Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia

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Résumé de l’article

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

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

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Introduction

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

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

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

3 Another particularly controversial change introduced by Bill C-31 is the Designated Countries of Origin list, which deems certain countries to be “safe,” meaning that asylum claims of persons from listed countries are accelerated and negative decisions are not subject to review. Pursuant to s 109.1 of the Immigration and Refugee Protection Act, SC 2001, c 27 (inserted by s 58 of Bill C-31) [IRPA], the power to designate certain countries as safe rests with the Minister. Thirty-seven countries have been designated: Order Designating Countries of Origin, (2012) C Gaz I, 3378–80 (Immigration and Refugee Protection Act). The original list of countries has been modified as per Order Amending the Order Designating Countries of Origin, (2012) C Gaz I, 317 (Immigration and Refugee Protection Act) and Order Amending the Order Designating Countries of Origin, (2012) C Gaz I, 1434 (Immigration and Refugee Protection Act). See also Canadian Association of Refugee Lawyers, “Designated Countries of Origin”, online: <www.carl-acaadr.ca/our-work/issues/DCO> (claiming that the DCO scheme violates the Charter rights of future claimants from these countries). At around the same time as the enactment of Bill C-31, the government also issued an Order in Council entitled Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 (2012) C Gaz II, 1135 (5 April 2012). That Order, revised by the subsequent Order Respecting the Interim Federal Health Program, 2012, SI/2012-26 (28 June 2012), drastically reduced the scope of healthcare provided to the vast majority of refugee claimants. In July 2014, the Federal Court held that the changes effected by the Orders amount to cruel and unusual treatment contrary to section 12 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter], and the distinction between levels of care pursuant to the Designated Countries of Origin scheme infringes section 15 of the Charter (see Canadian Doctors for Refugee Care v Canada (Attorney General), 2014 FC 651 at paras 11–12 (available on CanLII) [Refugee Care]). The government has indicated its intention to appeal (see Laura Payton, “Federal Government to Appeal Ruling Reversing ‘Cruel Cuts to Refugee Health’”, CBC News (4 July 2014), online: <www.cbc.ca/news/politics/federal-government-to-appeal-ruling-reversing-cruel-cuts-to-refugee-health-1.2696311>).
and indefinite detention of non-citizens following the arrival of some 735 Cambodian asylum seekers between 1989 and 1994.4

Canada’s DFN regime and Australia’s system of mandatory detention (and offshore processing of asylum seekers) are examples of the shift among Western nations toward framing outsiders as potential security threats.5 Detention of non-citizens is perhaps the most visible manifestation of the securitization6 of migration law.7 Increasingly, asylum seekers are constructed in political discourse as a threat associated with criminality, in part to create “the spectacle of being in control.”8 The language of burden sharing is being “transformed into a language of threats to the security of states”9 that in turn operates to justify the erosion of core international law principles such as non-refoulement,10 as well as carceral treatment of non-citizens.

This paper argues that the DFN provisions are antithetical to a politics of hospitality and infringe both the Charter and principles of interna-
tional law. Moreover, it is suggested that recent Australian history and policy provide a stark and salutary warning to Canada concerning the perils of adopting an ideology of control and exclusion toward asylum seekers instead of a politics of hospitality.11 Australia is a pertinent comparator because of its decades-long experience with mandatory detention and offshore processing, to which Canadian politicians have referred in justifying Bill C-31.12 The advent of mandatory detention in Australia engendered a realization on the part of some politicians that the asylum seeker issue could be leveraged for political gain.13 Ever since, measures designed to exploit this potential, under the guise of protecting Australia’s interests, have emerged with alarming frequency.14 Billions of dollars have been spent constructing offshore processing centres to detain asylum seekers while their claims are processed,15 despite the fact that most boat arrivals are eventually found to be refugees and admitted to Australia.16 The management of these facilities by private corporations17 reflects the


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

13 See Manne, supra note 4.


17 See Part I(C), below.
link between transnational capital and the international refugee system. Numerous reports attest to the psychological harm caused to detainees by long-term detention. Yet the boats still come.

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

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

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


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

22 Ibid at 1.
tention were introduced. Having enabled the Minister to designate particular persons for mandatory detention and a host of other harsh measures, Canada is now faced with a choice: to continue with a politics of inhospitality, or revert to the type of stance that earned it global acclaim in the 1970s and 1980s for its generosity toward asylum seekers.23

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

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the right of an alien not to be treated as an enemy upon his arrival in another’s country. If it can be done without destroying him, he can be turned away; but as long as he behaves peaceably he cannot be treated as an enemy.27
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The right is not to remain indefinitely within the borders of a nation exercising hospitality; such a right arises only through “a special, charitable agreement” granted by the state.28 This limitation is a product of Kant’s belief in the importance of boundaries: that a world federation, as opposed to a world government, is a necessary condition for peaceful coexistence.29

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

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23 See Part I(A), below.
25 Ibid at 112 [emphasis in original].
26 Ibid at 118 [emphasis in original].
27 Ibid.
28 Ibid.
29 See ibid at 115, 124–25.
30 See e.g. Benhabib, “The Rights of Others”, supra note 9 at 47.
idual coming into contact with an organized and bounded political entity.” The right to hospitable treatment “entails a moral claim with potential legal consequences,” the justification for which rests upon the “moral injunction against violating the rights of humanity in the individual person.” However, Benhabib also extends the Kantian obligation by arguing that, in the context of transnational migration, a cosmopolitan approach entails recognizing the moral claim of refugees and asylees to first admits- tance; a regime of porous borders for immigrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the right of every human being “to have rights,” that is, to be a legal person, entitled to certain inalienable rights, regardless of the status of their political membership.

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

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


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

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

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

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

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

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

part, as a legal instantiation of the principles of hospitality and cosmopolitanism—offers a way of addressing the tension between sovereignty and human rights\(^{38}\) in the context of transnational migration.

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

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

A. A Legacy of Inhospitality

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

\(^{38}\) The “paradox of democratic legitimacy,” according to Benhabib. “The Rights of Others”, supra note 9 at 47.

\(^{39}\) Commonwealth of Australia Constitution Act 1900 (Cth) [Australian Constitution].


\(^{41}\) The genesis of the policy was concern over Chinese immigration, which had begun in earnest in the mid-nineteenth century as part of the Australian gold rush (see Don McMaster, “Asylum-Seekers and the Insecurity of a Nation” (2002) 56:2 Austl J Intl Af-
Europeans in the wake of World War II, it is a testament to the country’s deep anxiety regarding immigration, as well as the depth of its racist foundations, that the White Australia policy was not formally abolished until 1975.

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

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

The detention of the Cambodians was made possible by legislation passed in 1989, which enabled the detention of persons on board a vessel
at the time of its arrival in port if “an authorized officer reason-ably be-lieve[d]” that the person was seeking to enter Australia in circumst ance in which the person would become an illegal entrant, for such time “until the departure of the vessel from its last port of call in Australia.”\(^51\) Officially, the motivation for the introduction of the discretionary detention regime was to ensure that persons arriving by boat were not forced to “re-turn to sea in unseaworthy vessels.”\(^52\) Whether or not the amendment was in fact motivated by compassion, it became the vehicle by which Australia began to construct and treat asylum seekers not only as undesirable others, but as criminals and security threats to be deterred and detained.

**B. Detention: Mandatory and Indefinite**

In the early 1990s, Australia experienced a dramatic increase (by Aus-tralian standards) in the number of asylum claims by people who had ar-rived by boat.\(^53\) By June 1992, 478 people were in immigration deten-tion;\(^54\) 421 of those people were boat arrivals, 306 of whom were Cambodian.\(^55\) In the same year, lawyers of thirty-six Cambodians whose applications for asylum had been rejected instituted proceedings to challenge the rejec-

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


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

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

\(^55\) See *ibid*. By the middle of 1993, asylum seekers who had arrived in 1989 and who were still in custody had experienced an average of 1,331 days in detention. Those who were no longer in custody had been detained for an average of 974 days. See Mary Crock, “Border Refugee Claimants at a Glance” in Mary Crock, ed, *Protection or Punishment: The Detention of Asylum-Seekers in Australia* (Sydney: Federation Press, 1993) xx at xxi.
Despite judicial orders setting aside the decisions rejecting the applicants’ claims, Parliament pre-empted a scheduled application for their release by passing the *Migration Amendment Act 1992*. That *1992 Act* introduced mandatory detention into Australian law. In doing so, the *1992 Act* signalled a profound shift away from the hospitality demonstrated in the 1970s toward a securitizing approach that has influenced Australian policy ever since. Crucially, the *1992 Act* established the class of “designated person,” defined in part by a temporally specific provision applying the regime to non-citizens who arrived on boats between 19 November 1989 and 1 December 1992—a definition that was clearly designed specifically to capture the Cambodians who had arrived in that period.

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

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

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

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

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

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

62 See *Chu Kheng Lim*, supra note 60 at 113. The existence of “significant restraints” on the operation of the detention regime (the limiting of detention to 273 days following the making of an application for an entry permit (s 54Q) and provision for the removal of designated persons who requested removal (s 54P)) meant that the powers of detention conferred by ss 54L and 54N were “an incident of the executive powers of exclusion,
Chu Kheng Lim was that the plaintiffs remained in immigration detention. In 1997, the United Nations Human Rights Committee found in A v. Australia that the continued detention of the Cambodian applicant by Australian authorities for four years constituted arbitrary detention contrary to article 9, paragraph 1 of the International Covenant on Civil and Political Rights.

In 1994, more comprehensive amendments to the detention regime came into effect. Mandatory detention was extended to all “unlawful non-citizens” and the 273-day limit on such detention was removed. In essence, the changes coming into force in 1994 created a binary distinction between “lawful” and “unlawful” non-citizens: the former were, inter alia, non-citizens who held a valid visa; the latter were non-citizens in the mi-
gration zone who were not lawful non-citizens. Thus, with minor exceptions, any person in Australia without a valid visa was thenceforth an unlawful non-citizen. Section 54W of the Migration Reform Act 1992 made detention of all unlawful non-citizens mandatory, while section 54ZD(1) introduced indefinite detention.

Ten years later, in *Al-Kateb v. Godwin*, the High Court upheld the validity of indefinite detention; in a companion case, the Court ruled that conditions of detention are irrelevant to their legality. Soon after, in *Re Woolley*, the High Court upheld the *Migration Act*'s detention provisions in respect of children.

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

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

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

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


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


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

74 See The Hon Phillip Ruddock MP (Minister for Immigration and Multicultural Affairs), Media Release, MPS 143/99, “Ruddock Announces Tough New Initiatives” (13 October 1999) online: Parliament of Australia <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2FFYOG06%22>. According to Nicholls, *supra* note 53 at 136, the final figure for 1999 was 3,274 asylum seekers arriving by boat. The countries of origin also changed during this period, with increasing numbers of asylum seekers from Afghanistan, Iran, and Iraq.
the government to establish Temporary Protection Visas (TPVs). The (then) Minister for Immigration and Multicultural Affairs, Phillip Ruddock, stated at the time that the measures would remove incentives for asylum seekers to arrive without authorization and remove the problem of “forum shopping” by refugees. This was quickly proved wrong, as whole families boarded boats to Australia in order to remain together.

The infamous MV Tampa incident in August 2001 and its aftermath were “the natural outgrowth of [the] restrictive and deterrent policies to refugees which had developed over the previous decade.” In the wake of Tampa, the government introduced the so-called “Pacific Solution.” Un-
der this policy, the territories of Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands81 were excised from Australia’s migration zone, and agreements were reached with the governments of Nauru and Papua New Guinea to process asylum seekers on Nauru and Manus Island (PNG) instead of Australia.82 To implement this strategy, the government adopted a military-style operation of intercepting boats; either turning them back to Indonesia or sending them to Australian offshore processing centres.83 Persons arriving at an “excised offshore place” were denied the ability to make a valid application for a visa, including protection visas, without approval by the Minister.84

A more hospitable approach to asylum seekers appeared likely with the 2007 election of the Labor Party, which had campaigned in part on a platform of ending the Pacific Solution. In early 2008, Labor resettled the last 21 asylum seekers on Nauru in Australia and announced that Nauru and Manus Island would no longer be used as processing centres. TPVs for persons found to be refugees were also abandoned.85 Nevertheless, offshore processing remained in operation at Christmas Island and long-term mandatory detention continued unabated86—as did the arrival of boats. Whether as a direct result of Labor’s somewhat less punitive stance, or by reason of other regional factors, there was a significant increase in the arrivals of boats following the dismantling of the Pacific So-

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

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


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

85 See Mansouri & Leach, supra note 76 (“ex]isting TPV holders would receive ‘Resolution of Status’ (subclass 851) visas, with equivalent rights to permanent protection visa holders” at 119).

86 See Phillips & Spinks, “Immigration Detention in Australia”, supra note 4 at 11–12. In October 2011, 39 per cent of detainees had been in detention for more than twelve months (see ibid).
lution.87 In 2008, seven boats arrived on Australian territory; in 2009 this number jumped to 60, and by 2012 it reached 278. As of June 30, 2013, the number of boats arrived had already reached 196.88 Even more striking was the increase in the number of people making the journey: from 161 in 2008, to 17,202 in 2012, to 13,108 as of June 30, 2013.89 Labor panicked at this new reality, introducing a series of legally and politically flawed measures. The “Malaysia Solution” was devised, under which Australia would send up to 800 boat people to Malaysia, and in return Australia would accept 4,000 refugees from Malaysia over four years. Before any transfers occurred, the plan was struck down by the High Court.90 In response to that case and the recommendation of an Expert Panel91 convened by the government, the Gillard Government passed legislation enabling the Minister to designate certain places as regional processing countries, without “reference to the international obligations or domestic law of that country”;92 the Minister subsequently designated PNG as a region-

87 See Phillips & Spinks, Boat Arrivals in Australia, supra note 16 at 22.
88 See ibid.
89 See ibid. Figures from the Department of Immigration reveal that most asylum seekers in these years hailed from Afghanistan, Iran, Pakistan, and Sri Lanka (a significant number of persons are also listed as stateless; presumably a large number of those persons are Palestinian) (see Australian Government, Department of Immigration and Citizenship, Asylum Statistics—Australia: Quarterly Tables—March Quarter 2013 (Belconnen, ACT, Australia: Systems, Program Evidence and Knowledge Section, 2013) at 10, online: Department of Immigration and Border Protection <www.immi.gov.au/media/publications/statistics/asylum_files/asylum-stats-march-quarter-2013.pdf>).
90 See Plaintiff M70/2011 v Minister for Immigration and Citizenship, [2011] HCA 32, 244 CLR 144 [Plaintiff M70/2011]. In brief, the majority found that the criteria governing the Minister’s decision to issue a declaration authorizing removal were “jurisdictional facts,” satisfaction of which was required for a declaration to be valid. Section 198A(3)(a) of the Migration Act empowered the Minister to declare that a country provided, for asylum seekers, access to effective procedures for assessment, and protection pending determination of status; and that the country met relevant human rights standards in providing such protection. The Court held that the absence of such access and protections under Malaysian law meant that the jurisdictional facts necessary to make a declaration were not established; accordingly, the Minister’s decision was beyond power. See especially ibid at paras 101–36, Gummow, Hayne, Crennan and Bell JJ.
92 Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth), s 198AA(d). However, to address the High Court’s finding in Plaintiff M70/2011, supra note 90, s 198AB(2) requires the Minister to have regard to the “national interest” in making a designation, which in turn requires consideration of whether the country has provided assurances that it “will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion” (ibid, s 198AB(3)(a)(i)).
al processing centre. A challenge to the provision conferring power on the Minister to designate regional processing centres, and to the designation of PNG as such a centre, was recently rejected by the High Court.

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


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

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


97 Ibid at 7.

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


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


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


106 See ibid.
gal advice. Eventually, the asylum seekers were briefly brought to Australia before being removed to Nauru.

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

C. Lessons from Australia

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

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


110 See ibid, Schedule 2, Part 4.

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

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

113 See 2014 Bill, supra note 109, Schedule 5.

114 See ibid, Schedule 4, Part 1.

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

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

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

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

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\textsuperscript{116} House of Commons, Standing Committee on Citizenship and Immigration, Evidence, 41st Parl, 1st Sess, No 40 (7 May 2012) at 1 (Catherine Dauvergne).
\textsuperscript{117} See Phillips & Spinks, Boat Arrivals in Australia, supra note 16 at 17.
\textsuperscript{118} See Crock & Ghezelbash, supra note 16 at 244.
\textsuperscript{120} UNHCR, “UNHCR Urges States to Avoid Detaining Asylum-Seekers” (12 May 2011), online: <www.unhcr.org/4dcbef476.html> [internal quotation omitted]. In fairness, it seems likely that there was a link between the extremely low number of boat arrivals in Australia in the mid-2000s and the harsh Coalition policies during that period. However, those policies came with costs to asylum seekers and Australian society that far outweighed their temporary benefits (see e.g. Crock & Ghezelbash, supra note 16 at 258ff).
\end{flushleft}
such people are primarily motivated by the desire to escape situations of intolerable violence, danger, or economic vulnerability, which manifestly outweigh the perceived drawbacks of detention. In the Australian context, it has been argued that the surge in boat arrivals in recent years was caused by the abandonment of the Pacific Solution in 2008. However, this confuses correlation with causation: existing research suggests that family, social networks, and agents, including smugglers, play a much more significant role in determining asylum seekers’ ultimate destinations than knowledge of entry policies and putative detention. Indeed, the cessation of boat arrivals to Australia in early 2014 is beginning to look like only a temporary decline, seeing as the numbers of asylum seekers in Indonesia are increasing and people smugglers are devising new means of enticing customers and evading detection by Australian border patrols. To the extent that deterrence can even be considered a legiti-

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

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

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

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

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

125 See George Roberts, “People Smugglers Offering Discounts, Multi-Buys to Combat Federal Government Asylum Seeker Policies”, ABC News (24 March 2014), online:
mate motivation for immigration detention, it would thus seem to rest on flawed assumptions regarding its efficacy, since, in Mary Crock’s words, “[w]hile there are families striving to be reunited, while there are people caught in limbo yearning for a safe haven, the refugees will continue to batter at Australia’s door.” There is no reason to think that the threat of detention is likely to function as a greater deterrent in Canada than in Australia.

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

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


126 Crock, “Conflicting Visions”, supra note 83 at 94.
127 See Bem et al, supra note 15 at 4.
128 See ibid.
129 See discussion of the Pacific Solution, above at 16.
130 See Bem et al, supra note 15 at 4.
131 See ibid.
War era. A fitting, if perverse, end stage of this cycle of economic influence is the fact that private corporations manage Australia’s immigration detention facilities. Since 2009, Serco Group has been contracted to manage the detention centre at Christmas Island and other centres throughout Australia. In February 2014, the government awarded a AUD$1.2 billion contract to Transfield Services to operate the centres at Nauru and Manus Island. Yet there is no evidence of a positive correlation between the spending and improvement of conditions in the centres; to the contrary—despite this degree of expenditure, the UNHCR’s second report on the conditions at the Manus Island Regional Processing Centre found that “[p]hysical living conditions remain harsh” and “freedom of movement remains extremely limited” contrary to UNHCR’s Detention Guidelines.

Given the disproportionate expense and poor standards of treatment reported in offshore Australian facilities, these findings reinforce why Canada would be well advised to avoid both building upon designation and mandatory detention, and the move to offshore processing.

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

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

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

140 Suicide Prevention Australia, Submission to the Joint Select Committee, supra note 19 at 4.
tween July 1, 2010 and April 24, 2013, there were 11 deaths in immigration detention.\(^{141}\) A 2014 inquiry into children in immigration detention heard evidence that 128 children had self-harmed in the preceding fifteen months.\(^{142}\) A recent protest by detainees on Manus Island against the conditions of detention led to the death of one Iranian asylum seeker; 77 others were injured.\(^{143}\)

The impact of detention on asylum seekers supports the argument that detention amounts to a violation of the right to hospitality at both a moral and legal level. Morally, detention of non-enemies infringes the obligation to accord hospitality, even if persons are seeking permanent membership in a community rather than temporary sojourn. Legally, detention on a mandatory and indefinite basis without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority amounts to arbitrary detention that is inconsistent with international human rights law.\(^{144}\)

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

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


\(^{144}\) UNHCR, *Manus Island*, *supra* note 137 at 1.


\(^{146}\) In particular, the Committee found that a blanket rule imposing detention without individual assessment was arbitrary within the meaning of article 9(1). It also found that substantive review of detention was unlikely in light of *Al-Kateb*, *supra* note 70, and that, in any event, *Plaintiff M47/2012 v Director-General of Security*, [2012] HCA 46 (5 October 2012) clarifies that a successful challenge to the making of an adverse security
fact that the DFN regime enables potentially indefinite detention suggests that Canada may very well be the subject of similar international criticism in the future.

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

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


149 See Barrett & Barlow, supra note 142.

150 See Karen Barlow, “Scott Morrison Says 157 Tamil Asylum Seekers are ‘Economic Migrants’ Not in Danger of Persecution in India, Calls Labor and Greens ‘Surrender Monkeys’”, ABC News (28 July 2014), online: <www.abc.net.au/news/2014-07-28/consular-staff-begin-processing-of-tamil-asylum-seekers/5627732>. Pre-empting a High Court challenge to the asylum seekers’ continuing detention on the Australian vessel, the Minister announced in late July 2014 that they would be brought to Australia. While that transfer took place, the asylum seekers have since been transferred from Curtin Detention Centre to Nauru (see “157 Tamil Asylum Seekers Sent from Curtin Detention Centre to Nauru”, ABC News (2 August 2014), online: <www.abc.net.au/news/2014-08-02/tamil-asylum-seekers-sent-to-nauru/5642972>). The plaintiffs have amended their claim in the High Court to state a case for damages for unlawful detention and false imprisonment (see CPCF v Minister for Immigration and Border Protection, [2014] HCATrans 156 (28 July 2014)).
While it may be true that not all of the Sri Lankans meet the criteria for protection, the government’s position is an example of a broader trend toward involuntary repatriation by states that are “unwilling to actualize the principle of burden sharing.” The rhetoric surrounding the introduction of Bill C-31 suggests that Canada is at risk of following a similar path. Recent Australian history would indicate that Canada ought to eschew a politics that rests on the construction of asylum seekers as scapegoats in order to confront deeper concerns over national identity and economic inequality.

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

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151 Chimni, “From Resettlement to Involuntary Repatriation”, supra note 18 at 66.

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


154 Supra note 16 at 245.
II. The DFN Regime: Protecting Canada’s Immigration System?

A. A Mixed Legacy

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

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


157 The Chinese Immigration Act, 1923, SC 1923, c 38.

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

159 Ibid, s 38.

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

161 See Knowles, supra note 155 at 131–32.
ception of the Canadian nation, and did not affect “the underlying economic determinants of Canadian immigration policy.”

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

By the late 1980s, however, Canadian hospitality was threatened by a global upsurge in the number of refugees and undocumented migrants. The arrival of Sikh asylum seekers by boat in Nova Scotia in 1987 appeared to confirm the “fear that Canada was in imminent danger of being overwhelmed by non-genuine refugee claimants.” In conjunction with administrative difficulties created by the Supreme Court’s ruling in *Singh v Minister of Employment and Immigration*, it can be argued that the arrival of the Sikhs influenced the passage of Bill C-84, the *Refugee Deter-
rents and Detention Act. This Act extended powers of detention, limited access to the determination system, and established a new system of refugee determination utilizing adversarial hearings, the outcomes of which were non-appealable.

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


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


178 See MacIntosh, supra note 176 at 188.
were required;\textsuperscript{179} the number of persons in immigration detention did, however, increase sharply in the years following the introduction of IRPA.\textsuperscript{180}

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

\textbf{B. The DFN Regime}

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

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

\textsuperscript{180} See François Crépeau, Delphine Nakache & Idil Atak, “International Migration: Security Concerns and Human Rights Standards” (2007) 44:3 Transcultural Psychiatry 311 at 321.

\textsuperscript{181} Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act, 3rd Sess, 40th Parl, 2010.

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

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

\textsuperscript{184} House of Commons Debates, 41st Parl, 1st Sess, No 90 (6 March 2012) at 5876 (Don Davies).

\textsuperscript{185} Neve & Russell, supra note 1 at 42. See also Canadian Bar Association, Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act (Ottawa: Canadian Bar Association, 2010) at 1, online: <www.cba.org/cba/submissions/pdf/10-78-
4 were incorporated within the omnibus Bill C-31, *Protecting Canada’s Immigration System Act*.

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

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

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

\(^{188}\) *IRPA, supra* note 3, s 20.1(1).

\(^{189}\) Ibid, s 20.1(1)(b).

\(^{190}\) See e.g. articles 2 and 26 of the ICCPR and possibly article 3 of the *Refugee Convention*. See also UNHCR, “UNHCR Submission on Bill C-31”, Legislative Comment on Protecting Canada’s Immigration System Act (2012) at para 8. The designation of persons based on their possible connection to people smuggling operations also potentially infringes article 16 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) [Convention Against Smuggling].
From this perspective, inhospitable treatment of asylum seekers is framed as muscular state policy designed to protect the nation from external threats.

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

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

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191 See Chimni, “Globalization”, supra note 5; Dauvergne, “Less Brave New World”, supra note 5; Rygiel, supra note 8; MacIntosh, supra note 176.
192 Bill C-31, supra note 2, cl 81(1).
193 See IRPA, supra note 3, s 55(3.1).
194 Under international law, a child is any person under the age of eighteen years (see Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, art 1 (entered into force 2 September 1990)). Under Canadian law, a minor is anyone under the age of eighteen or nineteen (depending on the province in question).
195 See ibid, art 3(1).
196 Ibid, art 37(b).
197 See IRPA, supra note 3, s 56(2)(a)–(c).
198 [Emphasis added].
in Australia whereby all unauthorized boat arrivals are subject to mandatory detention.

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

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

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

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

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

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;

...

(e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

200 See ibid, s 58(4).

201 See ibid, s 57.1(2). Further review was originally precluded for twelve months, but the government followed a recommendation by the House Standing Committee on Citizenship and Immigration that this be reduced to six months (see House of Commons, Standing Committee on Citizenship and Immigration, Third Report (May 2012) (Chair: David Tilson)). In contrast, section 57 provides that initial review of permanent residents and non-DFN foreign nations is to take place within forty-eight hours, then at least once more in the following seven days, and at least once more in every thirty-day period thereafter.
ly indefinite. The Immigration and Refugee Protection Regulations articulate a list of factors to be considered in determining whether a person is to be released from detention. However, as the Immigration Review Board’s Guidelines make clear,

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

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

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

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202 See Al-Kateb, supra note 70.
203 SOR/2002-227, s 248.
204 Immigration and Refugee Board of Canada, “Guideline 2: Guideline on Detention”, Guidelines Issued by the Chairperson, Pursuant to Paragraph 159(1)(h) of the Immigration and Refugee Protection Act (Ottawa: Immigration and Refugee Board of Canada, 5 June 2013) at para 3.4.1.
205 Arguably, detention of smuggled migrants also contravenes art 16 of the Protocol Against Smuggling (see “UNHCR Submission on Bill C-31”, supra note 190 at para 6).
207 For reasons that have not been publicly explained, this provision appears to replicate s 11(1.1).
208 Similarly, if a foreign national who has lodged an application for permanent residence is subsequently designated a DFN, their application is suspended for five years (see IRPA, supra note 3, s 20.1(2)). Section 24(5) operates in the same way in respect of temporary resident permits.
209 See IRPA, supra note 3, s 25(1.01).
status means that DFNs are prevented from sponsoring their family members to join them for five years from the date of designation.210 This is compounded by the inability of DFNs to obtain travel documents. Section 31.1 provides that a DFN is not “lawfully staying in Canada” for the purposes of article 28 of the Refugee Convention. The cumulative effect of these provisions is that persons deemed to be DFNs are cut off from their families for up to seven years, and possibly even longer, given that impetuousness could preclude immediate travel. The UNHCR has observed that this outcome does not accord proper respect to the principle of family unity under international law.211 The Canadian Bar Association has argued that “[d]enying family reunification by denial of access to [permanent resident] status is inconsistent with Article 23 of the [ICCPR].”212 In view of these consequences, it seems reasonable to argue that the DFN regime, in whole or in part, is punitive. A punitive regime contravenes article 31(1) of the Refugee Convention and demonstrates a deliberately inhospitable stance toward those persons for whom an absence of protection and even minimal rights may be destructive.

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

In December 2012, pursuant to section 20.1(1)(b) of the IRPA, the Minister of Public Safety designated 85 Romanians216 who arrived in Quebec after having crossed the Canada-US border in five groups be-

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210 See ibid, ss 13(1) (enabling permanent residents to sponsor a foreign national), 20.2(1)(a)–(c) (preventing designated foreign nationals from applying to become permanent residents for five years; see supra notes 186-190 and accompanying text).
211 See “UNHCR Submission on Bill C-31”, supra note 190 at para 25.
212 Canadian Bar Association, supra note 185 at 9.
213 See IRPA, supra note 3, s 110(2)(a).
214 See “UNHCR Submission on Bill C-31”, supra note 190 at para 45.
215 See ibid at para 11.
tween February and October 2012. Given that none of the eighty-five DFNs were ever proven to be the smugglers who facilitated the Romanians’ entry, it is doubtful that the designation succeeds in sending the “strong message” that the government of Canada “will take decisive action against those who earn their livelihood by criminally exploiting Canada’s immigration system.” Instead, the designation demonstrates the actualization of the securitizing logic that undergirds Bill C-31 and distances Canada from the politics of hospitality.

C. The DFN Provisions Contravene the Charter

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

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218 Ibid.

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


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

1. Detention and Imprisonment

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

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223 See Charkaoui, supra note 206 at paras 88–89.
225 It is conceivable that a deterrence objective grounded in concern over loss of life occasioned by the mode of irregular arrival (for example, dangerous vessels) might be valid; however, the attendant consequences of designation would still be arbitrary and disproportionate.
226 Charkaoui, supra note 206 at para 91.
227 See ibid at paras 61, 65 (albeit pursuant to a flawed process that infringed section 7 of the Charter).
sections 9 and 10(c) of the Charter. By parity of reasoning, it is difficult to see how detention for six months following an administrative determination is necessary, or in furtherance of the legislative objective, which in turn suggests that such detention is arbitrary and in contravention of sections 9 and 10(c). This being said, it is arguable that the time involved in processing significant numbers of asylum seekers justifies the lengthy detention period.

2. Fundamental Justice

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

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

228 See ibid at para 91.
229 See Chaoulli, supra note 224 at paras 128–53.
230 Charkaoui, supra note 206 at para 18. The Court clarified that while deportation of a non-citizen does not in itself constitute a breach of section 7 of the Charter, the manner in which a decision to deport a non-citizen is reached may implicate that section (ibid at paras 16–17; Accord Medovarski v Canada (Minister of Citizenship and Immigration), 2005 SCC 51 at para 46, [2005] 2 SCR 539).
231 Charkaoui, supra note 206 at para 65.
tunities to challenge their continued detention or the conditions of their release.232

For similar reasons, the detention provisions for DFNs may infringe section 7 by reason of overbreadth.233 The decision in R v. Heywood234 makes clear that the doctrine of overbreadth looks to the purpose underlying a law, and considers whether the means are sufficiently tailored to meet that objective. Specifically, Heywood suggests that the question of breadth is likely to turn on the period of time deemed necessary to achieve the legislative object.235 The government has made it clear that detention of smuggled migrants is intended to enable identification and assessment of security risks.236 Fourteen days’ detention is arguably not excessive (and therefore not overbroad) for this purpose; on the other hand, six months’ detention may well be sufficiently disproportionate—that is, beyond what is necessary to achieve the legislative object—to warrant judicial intervention.

The DFN provisions may also constitute an infringement of the right to security of the person guaranteed by section 7 of the Charter because of their likely or demonstrated deleterious impact on the psychological well-being of designated persons. It is an established principle in Canadian law that “serious state-imposed psychological stress” can infringe security of the person for the purposes of section 7.237 The cases thus far have applied this principle in the context of criminal law,238 child custody,239 and unreasonable delay by government entities.240 There exists overwhelming evidence, much of it derived from the Australian experiment, that immigration detention, particularly indefinite detention, has disastrous effects on the mental health of detainees.241 In addition, it is reasonable to assume that the denial of the ability to regularize one’s status, combined with en-

232 Ibid at para 107.
233 See e.g. Canadian Association of Refugee Lawyers, “The Unconstitutionality of Bill C-4, The Preventing Human Smugglers from Abusing Canada’s Immigration System Act” (October 2011) at 12, online: <www.cdhr-rcuottawa.ca>.
234 [1994] 3 SCR 761 at 792, 120 DLR (4th) 348 [Heywood cited to SCR].
235 See ibid at 796.
236 See Kenney, supra note 12 at 5873 (“[w]e have to be able to keep illegal immigrants in custody, in a completely humanitarian way, so that they can be identified”).
240 See Blencoe, supra note 237 at para 115.
241 See supra note 19.
forced family separation, will have serious negative psychological effects.\textsuperscript{242} The cumulative effect of putative or actual psychological harm by reason of the DFN provisions may in itself ground a claim under section 7 since, as the Court in \textit{Suresh v. Canada (Minister of Citizenship and Immigration)} made clear, grossly disproportionate government responses may not satisfy the second limb of section 7, amounting to a denial of fundamental justice.\textsuperscript{243} This being said, to the extent that a person seeking protection is found to be a security risk, psychological harm occasioned by lengthy detention appears less likely to result in a finding that the \textit{Charter} has been infringed.\textsuperscript{244}

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

\textsuperscript{242} See Mansouri & Leach, \textit{supra} note 76 at 110.
\textsuperscript{243} 2002 SCC 1 at para 47, [2002] 1 SCR 3 [\textit{Suresh}].
\textsuperscript{244} See \textit{Mahjoub (Re)}, 2013 FC 1095, FCJ No 1216 (QL).
\textsuperscript{245} See \textit{PHS}, \textit{supra} note 224 at para 114.
\textsuperscript{246} See \textit{ibid} at para 117. See also \textit{Suresh}, \textit{supra} note 243 at para 5.
\textsuperscript{247} See \textit{PHS}, \textit{supra} note 224 at paras 127–36.
\textsuperscript{248} Whether on the grounds of necessity for or consistency with a legitimate state interest (see \textit{ibid} at para 132).
3. Cruel and Unusual Punishment

The detention provisions appear to infringe the guarantee in section 12 of the Charter against cruel and unusual treatment or punishment. It is clear that section 12 applies in contexts beyond penal incarceration.249 Charkaoui tells us that, because of its potentially harmful psychological effects, prolonged detention under immigration law requires ongoing review and the provision of meaningful opportunities to challenge detention or conditions of release.250 In that case, the Court denied that a breach of section 12 (or section 7) of the Charter had occurred by reason of extended detention251 since there were found to be meaningful opportunities for review based on established criteria.252 Accordingly, it may be that the existence of review at six monthly periods in accordance with the criteria in section 58(1) and Part 14 of the Regulations satisfies the requirement put forward in Charkaoui. However, there is a crucial difference between the DFN regime and that which was considered in Charkaoui: review under the DFN regime is conducted by the Immigration Division—an administrative entity—whereas the acceptability of the review process in Charkaoui was premised on “robust ongoing judicial review of the continued need for and justice of the detainee’s detention.”253 This distinction in itself may be sufficient to challenge the detention regime on the basis of section 12.

4. Section 1

Assuming that one or more of the grounds above is successful, it will fall to the government to justify the infringement(s) under section 1 of the Charter.254 The first limb of the R v. Oakes255 test requires that the objec-
tive sought by the limit is sufficiently important. As noted above, the stated objectives of the DFN regime (determination of the identity and potential security risks of irregular arrivals) are by no means unimportant. The underlying objective, however, is potentially on less stable ground. While section 3(2) of the IRPA provides that deterrence is not a valid objective, in Canada, as in Australia, “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.” There is added support for the conclusion that deterrence is, in law, a permissible objective despite the IRPA if a national security element inheres in the purpose of the DFN regime, since “protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective.” Assuming that this first limb is satisfied, designation and initial detention likely bear a sufficiently rational connection to the purpose of the provisions given that these mechanisms enable identity and security checks. It is less clear whether long-term or indefinite detention, denial of status and rights to family reunion, and rights of appeal bear a rational connection to the purpose of the law. On the one hand, their punitive nature could be considered a rational, if inhumane, means of deterring unauthorized arrivals. On the other hand, these means can be considered so disproportionate that any connection cannot rightly be called rational; indeed, this would be the case if the core objectives were found to be identity and security checks. Whether or not the provisions survive this far, it is

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

257 See IRPA, supra note 3, s 20.1.

258 See Chu Kheng Lim, supra note 60.


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

261 Charkaoui, supra note 206 at para 68.
likely that they will fall foul of the next limb of the proportionality inquiry, which questions whether the means adopted minimally impair Charter rights. It is not clear that the IRPA’s initial fourteen-day detention period without review (at section 57.1(1)) can be considered a minimal impairment.\textsuperscript{262} The Supreme Court has indicated that a margin of appreciation must be accorded to the legislature; however, it has also made clear that infringements of section 7 in particular are held to an extremely high standard of justification.\textsuperscript{263} For argument’s sake, if the provisions were held to minimally impair a DFN’s Charter rights, it could also be argued that the effects of those impairments outweigh the benefits of the law in the final consideration of the Oakes test.\textsuperscript{264} This is in essence a normative determination as to whether even minimally impairing measures constitute impermissible infringements of Charter values.\textsuperscript{265} Given the nature and severity of the infringements, it seems unlikely that the DFN provisions would survive the final part of the test.

\textbf{Conclusion}

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

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

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

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

\textsuperscript{264} See \textit{Alberta v Hutterian Brethren of Wilson Colony}, 2009 SCC 37, [2009] 2 SCR 567.

\textsuperscript{265} See Hogg, supra note 256 at 38-43.

\textsuperscript{266} Kenney, supra note 12 at 5872.
While the Minister engaged in an overly generous reading of Canadian history, it is true that Canada has periodically evinced great hospitality toward non-citizens. However, it is difficult to see how Bill C-31 will reinforce or enhance the protection of refugees. Instead, as demonstrated, the measures introduced by the Bill, particularly the DFN provisions, reinforce the veracity of Dauvergne’s view that

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

In this respect, the DFN regime is antithetical to a politics of hospitality; it is also contrary to international law and the \textit{Charter}.\textsuperscript{268}

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

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

\begin{itemize}
\item \textsuperscript{267} Dauvergne, “Less Brave New World”, \textit{supra} note 5 at 542.
\item \textsuperscript{268} See \textit{Order Designating Countries of Origin}, \textit{supra} note 3.
\item \textsuperscript{269} Crock, “Defining Strangers”, \textit{supra} note 40 at 1070.
\item \textsuperscript{270} Spinks, \textit{Destination Anywhere?}, \textit{supra} note 122 at 8 [internal citation omitted].
\end{itemize}
stances amounts to an attempt to deny the very right to have rights.\textsuperscript{271} To borrow from Benhabib, in Australia the “right to universal hospitality [has been] sacrificed on the altar of state interest.”\textsuperscript{272}

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

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

\textsuperscript{272} “The Rights of Others”, supra note 9 at 177.

\textsuperscript{273} Dauvergne, Humanitarianism, supra note 115 at 10.

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