitioners in its submissions who were interdicted by the United States, repatriated to Haiti, and later lost their lives after being identified as “repatriates”.  

858 In reaching this conclusion, the Commission followed the international jurisprudence recognizing that a state who sends a person within its jurisdiction to another state where there is a real risk that his or her rights will be violated, that state is in violation of the relevant right (the implied non-refoulement obligation).  

859 The Commission further found interdiction to amount to a breach of the following rights: the right to liberty, the right to security of person, the right to equality before the law, the right to resort to the courts, and the right to seek and receive asylum.  

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E No individual assessment of ‘safety’ of third country – Australia’s exterritorial processing regime

856 8 USC Section 1158(a)(2)(A).


858 Ibid [168].

859 Ibid [167]. See the discussion on the implied non-refoulement obligation under general rights instruments, above n 388 - and accompanying text.

860 Ibid.
The Australian scheme also did not provide for any individualized assessments of whether Nauru or Papua New Guinea were in fact ‘safe’, instead relying on a veneer of ineffectual safeguards. The Australian Government introduced these safeguards into legislation at the outset of the offshore processing scheme in 2001.\textsuperscript{861} From their form, it is clear that they owe their origins specifically to safe third country provisions introduced in response to the arrival of Sino-Vietnamese refugees from China in the early 1990s.\textsuperscript{862} As a consequence, the 2001 amendments inherited a number of defects evident in the earlier safe third country provisions, including that they fail to guarantee a case-by-case consideration of whether the state hosting the EPC (Nauru or Papua New Guinea) is ‘safe’ for the individual asylum seeker.\textsuperscript{863}

As noted above in section III.B, the 2001 amendments prevent an asylum seeker arriving without a valid visa on islands off Australia’s northern coastline from making a valid application for a visa, including a protection (refugee) visa.\textsuperscript{864} By denying access to individualized determination of protection entitlements status, including eventual Ministerial consideration of claims to protection under the ICCPR and the CAT, the 2001 amendments effectively denied the only opportunity for case-by-case consideration of whether Nauru or Papua New Guinea was ‘safe’.

\textsuperscript{861} Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).

\textsuperscript{862} Migration Legislation Amendment Act (No 4) 1994 (Cth); Memorandum of Understanding between Australia and PRC (dated 25 January 1995).

\textsuperscript{863} The earlier safe country provisions stymied an individualized assessment of whether China was a ‘safe’ country for a Sino-Vietnamese asylum seeker by stipulating that any unlawful non-citizen who comes from a safe third country is not permitted to apply for a protection visa: Migration Legislation Amendment Act (No 4) 1994 (Cth), Schedule 1; Migration Act 1958 (Cth), s 91E. Instead, the safe third country provisions solely rely on blanket prescriptions that a third country is ‘safe’: Migration Legislation Amendment Act (No 4) 1994 (Cth), Schedule 1; Migration Act 1958 (Cth), s 91D(1)(a); Statutory Rules 1995 No 3, 27 January 1995.

\textsuperscript{864} Migration Act 1958 (Cth), s 46A(1).
In addition, like the earlier safe third country provisions, a Ministerial designation that a third country is ‘safe’ replaces the provisions that seek to implement Australia’s non-refoulement obligations through an individualized asylum process.\textsuperscript{865} The Immigration Minister may declare that a third country is a country to which an intercepted asylum seeker\textsuperscript{866} may be removed.\textsuperscript{867} Once the Minister makes the declaration, the legislation confers wide powers on Australian officials to take an intercepted asylum seeker to such a country free of any duty to consider individual claims to protection, including whether it is in fact safe to transfer them to that country.\textsuperscript{868}

Once again, the essential reason for the lack of an individualized assessment before transfer under the Australian regime would appear to be the scheme’s deterrence rationale. Given that the Australian Government promoted extraterritorial processing on the basis that it deterred future asylum seekers by denying access to Australia’s onshore asylum process,\textsuperscript{869} legislating for an individualized assessment before transfer would presumably have undermined this objective. In this way, the deterrence objective led to a failure to implement effectively a key protection safeguard.

F Problems with the Ministerial declarations of ‘safety’ – Australia

To make matters worse, the Ministerial declaration that Nauru and Papua New Guinea were ‘safe’ was inherently unreliable. The 2001 amendments facilitating Australia’s

\textsuperscript{865} Ibid s 36, s 417.

\textsuperscript{866} Referred to as an ‘offshore entry person’: Ibid s 198A(1), (3), s 5(1).

\textsuperscript{867} Ibid s 198A(1), (3).

\textsuperscript{868} Migration Act 1958 (Cth), s 198A(1), (2).

\textsuperscript{869} Migration Amendment (Excision from Migration Zone) Bill 2001, Explanatory Memorandum, 2; Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, [21].
offshore processing scheme set out statutory criteria for a declared country.\textsuperscript{870} Specifically, the criteria include that the declared country provides access to effective procedures for assessing protection, and provides protection, including the meeting of human rights standards, during the determination process and up to voluntary repatriation or resettlement.\textsuperscript{871}

In safe third country cases generally, if a declaration of ‘safety’ is to be of any utility the Minister responsible for making the designation must make an empirical assessment of whether a third country in practice complies with criteria for a safe third country. This requires that the Minister go further than simply ticking off that the third country complies with formal criteria, eg whether a third country is a party to the Refugee Convention.\textsuperscript{872} Importantly, the Minister must be satisfied that the third country implements ‘appropriate asylum procedures and systems fairly.’\textsuperscript{873} Failure to do so increases the risk of refoulement.\textsuperscript{874} The Minister should therefore assess the third country’s actual practices, decision-making procedures, and court judgments.\textsuperscript{875}

In addition, the Minister’s assessment must also be objective. Commentators have long observed that safe third country provisions, which rely on a ministerial declaration of safety, run an increased risk of being subject to foreign policy considerations\textsuperscript{876} or overrun by the objective of maintaining immigration control.\textsuperscript{877}

\textsuperscript{870} \textit{Migration Act 1958} (Cth), s 198A(3).

\textsuperscript{871} \textit{Migration Act 1958} (Cth), s 198A(3)(a)(i)-(iv).

\textsuperscript{872} UNHCR, \textit{Asylum Processes (Fair and Efficient Asylum Procedures)}, EC/GC/01/12, 31 May 2001, [14].

\textsuperscript{873} Ibid.

\textsuperscript{874} Legomsky, above n 855, 654-5.

\textsuperscript{875} Michigan Guidelines on Protection Elsewhere, above n 807, [3], [4].

\textsuperscript{876} Shacknove and Byrne, above n 855, 223.

\textsuperscript{877} Ibid.
The state's elaboration of formal safe country criteria does not itself lessen the risk that political considerations will outweigh protection obligations.\textsuperscript{878} Thus, the Ministerial investigation must not only be empirical, but also immune to arbitrary factors that might influence his or her decision that a country complies with safe third country criteria.

A fundamental problem, however, with the Australian scheme was that the Minister's use of the declaration power was tainted by the fact of the Australian Government's delivery of substandard processing at EPCs, as noted in section IV below. The declaration was further tainted by the fact that the Australian Government's processing of claims on Nauru and Papua New Guinea largely formed the basis for the satisfaction of the criteria for the Ministerial declaration. In the case of Nauru, for instance, it is not a party to the Refugee Convention\textsuperscript{879} and lacks asylum procedures of its own.

The Australian Government acknowledged, not surprisingly, that the '[p]ractical arrangements in place in Offshore Processing Centres supported by agreements with relevant host country Governments provide the basis for the Minister's declaration of a country'.\textsuperscript{880} The Minister's decision not to revoke the declarations was in effect justified by an ongoing favourable assessment of 'the effectiveness of these arrangements for ensuring protection and access to durable solutions for persons found to be refugees.'\textsuperscript{881} When making or allowing the continuation of the

\textsuperscript{878} Ibid.

\textsuperscript{879} Comment by Mr N Wright, Regional Representative, UNHCR, to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Senate, Committee Hansard, 26 May 2006, 3, 9.

\textsuperscript{880} Department of Immigration and Multicultural Affairs, Response to Questions on Notice, Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Public Hearing, 26 May 2006, 32.

\textsuperscript{881} Ibid.
declarations, the Minister was therefore assessing the effectiveness of the ‘practical arrangements’ that his or her department designed and implemented at the EPCs on Nauru and Papua New Guinea.

This was hardly an assessment likely to inspire confidence in the objectivity of the Minister. As discussed in section 4 below, the Australian Government’s deliberate use of extraterritorial processing as a deterrent also saw substandard processing at EPCs. An asylum seeker transferred to an EPC was therefore entitled to be sceptical concerning the degree of ministerial scrutiny of processing standards prior to the making of a declaration. Consider, for instance, that the then Immigration Minister designated Nauru a safe country 13 days after asylum seekers were first sent there in September 2001.\(^{882}\)

The obscurity of the offshore arrangements also did not inspire confidence that the Minister based an ongoing declaration on country information that was accessible and verifiable.\(^{883}\) Lastly, Nauru’s assurance not to *refoule* asylum seekers transferred under its earlier agreements with Australia\(^{884}\) was of doubtful efficacy because it was necessarily based on Australia’s processing arrangements. Perhaps in recognition of this fact there is no such assurance in the 2005 agreement between Australia and Nauru.\(^{885}\) As a result of these factors, the Australian Government’s objective of

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\(^{884}\) Australia-Nauru 2001 agreement, above n 581, [30]; Australia-Nauru 2004 agreement, above n 581, [24].

\(^{885}\) Australia-Nauru 2005 agreement, above n 581.
sanctioning its extraterritorial processing negated any benefits to be derived from the Ministerial declaration.

G No independent review before transfer to an EPC

Commentators argue that failure to provide for independent review increases the risk of arbitrariness and bias in the making of ministerial determinations that a third country is ‘safe’. They further observe that the number of successful appeals from safe third country determinations attest to the fact that the elaboration of formal safe country criteria does not substitute for independent and impartial review. The UNHCR and most observers view an appeal with suspensive effect as an essential requirement before transfer in safe third country cases. The Michigan Guidelines on Protection Elsewhere call for states to accord asylum seekers a right to challenge the legality of a proposed transfer in all ‘protection elsewhere’ policies, including extraterritorial processing.

However, contrary to this requirement, any chance of an appeal against a transfer to a third country under the US scheme was negated by the Government’s position that the statutory review provisions found in its immigration laws did not apply to interdicted refugees. Furthermore, as already noted, interdictees were unable to

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886 Shacknove and Byrne, above n 855, 223.
887 Ibid.
888 Legomsky, above n 855, 672.
889 Michigan Guidelines on Protection Elsewhere, above n 807, [12].
891 Haitian Refugee Center, Inc v Gracey, 600 F Supp 1396, 1404 (DDC 1985); Haitian Refugee Center, Inc v Baker, 953 F 2d 1498, 1509, 1510 (11th Cir 1992); Sale v Haitian Centers Council, Inc, 509 US 155, 173-177, 113 S Ct 2549, 125 L Ed 2d 128 (1993). The courts also largely accepted the Government’s argument that the judicial review provisions in the Administrative Procedure Act did not extend to interdicted aliens: Haitian Refugee Center, Inc v Baker, 953 F 2d 1498, 1505-1509 (11th Cir 1992).
seek judicial review based on a breach of the Refugee Convention following the US Supreme Court’s decision in *Sale*, which, it is submitted, incorrectly upheld the Government’s argument that the Refugee Convention does not apply extraterritorially.  

In comparison, the Australian Government frustrated independent review of the decisions leading up to and including transfer to an EPC by exploiting the ‘fault line’ between executive discretion and judicial review under the Australian Constitution. First, the Australian Government framed the Minister’s discretion to permit an intercepted asylum seeker to apply for a visa in such a way that no court can order him or her to exercise it. Put simply, Australian courts can only order a government officer to do what the law demands of him or her. The 2001 amendments stipulate that the Minister is under no duty even to consider whether to exercise his or her discretion to permit offshore entry persons to apply for a visa. As a result, the courts cannot order the Minister to consider exercising his or her discretion to permit an asylum seeker to apply for a visa, including a protection (refugee) visa. Second, the declaration power is subject to a bar on legal proceedings. The declaration power is also expressed in general terms that have

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893 *Migration Act 1958* (Cth), s 46A(1).


895 *Migration Act 1958* (Cth), s 46A(7).

896 *Migration Act 1958* (Cth), 494AA(1)(d). Subject to the jurisdiction of the Australian High Court under s 75(v) of the *Australian Constitution*: s 494AA(3).
posed difficulties for an Australian court reviewing the Minister’s declaration that a third country satisfies the criteria.  

Third, the final act of removal or transfer to the declared country under the Australian scheme is framed in such a way that it does not attract judicial scrutiny. The normal statutory removal powers under the Australian legislation assume, sometimes wrongly, that an asylum seeker has had the opportunity to apply for a visa and consequently gone through the onshore refugee determination process. The reasoning that follows is that an officer exercising the normal removal powers does not need to take into account whether removal will result in refoulement because the asylum seeker has been determined not to require Australia’s protection. Applying this reasoning, the powers introduced in 2001 that authorize removal to a third country for processing follow on from the Minister’s declaration. Because there is no judicial review of the Ministerial declaration, there is little or no opportunity to seek judicial scrutiny of the ensuing power to remove an asylum seeker to an EPC.

H Summary: failure to provide protection during interdiction and transfer

Collectively, these elements of the US and Australian schemes indicate the deliberate construction of laws and policies designed to entrench exclusive government authority over interdiction and transfer as a way of preventing and deterring asylum seekers from gaining direct access to in-country statutory and judicial protection measures. In doing so, governments effectively remove key safeguards designed to protect against refoulement, including access to the courts, while also penalizing asylum seekers


898 Migration Act 1958 (Cth), s 198A(1) and (2).

899 Migration Act 1958 (Cth), s 198.

because of the mode of their arrival. In the case of the US interdiction, there is also clear discrimination against Haitian refugees.

The obstructionist and deterrence rationale of extraterritorial processing schemes has also undermined states’ compliance with their obligation to ensure access to a fair and effective asylum process after transfer. This is evident from the substandard processing standards – characterized by a dearth of legislative or judicial mechanisms to guarantee the enforceability and enjoyment of a fair asylum hearing - provided at EPCs operated by the US and Australia respectively, discussed in the next section.

IV THE FAILURE TO PROVIDE A FULL AND FAIR ASYLUM PROCESS AT EPCS

This section identifies that the Australian and US governments put in place asylum procedures at their EPCs that were of a lower standard than those offered within Australia and the US respectively. In particular, as with the interdiction and transfer processes that brought asylum seekers to EPCs, the processes for determining their entitlement to protection at such centres were deliberately isolated from legal and institutional safeguards either in the territory of the intercepting state or in the third country.

A State responsibility

A preliminary issue is the state responsibility of the US and Australia for asylum processing at EPCs situated within third countries. As observed in chapter 5 and in section II.B above, a state retains responsibility for violations of rights wherever individuals are under their jurisdiction and control. In third country transfers, the

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901 UN Human Rights Committee, General Comment No 31: the Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, [31];
transferring state’s protection obligations under the Refugee Convention engage
irrespective of the fact that protection can be sought ‘elsewhere’ and regardless of
bilateral agreements seeking to delegate, assign or transfer responsibility to another
country. Extraterritorial processing will not divest the intercepting state of its
responsibility under the Refugee Convention until a durable solution is found.

The jurisdiction and control of the US and Australian governments over the
processing of asylum claims at EPCs clearly supports the continued engagement of
their protection obligations. Most clearly, the US exercises effective control over
Guantanamo Bay. While remaining under the ‘ultimate sovereignty’ of Cuba, the
obvious truth as stated by Justice Kennedy in concurrence in *Rasul v. Bush* is that
‘Guantanamo Bay is in every practical respect a United States territory.’ As a
result, ‘[a]t Guantanamo, the United States is accountable only to itself.’ The
extent of US Government authority over asylum seekers is plainly evident from the
fact that the US, and not Cuba, entered into recent agreements with Canada and
Australia for the resettlement of refugees from Guantanamo.

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the cases discussed in Lauterpach and Bethlehem, above n 662, 110-111; UNHCR, Advisory Opinion, above n 661, 16-18.


903 International Law Commission, Articles on State Responsibility, Art. 47, UNGA res. 56/83, UN doc A/RES/56/83, annex, 28 January 2002; Hyndman, above n 21, 251-52; Foster, above n 855, 262. Cf: Legomsky, above n 855, 620-621 (reaching a similar conclusion, but based on a broader ‘complicity principle’).

904 UNHCR, 2002, above n 773, [22].


906 Neuman, above n 774, 39.

907 In 2005, the Canadian Government received 14 Haitian refugee resettlement cases from Guantanamo Bay, Cuba, at the request of the US Government pursuant to Article 9 of the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (signed 5
It is clear that despite its argument in *Sale*, the US Government also accepted that it owed obligations to asylum seekers outside its territory when it undertook responsibility for asylum processing under agreements with third countries. The US agreement with the UK and its dependency, the Turks and Caicos Islands, gave the US Government permission to establish and operate the EPC on Grand Turk Island, and to process interdicted Haitians for refugee status there. The US was also responsible for a range of other matters, including: resettling or repatriating interdictees; ensuring ‘security, good order and discipline, health and welfare’ of interdicted Haitians; and meeting the costs of the EPC.

In comparison, under the agreement the Turks and Caicos Islands’s role was to be mainly facilitative: providing the site on Grand Turk Island, permitting the transit of US personnel, vessels and aircraft; assisting in obtaining public and private utilities; and permitting the transit of interdicted Haitians, including their repatriation or resettlement following the US determination of their status. The

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909 Turks and Caicos Islands agreement, above n 771, art II.1(i); United Kingdom, Hansard, House of Commons, Written Answers to Questions, 20 June 1994, Column 10.
910 Turks and Caicos Islands agreement, above n 771, art II.1 (iii).
911 Ibid art II.1 (iv)-(v).
912 Ibid art II.1 (vi).
913 Ibid art II.1 (vii).
914 Turks and Caicos Islands agreement, above n 771, art II.2 (i).
915 Ibid art II.2 (ii) and (iii).
916 Ibid art II.2 (vi).
917 Ibid art II.2 (xii)(b)-(c).
UK’s role in the meantime was supervisory at best.\textsuperscript{918} A similar regime of rights and responsibilities existed under the US agreement with Jamaica.\textsuperscript{919}

The Australian Government also retained a high degree of control over activities at its EPCS. Importantly, in accordance with its agreement with Nauru, Australia undertook responsibility for processing.\textsuperscript{920} In this endeavour, the Australian Government received the initial assistance of the UNHCR who processed some claims on Nauru.\textsuperscript{921} Shortly thereafter, due to dissatisfaction with the protection standards offered under the scheme, the UNHCR withdrew and distanced itself from Australia’s offshore processing.\textsuperscript{922} Following the UNHCR’s withdrawal, Australian officials processed all claims at the EPCs on Nauru.\textsuperscript{923}

Yet the clearest indication of the degree of continued jurisdiction and control of Australia over asylum seekers taken to EPCs on Nauru is again the fact that it was Australia, and not Nauru, that recently entered into a bilateral agreement with the US to ‘swap’ asylum seekers held at the EPCs at Nauru and Guantanamo Bay.\textsuperscript{924} This agreement reflected the fact that Australia had responsibility for day-to-day management of the centres on Nauru (exercised by Australia through the International

\textsuperscript{918} Turks and Caicos Islands agreement, above n 771, art II.3.
\textsuperscript{919} US-Jamaica agreement, above n 771, arts 3(A), 4 and 5.
\textsuperscript{920} Australia-Nauru 2005 agreement, above n 581, [3]. The Australian Government quickly mothballed the EPC on PNG due to falls in the number of unauthorized arrivals.
\textsuperscript{921} Senate Legal and Constitutional References Committee, Migration Zone Excision: An examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and related matters (October 2002), [5.34] – [5.40].
\textsuperscript{922} UNHCR, above n 584, [24].
\textsuperscript{923} Senate Excision Report, above n 921, [5.34] – [5.40].
\textsuperscript{924} Commonwealth of Australia, Official Committee Hansard, Senate, Standing Committee on Legal and Constitutional Affairs, Estimates, 21 May 2007, 98-111.
Organization for Migration),\(^{925}\) security personnel,\(^{926}\) removal after processing,\(^{927}\) durable solutions,\(^{928}\) and handling of ‘transitory persons’ (persons brought to Australia for health care and then returned to Nauru).\(^ {929}\)

In the meantime, Nauru’s role was mainly facilitative: permitting the entry and temporary residence of asylum seekers in its territory through the issue of a special purpose visa to the asylum seekers;\(^ {930}\) providing the Facilities’ sites;\(^ {931}\) ensuring the assistance of Nauru’s Health Service;\(^ {932}\) guaranteeing the co-operation of the Nauruan

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\(^{925}\) Australia-Nauru 2005 agreement, above n 581, Schedule A.1. The Australian Government retained IOM to maintain the EPCs on Nauru through an exchange of letters: Questions Taken on Notice, Budget Estimates Hearing: 22 May 2006, Immigration and Multicultural Affairs Portfolio, (246) Output 1.5: Offshore Asylum Seeker Management, 1-2; Mr W Farmer, Secretary, Department of Immigration and Multicultural and Indigenous Affairs, Letter to Mr D Nihill, Chief of Mission, Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, International Organization for Migration, December 2002, 2; Mr D Nihil, Regional Representative, International Organization for Migration, Letter to Mr W Farmer, Secretary, Department of Immigration and Multicultural and Indigenous Affairs, 27 February 2003, 1.

\(^{926}\) Australia-Nauru 2005 agreement, above n 581, Schedule A.6. As a part of its management role, the IOM had a protocol with the Nauru Police Force and the Australian Protective Service that governed their roles and responsibilities in respect of the security at the EPCs: Protocol Between the Nauru Police Force, the International Organization for Migration and the Australian Protective Service dated 15 October 2001. IOM had a contract with Chubb Protective Services, a private security firm, to provide ‘an escort and safekeeping function’ at the EPC: Mr Martin Studdert, Director, APS, Senate Legal and Constitutional Legislation Committee, Consideration of Additional Estimates, Official Committee Hansard (19 February 2002), 303-304.

\(^{927}\) Australia-Nauru 2005 agreement, above n 581, [3]. The Australian Government engaged IOM to deliver ‘management of the Reintegration Package and returns’ of asylum seekers to their countries of origin: Farmer, above n 925, 2.

\(^{928}\) IOM was also engaged to manage resettlement transfers to Australia and other countries: Ibid.

\(^{929}\) Australia-Nauru 2005 agreement, above n 581, Schedule A.9. Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth), Schedule 1; Migration Act 1958 (Cth), s 198A(1A) and s 198B.

\(^{930}\) Abbas Al Sayed Mahdi and others v. Director of Police, Steve Hamilton, Manager, IOM, Officer in Charge, Australian Protective Services, Supreme Court of Nauru, Civil Action No. 10/2003 (27 May 2003), [18] (Connell CJ).

\(^{931}\) Australia-Nauru 2005 agreement, above n 581, Schedule A.2.

\(^{932}\) Ibid Schedule A.4.
Police Force, and issuing visas and assisting in securing accommodation for persons travelling to Nauru for the purpose of the management of asylum seekers.

B Control as a precondition of denying access to national safeguards

The remainder of this section identifies that the US and Australian governments’ jurisdiction and control over extraterritorial processing, besides evidencing the continued engagement of the their protection obligations, also has had significant adverse implications for an asylum seeker’s right to a fair and effective asylum process in the third country. In addition, it is argued that the Australian and US governments exploited their principal or exclusive control over processing at EPCs in third countries in order to circumvent access to effective remedies as required by international law.

At the outset, it must be kept in mind that extraterritorial processing originated in the US as an ‘administrative convenience’, which sustained the deterrence objective of interdiction and screening on the high seas, rather than a principled search for some alternative form of protection under the Refugee Convention. To this end, the US Government was sure to assert and retain exclusive authority - outside prescribed statutory processes on the mainland - to determine whether an asylum seeker processed at Guantanamo met the ‘threshold standard’ for access to the mainland asylum process. This authority was confirmed by the President’s Executive Order

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933 Ibid Schedule A.7.
934 Ibid Schedule A.10 and A.11.
935 P Virtue, INS General Counsel, Legal Opinion: INS Authority to Operate an Overseas Facility to Maintain Interdicted Aliens, 1 September 1998, reproduced in 76 No. 13 Interpreter Releases 529 (2 April 1999), Appendix III, 5.
in 2002.\textsuperscript{937} In this regard, the US Government could also obviously rely on the lack of any Cuban statutory or judicial constraints due to its effective control over Guantanamo Bay.

The original administrative control and deterrence ethos of extraterritorial processing also became a feature of the US and Australian processing arrangements with third countries. The next part highlights that a result has been substandard asylum processing at EPCs largely devoid of any statutory or judicial constraints either in the third country or derived from the US and Australia’s respective domestic jurisdictions. As a consequence, both the US and Australian schemes have failed to ensure fair and effective asylum processes as required under international law.

\textit{C Failure to provide fair and effective asylum processing at EPCs}

Access to a fair and effective asylum process in the third country is a fundamental safe third country safeguard.\textsuperscript{938} As set out in section II above, a fair and effective determination procedure requires: fair decision-making, including access to legal representation; an impartial and qualified interpreter; a personal interview based on a thorough assessment of the circumstances of each case; an opportunity to present evidence of personal circumstances and country of origin information; a reasoned, written decision deciding the claim; and review by an independent body. In accordance with art 16(1) of the Refugee Convention and art 14 of the ICCPR, there

\textsuperscript{937} Executive Order 13276, issued in 2002, confirmed the authority of the Attorney-General (and the Secretary of Homeland Security since 2003) to act extraterritorially in relation to interdicted asylum seekers, including exercising authority over their screening: EO 13276, 67 FR 69985 (15 November 2002) (as amended by EO 13286, 68 FR 10619 (28 February 2003)), s 1(a)(i) and (ii).

should also be access to effective remedies, including a right to challenge the legality of the decision in the courts.

The US agreements with Jamaica and the Turks and Caicos Islands expressed the intention to deliver a ‘fair’ hearing and determination as to whether asylum seekers qualified for refugee status under the Refugee Convention. The agreements and the US Government’s public comments at the time relied upon the fact of UNHCR involvement, guidance and monitoring to claim that the appropriate international processing standards were observed. Similarly, despite lacking UNHCR endorsement of its scheme, the Australian Government likewise asserted that its offshore processing standards complied with international standards under the Refugee Convention because they were modelled on the ‘refugee determination process of the UNHCR’ – although the UNHCR questioned whether the processes on Nauru did in fact meet its guidelines.

Despite claiming to implement international or UNHCR standards, it is apparent that both the US and Australian schemes failed to satisfy the essential requirements of fair and effective processing under the Refugee Convention. The US administrative guidelines for offshore processing, either on the high seas or at Guantanamo Bay,

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939 US-Jamaica agreement, above n 771, 2; Turks and Caicos Islands agreement, above n 771, 1. See also: US-Jamaica agreement, above n 771, art 3A; Turks and Caicos Islands agreement, above n 771, art II.1 (ii).

940 US-Jamaica agreement, above n 771, art 7; Turks and Caicos Islands agreement, above n 771, art III.1 (i); Agreement amending the memorandum of understanding of June 18, 1994 (KAV3906), to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti, entered into force July 13, 1994, KAV3949, Temp State Dept No 94-189, Annex, 3; Press Briefing by William Gray, Special Advisor to the President on Haiti, 5 July 1994, The American Presidency Project. See also: Establishing the basis for a successful conclusion to the crisis in Haiti, US Dept. of State Dispatch, 27 June 1994, 6.

941 UNHCR, above n 584, [24].

942 Onshore Protection Interim Procedures Advice, above n 583, [10]; Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, 15-16; Senate Designated Unauthorised Arrivals Bill Report, above n 883, 43.

943 UNHCR, above n 584, 6.
have typically provided for a rudimentary and purely administrative screening process, other than under the policy between 1992 and 1994 when no screening at all took place prior to repatriation.\textsuperscript{944} Under the non-binding screening guidelines, there is no right to counsel and no right of appeal from an adverse determination to an independent tribunal.\textsuperscript{945} The US agreements with the Turks and Caicos Islands and Jamaica also contained no detailed processing requirements. US officials or UNHCR staff undertook processing\textsuperscript{946} but without any right of appeal or review other than by a US official.\textsuperscript{947} Despite improvements to the screening that took place on the high seas, Congressional hearings highlighted a lack of procedural safeguards aboard the US naval processing vessels in Jamaica under the US-Jamaica agreement.\textsuperscript{948}

Similarly, under Australia’s scheme, in contrast to its onshore asylum process,\textsuperscript{949} there were no statutorily prescribed procedures for the asylum process on Nauru, which instead took place predominantly under administrative policy.\textsuperscript{950} Transferees had no right to request legal representation as guaranteed (upon request) to asylum seekers granted access to Australia’s onshore refugee determination process.\textsuperscript{951} Furthermore,


\textsuperscript{946} 71 No 28 Interpreter Releases 966 (25 July 1994).

\textsuperscript{947} Ibid.

\textsuperscript{948} 71 No 26 Interpreter Releases 885 (11 July 1994).

\textsuperscript{949} The process for determining the grant of a Protection Visa is subject to subdivision AB of Pt 2, Div 3 of the Migration Act 1958 (Cth).

\textsuperscript{950} Onshore Protection Interim Procedures Advice, above n 583. Although, lawyers for asylum seekers held at the EPC on Nauru have had more success recently in pushing for consideration of their clients’ cases under the Australian Migration Act 1958 (Cth), discussed further below: M57A v Minister for Immigration and Citizenship [2007] HCATrans 330 (27 June 2007).

\textsuperscript{951} Migration Act 1958 (Cth), s 256.
as noted by the UNHCR, asylum seekers on Nauru did not have access to merits review before the Australian Refugee Review Tribunal or to judicial review.952

D Severing international obligations from national safeguards

Thus, the effect of extraterritorial processing schemes is that they not only exclude intercepted asylum seekers from the in-country asylum process in the intercepting state,953 but also impose a much lower standard of processing in the third country. Critically, extraterritorial processing breaks the nexus between international standards and the national laws and institutions that the UNHCR acknowledges remain essential to an effective asylum process.954

Extraterritorial processing is therefore objectionable on the grounds that an imposition of different standards between asylum seekers who are in-country and those at EPCs equates to penalisation,955 a discriminatory deprivation of rights,956 and leads to an increased risk of **refoulement** by denying due process and access to tribunals and courts that scrutinize asylum decision-making.957 Consequently, while states may defend the quality of their extraterritorial processing by appeals to ‘international’ or

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952 UNHCR, above n 584, [2].

953 Legomsky, above n 587, 686; UNHCR, above n 584, [2].

954 UNHCR, Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Migration Litigation Reform Bill 2005, [8].

955 Refugee Convention, art 31. The UNHCR expressed the view before the Australian Senate in 2006 that ‘[s]ubjecting all unauthorized arrivals by sea to differential treatment which abides by lesser standards as a deterrent measure is arguably an imposition of penalties on this category of persons’ and thereby a breach of art 31 of the Refugee Convention: UNHCR, above n 584, [25].


957 UNHCR, above n 584, [19].
It is unclear that those who appear to accept out-of-country processing for onshore arrivals sufficiently acknowledge this fundamental defect. Stephen Legomsky, for example, despite noting the lack of procedural safeguards in offshore processing undertaken under the US policy, concludes that ‘[u]ltimately, the solution almost certainly lies in some form of orderly out-of-country processing’. Legomsky does not, however, go on to spell out how such a process would operate given that the fundamental defect of extraterritorial processing is that it denies access to the in-country processes that provide the basis for fair and effective or ‘orderly’ processing.

In contrast, as discussed further in section V below, the adverse impact of extraterritorial processing on national safeguards has been an urgent issue for many legislators in Australia and the US. Most momentously, in 2006, legislators from the Australian Parliament, including members of the Government’s own party, rejected the Government’s attempts to extend the extraterritorial processing scheme on the grounds that it violated key provisions of the Refugee Convention by excluding refugees from national legal and institutional protections. Finally, in February 2008 a new Federal Government moved to quickly abolish extraterritorial processing in third countries under the Australian scheme.

958 Legomsky, above n 587, 695.

959 Senate, Designated Unauthorised Arrivals Bill Report, above n 883, 60, 65, 74, 75-76; Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 10 2006, Wednesday 9 August 2006, 42-44 (Mr Georgiou), 50-52 (Mr Broadbent) and 57 and 59 (Mrs Moylan).

960 Prior to the 2007 election of the new Government, eight Rohingya Burmese and 83 Sri Lankans were held at the EPC on Nauru: C Hart, ‘Nauru More Likely for Sri Lankans,’ The Australian, 6 March 2007; C Hart, ‘Sri Lanka detainees to be sent to Nauru,’ The Australian, 16 March 2007. By 8 February 2008, all Rohingya Burmese and Sri Lankans had been brought to Australia: Senator Chris
The absence of domestic constitutional and statutory rights under the US scheme has also been a long-standing concern of US legislators.\textsuperscript{961} Similar concerns have been expressed by parliamentarians in the EU in reaction to proposals to establish joint processing centres outside the EU.\textsuperscript{962} Before examining the significance of these developments in more detail in section 5 below, it is worthwhile understanding the full nature and extent of the schism created by extraterritorial processing between international processing standards and the institution that should provide the principal means for their enforceability: the courts.

E Failure to guarantee access to the courts in the host country or in the intercepting state after transfer

1 The right to an effective remedy after transfer

In safe third country cases, an asylum seeker should be able to pursue remedies against the third country in the third country’s courts for any failure by the third country to satisfy its obligations under the Refugee Convention. States who transfer an asylum seeker to a third country must therefore be satisfied that in practice the asylum seeker has access to the courts under art 16(1) of the Refugee Convention in order to challenge, for instance, the legality of his or her asylum determination.\textsuperscript{963} Article 16(1), when read with art 14(1) of the ICCPR, requires not only access, but also access to an effective means to vindicate rights that overcomes any jurisdictional barriers to the courts deciding a matter.\textsuperscript{964}

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Evans, Minister for Immigration and Citizenship, ‘Last refugees leave Nauru’ (Press Release, 8 February 2008).

961 69 No 21 Interpreter Releases 672 (1 June 1992).

962 House of Lords, above n 582, [97].

963 Michigan Guidelines on Protection Elsewhere, above n 807, [8].

964 Hathaway, above n 1, 647-50.
However, under extraterritorial processing, the fact that asylum seekers are processed in the territory of a third country by government officials from the intercepting state has raised serious domestic jurisdictional obstacles in front of asylum seekers wanting to access judicial remedies in either the third country or in the intercepting state. It is apparent from the following discussion that neither the US or Australian governments have done anything to alleviate these problems. On the contrary, both the US and Australian governments have taken pains to entrench the legal and practical barriers to accessing effective remedies under their schemes.

2 Proceeding against the intercepting state in the intercepting state’s courts after transfer

Article 16 of the Refugee Convention effectively ensures that an asylum seeker may take the intercepting state to task in its own courts for any failure by the intercepting state to provide for protection under the Convention even where the act or omission is in another jurisdiction. Moreover, since the intercepting state’s obligations under the Refugee Convention remain engaged despite transfer of an asylum seeker to a third country, as noted in section IV above, a transferee should be able to bring an action against the intercepting state in the intercepting state’s courts for any deprivation of his or her rights after transfer. Instead, the US and Australian governments have sought to entrench jurisdictional and legal barriers that prevent asylum seekers accessing the courts in their respective jurisdictions.

(a) Excluding the jurisdiction of the intercepting state’s courts

Both the US and Australian governments have attempted to exclude their courts from deciding matters involving the processing of asylum claims (or the detention of asylum seekers) at EPCs. They have particularly exploited the fact that the arena of
foreign relations has traditionally been the responsibility of executive government. In the US, the political question doctrine has traditionally meant that challenges to the executive’s conduct of foreign relations are non-justiciable on the ground that the formulation of foreign policy is constitutionally the purview of the political or executive branch.\(^{965}\)

At the inception of the US interdiction program, the US Government pleaded the political question doctrine in an attempt to deny the jurisdiction of the courts to review the executive’s interdiction of Haitian refugees on the high seas.\(^{966}\) The courts rejected the application of the defence to the US high seas interdiction policy on the ground that ‘the appellants here do not challenge a determination left exclusively to executive discretion, but a procedure utilized by the executive pursuant to his constitutional and statutory authority.’\(^{967}\) However, the executive’s traditional authority over foreign affairs (including aliens) appeared to still influence judicial willingness to entertain the executive’s broad authority over interdicted Haitians, adversely impacting on Haitians’ access to US courts.\(^{968}\)

Where the decision or action challenged is at an EPC established under a bilateral agreement, there may be greater scope for the US Government to plead the political question doctrine. If such a case were brought, based on past experience, an applicant might find the Government all too willing to argue that a US court should not accept jurisdiction where to do so would require it to inquire into the validity of acts of a

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\(^{966}\) Haitian Refugee Center, Inc v Gracey, 809 F 2d 794, 837 (DC Cir 1987); Haitian Refugee Center, Inc v Baker, 789 F Supp 1552, 1565-1566 (S D Fla 1991).

\(^{967}\) Haitian Refugee Center, Inc v Gracey, 809 F 2d 794, 837 (DC Cir 1987).

\(^{968}\) Haitian Refugee Center, Inc v Gracey, 600 F Supp 1396, 1400 (DDC 1985).
sovereign state in its own territory, thereby potentially encroaching on that state’s sovereignty.\textsuperscript{969}

In Australia, the potential force of such arguments have come to the fore through the Australian Government’s use of the ‘act of state’ doctrine to argue for the exclusion of asylum seekers transferred to EPCs from the jurisdiction of Australian courts.\textsuperscript{970} As explained by the common law courts, ‘[a]n act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts.’\textsuperscript{971} The effect of the act of state doctrine is to isolate acts between governments from judicial scrutiny.\textsuperscript{972}

In 2004, the Australian Government argued that the act of state doctrine precluded the Supreme Court of the State of Victoria, in Australia, from entertaining applications by 326 asylum seekers detained on Nauru who claimed that the Australian Government was guilty of the tort of false imprisonment.\textsuperscript{973} The trial judge accepted that a court would be precluded from determining the lawfulness, amongst other things, of acts or decisions of the Australian Government which involved the Court inquiring into the meaning or validity of agreements and other transactions between sovereign States.\textsuperscript{974} Whether this might exclude judicial consideration of the lawfulness of the asylum process at the EPCs on Nauru is unclear, although there can be little doubt that the

\textsuperscript{969} Underhill v Hernandez 168 US 250, 252 (1897).


\textsuperscript{971} Salaman v Secretary of State for India [1906] 1 KB 613, 639 (Fletcher Moulton LJ); Buttes Gas & Oil Co Ltd v Hammer (No 3) [1982] AC 888, 938 (Lord Wilberforce).


\textsuperscript{974} Ibid [16] (Bongiorno J).
Government would have argued so if the issue had ever come before an Australian court.

(b) Establishing the extraterritorial application of the laws of the intercepting state

Both the US and Australian governments have also made use of the inherent territoriality of their onshore asylum processes in an attempt to exclude judicial intervention in the asylum process at EPCs. It is a traditional principle that an alien has the protection of the laws of a state when he or she comes within its territory.\(^{975}\) Conversely, when the alien is not within the territory of the state there is a presumption that the state’s laws do not apply to them because ‘[i]t would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the [state].’\(^{976}\) The so-called ‘presumption of territoriality’ can however be rebutted where contrary indications are evident in legislation.\(^{977}\)

The US scheme displays the most obvious impact of the presumption of territoriality (or ‘presumption against extraterritoriality’) on the ability of asylum seekers to access US courts after transfer to Guantanamo Bay or some other EPC. Rather than dismantle problems of access to its courts, as required under article 16 of the Refugee Convention, the Government instead successfully argued that the provisions of the Immigration and Nationality Act (INA) requiring the Attorney-General to consider asylum claims made during exclusion or deportation proceedings did not apply

\(^{975}\) Al-Skeini and others v Secretary of State for Defence [2008] 1 AC 153, [45] (Lord Rodger of Earlsferry).

\(^{976}\) Ibid.

\(^{977}\) Ibid.
extraterritorially to refugees intercepted on the high seas. At the same time, the
Government also successfully maintained, contrary to the accepted extraterritorial
reach of the non-refoulement obligation, that nothing in the INA precluded US
officials from acting extraterritorially to repatriate asylum seekers without first
undertaking a screening process.

This effectively meant that asylum seekers transferred to Guantanamo Bay (or some
other EPC) faced an uphill battle trying to establish breach of any rights under US law
that could justify judicial interference in the administrative asylum processes that
prevailed offshore. In 1995, the Government successfully argued against claims
brought on behalf of asylum seekers detained at Guantanamo Bay that alleged that the
base was functionally equivalent to a port of entry or land border to the US for the
purposes of the application of provisions of the INA. As a result, asylum seekers
detained at Guantanamo Bay had to establish the extraterritorial application of the
INA. The INA claims failed because of the Government’s successful reliance on
the presumption against extraterritoriality of the relevant provisions.

The Government also successfully argued that asylum seekers had no constitutional
rights under US law. As Gerald Neuman notes, this ‘encouraged the government to
treat Guantanamo as an “anomalous zone,” a geographical enclave in which

acknowledging the fact that the application of the INA to the extraterritorial acts of the
Attorney-General on the high seas could have no adverse impact on the sovereignty of another country,
the Supreme Court was willing to apply the presumption against extraterritoriality in any event: Sale v

979 Ibid.

980 Cuban American Bar Assoc v Christopher, 43 F 3d 1412, 1425 (11th Cir 1995), cert denied, 515

981 Ibid.

982 Ibid 1426.

983 Ibid 1425.
fundamental legal norms do not apply'.\textsuperscript{984} Neuman further notes that this fact influenced the Government’s decision to select Guantanamo as a detention site for suspects arrested abroad in the “war on terrorism.”\textsuperscript{985}

Against this background, it should come as no surprise that the US Government has strenuously resisted the Supreme Court’s decision in \textit{Rasul v. Bush}, which countenanced the possibility of the extraterritorial application of US laws to cover ‘enemy combatant’ detainees held at Guantanamo Bay.\textsuperscript{986} In a rejection of the US Government’s attempts to exercise executive authority over ‘enemy combatants’ beyond the reach of US law, the Supreme Court recognized in \textit{Rasul v. Bush} that the habeas corpus jurisdiction under the federal habeas statute extended to ‘enemy combatants’ held at Guantanamo Bay.\textsuperscript{987}

In contravention of its \textit{non-refoulement} obligations, the US Government has since relied on ouster clauses to resist judicial review of not only detention, but also the transfer of detainees held at Guantanamo to countries where they fear persecution or torture.\textsuperscript{988} The Government’s position with respect to its military detainees sends a clear message that it will continue to resist scrutiny of its asylum process (or lack thereof) at Guantanamo in contravention of its international obligations.

Turning to Australia, representatives for Rohingyan Burmese asylum seekers held at the EPCs on Nauru attempted to get around the problem of the limited territoriality of

\textsuperscript{984} Neuman, above n 774, 4.

\textsuperscript{985} Ibid.

\textsuperscript{986} \textit{Rasul v Bush}, 542 U S 466, 483, 484, 122 S Ct 2686 (2004).

\textsuperscript{987} Ibid. See also, \textit{Hamdan v Rumsfeld}, 548 US 557, 126 S Ct 2749 (2006).

Australia’s onshore visa process by lodging an application for an Australian offshore visa. The intention was to force the Australian Government to consider and decide the visa application under the express provisions in Australia’s immigration laws for the grant of offshore refugee and humanitarian visas, which obviously have extraterritorial effect, rather than rely on the purely administrative processes that applied to the decision-making of Australian officials processing claims to asylum on Nauru.

Yet the Australian Government refused to consider their statutory visa applications and instead progressed with the non-statutory determination process. The legal representatives subsequently brought an action in the Australian High Court seeking an order that the Australian Government consider the visa application under statute. The legal representatives claimed that the Government’s refusal to consider the visa applications amounted to an attempt to avoid the possibility that the asylum seekers might seek judicial review of the rejected visa claim, and to pressure them to accept a non-statutory alternative with no legally enforceable rights.

The Australian Government conceded before it made any substantive submissions, leaving a number of legal issues unresolved. Even after conceding the case, the Australian Government refused to expedite the decision-making process, exploiting the fact that Australia’s offshore refugee and humanitarian visa application process is notoriously slow and non-transparent. The full significance of the case was still unfolding when the change of government saw the disbandment of extraterritorial

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990 Applications for offshore humanitarian visas, including sub-class 447 and 451 secondary movement visas, must be made outside Australia by applicants outside Australia: *Migration Regulations 1994 (Cth)*, r 1402.

991 Onshore Protection Interim Procedures Advice, above n 583.

processing and the Burmese were brought to Australia. As a result, it remains unclear whether this route offered a viable and effective means of circumventing the territoriality of onshore asylum processes and a means of accessing the courts in Australia, or whether (as appears to be the case) it simply replaced the onshore asylum process, with its prescribed decision-making steps and judicial scrutiny, with the non-transparent and non-reviewed offshore programme.

In summary, the US and Australian governments have sought to exploit, rather than remove, domestic jurisdictional barriers to their respective courts. The next part demonstrates that they have employed a similar strategy to divert asylum seekers from the courts in the third country hosting the EPC.

3 Erecting barriers to court access in the third country

The US Governments has also sought to deny asylum seekers the right to challenge in the third country’s courts decision-making by its officials at EPCs by relying on the doctrine of state immunity, and by insisting on third countries introducing legislation barring judicial review of official acts or decisions in relation to the processing or detention at an EPC.

(a) The state immunity doctrine

In accordance with the state immunity doctrine, decisions and actions by the intercepting state’s officials at an EPC are acts or decisions of a foreign state of a non-commercial, government nature and therefore presumably immune from court proceedings in the host state.993 State or sovereign immunity is a doctrine of international law that national courts are not at liberty to ignore.994 As the doctrine

993 P Nygh and M Davies, Conflict of Laws in Australia (Sydney, Butterworths, 2002), 147.
994 Holland v Lampen-Wolfe [2000] 1 WLR 1573, 1588 (Lord Millett); Jones v Saudi Arabia [2006] 2 WLR 1424, [101] (Lord Hoffman).
goes to the question of jurisdiction, whether in fact the foreign state has breached its international obligations does not arise.995

Moreover, following the approach of the European Court of Human Rights to the inherent right of access to the courts under art 6 of the ECHR, the state immunity doctrine does not breach a right of access to the courts because the immunity doctrine is an inherent limitation on the right of access.996 Thus, the question of whether or not the intercepting state has complied with its obligations under the Refugee Convention and associated human rights instruments may not even be entertained by a court in the host country.

On the other hand, immunity can be waived. Yet rather than do so, the US Government appears to have exploited the state immunity doctrine as a bar to claims against its officials working at EPCs in third countries. The US-Jamaica agreement, for example, expressly stated that the applicable law and jurisdiction was Jamaican law subject to ‘general principles of international law, including those relating to immunity’, and that ‘persons assigned to the operation by the [US Government] and agreed to by the [Jamaican Government] will receive privileges and immunities as are applicable under Jamaican law and international law.’997 The Turks and Caicos Islands agreement also stated that the Turks and Caicos Islands was required ‘as soon as practicable after the coming into effect of this Understanding, to introduce and support legislation for the purposes of … granting United States military and civilian

995 Jones v Saudi Arabia [2006] 2 WLR 1424, [64] (Lord Hoffman).
997 US-Jamaica agreement, above n 771, arts 8 and 10.
personnel immunity from any civil action brought against them in the Turks and Caicos Islands in respect of acts or omissions arising out of, and in the course of, their duties in connection with the operation.  

(b) Court ouster clauses

In addition, the US Government has also relied on third country’s introducing legislation expressly ousting their court’s power to hear matters relating to official conduct or decisions in connection with an EPC. The Turks and Caicos Islands agreement, for instance, expressly insulates US and host country officials from judicial review by requiring that the Turks and Caicos Islands pass and support legislation ‘excluding from the jurisdiction of the courts of the Turks and Caicos Islands any civil action which may be brought against the Governments of the United States, the United Kingdom, and the Turks and Caicos Islands arising out of, or in connection with, the operation’. Presumably, the US de facto sovereignty under the 1903 lease with Cuba is regarded as safely precluding any access to the courts of the host state in that instance.

No such articles are found in the Australian agreements with Nauru and Papua New Guinea. Presumably this is because the Australian Government relies on the fact that refugee determinations made by their officials are sanctioned by a Nauruan special purpose visa issued to asylum seekers brought to EPCs on its territory for ‘humanitarian endeavours’. In such circumstances, where the host country’s laws sanction the processing (or detention) of asylum seekers at EPCs, the question is less one of the state immunity of officials as who to claim against.

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998 Turks and Caicos Islands agreement, above n 771, art II.2 (xi)(b).
999 Turks and Caicos Islands agreement, above n 771, art II.2 (xi)(a) and (c).
1000 Ibid [18].
This problem is illustrated in the Nauruan Supreme Court case of Abbas, a case concerning the challenge to the lawfulness of detention of asylum seekers at one of the Australia-Nauru EPCs. The asylum seekers attempted to claim against the Nauru’s Director of Police, IOM, and the Australian Protective Services. However, the Nauru Supreme Court found that Nauru’s Director of Police was the appropriate respondent to a petition for habeas corpus brought by asylum seekers, not the IOM or the Australian Protective Services.\(^{1001}\) Connell CJ referred to the fact that the asylum seekers were restricted to the sites of the EPC facilities by authority of a special purpose visa issued by the Nauruan Government.\(^{1002}\) Furthermore, the Australian protective personnel responsible for securing the facilities were sworn in as reserve officers under the Nauru Police Force Act.\(^{1003}\) The detainees were therefore subject to the laws of Nauru and should have brought any action against the relevant Nauruan officials. Bound by the laws of the land, the Supreme Court was unwilling to look beyond Nauru’s formal national control over the detainees to the joint control exercised by Nauru and Australia as a matter of international law.\(^{1004}\)

Thus, an asylum seeker at an EPC may very well face the immunity doctrine or ousting legislation if the court finds that an intercepting state official made the adverse determination, or, alternatively, he or she might not be able to proceed against an intercepting state official where the decision is traceable to the lawful authority of

\(^{1001}\) Abbas Al Sayed Mahdi and others v Director of Police, Steve Hamilton, Manager, IOM, Officer in Charge, Australian Protective Services, Supreme Court of Nauru, Civil Action No. 10/2003 (27 May 2003), [23] (Connell CJ).

\(^{1002}\) Ibid [18].


\(^{1004}\) Since the Abbas case, a bilateral agreement between Australia and Nauru ensured Australian police deployed to the Australia-Nauru OPC are outside the jurisdiction of Nauruan courts: Australia-Nauru Agreement concerning police and assistance to Nauru, 10 May 2004, entry into force 29 July 2004, [2004] ATS 21, art 3.5.
the third country. However, rather than take positive steps to remove these barriers to the courts, the US and Australian Governments have built them higher.

4 *Proceeding against the third country in the third country’s courts*

A final option open to an asylum seeker transferred to an EPC is to seek to enforce his or her rights against the third country in the third country’s courts. If the intercepting state complies with its obligations under safe third country or protection elsewhere rules before transfer, it should be satisfied that the third country provides this access. However, for a number of reasons, effective access has not generally been available.

The US de facto sovereignty over Guantanamo Bay precludes any chance that asylum seekers might have to enforce any claims that they have against Cuba (putting aside the question whether Cuba has any obligations given the US control of the Bay under the 1903 lease). At other US-controlled EPCs, as noted above, the US has sometimes insisted that legislation is introduced that ousts the jurisdiction of the courts in the host country to hear claims against any officials acting in relation to an EPC.  

Where such provisions do not exist, e.g. under the US-Jamaica agreement or the Australia-Nauru agreement, this does not mean that asylum seekers are guaranteed an effective remedy against the respective third country. The construction of extraterritorial processing so that generally an official from the intercepting state makes the determination under the intercepting state’s own administrative procedures by itself is enough to create a whirlpool of jurisdictional problems. The uncertainty surrounding who would be the appropriate respondent, as already noted, and what laws would govern the legality of the determination under conflict of laws rules.

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1005 Turks and Caicos Islands agreement, above n 771, art II.2 (xi)(a) and (c).

1006 See, eg, *Custom and Adopted Laws Act 1971* (Nauru); *Conflict of Laws Act 1974* (Nauru).
might explain why no cases have been brought to date in any third country courts challenging a negative administrative refugee status determination at an EPC.

In addition, governments have proven all too willing to exploit the fact of the existence of bilateral agreements establishing EPCs to argue for a deferential judicial construction of third country laws so as to facilitate their arrangements. This is evident in another challenge to the detention of asylum seekers at the EPCs on Nauru commenced in the Nauruan Supreme Court.\(^{1007}\) In that case, asylum seekers alleged a breach of their right under article 5(1) of the Nauruan Constitution that 'no person shall be deprived of his personal liberty, except as authorized by law in any of the following cases ... (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.'

The Nauruan Supreme Court denied the claim on the basis that the applicants entered and were detained on Nauru in accordance with the conditions contained in the special purpose visa issued by the Principal Immigration Officer of Nauru.\(^{1008}\) In reaching this conclusion, the Supreme Court found that the power of the Principal Immigration Officer to issue a special purpose visa to a person who arrives in Nauru without a passport on 'such conditions as the Principal Immigration Officer thinks fit' extended to the long-term detention of asylum seekers brought to Nauru against their will under the Australia-Nauru agreement.\(^{1009}\) Prevalent in the court’s approach is

\(^{1007}\) Abbas Al Sayed Mahdi and others v Director of Police, Steve Hamilton, Manager, IOM, Officer in Charge, Australian Protective Services, Supreme Court of Nauru, Civil Action No. 10/2003 (27 May 2003); Amiri v Director of Police [2004] NRSC 1; Civil Action No 08 of 2004 (31 May 2004).

\(^{1008}\) Abbas Al Sayed Mahdi and others v Director of Police, Steve Hamilton, Manager, IOM, Officer in Charge, Australian Protective Services, Supreme Court of Nauru, Civil Action No. 10/2003 (27 May 2003); Amiri v Director of Police [2004] NRSC 1; Civil Action No 08 of 2004 (31 May 2004).

\(^{1009}\) Amiri v Director of Police [2004] NRSC 1; Civil Action No 08 of 2004 (31 May 2004), [30]-[32] (Connell CJ). By a quirk of Australia’s imperial history, the Australian High Court is the final court in the Nauruan court hierarchy. A right of appeal lies in civil matters from the Nauru Supreme Court to
deference to the bilateral arrangements between Nauru and Australia, which were a pervasive element in other proceedings as well.\textsuperscript{1010}

In stretching the legitimizing reach of Nauru’s immigration regulations to encompass the bilateral arrangements, where it was clear that the arrangement was clearly not contemplated by Nauru’s immigration legislation, the courts deferred to an operational reality of extraterritorial processing, namely, that the intercepting state’s commitment to detain, process and remove the transferred refugees with minimal impact on the host country has to date mandated prolonged, mandatory detention (as well as substandard processing).\textsuperscript{1011} Yet it is clear from the powerful dissenting judgment on appeal, that the prolonged detention of asylum seekers (four years at the time of the proceedings) amounted to a breach of article 5(1) of the Nauruan Constitution when read in light of international human rights instruments.\textsuperscript{1012}

**F Summary - Denying access to effective remedies via an avalanche of jurisdictional issues**

From the above discussion, it is apparent that the fact that asylum seekers at EPCs are processed by officials from the intercepting state in the territory of a third country, the High Court of Australia under s 5(1) of the Nauru (High Court Appeals) Act 1976 (Cth). At the same time, the High Court may not hear matters on appeal from the Nauru Supreme Court where such matters relate to the interpretation of the Nauru Constitution: Nauru (High Court Appeals) Act 1976 (Cth), Schedule, art 2(a) of the Agreement Between the Government of Australia and the Government of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru. A majority of the High Court upheld the above decision on appeal: *Ruhani v Director of Police [No 2] [2005] HCA 43* (31 August 2005), [25]-[27] (Gleeson CJ, Gummow, Hayne and Heydon JJ) cf [61]-[80] and [84]-[108] (Kirby J).

\textsuperscript{1010} Abbas Al Sayed Mahdi and others v Director of Police, Steve Hamilton, Manager, IOM, Officer in Charge, Australian Protective Services, Supreme Court of Nauru, Civil Action No 10/2003 (27 May 2003), [1], [13] (Connell CJ); *Amiri v Director of Police [2004] NRSC 1*; Civil Action No 08 of 2004 (31 May 2004), [3], [12], [22], [23] (Connell CJ); *Ruhani v Director of Police [No 2] [2005] HCA 43* (31 August 2005), [11] – [13], [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

\textsuperscript{1011} *Amiri v Director of Police [2004] NRSC 1*; Civil Action No 08 of 2004 (31 May 2004), [30]-[31] (Connell CJ); *Ruhani v Director of Police [No 2] [2005] HCA 43* (31 August 2005), [25]-[26] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

\textsuperscript{1012} *Ruhani v Director of Police [No 2] [2005] HCA 43* (31 August 2005), [61]-[80] and [84]-[108] (Kirby J).
deliberately buries any potential litigation in any court under an avalanche of complex jurisdictional issues. Practically, enforcing access to the courts and to an effective remedy becomes problematic to say the least. Hence, contrary to safe third country rules requiring that there should be access to the courts as required under article 16 of the Refugee Convention, in the case of the US and Australian extraterritorial processing schemes there has been little or no access to an effective remedy.

In sum, these observations illustrate that extraterritorial processing entrenches serious jurisdictional and legal obstacles to meaningful and effective remedies, further undermining asylum seekers’ right to a fair and effective determination of their claim. There is a plain teleological line between denial of access to the courts in the intercepting state before and during transfer and the inability to access effective remedies in the third country after transfer. Denial of access to effective remedies in the third country is an intentional, not accidental, aspect of extraterritorial processing. At base, it derives from the intercepting state’s configuration of an extraterritorial processing (and detention) regime that excludes its officials from the reach of any court.

V LESSONS FROM THE DISBANDMENT OF THE AUSTRALIAN SCHEME

At a time when extraterritorial processing remains under consideration in the EU as part of the Hague Programme adopted by the European Council, it might be
worthwhile to conclude this paper by considering what lessons can be learnt in light of the above analysis from the recent disbandment of Australia’s scheme.

The new Australian Government’s decision to disband extraterritorial processing in third countries can be traced back to 2002 when the Australian Senate Legal and Constitutional References Committee recommended against passing legislation extending the reach of the then Government’s extraterritorial processing scheme. Concerns grew as the nature of extraterritorial processing became apparent until a Government-dominated Senate committee again recommended against passage of similar legislation seeking to extend the scheme in 2006. Specifically, legislators, including members of the Government’s own party, rejected the Government’s amending bill on the basis that the regime violated key provisions of the Refugee Convention by excluding refugees from statutory processes, tribunals, and courts that were available to them within Australia. The Committee’s report set the scene for the effective disbandment of the Australian policy of transferring onshore asylum seekers to third countries for processing by the new Australian Government in February 2008.

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1014 Senate Excision Report, above n 921.

1015 The Prime Minister withdrew the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, which sought to extend the offshore processing regime, on 14 August 2006 (Commonwealth of Australia, Parliamentary Debates, Senate Official Hansard No. 15, 2006, 7 December 2006, 115, Government Responses to Parliamentary Committee Reports). The decision to withdraw the Bill followed indications that members from the Government party would cross the floor in the Senate to vote against the Bill. Furthermore, three Government backbenchers had crossed the floor in the House of Representatives to vote against the Bill on 11 August 2006 (Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 10 2006, Wednesday 9 August 2006, 40-44 (Mr Georgiou), 49-52 (Mr Broadbent) and 57-60 (Mrs Moylan)).

1016 Senate Designated Unauthorised Arrivals Bill Report, above n 883, 60, 65, 74, 75-76; Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 10 2006, Wednesday 9 August 2006, 42-44 (Mr Georgiou), 50-52 (Mr Broadbent) and 57 and 59 (Mrs Moylan).

1017 Senator Chris Evans, Minister for Immigration and Citizenship, ‘Last refugees leave Nauru’ (Press Release, 8 February 2008).
Following the Government’s change of policy, there is also cause for repeal of the 2001 amendments, referred to in section III above, that facilitated the interdiction and transfer of asylum seekers to EPCs. This would, amongst other things, restore the statutory right to apply for a protection visa with the associated statutory and judicial safeguards under Australian law.

Legislators’ concerns regarding extraterritorial processing are not restricted to Australia. The UK House of Lords European Union Committee similarly rejected the UK proposal to establish transit processing centres outside the EU on the ground that ‘[t]he new proposals do not provide the safeguards contained in national law’. The Committee also did not favour the UNHCR’s proposal at the time to establish joint processing centres within the EU because of the lack of adequate legal safeguards and uncertainties over state responsibility and processing where the joint processing centre was outside the territory of the UK.

The European Union Committee’s concerns were well-founded when taking into the similarities between the UK proposal and the US and Australian schemes. As pointed out earlier, the UK proposal was driven by the same prevention and deterrence objective as the US and Australian schemes. This can be attributed, in part, to a longer and more concrete historical association between the UK and extraterritorial processing, as reflected in the Turks and Caicos Islands agreement between the US, the UK and the Turks and Caicos Islands government, than was previously understood to be the case.

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1018 House of Lords, above n 582, [97].
1019 House of Lords, above n 582, [58], [76], [80]-[88].
1020 Noll, above n 582, 313; UK, New Vision, above n 815, [1.2], [6.4].
1021 Turks and Caicos Islands agreement, above n 771, art II.1(i); United Kingdom, Hansard, House of Commons, Written Answers to Questions, 20 June 1994, Column 10.
The UK proposal therefore shares the same procedural shortcomings that drove the disbandment of the Australian scheme. The UK proposal, mooted in 2003, specifically foresaw that refugees arriving in the EU would potentially be sent to Transit Processing Centres situated outside the EU. Similar to the Australian regime, the IOM would undertake the management of these centres. UNHCR would have the role of providing for the protection needs of refugees sent there. A UNHCR-approved ‘screening system’ would be put in place. The proposal further suggested that the sending EU states would finance the IOM and UNHCR to perform these functions. The UK’s suggestions are, however, notable for the absence of reference to equivalent national safeguards found in the UK and other EU countries.

The Danish operational memorandum in 2004, which built on the earlier UK proposal, did make some suggested improvements on the US and Australian ‘models’. First, it put forward a rapid screening process to assess whether an asylum seeker should be sent to a ‘protected area’ outside the EU or should be entitled to apply under normal refugee status determination processes within the EU. Second, the Danish memorandum also alluded to the possibility of a right to challenge a transfer to an EPC in a judicial forum.

1022 Ms Eve Lester, Select Committee on European Union – Minutes of Evidence, House of Lords, UK Parliament, 12 November 2003, [152].
1023 Ibid.
1024 Ibid; Noll, above n 582, 304, 313.
1025 UK, New Vision, above n 815, [1.2].
1026 United Kingdom, ‘Concept Paper on Zones of Protection’, March 2003, reproduced in House of Lords, above n 582, Appendix 5, 56.
1027 Ibid.
1028 Noll, above n 582, 321.
1029 Ibid 321, 332.
Yet a salutary lesson from the Australian experience is that while the fundamental schism between international protection and national safeguards remains a hallmark of extraterritorial processing schemes, the isolated application of formal safe third country safeguards may not produce any real protection for asylum seekers. This was evident in the tainted Ministerial declaration power, discussed in section III.A.4 above, which saw the safe third country practice of declaring countries to be ‘safe’ according to human rights criteria conscripted to the service of the underlying deterrence objective of Australia’s extraterritorial processing scheme. Other safeguards await a similar fate while extraterritorial processing remains an exercise in defeating access to meaningful national legal and institutional protections.

For example, to the extent that the Danish memorandum envisaged an individualized assessment of ‘safety’ before transfer to an EPC, it would presumably require that an immigration official from an EU country evaluate the effectiveness of the processing endorsed by the highest levels of his own government and the EU. If applied in isolation without any alleviation of the underlying defects in extraterritorial processing, it would most probably simply serve the preventative and deterrent objective of extraterritorial processing without offering any real protection.

It might, for instance, simply exacerbate what commentators have already observed to be the difficulty immigration officers face in making objective decisions where a senior minister has declared that a third country is ‘safe’. In addition, it would be almost impossible for an asylum seeker facing transfer to an EPC to rebut the general presumption of safety of the third country where criteria for determining refugee status is obscured by administrative extraterritorial asylum processes, rather than

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1030 See, below n 861 - and accompanying text.
1031 Shacknove and Byrne, above n 855, 196.
clearly laid out judicial interpretations. Unlike safe third country cases like Adan, a transferee to an EPC generally has no recourse to published judicial proceedings or to the record of administrative decision-making (there being no detailed reasons given for determinations) that catalogue the criteria adopted at an EPC.

Yet at the end of the day it is difficult to examine the UK and Danish proposals because they leave so much unsaid. As a recent resolution of the Parliamentary Assembly of the Council of Europe made clear, the proposals to instigate transit processing centres whether inside or outside the EU are difficult to analyse in the abstract. However, the Parliamentary Assembly did make this much clear: firstly, ‘centres should not replace national well-established asylum procedures in European destination countries’; and secondly, ‘centres should not undermine national policies and practices and determination procedures and facilities in the countries where centres might be established.’ In light of the analysis of the US and Australian schemes in this article, it is difficult to envisage a scheme of extraterritorial processing in any arena that would not breach these requirements.

VI CONCLUSION

The Australian Government’s disbandment of the extraterritorial processing of claims in third countries, along with the concerns expressed by other parliamentarians in the US and within the EU, is ultimately recognition that extraterritorial processing schemes

1032 UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, 13.
1033 R v Secretary of State for the Home Department, ex parte Adan [2001] 2 AC 477.
1035 Ibid [13.1] and [13.2].
are anathema to protection under the Refugee Convention and cognate rights instruments while such schemes retain their fundamental objective of preventing and deterring direct access to fair and effective processing in-country.

Rather than employ legislatures, courts, and administrative agencies to protect the right to a fair and effective asylum process, extraterritorial processing exploits the fault lines between these institutions to deny this right. The collapse of the Australian scheme points to the importance of keeping protection at home amidst the national laws and institutions that provide the means for the state’s satisfaction of its obligation to provide a full and fair hearing of a person’s claim to protection.
I INTRODUCTION

This chapter examines attempts by states to restrict the access of asylum seekers to the courts. However, rather than focus solely on judicial scrutiny of the asylum process, this chapter contends that effective state scrutiny of asylum procedures is dependent on the co-ordinated operation of appropriate judicial, legislative and administrative scrutiny mechanisms. This chapter proposes that this is best achieved by states engaging a range of scrutiny mechanisms that are guided by a common rights-based standard of scrutiny.

From the discussion of the restrictive trend in asylum procedures in earlier chapters, it is apparent that the last decade or more has seen a number of traditional asylum states restructure their asylum procedures. In light of this trend, this chapter argues that is essential that states engage in continual scrutiny of their asylum procedures to ensure that they are devised and implemented in a fair and effective manner.

In making this argument, this chapter takes a broad approach to ‘scrutiny’. To date, the asylum debate has focused on judicial scrutiny of asylum decision-making and procedures. In contrast, there is little work on the scrutiny role of the political branches – the executive and parliament – in the asylum context.\textsuperscript{1037} This is a yawning gap in the literature given the prevalence of the political branches in the formulation, implementation and scrutiny of asylum policy. This chapter aims to help fill this void.

This chapter’s premise is that national institutions remain an important mechanism of scrutiny in the asylum arena. This does not exclude the important role of international supervision and monitoring by the UNHCR.\textsuperscript{1038} On the contrary, this chapter observes that a key benefit of states employing a range of national institutional scrutineers of asylum processes is the potential for greater state engagement with the UNHCR and other international organizations, e.g. through interaction between parliamentary scrutiny committees and international organizations.\textsuperscript{1039} This interaction is important given the lack of any mandatory international reporting and review mechanism under the Refugee Convention such as found in other international rights instruments.

\textsuperscript{1037} Although a few scholars have examined the asylum debates in parliament: see, eg, Steiner’s exploration of the arguments made by Swiss, German, and British parliamentarians when debating asylum legislation over two decades study (Steiner, above n 444) and Osamu Arakaki’s examination of the debate in the Japan Diet on the Immigration Control and Refugee Recognition Act (Arakaki, above n 37, 19-).


\textsuperscript{1039} For example, through the direct interaction between parliamentary scrutiny committees and the UNHCR. See, eg, UNHCR, above n 584 (UNHCR’s submission to an Australian Senate inquiry into Australia’s policy of processing asylum claims offshore); House of Lords, European Union Committee, 11\textsuperscript{th} Report of Session 2003-2004, Handling EU asylum claims: new approaches examined, Report with Evidence, 30 April 2004, [58], [76], [80]-[88] (discussion of UNHCR oral evidence before the House of Lords, European Union Committee’s inquiry into the UK proposal to establish transit processing centres outside the EU).
In making the argument in favour of strengthening national institutional scrutiny of asylum processes, this chapter also does not mean to exclude the benefits gained from co-operative forms of regional governance. Regional organisations, such as the European Union and the Organization of American States, potentially add another level of scrutiny to existing national mechanisms.\textsuperscript{1040} The importance of fostering the scrutiny role of regional institutions is especially important in the EU context, where the European Commission has assumed the lead role in the formulation of asylum policy.\textsuperscript{1041} The EU experience, which historically was marked by ‘secretive and unaccountable’ policy development\textsuperscript{1042} and a willingness by national governments ‘to adopt and apply concepts developed at the EU level’,\textsuperscript{1043} highlights the importance of identifying and strengthening processes for effective scrutiny that utilise all levels of regional governance frameworks – including national parliaments.

This chapter is set out as follows. Section II identifies the express and implied obligations that require states to engage in the effective scrutiny of asylum procedures. In light of these obligations, sections III-V analyze the current limitations and potential benefits of executive, parliamentary, and judicial scrutiny of asylum procedures.

\textsuperscript{1040} See, eg, the Inter-American Commission on Human Rights, above n 433.

\textsuperscript{1041} Harvey, above n 1036, 219.

\textsuperscript{1042} D Joly, ‘A new asylum regime in Europe’, in F Nicholson and P Twomey eds., \textit{Refugee Rights and Realities: Evolving international Concepts and Regimes} (Cambridge, Cambridge University Press 1999) 336-357; B Chimni (2000) ‘Reforming the International Refugee Regime: A Dialogic Model,’ a paper given at the workshop Alternative Futures: Developing An Agenda for Legal Research in Asylum, 1-3 June 2000, Refugee Studies Centre, Oxford University, 23, n xii (‘Aware of the lack of equity in establishing a restrictive regime in one region, the governments in the region, and appreciating the weight of protests by the civil society, EU States have not adhered to the principles of discourse ethics within the region. The regional regime in Europe has essentially been arrived at in secrecy and through the denial of a role to the European parliament, non-governmental organizations and the UNHCR’); Harvey, above n 1036, 219.

\textsuperscript{1043} Harvey, above n 1036, 226.
II THE REQUIREMENT TO SCRUTINIZE ASYLUM PROCEDURES

A Judicial scrutiny as an express requirement

The Refugee Convention, ICCPR and CAT, as well as regional rights instruments, create an obligation upon states to ensure that refugees and persons in need of protection obtain access to the courts and an effective remedy.\textsuperscript{1044} Judicial review contributes significantly to lessening the risk of \textit{refoulement} through independent scrutiny of the degree to which a state’s protection process complies with standards of due process, the true and autonomous meaning of ‘refugee’, and subsidiary protection obligations.

A good faith application of the right of access to the courts requires that the political branches take all possible steps to ensure that the courts retain a role in the asylum process. As a practical matter, this requires that the political branches adopt administrative and legislative measures that foster access to the courts, rather than erect barriers to effective judicial scrutiny of asylum decision-making. This would mean, for example, that an overly onerous leave mechanism which unreasonably prevented asylum seekers from accessing the courts would infringe this right.\textsuperscript{1045}

B Political scrutiny as an implied requirement of the good faith obligation

The need for the political branches of the state to engage in diligent scrutiny of asylum procedures is a logical application of the general duty upon states to interpret and apply the Refugee Convention and related rights instruments in good faith.\textsuperscript{1046} While the good faith obligation cannot give rise to obligations that do not exist under

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\textsuperscript{1044} See above n 399 – and accompanying text.

\textsuperscript{1045} Inter-American Commission on Human Rights, above n 433, 30-33.

\textsuperscript{1046} See above n 349 – and accompanying text.
a treaty, \(^{1047}\) it does obligate states to ensure that those duties that are set out in treaties are implemented to the greatest extent possible.

When applied in good faith, the non-refoulement obligation requires that states diligently ensure that their asylum procedures are compliant with evolving standards of protection. In other words, it is integral that states parties should not adopt a process that is manifestly unsuited to the task of identifying persons requiring protection, but should diligently and rigorously assess and scrutinize the development and implementation of new or existing asylum procedures. In short, fair and effective asylum procedures require reflective and responsive scrutiny practices.

Arguably, given the numbers and complexity of asylum decision-making today, this requires the engagement of both executive and parliamentary scrutiny. Where states utilize their administrative and legislative organs to ensure asylum policies and bills comply with international standards, they are simply fulfilling the general good faith obligation to ensure compliance with their international obligations to the greatest extent possible. This is a logical consequence of the fact that the duty to ensure the effectiveness of rights requires that states adopt positive administrative, judicial and legislative measures to ensure that rights are applied to the greatest extent possible within their jurisdictions.

C Scrutiny as a component of the obligation to facilitate international supervision

The need for states to scrutinize and assess their asylum procedures for compliance with international standards is also a practical component of states engagement with the UNHCR. States should actively seek UNHCR comment on the development of

national or regional laws and policies. Pursuant to its Statute and the Refugee Convention, the UNHCR has competence to supervise the application of the Refugee Convention.\footnote{Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(V), Annex, UN Doc A/1775, (1950) s 8. UNHCR’s supervisory responsibility under its Statute is mirrored in art 35 of the Refugee Convention and art II of the 1967 Protocol relating to the Status of Refugees.} This jurisdiction expressly extends to fostering the development of laws and policies concerning refugees that are consistent with international law.

Article 35 of the Refugee Convention obligates states parties to cooperate with the UNHCR in the performance of its role. Engagement with the UNHCR should thus form part of, and engender, diligent scrutiny by states of their asylum procedures.

States’ scrutiny of their asylum procedures is also demanded by collective international protection standards that states themselves have laid down as part of the activities of EXCOM. EXCOM consists of states parties to the Refugee Convention and its Protocol. The annual EXCOM Conclusions are arrived at through a consensual process requiring the agreement of states. The EXCOM Conclusions are a source of basic asylum processing standards that states should refer to when developing and implementing their own determination process.\footnote{EXCOM Conclusions No 8 (XXVIII)-1977, (d) and (e), No 28 (XXXIII)-1982, (c), and No 85 (XLIX)-1998, (r).} At the time of writing, the UNHCR is also considering the development of a more comprehensive EXCOM Conclusion on Asylum Procedures.

States may also be required to scrutinize and assess their asylum procedures as part of the periodic reporting requirements under the ICCPR and CAT or when responding to individual complaints made to the Human Rights Committee and the Committee against Torture respectively.\footnote{ICCPR, art 40; Optional Protocol to the ICCPR; CAT, art 19.} As noted by the Committee against Torture, States Parties to the CAT ‘have the obligation continually to keep under review and improve
their national laws and performance’ under the CAT ‘in accordance with the Committee’s concluding observations and views adopted on individual communications …’ These mechanisms are assuming growing significance in the asylum adjudication context as the ICCPR and CAT deal with a growing number of allegations of violations of the non-refoulement principle.

D Scrutiny as a component of regional governance frameworks

State scrutiny is also a necessary component of regional governance frameworks. The increasing role of EU institutions in the development of asylum procedures does not absolve states from their responsibility to ensure that such processes comply with international standards, obligating states to diligently and rigorously scrutinize the development of asylum procedures at the national and confederational levels. In addition, OAS member states must also respond to the monitoring function of the

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1051 Committee against Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No 2 (Implementation of Article 2 by States Parties), CAT/C/GC2/CRP.1/Rev.4, [4].

1052 CAT: Pelit v Azerbaijan, Communication No 281/2005, CAT/C/38/D/281/2005, 5 June 2007 (CAT finding that Azerbaijan’s extradition of Pelit to Turkey violated art 3 of the CAT despite diplomatic assurances from Turkish authorities that Pelit would receive humane treatment); Agiza v Sweden, Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005) (CAT of the view that Sweden in breach of art 3 of the CAT when failed to provide independent review of the expulsion decision); Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19: United States of America, Conclusions and Recommendations, CAT/C/USA/CO/2, July 25, 2006, 5 [21] (CAT expressing concern regarding the US’s use of diplomatic assurances that a person will not be tortured if expelled). See generally, S Joesph, ‘Committee against Torture: Recent Jurisprudence’ (2006) 6 Human Rights Law Review, 571-577, 574 (observing that ‘[t]he Committee’s jurisprudence in individual complaints has been dominated by matters arising under Article 3 of CAT …’). ICCPR: Mohammed Alzery v Sweden, Communication No 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006) (HRC of the view that Sweden breached arts 2 and 7 of the ICCPR when state expelled author to Egypt where state acknowledged a risk of ill-treatment in Egypt and failed to provide an avenue for the review of the expulsion decision); Mr C v Australia, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), [8.5] (HRC of the view that deportation in circumstances where the State party has recognized a protection obligation towards the author, and where it was unlikely the author would receive necessary medical treatment for a condition caused by the State party’s violation of the author’s rights amounted to a violation of art 7 of the ICCPR).

1053 Goodwin-Gill, above n 344, 146.
Inter-American Commission on Human Rights. In performing its mandate, the Commission has undertaken important inquiries into the treatment of asylum seekers, including the operation of refugee determination procedures.

The next three sections explore in more detail the role of judicial, executive, and legislative scrutiny of asylum procedures.

III JUDICIAL SCRUTINY OF ASYLUM DECISION-MAKING

A Attempts to restrict the judiciary’s role in the asylum process

The benefits of judicial scrutiny of asylum adjudication, noted in chapter 4 of this thesis, have been seriously undermined in recent times by attempts to restrict asylum claimants accessing the courts in developed states. Most blatantly, states have sought to introduce ouster clauses or similar legislative provisions designed to exclude or limit the grounds of judicial review of asylum decisions. In addition,


1055 See, eg, the Inter-American Commission on Human Rights, above n 433.

1056 See above n 536 - and accompanying text.

states have introduced laws defining and limiting the scope of the refugee definition, thereby depriving the courts of the capacity to foster an inclusive interpretation of the refugee definition in line with international jurisprudence.

Another measure that restricts access of asylum seekers to an effective judicial remedy is decision-making processes prescribed by statute that are exclusive of judicial or common law notions of fairness – effectively depriving the courts of any role in ensuring the asylum process is fair. As observed in chapters 5 and 6 of this thesis, judicial involvement is also effectively stymied by statutory or administrative schemes that seek to entrench unfettered administrative discretion or privatized immigration control at the ‘exported border’. Lastly, states have sought to deny access to judicial review in cases where border officials classify an asylum claim as ‘manifestly unfounded’.

**B Unsustainable reasons for limiting judicial involvement**

The policy reasons put forward in support of limited access to the courts for asylum seekers are unsustainable as a matter of international law. Commonly, it is argued that the courts are an unwarranted check on the state’s capacity to control its immigration programme. Excluding the courts from the asylum arena, it is said,

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1058 See, eg, Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth). According to the Second Reading speech to the Bill, the purpose of this legislation is ‘to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness “hearing rule”’: (Commonwealth of Australia, Parliamentary Debates, Senate, Official Hansard, No. 6 2002, Thursday, 27 June 2002, Migration Legislation Amendment (Procedural Fairness) Bill, Second Reading, Senator Ian Campbell, 290).

1059 Byrne draws a link between the adverse effect of the practice of ‘manifestly unfounded’ claims upon appeal rights and the ‘classification approach’ taken in EXCOM Conclusion No 30 (XXXIV) – 1983, ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,’ UN Doc A/AC.96/631: Byrne, above n 594, 75.
guarantees that government – perhaps with the assistance of a subservient legislature – can efficiently and effectively safeguard the state’s sovereign right to control immigration.\textsuperscript{1060} This argument is clearly fallacious. A state’s international protection obligations are an exception to the immigration control norm. To the extent that the courts ensure the effective recognition of that exception within the domestic milieu, they do no more - and no less - than guarantee the enforceability of self-imposed limitations on state sovereignty.

Second, it is argued that greater access to the courts equates to greater social and economic costs associated with prolonged asylum adjudication.\textsuperscript{1061} Rosemary Byrne observes that in the EU asylum ‘appeals were seen as an often costly and lengthy component of procedures in need of enhanced efficiency and became the prime target of streamlining reforms.’\textsuperscript{1062} Governments may point to the recent drop in asylum claims as evidence of the success of restrictive asylum measures.\textsuperscript{1063} Yet assessing the ‘effectiveness’ of asylum policies against how well they deny access to asylum is

\textsuperscript{1060} Introducing the Border Protection Bill in Parliament in 2001 (the Border Protection Bill sought to grant Commonwealth officers the power to seize any vessel and take it outside Australia’s territorial waters. Moreover, no civil or criminal judicial proceedings could be taken against the Commonwealth or its officers for events occurring during those operations), Australia’s then Prime Minister, John Howard, stated: ‘This Bill will confirm our ability to remove to the high seas those vessels and persons on board that have entered the territorial waters under Australian sovereignty contrary to our wishes. It is essential to the maintenance of Australian sovereignty, including our sovereign right to determine who will enter and reside in Australia.’ Significantly, the Prime Minister also stated that it was essential that the removal process ‘not be able to be challenged in any court’ because ‘the protection of our sovereignty ... is a matter for the Australian government and this parliament’: Hansard, House of Representatives, 29 August 2001, 30569-70.

\textsuperscript{1061} See, eg, Senator Ian Campbell, above n 1058, 2791 (stating that ‘[t]he Migration Legislation Amendment (Judicial Review) Act 2001 sets out a new judicial review scheme to address concerns about the growing cost and incidence of migration litigation and the associated delays in removal of non-citizens with no right to remain in Australia.’)

\textsuperscript{1062} Byrne, above n 594, 72.

\textsuperscript{1063} T Hatton, ‘The Rise and Fall of Asylum: What Happened and Why?’, Discussion Paper No 577, Centre for Economic Policy Research, The Australian National University, March 2008, 27 (concluding that ‘[t]here is evidence that asylum policies have become tougher and that this has reduced the volume of asylum applications. This effect appears to be stronger than some previous studies have suggested and it accounts for all of the fall in applications since 1997. But policy explains only about a third of the steep decline between 2001 and 2006—a distinctly smaller effect than some politicians have claimed.’)
simply wrong as a matter of international law. Asylum policies should be judged according to how well they protect access to a fair and effective asylum process, not by how well they prevent access to protection.

*C Facilitating judicial involvement in the asylum process*

The courts in the UK and Australia have had some success in contesting direct challenges to their jurisdiction in the asylum arena. In other instances, the courts appear content to perpetuate the executive’s traditional unfettered authority in relation to the exclusion or expulsion of foreigners. While these cases may be in conformity with the judiciary’s strict constitutional function, it ignores or undermines the application of fundamental limitations placed on governments by their protection obligations.

In balance, despite judicial activism in certain instances, there remains a very real risk that asylum adjudication is heading back towards arbitrary, non-transparent, and non-reviewable executive decision-making that was the lot of refugees for centuries. To arrest this process the onus is on the political branches to ensure that asylum seekers retain access to the courts by putting in place a conducive statutory and administrative framework. This brings the discussion to the nature and potential benefits of scrutiny by the political branches of asylum procedures.

**IV EXECUTIVE SCRUTINY OF ASYLUM PROCEDURES**

Governments take on the task of devising and implementing asylum processes in most jurisdictions. Governments should not seek to abdicate their responsibilities to devise

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and implement a fair and effective asylum process to private institutions or to an international organization. As a matter of international law, state responsibility attaches to the conduct of processing where individuals fall with the state’s jurisdiction.

States that involve private contractors in the asylum process, for example through a requirement that carriers ‘screen’ unauthorised arrivals, cannot avoid responsibility for ensuring that asylum seekers have access to fair and effective determination procedures. Equally, state responsibility remains engaged where the UNHCR conducts asylum processing at a state’s request. States who seek to engage private contractors or international organisations in this way are not absolved from scrutinizing those procedures to determine whether they are, in practice, fair and effective.

A Administrative scrutiny mechanisms

A number of administrative institutions and mechanisms have emerged across jurisdictions in recent years that can usefully be employed in the scrutiny of asylum policy and procedures. They include: independent merits review tribunals; internal department review processes that scrutinize individual decision-making as part of new performance management and managerial techniques of good administration;\textsuperscript{1066} Ombudsman;\textsuperscript{1067} independent human rights agencies;\textsuperscript{1068} government auditors;\textsuperscript{1069} and


\textsuperscript{1067} The Commonwealth Ombudsman in Australia is performing an increasingly important evaluation function in the immigration area generally: See \textit{Ombudsman Act 1976} (Cth) s 4(4), inserted by \textit{Migration and Ombudsman Legislation Amendment Act 2005} (Cth) s 8. The Ombudsman has a duty to investigate and make recommendations on the appropriateness of detention arrangements for long-term detainees: \textit{Migration Act} s 486O, inserted by \textit{Migration Amendment (Detention Arrangements) Act 2005} (Cth) s 3, sch 1(19).

\textsuperscript{1068} Australia’s Human Rights and Equal Opportunity Commission (HREOC) undertook a number of illuminating investigations into the operation of Australia’s immigration laws and policies: see, eg,
budgetary review processes that ensure that administrative agencies remain accountable to Parliament for the expenditure of public funds.

**B Self-assessment and evaluation by government**

The successful application of these administrative scrutiny mechanisms in the asylum context depends on the extent to which they prioritise rights above competing policy objectives. Without a clear and binding set of rights-based scrutiny standards, such mechanisms can too easily be co-opted to the achievement of implicit government policy objectives that themselves reflect a deficient understanding and appreciation of the scope of a state’s protection obligations.

This is particularly apparent in the case of Australia’s offshore processing of asylum claims, which fell through the gaps of administrative scrutiny mechanisms.

Beginning with the department responsible for devising the scheme, Australia’s offshore processing of asylum claims was subject to a much lesser standard of internal monitoring and review by Australia’s Department of Immigration and Citizenship (DIAC). There was very little in terms of quality assurance checks in the way files and personal information was managed nor in the standard of reasons provided.

There was also no access to the usual independent review and scrutiny mechanisms. First, there was no individual external tribunal review of the merits of a claim before the Refugee Review Tribunal (as well as no avenues for judicial review).

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1069 *Auditor-General Act 1997* (Cth) s 8.

1070 As noted in chapter 6, Australia’s offshore processing of asylum claims was governed by an interim policy document issued by the Department of Immigration and Multicultural and Indigenous Affairs: Onshore Protection Branch, Department of Immigration and Multicultural and Indigenous Affairs, *Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons Taken to Declared Countries* (Onshore Protection Interim Procedure Advice No 16, 2002). Under the procedures, asylum seekers processed on third countries had no right
Furthermore, the Australian Human Rights and Equal Opportunity Commission was unable to access asylum seekers at offshore processing centres for the purposes of evaluating the conditions of their detention, processing etc. The Australian Commonwealth Ombudsman was similarly excluded from reviewing the detention of long-term detainees despite the power of the Ombudsman to review the detention of unlawful non-citizens in Australia.

Where the offshore processing scheme was subject to administrative scrutiny, the scrutiny standards that were employed reflected underlying policy preferences that prioritised immigration control over the delivery of fair and effective asylum processing. Internal department reviews of individual cases, for instance, took place according to much lower benchmarks of good decision-making - requiring the reviewing officer to assess the merits of another officer’s decision without recourse to any reasons provided by the original officer.

C Administrative scrutiny of asylum procedures through the budget reporting process

The triumph of competing policy objectives was also obvious in the administrative scrutiny of the scheme that took place according to mandatory budgeting reporting. By way of background, DIAC – like most administrative agencies in the developed world - participates in a form of post-enactment review through the gathering of ‘performance information’ with measures presented to Parliament in DIAC’s portfolio of appeal to the Refugee Review Tribunal or to the courts: Senate Designated Unauthorised Arrivals Bill Report, above n 883, [3.16]-[3.23], [3.202].


1072 Ibid [3.61].
budget statements and annual report.1073 The collection of performance information is designed to ensure that the executive is accountable to Parliament, and through it the people, for the spending of public money. In Australia, as elsewhere in the OECD, ‘[i]n the past twenty years in particular there have been significant changes in the way that the executive government presents its budget to the parliament for approval and in the way in which it accounts for past expenditure.’1074 Government departments are the provider of ‘outputs’ to their Minister, who is the ‘purchaser’.1075 Departments are required to assess their programmes against how efficiently and effectively they achieve identified policy aims expressed in terms of outcomes and outputs and measured by quantitative and qualitative performance measures.1076

In Australia, the Minister for Immigration presents his or her portfolio’s outcomes and outputs to Parliament for approval in portfolio budget statements each year, acknowledging in the transmittal letter that he or she does so ‘by virtue of my responsibility for accountability to the Parliament and, through it, the public.’1077 DIAC’s annual report is presented to Parliament as a ‘report on performance’.1078

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1076 See Finance Minister’s Orders for Finance Reporting (Incorporating Policy and Guidance) 2007 (Cth) O 121. This is issued under Financial Management and Accountability Act 1997 (Cth) s 63. See also Combet v Commonwealth (2005) 224 CLR 494, 523 (Gleeson CJ).


which evaluates DIAC’s performance against the outcomes and outputs set out in the portfolio budget statements and portfolio additional estimates statements.\textsuperscript{1079} Parliament then has the opportunity, through Senate estimates hearings, to question the Minister and Department officers concerning the realisation of outcomes and outputs developed by DIAC to benchmark their performance.\textsuperscript{1080}

Although formally concerned with the expenditure and appropriation of public funds, the outcomes/outputs framework is a centrepiece of post-enactment scrutiny in Australia.\textsuperscript{1081} First, it allows a department such as DIAC, and senators during estimates hearings, to get a systems-level analysis, or a ‘snapshot’, of decision-making and implementation of laws and policies which otherwise would be lost in the mass of decision-making in a portfolio that annually delivers a migration programme of more than 140 000 people.\textsuperscript{1082} Second, estimates hearings provide parliamentarians with an important opportunity to question department officers and ministers concerning the administration and operation of the relevant regulatory framework.\textsuperscript{1083}

Yet the outcomes/outputs framework is not simply a value free process that reports to Parliament whether public funds have been, or are to be, spent in the ‘efficient’ and ‘effective’ achievement of stated policy aims. In reality, the setting of outcomes and outputs, and the determination of what performance reporting measures should assess the efficient and effective meeting of those goals, necessarily involves significant, 


\textsuperscript{1081} H Evans, ‘Senate Estimates Hearings and the Government Majority in the Senate’ (Address delivered at the National Press Club, Canberra, 11 April 2006) 1.

\textsuperscript{1082} A Metcalf, Secretary, Department of Immigration and Multicultural Affairs, DIMA Plan Launch, 18 July 2006.

\textsuperscript{1083} H Evans, above n 1081, 1.
value laden decisions that can lie obscured beneath general and vaguely expressed outcomes and outputs.\textsuperscript{1084}

The influence of policy on the outcome/output framework is reflected in DIAC’s use of outcomes and outputs to report on its performance in relation to Australia’s offshore processing of refugee claims. Outcome 1 of the immigration portfolio is framed in terms of ‘contribute to Australia’s society and its economic advancement through the lawful and orderly entry and stay of people.’\textsuperscript{1085} To provide further guidance, this outcome is divided into supporting outputs.\textsuperscript{1086}

Output 1.6 (offshore asylum seeker management)\textsuperscript{1087} covered Australia’s offshore processing regime — the so-called ‘Pacific Solution’. As noted in chapter 6 of this thesis, Australia’s Pacific Solution refers to the Howard Government’s policy of processing claims for onshore refugee arrivals in the territory of other states.\textsuperscript{1088} The policy was designed to deter future boat arrivals of asylum seekers by ensuring that they did not get direct access to Australia’s onshore refugee status determination process.\textsuperscript{1089} Processing took place according to what the government claimed were


\textsuperscript{1085} See Commonwealth, Portfolio Budget Statements 2007–08, above n 1077, 19 (emphasis in original).

\textsuperscript{1086} The output structure of DIAC has been revised in the latest Portfolio Budget Statements: see Commonwealth, Portfolio Budget Statements 2007–08, above n 1077, 21–2.

\textsuperscript{1087} Output 1.6 was previously classified as Output 1.5: ibid.

\textsuperscript{1088} This policy was introduced by a package of legislation in 2001: see Border Protection (Validation and Enforcement Powers) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth). For an overview of the Pacific Solution see Submission to Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, 26 July 2002, Submission No 26 (Angus Francis); Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 22 May 2006, Submission No 60 (Angus Francis).

\textsuperscript{1089} See Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) Bill 2001 (Cth) 2; Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) 5.
the UNHCR processing standards — a lower standard of processing than that available onshore.\textsuperscript{1090} As early as 2002, the UNHCR expressed the view that applying a lower processing standard offshore was ‘discriminatory’ and not in accordance with Australia’s ‘international protection obligations.’\textsuperscript{1091}

The way DIAC developed output 1.6 as a new output for Australia’s offshore processing centres downplayed these concerns. Specifically, output 1.6 effectively obscured any problems with the programme by subjecting it to performance measures qualitatively ‘lower’ than those used to assess the efficient and effective achievement of the outputs set for Australia’s onshore regime. The relevant performance measure under this output was: ‘Persons in offshore processing centres … given the opportunity to have any claims for refugee asylum considered against Refugee Convention standards.’\textsuperscript{1092} Not surprisingly, DIAC’s Annual Report declared in positive terms to Parliament that the offshore processing centres ‘in Nauru and [Papua New Guinea] have been effective in delivering offshore asylum seeker processing.’\textsuperscript{1093} Yet this failed to indicate that the UNHCR contested the ‘standard’ applied to offshore processing. While from the perspective of identifying expenditure it was justifiable to set a new set of outcomes, outputs and performance measures for


\textsuperscript{1092} Department of Immigration and Multicultural and Indigenous Affairs, above n 1078, 139. DIAC was then known as this Department.

\textsuperscript{1093} Ibid.
the offshore scheme, the way this was done obscured the ‘inefficiencies’ in the scheme.

Hence, a major risk of the outcomes/outputs framework is that it can lead to the downplaying of the importance of rights in the evaluation process. Procedural qualities like efficiency and effectiveness are introduced as values that ‘overwhelm more substantive principles’. The efficient achievement of performance measures becomes the benchmark for how government and Parliament should evaluate programmes — a form of ‘actuarial justice’. In short, the budget reporting of Australia’s offshore processing programme subsumed the rights of refugees under disingenuous scrutiny criteria.

This approach infected that of other executive agencies, including the Auditor-General. The Auditor-General assists Parliament in maintaining accountability for government spending. Section 8(1) of the Auditor-General Act 1997 (Cth) appoints the Auditor-General as an officer of the Parliament. The Auditor-General, with the assistance of the ANAO, performs this function through a programme of ‘performance audits’ of the self-monitoring and evaluation conducted by

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departments. In this capacity, the ANAO has performed a number of audits of DIAC programmes.

While an independent agency, the ANAO’s performance audits of DIAC sometimes follow the outcomes and outputs framework established by DIAC. When this occurs, the underlying policy agenda imbedded in performance reporting measures can undermine the effectiveness and comprehensiveness of ANAO auditing as an independent scrutiny mechanism. This becomes apparent upon examination of ANAO’s approach to auditing Australia’s onshore refugee determination process. At the height of the Pacific Solution, the ANAO reported that Australia’s onshore processing regime met the quality measures used to assess output 1.2 ‘refugee humanitarian entry and stay’. This may have been true. Yet this finding ignored output 1.6 (offshore asylum seeker management), discussed above. No-one reading the audit report would know that the Pacific Solution had replaced the onshore protection determination process for nearly all unlawful boat arrivals, leading to substantially lower standards of procedural fairness. This blinkered approach, while perhaps methodically correct from an auditing point of view, failed to acknowledge the reality of Australia’s onshore/offshore processing regime.

1099 See ANAO, Management Framework for Preventing Unlawful Entry into Australian Territory, above n 1098; ANAO, Management of the Processing of Asylum Seekers, above n 1098.
1100 See generally, ANAO, Management of the Processing of Asylum Seekers, above n 1098.
1101 See above n 1092 - and accompanying text.
Thus, it becomes clear that administrative scrutiny mechanisms will not cure systemic defects in asylum processing where they simply apply non-rights based policy objectives as the criteria for the evaluation of those processes. This finding points to need for a greater co-ordinating role of parliament in what administrative agencies scrutinize, the timing of the review, and the criteria employed. National and regional parliaments should seek out input from UNHCR and local and regional human rights bodies in order to devise appropriate criteria.

V PARLIAMENTARY SCRUTINY OF ASYLUM PROCEDURES

A The immediate benefits of parliamentary scrutiny of asylum procedures

Parliamentary scrutiny of asylum processes has important potential benefits. First, in terms of pre-legislative scrutiny, the introduction of new or amending legislation provides legislators with an opportunity to scrutinize the asylum process contained in those provisions against human rights criteria. Second, as a matter of post-enactment scrutiny, parliament can investigate whether the asylum process established under law or policy is operating in accordance with human rights.

These potential benefits are not out of reach. Scholars acknowledge the increasing benefits of greater parliamentary involvement in the scrutiny of legislation,102 through the work of parliamentary committees such as the United Kingdom’s Joint

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Committee on Human Rights and Australia’s Senate Scrutiny of Bills Committee. The use of legislative scrutiny as a tool for rights protection has figured significantly in these studies. There is also growing awareness of the potential for greater involvement of parliamentarians in the scrutiny of the impact and operation of legislation after enactment (‘post-legislative scrutiny’). Various UK parliamentary reports, for instance, have recommended that legislators both set the criteria for post-legislative scrutiny by the executive and provide oversight of that evaluation process through the existing parliamentary committee structure.

Without distinguishing between pre- and post-legislative scrutiny, David Feldman defines scrutiny of legislation as ‘a matter of testing legislation by reference to certain standards, and seeking to ensure that it meets those standards, whether or not one approves of what the legislation is trying to achieve.’ In this sense, scrutiny is a ‘principled activity’ that tests legislative measures against standards or criteria that are independent of the measures themselves. The use of independent scrutiny criteria represents an example of what Jeffrey Goldsworthy refers to in a more general

1103 See Kinley, above n 1102, 252–3; Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’, above n 1102, 323–4, 345; Horrigan, above n 1102, 72.


1106 Select Committee on the Constitution, above n 1105, 46.


sense as the ‘structuring’ of the law-making function through the law-making procedures of Parliament. Bringing these wider developments to bear on asylum procedures stands to contribute to more fairer and effective identification of persons in need of protection.

A third benefit of parliamentary scrutiny is that it can provide the impetus for rights-focused scrutiny standards that guide not only parliaments, but also governments and the courts. Thus, parliament can be instrumental in inserting international standards into the construction, implementation and scrutiny of asylum processes. Fourth, parliamentary scrutiny committees can perform an important role in co-ordinating the various mechanisms of oversight that are available through the political branches. This may include co-ordinating the roles of Ombudsman and independent human rights agencies to ensure greater and more systematic scrutiny of asylum processes. It may also include setting independent rights-based scrutiny standards in the nature of a checklist. This would also ensure that parliaments have a greater important role in setting the standards for the scrutiny of government expenditure through annual budget processes.

B The long-term creation of a human rights culture

Perhaps the greatest potential benefit of parliamentary oversight of asylum processes is the creation of a human rights culture. Parliament’s endorsement of rights-criteria as the overriding standard for scrutinizing asylum processes can work to infect the

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executive's development, implementation, and evaluation of such procedures. In addition, if Parliament clearly and authoritatively lays down binding international standards governing asylum processes, the courts have an added incentive and justification for insisting on fair and effective asylum procedures.

These arguments recognize that in the asylum arena (or any other area of human rights) parliament need not be simply a conduit for electoral demands as interpreted from time to time by the executive. Use of human rights criteria during pre- and post-legislative scrutiny is consistent with a rationale for democratic government that enables the 'detection and correction' of abuses of political power. Parliament's adherence to rights in the scrutiny process fosters states' engagement with international law and their compliance with international obligations.

In this regard, it must be remembered that 'Parliament' is a diverse institution. Parliament consists of not just the political executive, but also a majority of non-executive members who serve in either the House of Representatives or the Senate, 'each with its own power to organize itself as a remarkably autonomous constitutional entity.' This underlying institutional dynamic is allowing parliamentary scrutiny committees to play an increasingly important role in facilitating the discussion and application of international human rights generally. There is no reason that this should not occur with greater frequency in the asylum context.

1114 J Uhr, ‘The Performance of Australian Legislatures in Protecting Rights,’ in T Campbell, J Goldsworthy and Stone (eds), Protecting Rights Without a Bill of Rights (2006), 46; Oliver, above n 1109, 39.
1115 Uhr, above n 1114, 46.
Advocating a greater role for Parliament as a protector of the rights of a minority or a marginalised group, such as refugees, has traditionally raised the vexed issue of the place and role of the *demos* in relation to asylum policy. Matthew Gibney’s work provides probably the most sophisticated analysis of this issue. Central to Gibney’s work is his notion of the ‘democratisation of asylum’. Gibney argues that the trend toward restrictive asylum policies since the 1980s is the result of the ‘democratisation’ of asylum policy. By this Gibney claims that after the end of the Cold War asylum policy shifted from ‘high politics’, involving geopolitical security issues centred on the Cold War, to ‘low politics’ (‘matters of day to day electoral politics, including employment, national identity and the welfare state.’) Gibney further asserts that the asylum crisis ‘exposes the tense and conflictual relationship between the values that constitutional democracies are supposed to uphold.’ According to Gibney, ‘[e]mbodying the principle of democratic rule, electoral politics pushes policies towards closure and restriction; embodying constitutional principles, the law inches unevenly towards greater respect for the human rights of those seeking asylum.’ Gibney argues that a principal solution to restrictive asylum policies is to neuter the push of electoral politics by ‘a more inclusive politics of asylum, one that goes beyond the law to elicit from the public of western states greater identification with and respect for the claims of refugees and asylum seekers.’ Gibney presciently observes that ‘a new and positive political

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1117 Ibid.
1118 Id at 43.
1119 Ibid.
1120 Id at 45.
bipartisanship within western states on refugee questions would be needed.***

Gibney’s thesis has been borne out to a certain extent by subsequent developments in states like Australia. There is no doubt that important sectors of public support, coordinated by civil society and aided by a certain level of bipartisanship, fuelled backbench revolts against Australia’s mandatory detention and offshore processing policies in 2005 and 2006.

However, too greater a focus on public opinion risks endorsing a crude majoritarian conception of democracy. As Tom Campbell observes, ‘[d]emocratic governments have a built-in bias towards the abuse of the power that they are designed to control.’** Campbell therefore argues that there is ‘a perpetual imperative to reassert human rights values and to work out how they may be better protected.’***

‘The articulation and promotion of human rights’, says Campbell, ‘is an important part of the endeavour to make democracies more democratic and protect both majorities and minorities against ever-present internal and external threats to their wellbeing.’**** In agreement with this understanding of democratic government, strengthening the institutions of rights-scrutiny within Parliament is a demonstratively and normatively preferable solution to reliance on the vagaries of public opinion (as interpreted from time to time by the political executive). This is particularly essential in refugee law and policy where the persons subject to the policies are non-members and rarely popular - the classic ‘other’ according to Costas Douzinas.****

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1121 Ibid.
1123 Ibid.
1124 Ibid.
Secondly, at the same time as it raises the issue of Parliament’s role in upholding the rights of marginalised groups, asserting a role for Parliament with respect to the rights of refugees and human rights challenges assertions of ‘state sovereignty’ as a ‘shield’ against international legal rules. Parliament’s capacity to engage independently with international human rights law in a way that internally restricts state sovereignty requires a rethink of the rhetoric behind such bald assertions of ‘sovereignty’. Thus, the engagement of legislators with the executive in matters of refugee rights also has implications for the nature of sovereignty and state’s relationship with international law and their international protection obligations.

In *No Country is an Island: Australia and International Law*, the authors make the important point that the concept of sovereignty is ‘infinitely fluid.’ As the authors remark, ‘[s]overeignty can be understood as the capacity of a country to cooperate with the international community to prevent arbitrary action and the abuse of power in all spheres’ (citing Philip Allot’s *Health of Nations*) as well as a “‘conceptual barricade” against what is assumed to be a meddling or hostile international society.’

Philip Allot bases his account of sovereignty – an account that recognizes the role of international law in preventing the ‘abuse of power in all spheres’ - on a transcendental, Kantian vision of the international legal order. Other scholars, in the meantime, have derived the same principle as Allot but from a more positivist framework – one that recognizes the role of states in making international law, but

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1127 Ibid.
1128 Id 144.
1129 Ibid.
which also entertains the interdependence of national, regional and international legal institutions and laws.\footnote{E de Wet, ‘The International Constitutional Order’ (2006) 55 ICLQ 51.} Erika de Wet has argued, for example, that there exists an ‘international community with an international value system’ that ‘leads to the replacement of the traditional, dualist system with a more integrated system.’\footnote{Id 75.} She observes that in this system ‘individuals and State organs simultaneously function both within the national and post-national communities and legal orders.’\footnote{Ibid.} This analysis rings true if we consider Parliament’s direct engagement with international law through the scrutiny process, e.g. its ability to request, assess, and question submissions from international rights agencies such as the UNHCR.

It is important to recall, in addition, that the human rights legislators employ during the scrutiny process have both an international and national dimension. While human rights may derive from international law, they fundamentally reconfigure the relationship between the state and its citizens (and non-citizens). The substantive norms underlying human rights traverse the international and national, binding the exercise of public power at different levels of the international legal order.

Once accepted in principle as a binding set of normative criteria, state organs (the courts, parliament, and the executive) inevitably confront the limitations rights place on the exercise of public power within the state. The increasing evidence of the application of independent human rights scrutiny criteria by parliaments signals that the conceptual force of rights as a normative constraint on the exercise of public power has its own momentum irrespective of formal acts of incorporation.

Traditional conceptions of states’ relationship with international law, which maintain
the dualist division between international and domestic law, struggle to accommodate this fluidity and interdependence.

The tendency to overlook the true significance of states’ relationship with international human rights law has gone hand in hand with ignoring the importance of the divisibility of sovereign power within the state when debating the relationship between the state and the international legal order. State ‘sovereignty’ is often invoked as a ‘shield against international legal rules’ without any true understanding or analysis of how that ‘sovereignty’, commonly understood as an expression of sovereignty at the international level, divides within the domestic political system.

VI CONCLUSION

In conclusion, a more nuanced understanding is required of the engagement of the different arms of government in the scrutiny and strengthening of asylum procedures. This especially requires the acknowledgment of the potentially fruitful engagement of legislators with asylum policy as an avenue to cement the role of Parliament in interpreting the extent to which a state’s international protection obligations impinge on the state’s sovereignty.

1134 Charlesworth, Chiam, Hovell, & Williams, above n 1126, at 3.
This thesis has broader significance for our understanding of human rights generally. International human rights are intended to supplement, rather than supplant, national institutions. They depend on a framework of national judicial, administrative, and legislative institutions and mechanisms for their successful implementation. The international human rights movement therefore presupposes and demands an integrated and rights-based international legal order in which the realization of rights is achieved through checks and balances on the exercise of public power within the state.

Expressed in terms of the sovereignty doctrine, in order for human rights to limit the external sovereignty of the state in international law, states must implement rights within the state as a limitation on the internal authority or sovereignty of government. Thus, appeals to the traditional sovereign right of states to exclude or expel aliens in order to justify the maintenance of blunt immigration tools that block access to in-country asylum procedures, or to support the unfettered authority of government to devise, implement and scrutinize the asylum process, is fundamentally misconceived. States should not avoid the restrictions that rights place on their traditional sovereignty by the creation of zones of unfettered administrative power at the national level that deprive persons of meaningful protection.

Checks and balances on the exercise of public power or internal authority within the state require the input of parliaments, courts and different administrative agencies. In relation to parliament, this requires more than seeing parliament’s role as simply the
rubber stamp of government-sponsored restrictive asylum policies. While the political executive has no doubt used the legislature as a means of entrenching executive power in the asylum context since at least the eighteenth century, the important point that emerges from this thesis is that this historical dominance did not go unchallenged. Nor should it go unchallenged today.

Parliament’s potential contribution to a fair and effective asylum process is far too important to discard. Statutory provisions that safeguard the right to apply for protection; sections that implant procedural rights, including to merits review and judicial review of an administrative decision denying an application for protection; and the benefits to be derived from a thorough and systematic rights-based process of pre-legislative and post-legislative scrutiny of asylum bills – all these emerge in this thesis as important institutional safeguards of a fair and effective asylum process.

The comparative neglect of parliament’s role in ensuring a fair and effective asylum process may also be caused by underlying assumptions about the role of parliament in a liberal democracy. In the asylum area, governments – and some commentators – all too often portray parliament’s proper role as no more than facilitating the political executive’s interpretation of the wishes of the electorate. As the electorate favours a tough asylum policy, it is the role of parliament to ensure that the political executive can delivery it. This thesis queries this one-dimensional view of parliament’s contribution to asylum policy.

Instead, this thesis raises the prospect of parliament’s role and responsibility to act as an agent of rights. The reform focus should shift from how governments have no doubt exploited parliament to devise restrictive asylum policies, to an examination of how parliament’s law making and scrutiny processes can act as a mechanism for entrenching the rights of refugees within the national legal and political landscape.
The extent to which this vision can be entertained for national parliaments within the EU, not only only in the asylum area but with respect to rights generally, is emerging as a major challenge of this century.

None of this is to discount the important role and responsibility of the courts in ensuring a full and fair hearing of an asylum claim. However, this thesis does suggest that even an activist and liberal judiciary can only go so far in the incorporation and protection of human rights. Eventually, the courts are dependent on the political branches to maintain and strengthen the rights-centredness of the constitutional, statutory and policy framework within which they operate. Parliament, the executive, and the courts must work together to ensure a fair and effective asylum process.

This analysis suggests that domestic reform of restrictive asylum policies is most likely to occur through the efforts of parliamentary and judicial institutions with the co-operation of international agencies and the support and encouragement of civil society. It is clear that parliament and the courts are increasingly taking part in an international rights dialogue with international agencies. There are signs that this dialogue may be beginning to pay dividends in terms of forcing the political executive to adopt fairer and more effective asylum procedures. Reform efforts in the asylum context should be directed in part at strengthening the means by which this dialogue can take place, eg legislative scrutiny procedures that allow legislators direct engagement with the UNHCR.

This thesis runs counter to a powerful force toward tighter immigration control that has gripped the imagination of policy-makers in many developed states. Yet contrary to the propaganda that drives the ‘denationalization’ trend, we are not in a new ‘age’ of global migration that somehow requires a different (read more restrictive) approach to asylum. Immigration control is as old as the state itself. The challenge that
asylum poses for immigration control is also nothing new. Yet immigration control did not prevent the creation of international protection instruments over 50 years ago; it should not prevent their effective application today.

The argument in this thesis also has broader implications for the realization of fair and effective asylum procedures globally. The argument in this thesis, while directed at the policies of developed states, goes beyond them. The restrictive asylum policies of developed states are redirecting refugees to states that are least likely to provide fair and effective asylum procedures. Consequently, developing states are increasingly asking the UNHCR to undertake asylum processing. The UNHCR, which reluctantly takes on this role, continually reiterates that its own processes are not a substitute for state protection. The result is a steady decline in the standard of asylum processing in developed and developing states.

It is in the interests of all states to address this decline. Poor processing standards in developing states are an important factor that contributes to secondary movement of asylum seekers from developing to developed states. This creates tension between developed and developing states. Developing states justifiably claim that they are shouldering the burden of refugee flows, while developed states resent the secondary movement of asylum seekers. An important response is to increase the capacity of developing states to provide a fair and effective asylum process.

However, developing states are more likely to devote resources to increase their processing capacity and safeguards when developed states ensure access to a fair and effective asylum process within their own territory. A principled approach by developed states to the asylum process, such as advocated in this thesis, is essential to fostering or maintaining the commitment of developing states to their own asylum procedures.
Thus, the realization of fair and effective asylum processes within individual states (or bodies of states) has significance for the worldwide protection of refugees. The achievement of this goal will require a commitment to ensuring greater protection to asylum seekers through incremental, practical and hard-won improvements in national institutional safeguards.
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