ARTICLE

CHECKING RIGHTS AT THE BORDER: MIGRANT DETENTION IN INTERNATIONAL AND COMPARATIVE LAW

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Human rights laws, both international and domestic, present a challenge to the sovereign rights of states. The right to determine who may enter a state is one of the fundamental attributes of sovereignty. Under international law, however, states cannot return a migrant with a potentially valid asylum claim to a place where his life will be in danger, and cannot return any migrant to a place where he might be tortured. States often detain migrants while processing their asylum claims, and pending deportation if those claims should fail. Yet international law, and many states' domestic laws, prohibit prolonged detention and restrict detention conditions. As migration flows and detention rates have swelled globally, high courts have increasingly decided cases involving the rights of detained migrants. On February 27, 2018, the U.S. Supreme Court handed down a critical decision on this issue in Jennings v. Rodriguez*, allowing thousands of immigrants and asylum seekers to be detained indefinitely, without bail hearings, while remanding the case for consideration of their constitutional claims. This Article compares court cases involving detention of migrants in the United States, Australia, and Europe to determine how states can comply with human rights law while preserving their right to protect their borders. Based on these cases, the Article proposes best practices for state compliance with international law on detention. This comparison illuminates how courts strike a delicate balance between human rights and state sovereignty where national security interests are at stake.*

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I. INTRODUCTION

Alejandro Rodriguez, a legal permanent resident of the United States since childhood, was convicted of two minor criminal proceedings and detained pending removal proceedings.[1] Rodriguez was held for three years, separated from his children, with no opportunity for a bail hearing, before succeeding in challenging his removal. Rodriguez's Kafkaesque circumstances are shared by thousands of immigrants and asylum seekers detained for more than a year, on average, while awaiting removal or asylum proceedings. In 2010, thousands of detainees brought a federal class action to challenge the mandatory detention provisions of the Immigration and Nationality Act ("INA") under which they are held, with Rodriguez as lead plaintiff. The district court and the Ninth Circuit Court of Appeals agreed that indefinite detention for noncitizens without review created a serious constitutional problem, and thus read the INA to require periodic bail hearings.[2]

On February 27, 2018, the United States Supreme Court reversed and remanded the case. In *Jennings v. Rodriguez,* the Court held the INA, on its face, allows immigrants and asylum seekers to be detained indefinitely without bail hearings.[3] The Court found that the Ninth Circuit impermissibly rewrote the statute to say otherwise. However, the Court noted that indefinite detention of noncitizens creates constitutional concerns. The Court thus remanded the case for the Ninth Circuit to consider the very issue it had sought to avoid: the noncitizens' due process claims.[4] This poignant case pits the human and constitutional right to liberty against a state's sovereign right to police its borders. It also implicates the fraught political question of what rights states owe to noncitizens.

Courts in the United States and elsewhere must strike a careful balance between national security and international legal and constitutional guarantees to migrants, asylum seekers, and refugees. States have the sovereign right to determine who may enter their borders. However, international law, as well as many states' corresponding domestic laws, constrain this right. International law prohibits states from returning refugees to a place where their lives will be in danger[5] and from returning

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1 *Jennings v. Rodriguez*, 583 U. S. ___, 138 S. Ct. 830, 860 (2018).

2 Immigration and Nationality Act, 8 U.S.C. §§ 1151-1574 (2012).

3 *Id.*

4 *Id.*

5 *See* Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan.

migrants to a place where they might be tortured.[6] Yet most states will not allow migrants to enter until their asylum claims are processed and accepted.

For the United States and other states, the solution to managing large migration flows has been detention.[7] The Trump administration's decision to use detention of migrants at the border as a tool for dissuading further migration has been well-publicized. The United States, Australia, the European Union, and its member-states have built and expanded their own detention centers and subsidized the building of detention centers abroad in recent years. However, international law and many states' domestic laws prohibit prolonged detention and restrict detention conditions. Faced with record numbers of migrants, states have argued that lengthy detention can be necessary to make proper individualized asylum determinations, which are also required by international law.

Clashing legal requirements and national security concerns thus create a dilemma for states. Courts must draw a fine legal line balancing states' sovereign right to protect their borders with their human rights commitments. Cases involving migration and detention have reached the highest courts of the United States and Australia, and the European Court of Human Rights ("ECtHR"). Each court has interpreted international human rights law differently in its jurisprudence, creating a discrepancy as to what that law actually requires. The cases are so poignant and politically charged because they implicate fundamental rights of both individuals and states. The right to liberty, right against arbitrary detention, and freedom from torture or cruel, unusual, or degrading treatment are among the most basic human rights, entrenched in international human rights law and the constitutional or domestic laws of most states. These cases also involve the volatile questions of whether a state may infringe upon these fundamental rights in a national security emergency, and what rights states owe to noncitizens.

Courts in the United States, Australia, and Europe have consistently emphasized the importance of due process and procedural rights for

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31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The United States is a party to the 1967 Protocol, which incorporates the Convention. *See also* Jean Allain, *The* Jus Cogens *Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 557 (2001).

6 The Convention Against Torture prohibits deportation of anyone "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 114 [hereinafter Convention Against Torture].

7 States have also employed other measures, such as interdiction at sea, and processing in third countries. On interdiction at sea, see Jill I. Goldenziel, *When Law Migrates: Refugees in Comparative International Law*, *in* COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds., 2018).

immigrants. The Supreme Court and the High Court and Federal Court of Australia have been deferential to their respective states in their broad powers to enforce immigration law. The European Court of Human Rights has been more likely to rule in favor of migrant applicants, reflecting its unique mandate to enforce a human rights charter. Comparing how courts in these three jurisdictions balance delicate questions of individuals' due process rights with the state's sovereign prerogatives illuminates the critical question of the appropriate balance between national security and human rights, especially in times of emergency. Based on cases from these three jurisdictions, this Article proposes best practices for state compliance with international law on detention.

This Article employs the techniques of comparative law to improve our understanding of international and domestic human rights laws and their interpretation, and to find points of departure and agreement by different high courts. This project is, therefore, situated in an emerging body of scholarship on Comparative International Law.[8] The Supreme Court, the ECtHR, and the High Court of Australia present excellent cases for comparative analysis because their jurisdictions are common destinations for migrants and asylum seekers.[9] Moreover, state practices of the United States, Australia, and EU member-states have strongly influenced the development of international law. By comparing high court cases involving detention of migrants in the United States, Europe, and Australia, this Article illuminates how states can comply with human rights obligations while protecting their borders.

Part I of this Article will present key terminology necessary to understand the argument. Part II will explore the tension between international laws relating to the detention of migrants. Part III will analyze court cases in the United States, Australia, and Europe, placing them in political and historical context. Part IV will discuss the implications of these decisions for restrictions on the sovereign rights of states to protect their own borders and constraints on the reach of international human rights law. The Article will conclude by discussing the broader implications of this analysis for how states can manage migration while protecting their national security and upholding the human rights of noncitizens.

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8 *See id.*

9 Katerina Linos, *Methodological Guidance: How to Select and Develop Comparative International Law Case Studies, in* COMPARATIVE INTERNATIONAL LAW, *supra* note 13.

II. MIGRANTS? ASYLUM SEEKERS? REFUGEES?

Use of appropriate terminology to describe people who cross international borders can literally mean the difference between life and death. While the terms "refugee" and "migrant" are often used interchangeably, "refugee" has a specific meaning in international law. The 1951 Convention Relating to the Status of Refugees ("Refugee Convention") defines a "refugee" as a person who crosses an international border due to persecution on the basis of race, religion, national origin, membership in a particular social group, or political opinion.[10] A person becomes a refugee the moment she meets these criteria, regardless of whether she has received a refugee status determination by the UN Refugee Agency (the UN High Commissioner on Refugees, or UNHCR) or a refugee-receiving state.

The concept of "refugee" is closely related to that of "asylum seeker." "Asylum" is the protection granted by a state to a foreign citizen against his own state. An "asylum seeker" is one who claims these protections once inside another state. While the Universal Declaration for Human Rights includes a right to seek asylum, this right is not specified in any international human rights treaty.[11] The criteria for granting asylum in most states mirror the criteria in the Refugee Convention. A person can be a refugee and an asylum seeker simultaneously, and the terms are often used interchangeably in common parlance. In the United States, the government usually uses the term "refugee," or "overseas refugee," to refer to those abroad who seek international protection; while "asylum seekers" are those who claim asylum when they have already reached the United States.[12] To have a successful asylum claim in the United States, every asylum seeker must meet the statutory definition of "refugee," which deliberately reflects the criteria in the Refugee Convention.[13] Every asylee to the United States therefore, is also a refugee.

Once individuals are granted asylum or determined to be refugees, states must provide them with legal protections. For refugees, these protections are outlined in the Refugee Convention, and include the rights to work and

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10 *See* Refugee Convention, *supra* note 4, at 626.

11 Universal Declaration of Human Rights art. 14, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

12 Legally, however, the U.S. statutory definition of refugee does not require that a refugee be located outside the U.S. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012) [hereinafter INA].

13 *Id.* § 208; *see also id.* § 1158.

to access justice. However, protection for refugees and those granted asylum may be temporary or permanent, depending on the domestic laws of the state where they flee. A determination of refugee status by UNHCR does not entitle one to resettlement outside her country of origin. Less than one percent of all refugees are granted permanent resettlement each year.[14] Most remain in their region of origin, often without legal rights or status, for years or even decades.[15]

The term "migrant," by contrast, is undefined in international law. The U.N. Migration Agency, the International Organization for Migration (IOM), defines a migrant as "any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is."[16] This broad definition includes refugees and asylum seekers, but it also includes travelers or those working abroad. States are not obligated to provide international legal protections to migrants or allow them to remain within their borders. Two notable exceptions exist. First, migrants who have worked, are working, or will work for employers abroad, are covered by the Migrant Workers Convention, although that has only 55 parties.[17] Second, states cannot return migrants to a place where they will be tortured, in accordance with the Convention Against Torture and *jus cogens* norms of international law.[18]

The definition of "immigrant" varies according to the domestic laws of individual states. In the United States, for example, the INA classifies all noncitizens as immigrants or non-immigrants.[19] Any non-immigrant who wants to enter the United States must prove that she fits into a statutorily enumerated category, such as student, business visitor, tourist, or person

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14 *Less Than 5 Per Cent of Global Refugee Resettlements Met Last Year*, UNHCR (Feb. 19, 2019) https://www.unhcr.org/en-us/news/briefing/2019/2/5c6bc9704/5-cent-global-refugee-resettlement-needs-met-year.html.

15 *How Many Years Do Refugees Stay in Exile? To Find Out, Beware of Averages*, WORLD BANK (Dec. 9, 2019), https://blogs.worldbank.org/dev4peace/how-many-years-do-refugees-stay-exile (noting that the median duration of exile is four years and that 4.2 million people have remained in exile for a decade or longer).

16 *Who is a Migrant?*, INTERNATIONAL ORGANIZATION FOR MIGRATION, https://www.iom.int/who-is-a-migrant (last visited Jan. 31, 2020) (discussing the absence of a legal definition).

17 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 1-2, Dec. 8, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

18 *See* Convention Against Torture, *supra* note 6.

19 INA, *supra* note 12, at § 101(a)(15), (8 U.S.C. § 1101(a)(15)).

married to a U.S. citizen.[20] An immigrant, then, is any noncitizen within the United States who does not fit into one of these specific categories. Those who wish to immigrate legally must then fall into an admission category established by Congress or be admitted through a general quota system. Under U.S. law, refugees are a special category of immigrant.

To simplify this overlapping terminology, "migrant" is a catch-all category encompassing all people who cross international borders, for whatever reason. "Refugees," "asylum seekers," "asylees," and "immigrants" are all subsets of this broad category. Only refugees legally have the right of non-refoulement, the right not to be returned to a place where his or her life will not be endangered. Individuals who are not deemed to be refugees may be sent back to their countries of origin—even if those countries are war-torn—so long as they will not be tortured. A court's determination that one is a refugee or migrant can literally mean the difference between life and death. And a state's decision to call a group of people "refugees" or "migrants" has different legal and moral connotations.

II. INTERNATIONAL HUMAN RIGHTS LAW AT THE BORDERS

A. The Clash of Rights and Sovereignty

Sovereignty, in the classic Hobbesian sense, means that a state has the absolute right to decide what happens within the territory it legitimately controls. A sovereign state has the right to make and enforce laws throughout the territory that apply to anyone present on that territory. For example, a sovereign may take away an individual's liberty when a person is a threat or potential threat to public order or national security, within the limits of its own laws. The right to determine who enters its borders is another aspect of a state's right to enforce its own laws on its territory.

Where the people are sovereign, as in a democracy, they have an additional right of self-determination. Democracy, in particular, requires a polity whose members exercise self-determination, including the right to define their own membership. As political philosopher Michael Walzer puts it, "admission and exclusion . . . suggest the deepest meaning of self-determination."[21] For Walzer, democratic self-determination requires unilateral border control because, without this power, a people could not

20 *Id.*

21 MICHAEL WALZER, SPHERES OF JUSTICE 62 (1983).

form a "community of character" with its own distinctive way of life.[22] Without the ability to define its own membership, a people would be unable to pursue its own distinctive projects and goods, including welfare programs or national cultural practices. If a people's self-determination were undermined, the individual autonomy of its citizens would be undermined as well. For these reasons, democratic theorists generally find it morally permissible for a state to deny certain rights and privileges to those who do not have full membership in a society.[23]

International and domestic human rights laws are designed to legally entrench rights commonly described as "inalienable," "universal," and "fundamental."[24] These laws exist to set moral limits on state sovereignty and democratic self-determination.[25] However, in practice, these rights are not absolute. States have the responsibility to provide their citizens with security, such that they may realize these human rights, and theorists have long recognized that states may have to infringe on some human rights to do so. Even the strongest advocates of open borders concede that the state still has discretion to exclude people from entry when public order is at stake.[26] The Refugee Convention and other human rights treaties also include exceptions for preserving national security and public order, which reveals that not all human rights enumerated in such laws may be absolute. To paraphrase Justice Robert Jackson's famous line regarding rights and security, the Constitution is not meant to be a suicide pact.[27]

During national security emergencies, states may place national security concerns above individual liberties.[28] Citizens are more likely to defer to their governments in such circumstances and fear they will be criticized for being unpatriotic or unrealistic if they object to security measures.[29] States are more likely to infringe upon individual liberties in the name of protecting national security when it perceives a threat to security as greater or more imminent.[30] This situation of heightened threat can place individual human rights in grave danger.

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22 *Id.*

23 Patti Tamara Lenard, *The Ethics of Deportation in Liberal Democratic States*, 1 EUR. J. POL. THEORY 1, 6 (2015).

24 *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), U.N.G.A. Res. 2200(A), preamb. (Dec. 16, 1966) (describing the purpose of the treaty as the recognition of the "inalienable rights of all members of the human family" and the promotion of "universal" respect for these rights).

25 JOSEPH CARENS, THE ETHICS OF IMMIGRATION 7 (2014).

26 *Id.* at 277-79.

27 *See generally* Terminiello v. Chicago, 337 U.S. 1 (1949) (Jackson, J., dissenting).

28 *See* JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS 20 (2010).

29 *Id.*

30 *Id.* at 21.

Theorists disagree strongly on the appropriate balance between a state's prerogative to protect national security and the right to individual liberty,[31] including whether this balance should be "vulnerable to routine changes in the calculus of social utility."[32] If rights are absolute, then the degree to which they can be infringed should not depend on changes in the level of any given national security threat or cost to the state in enforcing such a right. Legal theorist Jeremey Waldron argues, therefore, that a temporary and hypothetical improvement in national security resulting from an increase in detentions without trial would be improper because it would not make national security more efficient overall.[33]

Waldron further argues that adjustments in enforcement and enjoyment of rights require "structured arguments for their justification." These arguments must consider the special character of rights, priorities and hierarchies of rights, and the relationship between one person's rights and another's.[34] Simply asserting that a state's rights outweigh an individual's rights in a time of threat or national emergency is insufficient. Structured reasons are necessary to justify why the state must restrict individual liberties and freedoms to achieve a desired goal for the collective.

Weighing these structured reasons, for example, most theorists reject any relaxation of the prohibition against torture. Some theorists might permit torture if it could be determined, with certainty, that torturing an individual would lead to obtaining information that would save the lives of others.[35] However, torture is not justified since this certainty is nearly impossible to attain.

The issue of migrant detention acutely implicates the fundamental rights of both individuals and states. Most states have voluntarily bound themselves to a human rights regime that constrains their ability to summarily expel and return all migrants away from their borders. This is reflected in practices such as non-refoulement, asylum, and granting of procedural rights to noncitizens to challenge detention and deportation.[36] These human rights are generally viewed as being in tension with the right of state sovereignty, as well as the right of democratic citizens to fully control the membership and boundaries of their own polity.[37] Regarding migration controls, some political theorists, most notably Joseph Carens,

31 *Id.*
32 *Id.* at 28.
33 *Id.* at 28-29.
34 WALDRON, *supra* note 28, at 33.
35 *Id.* at 41-42.
36 *Id.*
37 *Id.*

have argued that migration controls interfere with the human right of freedom of movement.[38] David Miller, by contrast, argues that freedom of movement is not an absolute right and can be limited in certain ways.[39]

The right to liberty, moreover, is arguably the most fundamental of human rights. Most theorists, following John Stuart Mill, believe that a state may only infringe on the right to liberty when his exercise of that liberty may cause harm to society.[40] Symbolic gains in national security are insufficient to infringe upon individual rights.[41] Mandatory detention of migrants who enter a state illegally would infringe upon this principle.

1. The Principle of Non-Refoulement

The concept of non-refoulement is the cornerstone of the Refugee Convention and its 1967 Protocol.[42] This principle requires that states must not expel or return a refugee to a place where his life will be endangered. The United States, Australia, and all EU member states are parties to the Refugee Convention. However, most commentators consider non-refoulement to be a *jus cogens* norm, a peremptory norm that no state can violate, regardless of their signatory status.[43]

Non-refoulement imposes a strong constraint on a state's sovereign right to regulate its borders. The text of the Refugee Convention is clear that states may not refoul anyone from within the territory of a state. In practice, this means that if a state apprehends anyone with a potentially valid asylum claim within its territory, it may not deport that person to his country of origin until his claim can be processed. Non-refoulement thus places constraints on whom a state can force to leave its borders and when and how it can do so. Non-refoulement restricts states from summarily refouling bona fide asylum seekers who have entered their countries illegally until their

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38 *See* CARENS, *supra* NOTE 25.

39 David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS (A.I. Cohen & C.H. Wellman eds., 2005).

40 *See generally* JOHN STUART MILL, ON LIBERTY (1859).

41 William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 249 (2004).

42 Contracting States may not "expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 5, art. 33(1).

43 *See* Allain, *supra* note 5 (discussing how non-refoulement acquired *jus cogens* status as a peremptory norm). For discussion on scholarly disagreement about the status of non-refoulement as a peremptory norm, see GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (3d ed. 2007).

claims are processed. The Refugee Convention states explicitly that a state may not penalize a refugee for entering the country illegally.[44]

While states largely agree on what non-refoulement requires when a noncitizen is found within their borders, states disagree over whether non-refoulement applies *at* their borders. The text of the Refugee Convention is unclear on this point, and the travaux préparatoires, or the Convention's drafting records, show that the delegates disagreed on this issue.[45] Most scholars agree that application of the principle of non-refoulement at the border follows logically from the text of the Refugee Convention.[46] To interpret the treaty otherwise would mean that migrants who came illegally to a country would receive legal protections against refoulement that are not available to those who presented themselves legally at the border to claim asylum.

However, states differ in their official positions and policies on non-refoulement at the border. The United States strongly maintains the official position that non-refoulement applies only within its territory.[47] By contrast, the EU has codified non-refoulement from the border in its migration directives.[48]

Still more disagreement exists as to whether non-refoulement applies *beyond* a state's borders. International and domestic courts are increasingly adopting the standard of "effective control" in international human rights cases.[49] A state may be liable for human rights violations occurring while it has "effective control" over a given person, territory, or situation. Thus, a state may legally transfer an asylum seeker outside its territory for processing, subject to that state ensuring that he will not be refouled from the third-country or suffer maltreatment there.[50] However, the United States

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44 Refugee Convention, *supra* note 5, art. 31(1).

45 THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM 50-51 (2011).

46 "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on the basis of his race, religion, nationality, membership of a particular social group, or political opinion." Refugee Convention, *supra* note 4, art. 33(1).

47 *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (holding that non-refoulement does not apply on the high seas).

48 Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1; Council Directive 2005/85/EC, Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) art. 3(1), 35. Under Art. 35, member states may still apply national border procedures subject to fewer legal safeguards. *Id.*

49 Oona Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011).

50 *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255.

has not recognized the "effective control" standard in its jurisprudence. Moreover, many states distinguish refugee law from other areas of human rights law. They argue that the right of non-refoulement implicates national security concerns and the sovereign right of a state to control its borders in ways that other human rights treaties do not.[51]

The Refugee Convention exempts states from the obligation of non-refoulement only when an individual refugee threatens national security or public order, or when an individual refugee has been convicted of a particularly serious crime and constitutes a danger to those in the receiving country.[52] Such determinations must be individual and not group-based. States may not, for example, bar a particular nationality group from entry on grounds that its members threaten public order. Instead, the state must have information that, or hold proceedings to determine that, an individual asylum seeker is a threat.

The Refugee Convention's national security exception, then, is circumscribed by the rights of the individual alleged to be a security threat. In a 2006 advisory opinion, UNHCR stated that any exception to the principle of non-refoulement must be interpreted restrictively and in full accordance with the principle of proportionality.[53] States must consider both the danger to the national security of the receiving country and the danger that the refugee would be likely to face if he were refouled.[54] Moreover, the proposed remedy of refoulement must be directly related to removing the harm that would come from a particular refugee's presence in the receiving country.[55]

Thus, states are faced with moral and legal dilemmas when migrants appear within or at their borders without appropriate authorization. Non-refoulement presents a strong international legal obligation to protect foreigners who have no government of their own to which they can turn for protection. By abiding by this international norm and codifying it in the Refugee Convention, states have affirmatively accepted a large constraint upon their sovereign rights to determine who may enter their borders. Because states are obligated not to refoul people with a credible fear of

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51 *See* Jill I. Goldenziel, *The Curse of the Nation-State: Refugees, Migration, and Security in International Law*, 48 ARIZ. ST. L.J. 579 (2016) (discussing the security risks posed by refugees).

52 Refugee Convention, *supra* note 5, art. 33(2).

53 Thomas Albrecht, Deputy Regional Representative, UN High Commissioner for Refugees, *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees* 3-4, 6-7 (Jan. 6, 2006), http://www.refworld.org/docid/43de2da94.html.

54 *Id.* at 6-8.

55 *Id.* at 7.

persecution—whether within their borders, at their borders, or under their effective control—they must protect those people from refoulement until their claims can be processed. For many states, some period of detention will be necessary to appropriately assess and process asylum claims. Migrant-receiving states may legally transfer asylum seekers to a third country.[56] However, if at any time—including detention and transport to the third country—the original receiving state is in "effective control" of the migrants' circumstances, that state can be legally liable for any maltreatment of migrants.[57]

2. International Law on Detention

The rights to liberty and to be free from arbitrary detention are fundamental to international human rights law. International human rights law reflects commitments states have made to safeguard the rights of their own citizens, not foreigners. However, freedom of liberty is considered a *jus cogens* norm, as reflected and codified in numerous international human rights treaties, declarations, and interpretive guidance that provide for freedom of liberty and restrict arbitrary detention.[58] While these instruments implicitly recognize the right of states to detain migrants, they mandate certain constraints on detention generally and migrants specifically.

International human rights law also forbids arbitrary and prolonged detention.[59] States must make individualized determinations of whether detention or other restrictions on a migrant's liberty are justified, such as prompt court review and periodic review of detention decisions. States must treat detainees according to baseline international human rights standards,

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56 UNHCR Division of Int'l Protection, *Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing, in* 2 RESCUE AT SEA, STOWAWAYS AND MARITIME INTERCEPTION: SELECTED REFERENCE MATERIALS 97 (Dec. 2011).

57 *Id.*

58 *See* International Covenant on Civil and Political Rights art. 9, 16, Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure [sic] as are established by law."); Migrant Workers Convention, *supra* note 17. These principles are also drawn from the Universal Declaration of Human Rights, *supra* note 11, arts. 3, 9 ("Everyone has the right to life, liberty, and security of person . . . . No one shall be subjected to arbitrary arrest, detention or exile.").

59 ICCPR, *supra* note 58, art. 9; GAMMELTOFT-HANSEN, *supra* note 58; Convention Against Torture, *supra* note 6.

including providing food, sanitary conditions, and protection from torture and cruel, inhuman, or degrading treatment.[60]

Other principles common to interpretive guidance on human rights treaties include a presumption against detention of migrants, especially vulnerable migrants like children and victims of torture or trafficking, the use of detention as a last resort, and ensuring that detention of migrants and asylum seekers is not punitive or in penal conditions.[61] States must always apply the principles of necessity and proportionality when deciding whether to detain migrants.[62] States must consider whether detention of each individual migrant is necessary, then weigh the potential harm to society against the cost of restricting the individual liberty of that migrant.

UNHCR Executive Committee (ExCom), which is comprised of states that advise the Agency, directly considered detention of refugees at its 1986 meeting. ExCom noted that:

> [i]f necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.[63]

ExCom also recognized the importance of "fair and expeditious procedures" to determine refugee status and of judicial and administrative review of detention decisions.[64] In 1999, at its Global Consultations on International Protection, UNHCR reiterated that restrictions on refugee

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60 *See generally* UNITED NATIONS, HUMAN RIGHTS AND PRISONS: A POCKETBOOK OF INTERNATIONAL HUMAN RIGHTS STANDARDS FOR PRISON OFFICIALS (2005).

61 *See, e.g.*, UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* 1-10 (Feb. 26, 1999), http://www.refworld.org/docid/3c2b3f844.html; UN Sub-commission on the Promotion and Protection of Human Rights, *Resolution 2000/21 on the Detention of Asylum-Seekers* ¶ 6 (Aug. 18 2000), http://www.refworld.org/docid/3dda66394.html; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers* 12-13 (Dec. 18 1998), http://www.refworld.org/docid/45377b810.html.

62 *See supra* note 61.

63 UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) – 1986* (Oct. 13, 1986), http://www.refworld.org/docid/3ae68c43c0.html.

64 *Id.*

movement should be used only as necessary in each individual case and that detention should be an exceptional measure.[65]

International human rights law in these areas is often reflected in domestic laws. Most of the world's constitutions or criminal codes include the right to liberty and prohibit arbitrary and prolonged detention. The provision against non-refoulement may also be reflected in domestic laws. In the United States the INA contains a non-refoulement provision reflecting that in the 1951 Refugee Convention. Such domestic laws provide an additional constraint on a state's ability to detain migrants in the name of national security.

3. Rights vs. Security

Thus, the issue of migrant detention implicates some of the most fundamental rights of individuals and states. Out of an abundance of caution for their national security, states often err on the side of presuming a migrant is a risk and detaining him until a determination can be made of whether he can safely enter the community. While states may justify such a decision based on national security concerns, doing so runs contrary to the presumption that a migrant should not be detained, and potentially into laws against arbitrary detention. It could also violate the fundamental human right to liberty if the detained individual does not present a security threat. If states are unable to process asylum claims quickly, and if migrants protest and appeal negative determinations, detention of migrants may become prolonged. This results in a perverse irony: those migrants who are detained the longest may be those who choose to challenge their determinations and who cannot be processed quickly because they have valid asylum claims. Also, states that take individualized processing seriously and ensure the most stringent procedural safeguards may need to detain migrants for long periods while these determinations are being made.

When mass migration occurs, states may be challenged to properly balance human rights and national security. Given limited resources, states may strain to provide individuals who arrive in a mass influx of migrants with adequate accommodations and speedy processing of asylum claims. If trained personnel are unavailable, states may substitute less-trained staffers who are more likely to make procedural mistakes. Mass influxes may also

65 Erika Feller et al., *Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 253, 256-57 (Erika Feller et al. eds., 2003).

cause national security concerns if they result from a spillover of armed conflict or if they overwhelm national processing systems. States may require more lengthy processing to ensure that individual migrants do not pose a security threat, or additional time to secure proper provisions and housing.

Courts in the United States, Australia, and Europe have been faced with the task of providing Waldron's "structured arguments" for the justification of infringing on the rights of migrants. Courts have balanced the inalienability of human rights with the national security of states, the right of a democracy to define its community, and the relationship between the rights of individuals and society as a whole.

III. ADJUDICATING SOVEREIGNTY VS. RIGHTS

As the number of migrants continues to grow, courts have stepped in to protect both the sovereign rights of states and the international human rights of migrants. Courts in the United States, Australia, and Europe have drawn the necessary, fine lines in different places, reflecting the unique political contexts in which cases have arisen. Taken together, these court decisions reveal states' complicated, ambivalent, and evolving positions on human rights and border protection.

A. United States

1. U.S. Migrant Detention Programs

Immigration detention in the United States is expensive, expansive, and on the rise. Just after his inauguration, on January 25, 2017, President Trump ordered immigration officials to take "appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings" and to end "catch and release" programs through which aliens apprehended for immigration law violations are routinely released in the United States.[66] Detention of migrants promptly

66 Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 § 6 (2017); *see also* Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection, et al., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (discussing plans to hire additional immigration officers to support increased enforcement).

increased.[67] The Trump administration has continued to use detention of migrants and publicity about the United States' detention and poor treatment of migrants as a deterrent to those wishing to enter the United States.

The Immigration and Nationality Act (INA) gives the U.S. government discretion to detain migrants who are alleged to have violated criminal or immigration law, including asylum seekers, undocumented migrants, students, and lawful permanent residents (LPRs, commonly known as "green-card holders"). INA authorizes detention while a noncitizen's removal proceedings are pending. Detention is mandatory for noncitizens who are detained on criminal or terrorism-related grounds,[68] who have committed certain crimes,[69] and who are inadmissible and arrive at the border.[70] The INA also mandates the detention of non-citizens who have final orders of removal.[71] If detention is "mandatory" under the INA, the government may detain immigrants without a hearing to determine whether they pose a public safety or flight risk or can be released on bond.[72]

The INA's provisions on mandatory and discretionary detention have led to the largest migrant detention program in the world.[73] Each year, the United States places more than 350,000 migrants into detention.[74] As of 2015, DHS's appropriations funding was tied to the maintenance of 34,000

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67 Philip L. Torrey, Jennings v. Rodriguez *and the Future of Immigration Detention*, 20 HARV. LATINX L. REV., 171, 172-73 (2017); Emily Kassie, *How Trump Inherited His Expanding Detention System*, THE MARSHALL PROJECT (Feb. 12, 2019, 3:45 PM), https://www.themarshallproject.org/2019/02/12/how-trump-inherited-his-expanding-detention-system.

68 INA, *supra* note 12, § 241(c), 8 U.S.C. § 1231(c).

69 *Id.* § 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I) (including multiple criminal convictions, aggravated felonies, controlled substances violations, certain firearm offenses, espionage, sabotage, or treason with a penalty of imprisonment for five years or more; threats against the President; violations of the Neutrality Act, Military Selective Service Act, or Trading with the Enemies Act; travel control crimes; and importation of aliens for immoral purposes).

70 INA, *supra* note 12, § 235(b), 8 U.S.C. § 1225(b) (mandating detention of inadmissible noncitizens arriving at or near U.S. borders until they're removed, or until credible fear finding); *id.* § 236(c), 8 U.S.C. § 1226(c) (requiring detention of certain noncitizens with certain criminal convictions); *id.* § 236(a), 8 U.S.C. § 236(c) (permitting detention of noncitizens in removal proceedings who are a danger to the community or a flight risk). Noncitizens may be discretionarily released after custody hearing. This is the only one of the several provisions that allows for discretionary release (for example, certain crimes involving moral turpitude, controlled substance violations, multiple criminal convictions, prostitution, and money laundering) as well as certain aliens involved in serious criminal activity who have asserted immunity from prosecution and foreign government officials who have committed severe violations of religious freedom and traffickers in persons. *Id.*

71 INA, *supra* note 12, § 241(a), 8 U.S.C. § 1231(a).

72 *Id.* § 236(c), 8 U.S.C. § 1226(c)`

73 Torrey, *supra* note 75.

74 *Id.*

detention beds per day.[75] The number of non-citizens detained annually by DHS increased by nearly 25% between 2009 and 2014.[76] Private prison corporations operate sixty-two percent of immigration detention beds and nine out of ten of the largest immigration centers in the country.[77] The United States spends $2.8 billion per year on immigrant detention, providing a significant profit motive to industry players.[78] Costs have more than doubled since 2006, even though border entries have fallen by two-thirds.[79] The United States spends more on immigration enforcement agencies than on all other principal criminal federal law enforcement agencies combined.[80]

By law, immigration detention is administrative, not criminal. However, immigration detention facilities often appear indistinct from prisons. DHS also contracts with actual prisons and jails, which hold immigrants alongside criminals.[81] These facilities may be inappropriate for administrative detention, especially if they are overcrowded during a mass influx of migrants. Conditions in U.S. detention centers for migrant children, for example, have been highly criticized in 2018 and 2019.[82] In June 2019, reports from detention centers found children in soiled clothing, with migrants as young as seven taking care of infants.[83] The U.S. government unsuccessfully argued in Court that it was not required to provide detained children with toothbrushes or soap because these were not necessary to

75 Philip L. Torrey, *Immigration Detention's Unfounded Bed Mandate*, 15 IMMIGR. BRIEFINGS 1, 8 (2015).

76 Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CENTER FOR MIGRATION STUDIES (2014), http://cmsny.org/immigration-detention-behind-the-record-numbers/ (noting the average daily population increased almost fivefold).

77 *See* Anita Sinha, *Arbitrary Detention?: The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 91-92 (2017).

78 *Id.* at 92.

79 *Id.*

80 Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, IMMIGRATION POLICY INSTITUTE (Jan. 2013), https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

81 Sinha, *supra* note 77, at 84.

82 Zolan Kanno-Youngs, *Poor Conditions Persist for Migrant Children Detained at the Border, Democrats Say*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/us/politics/homeland-security-migrant-children.html.

83 Caitlin Dickerson, *Migrant Children Are Entitled to Toothbrushes and Soap, Federal Court Rules*, N.Y. TIMES (Aug. 15, 2019), https://www.nytimes.com/2019/08/15/us/migrant-children-toothbrushes-court.html; Caitlin Dickerson, *"There Is a Stench": Soiled Clothes and No Baths for Migrant Children at a Texas Detention Center*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html

provide "safe and sanitary" conditions. Children were not even allowed to give or receive hugs.[84]

2. Migrant Detention in U.S. Courts

The United States' positions and policies regarding non-refoulement and detention reflect tensions between its view of itself as a beacon of human rights and its concern with protecting its borders. The United States interprets its obligation of non-refoulement quite narrowly. Its formal position is that non-refoulement applies only territorially and not at its borders. In response to a 2007 UNHCR advisory opinion, for example, the United States noted its "longstanding interpretation" that non-refoulement applies only to migrants within state territory, and emphasized that any U.S. practice to the contrary is a policy matter, not a legal obligation.[85] The U.S. Supreme Court has upheld this interpretation of non-refoulement.[86]

The Court has also been reluctant to intervene to halt detention of migrants. The Court's plenary power doctrine holds that the political branches have the sole power to regulate all aspects of immigration because of sovereignty.[87] U.S. courts have applied this doctrine to essentially immunize immigration laws from judicial review, a phenomenon known as immigration exceptionalism. In recent years, however, courts have begun to chip away at the legality of the government's detention programs, and the plenary power doctrine along with them.

i. Sale v. Haitian Centers Council*: Non-Refoulement at Its Narrowest*

Sale v. Haitian Centers Council defined the U.S. position on non-refoulement.[88] In 1981, the United States and Haiti created a cooperative

84 Ashley Fetters, The Exceptional Cruelty of a No-Hugging Policy, THE ATLANTIC (June 20, 2018), https://www.theatlantic.com/family/archive/2018/06/family-separation-no-hugging-policy/563294/.

85 U.S. Mission to the United Nations, *Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 9 (Dec. 28, 2007), https://2001-2009.state.gov/s/l/2007/112631.htm.

86 *Sale*, 509 U.S. 155.

87 *Shaughnessy* v. *United States* ex rel. *Mezei*, 345 U.S. 206 (1953) (upholding the indefinite detention of a long-term legal immigrant who had briefly visited his native country).

88 *Sale*, 509 U.S. 155.

interdiction program.[89] The U.S. Coast Guard would interdict Haitian vessels and interview passengers to determine whether any of them had credible fears of political persecution.[90] The Coast Guard brought those "screened-in" to the United States to process their asylum claims, and returned all others to Haiti.[91]

Following a coup in September 1991, thousands of Haitian democracy supporters sought refuge in the United States and Cuba. The U.S. Coast Guard interdicted 34,000 Haitians in the six months following October 1991.[92] Initially, the Coast Guard conducted informal hearings aboard U.S. cutters.[93] Overwhelmed by the mass exodus and unable to send the Haitians elsewhere, the United States moved them to a makeshift camp at Guantanamo Bay while it conducted hearings.[94] When the facilities at Guantanamo became overfull, President Bush issued an executive order authorizing the Coast Guard to repatriate Haitians without screening.[95]

A group of Haitian migrants, represented by Professor Harold Koh and a team at Yale Law School, sued the United States. They claimed the United States had forcibly refouled Haitians without processing their individual asylum claims, in violation of the INA and the Refugee Convention.[96] In 1993, in an 8-1 opinion, the Supreme Court upheld the U.S. program of interdiction at sea and summary return. Citing the presumption against extraterritoriality in American law, the Court held that the INA applies "only to aliens who reside in or have arrived at the border of the United States," and not extraterritorially.[97] Interpreting the statute, the Court also said Congress's choice to use both the words "return" and "deport" together in the 1980 Amendment shows that it did not intend the statute to apply

89 Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, U.S.-Haiti, Sept. 23, 1981, 20 I.L.M. 1198, implemented by Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

90 *Id.*

91 *Id.*

92 *Sale*, 509 U.S. at 163.

93 *See id.*

94 *Id.*

95 *Id.*

96 *See* Harold Hongju Koh & Michael J. Wishnie*, The Story of* Sale v. Haitian Centers Council*: Guantanamo and Refoulement, in* HUMAN RIGHTS ADVOCACY STORIES (Deena R. Hurwitz et. al. eds., 2009); 8 U.S.C. § 1253(h)(1) (1988 Supp. IV); INA, *supra* note 12, § 243(h) ("The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.").

97 *Sale*, 509 U.S. at 160, 173.

extraterritorially.[98] Congress's use of the two words refers to both deportation and exclusion proceedings.

Turning to the Refugee Convention, the Court held that the United States did not incur an extraterritorial obligation by acceding to the 1967 Protocol.[99] The Court also found that the Convention contained no extraterritorial obligation of non-refoulement. The Court noted that Article 33.2 "explicit[ly] reference[s] . . . the country in which the alien is located."[100] According to the Court, if the obligation of non-refoulement applied on the high seas, "no nation could invoke the second paragraph's exception with respect to an alien there."[101] In the Court's view, extraterritorial application of non-refoulement would "create an absurd anomoly: Dangerous aliens on the high seas would be entitled to the benefits of [the prohibition against refoulement in Article 33.1] while those residing in the country that sought to expel them would not."[102] Reading the two clauses together, the Court reasoned that, if the exception to the rule of non-refoulement is geographically limited to the territory of the country that the refugees are in, the rule must have that limitation as well.

The Court also parsed the meaning of "non-refoulement." Article 33.1 uses both "expel" and "return ('refouler')." The Court held that "refouler" has a legal meaning narrower than its common meaning.[103] According to the Court, "refouler" translates to "repulse," "repel," "drive back," or "expel."[104] "Return," as used in the Convention, "means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination."[105] Thus, the Court concluded that the Convention was not intended to apply extraterritorially.

Sale is the only time non-refoulement has reached the court, and it defines the United States' stringent position on non-refoulement. Even as international organizations have interpreted non-refoulement more broadly,

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98 *Id.* at 174-75.

99 *Id.* at 178.

100 *Id.* at 179; *see also* Refugee Convention, *supra* note 5, art. 33(2) ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."). *id.* ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

101 *Sale*, 509 U.S. at 179-80.

102 *Id.*

103 *Id.* at 180.

104 *Id.*

105 *Id.* at 182.

and as other countries have held that non-refoulement applies at the border, the United States clings to the official position that non-refoulement does not apply outside either maritime or land borders.[106] As a matter of policy, however, the United States regularly conducts credible fear screenings when interdicting and apprehending migrants, revealing a "say-do" gap between its legal position and policies.[107] This gap reveals the tension between the United States' desire to maintain its sovereign right to protect its borders and wanting to present itself as a protector of human rights, especially as a nation of immigrants.

ii. Zadvydas v. Davis: *Restricting Post-Removal Detention*

Once migrants enter the United States, a different set of legal protections applies to them than to migrants apprehended at sea. Migrants who enter the United States without authorization are subject to detention. However, in addition to non-refoulement, migrants on U.S. territory benefit from the due process of law guaranteed by the U.S. Constitution.

In 2001, months before the September 11 terrorist attacks, the Supreme Court carved out a significant exception to the plenary power doctrine in *Zadvydas v. Davis*.[108] Kestutis Zadvydas and Kim Ho Ma were LPRs who had been ordered removed from the United States and had been held in custody while officials attempted to deport them. Zadvydas was stateless, and the United States was unable to repatriate him anywhere.[109] Kim was a refugee from Cambodia, which refused to accept him.[110] Both men suffered prolonged detention while the United States attempted to remove them and filed habeas corpus petitions.[111]

Under the INA, a noncitizen who is unlawfully present in the United States must be deported within 90 days of the entry of his final order of removal.[112] If the government is unable to remove the noncitizen in 90 days, he may be detained beyond the initial removal period, but the statute does not specify for how much longer.[113] The Court was asked to decide whether the Fifth Amendment's Due Process Clause limits the executive branch's

106 *See supra* note 85.
107 *Id.*
108 *Zadvydas v. Davis*, 533 U.S. 678 (2001).
109 *Id.* at 684-85.
110 *Id.* at 686.
111 *Id.* at 684-85 (Zadvydas), 868 (Ma).
112 INA, *supra* note 12, § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A).
113 *Id.* § 241(a)-(c), 8 U.S.C. § 1231(a)-(c).

authority to detain noncitizens with removal orders beyond the initial ninety-day period.

Justice Breyer, writing for the Court, held that indefinite detention of noncitizens was impermissible under the statute and created a "serious constitutional problem."[114] Applying the canon of constitutional avoidance, the Supreme Court instead engaged in statutory interpretation, conducted in light of what the Constitution requires.[115] The Supreme Court "construe[d] the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."[116] The Court held that the statutory text alone "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."[117]

The Supreme Court's concern was detaining someone pending a removal when that removal was not foreseeable. The government conceded that the statute had two regulatory goals: ensuring appearance at immigration proceedings and preventing danger to the community.[118] The Supreme Court reasoned that, when removal cannot occur, regular immigration proceedings are not necessary. If removal is not reasonably foreseeable, continued detention is also not reasonably foreseeable and not statutorily authorized.[119] Moreover, the second purpose must be limited to "specially dangerous individuals" and requires stringent procedural protections.[120] Petitioners' procedural rights were not upheld when the detainees had the burden to show that their release was justified, and received only limited review of the decision to detain.[121]

The Supreme Court then addressed the permissible length of a post-removal detention period. Noting that the Supreme Court had "reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months," The Supreme Court interpreted the detention statute to include a rebuttable presumption that detention beyond six months was not authorized.[122] After six months, the alien may be

114 *Zadvydas*, 533 U.S. at 692.
115 *Id.* at 689.
116 *Id.* at 682.
117 *Id.* at 689.
118 *Id.* at 690.
119 *Id.*
120 *Zadvydas*, 533 U.S. at 691.
121 *Id.* at 692.
122 *Id.* at 701.

detained until it is determined that his removal is unlikely in the "reasonably foreseeable future."[123]

The Supreme Court restricted its opinion to noncitizens who had already been admitted to the United States and later ordered removed.[124] Justice Breyer noted that noncitizens who had not yet gained admission to the United States "would present a very different question," because different constitutional protections apply to those on U.S. territory than those at the border.[125] The Supreme Court also left open the question of whether national security concerns or other special circumstances might allow preventative detention and heightened deference to other branches of government.[126]

In *Zadvydas*, the Court showed a willingness to undercut the plenary power doctrine due to Constitutional concerns. It emphasized the importance of affording even noncitizens with due process rights. Furthermore, it shifted the burden of proving that detention is necessary to protect public order to the state, rather than requiring a noncitizen to prove that he is not a threat. The Court found these due process rights to be so paramount that it took the unusual step of effectively rewriting the statute to require additional hearings. Although Breyer's willingness to rewrite the INA to protect these rights would come back to bite him, the Court's emphasis on the importance of procedural rights would prove influential.

iii. Demore v Kim: *Permitting Indefinite Pre-Removal Detention*

In the 2003 case of *Demore v. Kim*, the Supreme Court refused to place a constitutional limit on prolonged, pre-removal immigration detention.[127] The Supreme Court invoked and asserted the plenary power doctrine, which it had undercut in *Zadvydas*.[128] In the two intervening years, the terrorist attacks of September 11, 2001 indelibly changed the way the United States views immigration. Stringent government programs had begun to screen and detain noncitizens to ensure they did not present a terrorist threat.

Hyung Joon Kim was a South Korean national and LPR who entered U.S. at age six.[129] He was later convicted of first degree burglary, followed

123 *Id.*
124 *Id.* at 682.
125 *Id.*
126 *Zadvydas*, 533 U.S. at 695-96.
127 *Demore v. Kim*, 538 U.S. 510, 513 (2003).
128 *Id.* at 521-22.
129 *Id.* at 513.

by petty theft with priors.[130] He was detained pending removal under INA § 236(c), which requires detention of noncitizens with certain criminal convictions.[131] Kim challenged the mandatory detention statute, claiming that it violated his substantive due process rights.[132] The statute required detention without giving him an opportunity to contest it, prove that he was not a flight or safety risk, or request release on bond.[133] The district court agreed the statute was unconstitutional and ordered the Immigration and Nationality Service (INS) to hold an evidentiary hearing to determine if Kim presented a threat or a flight risk, after which he was released on bond.[134] The Ninth Circuit affirmed, and the Supreme Court granted certiorari to resolve a circuit split.[135]

The Supreme Court split 5-4, with Kennedy providing the deciding vote. Invoking the plenary power doctrine, the Court stated that Congress has near-absolute power to enact immigration laws.[136] Congress may require that noncitizens "be detained for the brief period necessary for their removal proceedings," to achieve the goals of preventing crime and ensuring that noncitizens appear at their hearings.[137] The Supreme Court then reviewed government-provided statistics.[138] The statistics showed a high rate of recidivism of previously convicted noncitizens who were released during their removal proceedings and a high rate of noncitizens failing to attend hearings after release during removal proceedings.[139] Most removal proceedings were completed in an average of forty-seven days and a median of thirty days—less time than the ninety days that the Court considered to be presumptively valid in *Zadvydas*.[140]

The Supreme Court distinguished *Zadvydas* by explaining that post-removal-period detention in that case did not serve its purpose, since Zadvydas's removal was impossible.[141] The purpose of Kim's detention, by contrast, was to ensure attendance at future removal hearings.[142] This type

130 *Id.*
131 *Id.*
132 *Id.* at 514
133 INA, *supra* note 12, § 236, 8 U.S.C. § 1226.
134 *Demore*, 538 U.S. at 514-15.
135 *Id.* at 515-16.
136 *Id.* at 521-22.
137 *Id.* at 513.
138 *Id.* at 529-30.
139 *Id.* at 518-19.
140 *Demore*, 538 U.S. at 529.
141 *Id.* at 527.
142 *Id.* at 548 (Souter, J., concurring in part and dissenting in part).

of detention, according to government statistics, is much shorter than the potentially indefinite detention that was at stake in *Zadvydas*.[143]

The Supreme Court further noted that, by conceding he was deportable, Kim forwent a hearing at which he could have argued that he was exempt from mandatory detention.[144] INA § 236(c) was related to government interest in public safety and enforcement of removal laws and not overly burdensome to someone detained only for the duration of his removal proceedings. Thus, the statute was constitutional.[145]

Demore has an important coda. In 2016—thirteen years after *Demore*—Acting Solicitor General Ian Heath Gershengorn sent the Supreme Court a letter admitting that the statistics on which the Court so heavily relied were incorrect.[146] Detention pursuant to § 236 (c) did not last "about five months"—the period that the Court found "reasonably short,"—but an average of over one year.[147]

iii. Jennings v. Rodriguez*: Unsolved Constitutional Questions*

On February 27, 2018, the Supreme Court clarified that the legality of mandatory detention without periodic review is a constitutional question. However, it remanded the case back to the appellate court for a constitutional answer. *Jennings v. Rodriguez* is a class action comprised of three subclasses of immigrants and asylum seekers who are indefinitely detained pending removal or asylum proceedings. The detainees are being held, without access to bail hearings, under three separate mandatory detention provisions of the INA. The class members have been detained for an average of one year each.[148] The Ninth Circuit had reasoned that, if the statute allowed these immigrants to be held indefinitely without an opportunity to contest their detention, this could create the "serious constitutional concerns" in *Zadvydas*.[149] To avoid this, the Ninth Circuit held that bond hearings must occur every six months.[150]

The Supreme Court reversed, holding that the Ninth Circuit had effectively rewritten the statute to require bond hearings. The Court

143 *Id.* at 528-29.
144 *Id.* at 513-14.
145 *Id.* at 513.
146 Torrey, *supra* note 67, at 172-73.
147 *Id.* at 178.
148 *See Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting).
149 *Rodriguez*, 804 F.3d at 1082.
150 *Id.*

reasoned that the canon of constitutional avoidance did not permit the Ninth Circuit to rewrite a statute to avoid a Constitutional question. Justice Alito, writing for the majority, highlighted one of respondent's arguments to show how the statute alone could not be read to require bond hearings. If detention authority ends for asylum seekers under INA §§1225(b)(1) and (b)(2), respondents had argued that noncitizens can be detained only under §1226(a). However, that section requires the Attorney General to issue a warrant for the alien's arrest. This would mean that the government could detain an alien at the border without a warrant, but the Attorney General would have to issue a warrant to continue detaining the alien in order to begin removal proceedings after he entered U.S. territory. To Justice Alito, this "makes little sense."[151] Having found no statutory right to periodic bond hearings, the Court remanded the case to the Ninth Circuit for decision on the Constitutional claims. Alito also asked the Ninth Circuit to revisit whether a class action is the appropriate vehicle to consider the fact-specific, due process claims of detained immigrants. Quoting prior decisions, he noted, "'[D]ue process is flexible . . . and it 'calls for such procedural protections as the particular situation demands.'"[152]

Justice Breyer read a blistering dissent from the bench, comparing holding of immigrants without bond hearings to slavery.[153] Reciprocating Alito's adamant tone, Justice Breyer, joined by Justices Sotomayor and Ginsburg, found absurdities in the majority's opinion. First, many of the detained noncitizens were eventually admitted to the United States, including two-thirds of the asylum seekers.[154] Second, the asylum seekers would have received bail hearings if they had been taken into custody in the United States rather than at the border, meaning they would have greater due process rights if they had entered the country illegally than if they had presented themselves legally at the border. Noting that "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries," Justice Breyer lambasted the Government's legal fiction that the detainees had no due process rights since they were not held "within" the United States.[155] He would have read the statute to require bail hearings to avoid the "serious constitutional problem" he found years ago in *Zadvydas*.

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151 *Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting).

152 *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

153 *Jennings*, 138 S. Ct. at 853.

154 *Id.* at 860 (Breyer, J., dissenting).

155 *Id.*

In the short term, *Jennings* is a tragedy for the thousands of immigrants and asylum seekers who will remain indefinitely detained until the case is resolved. It remains to be seen, however, whether *Jennings* will bolster rights protections for immigrants in the long term, and whether it will bring U.S. immigrant detention practices in line with international human rights standards.[156] In *Jennings*, the Supreme Court signaled a willingness to continue eroding the plenary power doctrine.[157] By remanding the case, the Court effectively affirmed that the power of the other two branches to make immigration law is not absolute, but subject to constitutional constraints. While the Court will not tolerate judicial rewriting of immigration statutes, it is willing to review them. The plenary power doctrine has thus been weakened, but is not dead yet.

The Supreme Court's decision emphasizes the importance of individual procedural rights, even for noncitizens. By holding that the matter involves a Constitutional question, the Court has reiterated its view that the Constitution requires that noncitizens have due process rights to challenge their detention. Despite the Government's argument to the contrary, the majority and dissent concur that noncitizens have due process rights. Ironically, by holding that the case could not be resolved on statutory grounds without consideration of constitutional issues, and remanding the case to the Ninth Circuit for consideration of constitutional claims, the Court has reinforced the importance of constitutional procedural rights for immigrants in detention. By asking the Ninth Circuit to decide if a class action is the appropriate vehicle for due process claims, the Court reinforces the importance of these individual procedural rights.

However, with its nebulous note that due process is flexible and contextual, the majority left courts some flexibility to determine what due process means in the particular context of immigration detention. Both the majority and the dissent query whether immigrants and asylum seekers detained at the border versus inside the country should receive the same due process rights. As noted above, the United States has always held that non-refoulement applies inside the country, but not at or beyond the border—although it has extended non-refoulement extraterritorially in practice. *Jennings* may decide the contours of the related rights of immigrants and asylum seekers who are detained for trying to enter the country.

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156 As of this writing, the Ninth Circuit has remanded the case back to the District Court for consideration of procedural matters. *See Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018).

157 Justice Thomas found the Court did not have jurisdiction over the case because of the plenary power doctrine. *Jennings*, 583 U.S. at 852-59 (Thomas, J., concurring in Parts I and III-VI of the opinion and in the judgment).

The Supreme Court's decision in *Jennings* reflects the dilemma that confronted it in *Zadvydas* and *Demore*. In general, the Court does not like to rewrite statutes, nor to allow other courts to do so. Justice Breyer faced strident dissent when he inferred a six-month limit to post-removal period detention in *Zadvydas*, and he could not muster a majority in *Jennings* to allow him to extend the relevant INA statutes beyond the four corners of their text. However, both the majority and the dissent had to strain to divine Congressional intent when deciding the case, due to poor drafting by Congress. Had Congress specified maximum post-removal detention limits, or specified conditions under which immigrants in mandatory detention may contest their detention, their intent would have been clear.

Because immigration is such a fraught political issue, the INA has not been substantially revised since the mid-1990s, and interpretation has been left to courts.[158] Congress seems unlikely to revise the statue if courts will not step in. While Congress and the courts deliberate, the liberty of thousands of immigrants and asylum seekers is at stake.

B. Australia

Migration has been a highly salient political issue in Australia for decades. Australia has developed two pervasive migrant detention systems: an onshore system for migrants who have entered the Australian mainland, and an elaborate offshore system designed to keep migrants out.

Australia is the only advanced industrialized democracy not to have a national human rights instrument. The Australian constitution does not include provisions for individual rights. Australia, however, is a signatory to most major international human rights treaties, including the Refugee Convention and the International Covenant on Civil and Political Rights (ICCPR). It is widely recognized as upholding political freedoms and civil rights within its borders.

Australian courts have been reluctant to intrude upon the government's powers to control immigration. The courts have often refused to reach international human rights issues in migration cases, instead deciding them on narrow, statutory grounds. The courts have placed some limits on indefinite detention of migrants and transferring migrants to places where

158 Since *Jennings*, the Supreme Court decided an additional case on § 1226, holding that aliens who are not immediately detained by immigration officials upon release from criminal custody remain subject to mandatory detention and are not entitled to a bond hearing to determine if they should be released pending a decision on their status. *See Nielsen v. Preap*, No. 16-363, 586 U.S. ___ (U.S. Mar. 19, 2019). The case was decided on statutory interpretation rather than constitutional grounds.

their international human rights are likely to be violated. The Australian courts' commitments to upholding international human rights standards are, however, inconsistent at best.

1. Australian Migrant Detention Programs

i. Onshore Detention

Any noncitizen in Australia without a valid visa can be detained pending issuance of a visa or removal.[159] Detention is mandatory for all who enter or are present in the country without a valid visa while their claim to remain in Australia is being processed.[160] Australia also permits noncitizens to be detained indefinitely, pursuant to § 196 of the Migration Act of 1958.[161]

Due to this strict mandatory detention policy, noncitizens and asylum seekers make up a high percentage of all people in detention in mainland Australia. In 2016-2017, 27.1% of all people in Australian detention were detained for arriving by boat, 20.2% were detained for overstaying their visas, 47.5% because of visa cancellation, and 4.5% of those detained arrived in Australia by plane without a valid visa.[162]

ii. Al-Kateb *and* Al-Khafaji*: Upholding the Legality of Indefinite Detention*

The High Court has repeatedly upheld the constitutionality and legality of indefinite mandatory detention of noncitizens. The Court has held that Australia's mandatory detention system is constitutional because detention is not penal or punitive and therefore does not trigger Australia's constitutional provisions regarding punitive actions.[163] Two consolidated

159 Australian Human Rights Commission, *A Last Resort? Summary Guide: The Facts About Immigration Detention in Australia* (2004), https://www.humanrights.gov.au/publications/last-resort-summary-guide-facts-about-immigration-detention-australia.

160 *Id.*

161 *Migration Act 1958*, (Cth) s 196 (Austl.): ("An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is: removed from Australia under section 198 or 199; or an officer begins to deal with the non-citizen under subsection 198AD(3): or deported under section 200; or granted a visa. To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen. To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.").

162 *Statistics on People in Detention in Australia*, REFUGEE COUNCIL OF AUSTRALIA (Jan. 28 2018), https://www.refugeecouncil.org.au/getfacts/statistics/aust/asylum-stats/detention-australia-statistics/.

163 *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64.

cases, *Al-Kateb v Godwin*[164] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*, further held that the Migration Act requires detention to continue until an applicant receives a visa or is removed, even if that detention is indefinite.[165] Read literally, the Act requires that detention must continue until an applicant receives a visa or is removed.

Plaintiff Al-Kateb was stateless, having been born in Kuwait to Palestinian parents. He arrived in Australia by boat in December 2000 and was detained under the Migration Act. Six months later, Al-Kateb asked to leave for Kuwait or Israeli-occupied Gaza. After three years, Australia still could not find a country to accept him. Plaintiff Al-Khafaji was an Iraqi national who fled to Syria in 1980. He was detained upon arrival in Australia in 2000. Australia's Department of Immigration found Al-Khafaji to have a well-founded fear of political persecution in Iraq. However, Australia refused to grant him a protection visa pursuant to the 1999 amendments to the Migration Act. The amendments removed Australia's protection obligations where the applicant could have sought protection in a third country without risk of refoulement—here, Syria. After exhausting his claims, Al-Khafaji languished in detention pending removal to Syria. In 2002, he petitioned for habeas corpus relief.[166]

In the 4-3 decision, the High Court held that § 196 unambiguously means that a noncitizen must continue to be detained until he receives a visa or is removed from Australia.[167] The Court also held that Al-Kateb's detention was administrative and not punitive, and thus constitutional.[168] The Australian Constitution states that punitive detention is permissible only in circumstances of a court finding of criminal guilt against a person.[169] The Australian parliament had created legislation with the clear intent of permitting lifelong detention.[170] The plaintiffs could legally and constitutionally remain in detention—even if their detentions were indefinite or lifelong.[171]

Thus, like the Supreme Court in *Demore* and *Jennings*, the Australian High Court has held to a strict statutory interpretation of Australia's mandatory detention statutes. In doing so, both countries have deferred to the state's power to regulate its borders by detaining noncitizens. Unlike

164 *Al-Kateb v Godwin*, [2004] HCA 37.
165 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38.
166 *Id.* ¶ 34.
167 *Id.* ¶¶ 12, 18, 22.
168 *Id.* ¶ 4.
169 *Australian Constitution*, s III.
170 *Al-Kateb v. Godwin* [2004] HCA 37, ¶ 19.
171 *Id.*

the Supreme Court, however, the Australian High Court has not held that constitutional claims, like the due process rights of noncitizens, must be considered in cases involving its Migration Act.

iii. Offshore Detention

Australian courts have seen frequent cases involving migrant detention as migration has increased in recent years. Australia's outlying territories are popular destinations for migrants and human smugglers coming from Southeast Asia.[172] Christmas Island, for example, lies only 360 kilometers south of Java. In the early 2000s, the Australian parliament adopted the so-called "Pacific Solution" to stop migration flows.[173] This program was explicitly modeled after the United States' "Caribbean Solution" that was deemed legal in *Sale*.[174] Parliament designated most of Australia's outlying territories to be "excise offshore places."[175] Its intent was that a noncitizen who entered Australia unlawfully through these territories would never be allowed to submit a valid application for an Australian visa without express authorization from the Minister of Immigration.

The legislation also allowed Australia to send offshore entry persons to third countries for processing of their asylum claims.[176] Under international law, third-country processing of asylum seekers does not violate the principle of non-refoulement if conditions in the third country are humane and no danger of refoulement or maltreatment exists there.[177] The intent of the new legislation was keep migrants arriving at excise offshore places from receiving refugee status in Australia, thereby deterring migration.

Australia soon established offshore processing programs for asylum seekers on Nauru and Papua New Guinea ("PNG"). Asylum seekers would remain in these countries until their asylum claims could be adjudicated –

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172 *See* Jill I. Goldenziel, *International Decision:* Pllaintiff M68/2015 v. Minister for Immigration and Border Protection, 110 AM. J. INT'L L. 547, 574-48 (2017).

173 *Id.* at 548.

174 Jill I. Goldenziel, *When Law Migrates: Refugees in Comparative International Law*, *in* COMPARATIVE INTERNATIONAL LAW 407 (Paul B. Stephan et al. eds., 2018).

175 *Id.*

176 *Id.*

177 United Nations High Commission for Refugees, *Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey As Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept* 2 (Mar. 23, 2016), refworld.org/docid56f3ee3f4.htm.

effectively subjecting them to indefinite detention.[178] Australia's Migration Act does not apply extraterritorially, so Australian law did not apply as soon as migrants entered these third countries. Accordingly, their asylum claims would be processed under the domestic laws of the third countries. Noncitizens may apply for certain types of visas to Australia, but not protection visas. They may, however, seek asylum in PNG and Nauru. Australia spends about $400,000 per refugee, per year to house them on Nauru and PNG.[179]

Numbers of irregular migrants to Australia plummeted during the initial years of the Pacific Solution.[180] The program was briefly suspended in 2008 but reinstated following an influx of asylum seekers in 2014.[181] Meanwhile, Australia began to promote its resettlement program as the proper, legal way to seek asylum in Australia. Since 2005, Australia has resettled approximately 6,000 refugees per year, plus additional humanitarian resettlement.[182] In 2013-2014 Australia resettled 12,000 refugees.[183]

Conditions in Australia's offshore refugee processing centers have been harshly criticized. Amnesty International, Human Rights Watch, and UNHCR have derided the camps as prison-like, overcrowded, unsanitary, and dangerous.[184] Physical abuse, sexual assault, and rape have been repeatedly documented.[185] Mental health problems and suicide attempts are frequent.[186] Almost 2,000 asylum seekers and refugees have been effectively detained for years while UNHCR has processed their resettlement claims.[187]

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178 Refugee Convention, *supra* note 4; 1967 Protocol, *supra* note 5. Australia, Nauru, and PNG are all parties.

179 *The True Cost of Australia's Refugee Policies*, UNICEF (Sept. 13, 2016), https://www.unicef.org.au/blog/news-and-insights/september-2016/the-true-cost-of-australias-refugee-policies.

180 PARLIAMENT OF AUSTRALIA, BOAT ARRIVALS AND BOAT "TURNBACKS" IN AUSTRALIA SINCE 1976: A QUICK GUIDE TO THE STATISTICS (Jan. 17, 2017), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks.

181 Ariane Rummery, *Australia's "Pacific Solution" Draws to a Close*, UNHCR (Feb. 11, 2008), http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=47b04d074&query=australia.

182 Maria O'Sullivan, *Questioning the Australian Refugee Model*, REFUGEES DEEPLY (Jan. 9, 2018), https://www.newsdeeply.com/refugees/community/2018/01/09/questioning-the-australian-refugee-model.

183 *Id.*

184 *Appalling Abuse, Neglect of Refugees on Nauru,* HUMAN RIGHTS WATCH (Aug. 2, 2016), https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru

185 *Id.*

186 Petra Cahill, *Australia Houses Migrants in 'Degrading' Offshore Detention Camps*, NBC NEWS (Feb. 2, 2017), https://www.nbcnews.com/news/world/australia-houses-migrants-degrading-offshore-detention-camps-n715761.

187 *Id.*

Australia has recently been reported to the International Criminal Court because of conditions in the detention centers.[188]

Asylum seekers have mounted legal challenges to the Pacific Solution to little avail. The High Court has held that Australia owes some degree of protection to asylum seekers detained in excised offshore places similar to that of asylum seekers found on the Australian mainland, including procedural fairness and access to courts.[189] It has also held that Australia owes some duty of care to migrants on Nauru and PNG, whether inside or outside of the detention centers.[190] The High Court has also invalidated Malaysia as a proper location for third-country processing because of the risk that migrants will not be treated according to human rights standards.[191] Beyond this, the High Court has consistently rejected challenges to migration programs.[192] The High Court has also consistently refused to reach migrants' claims under international human rights law or international refugee law, and instead has interpreted domestic law strictly to avoid reaching those claims.[193]

iv. M69 *and* M70*: Limits on Choice of Third-Country Processing Countries*

In July 2011, Australia signed an agreement with Malaysia to send offshore entry persons there for processing.[194] Malaysia has not signed the Refugee Convention and did not recognize the status of "refugee" in its domestic law.[195] Two asylum seekers who had entered Australia via Christmas Island brought suits that challenged the legality of this program before it went into place.[196]

The Court held that, pursuant to § 198A of the Migration Act, the Minister cannot designate a third-country processing location for asylum seekers unless that country is legally bound by international or domestic law to: 1) provide asylum seekers with access to effective procedures for

188 Rebecca Hamilton, *Australia's Refugee Policy is a Crime Against Humanity*, FOREIGN POLICY (Feb. 23, 2017), http://foreignpolicy.com/2017/02/23/australias-refugee-policy-may-be-officially-a-crime-against-humanity/.

189 *Plaintiff M69/2010 v Commonwealth of Australia & ORS* [2010] HCA 41 (Austl.).

190 *Id.*

191 *Id.*

192 Goldenziel, *supra* note 174, at 405.

193 *See infra* Part IV and accompanying text.

194 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ¶ 8 [2011] HCA 32 (Austl.).

195 *Id.* ¶ 28.

196 *Id.*; *Plaintiff M106/2011 by his Litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Austl.).

assessing their protection needs, 2) protect asylum seekers pending their refugee status determinations; 3) protect those granted refugee status pending resettlement or voluntary return to their country of origin.[197] The country must also meet certain human rights standards.[198] Malaysia has not signed the Refugee Convention and is known for many human rights violations.[199] Therefore, Australia could not ensure that Malaysia would give asylum seekers the necessary legal and human rights protections. Sending asylum seekers to Malaysia, then, could violate Australia's non-refoulement obligations. The Minister of Immigration's designation of Malaysia as a place where it would send asylum seekers was, therefore, invalid.

M69 shows the Australian court's concern with the importance of procedural rights in cases involving migration and detention. The High Court held that Malaysia was not an appropriate place for third-country processing because Australia could not guarantee that asylum seekers would have access to effective procedures for assessing their protection needs, or appropriate protections pending their refugee status determinations. In *M69*, the High Court also showed an unusual willingness to consider the plaintiffs' international human rights claims. Perhaps it felt more comfortable doing so than in other cases because it was ruling on a hypothetical program, rather than on the legality of an actual one.

v. CPCF: Upholding the Legality of Detention at Sea

In a highly criticized decision, the High Court held in 2015 that Australia's month-long detention of 157 Sri Lankan asylum seekers aboard a windowless boat and subsequent transfer to Nauru were legal under the Migration Act and the Maritime Powers Act.[200] The plaintiff and 156 other Sri Lankan asylum seekers were on an Indian-flagged boat when they were intercepted by Australian border protection and detained.[201] When the Indian ship became damaged, passengers were transferred to an Australian ship. The plaintiff was not asked whether he claimed asylum or the right of

197 *See supra* note 196.

198 *Id.*

199 HUMAN RIGHTS WATCH, https://www.hrw.org/asia/malaysia (last visited Feb. 19, 2020); AMNESTY INTERNATIONAL, https://www.amnesty.org/en/countries/asia-and-the-pacific/malaysia/ (last visited Feb. 19, 2020); FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2019/malaysia (last visited Feb. 29, 2020) (giving Malaysia a "freedom score" of only 52/100.

200 *CPCF v Minister for Immigration and Border Protection & ANOR* [2015] HCA 1 (Austl.). For criticism, see *Despite Court Ruling on Sri Lankans Detained at Sea, Australia Bound by International Obligations*, UNHCR (Feb. 4, 2015), http://www.unhcr.org/54d1e4ac9.html.

201 *CPCF v Minister for Immigration and Border Protection & ANOR* [2015] HCA 1 (Austl.).

non-refoulement. The Australian ship sailed to India, and the passengers were detained until the Minister decided that he could not secure the passengers' release within a reasonable time. Upon return to Australia, the plaintiff and the other passengers were detained. The plaintiff alleged that his detention was unlawful and claimed damages for wrongful imprisonment.[202]

The High Court held that the detention was lawful and that the Maritime Powers Act does not require that the plaintiff receive procedural fairness.[203] The detention was lawful even though the plaintiff was detained in implementation of a decision by the Australian Government, without independent consideration of whether detention should have occurred at all. More broadly, Australia's programs of interdiction at sea and third-country processing were legal so long as Australia was bound to ensure the asylum seekers' safety in any country to which they were transferred. The Court dismissed the asylum seekers' claims of false imprisonment.[204] The Court did not reach the question of Australia's non-refoulement obligations, although several justices raised concerns about summary return.[205]

Once again, the High Court hewed to the text of the statutes involved. It did not reach the broader human rights claims asserted by the plaintiff. Instead, it interpreted the bare minimum of what the statutes required, deciding the case accordingly. Other High Courts' emphasis on procedural rights are not echoed here.

vi. S99*: Duty of Care Owed to Migrants in Third-Country Detention*[206]

The Australian High Court has been reluctant to reach human rights claims in statutory cases. However, loopholes exist for consideration of human rights claims in Australian courts. In the 2004 case of *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*, the Court held that an inmate may have had a civil cause of action to challenge conditions in a detention center, even though the Migration Act authorized the detention regardless of the center's conditions.[207] In 2016, the High Court referred the urgent case of Plaintiff S99 for expedited

202 *Id.* ¶ 59.
203 *Id.* ¶ 146.
204 *Id.* ¶ 146.
205 *Id.* ¶ 219 (Crennan, J.); ¶ 297 (Kiefel, J.); ¶ 327 (Gageler, J.).
206 *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 (Austl.).
207 *Behrooz v Sec'y of the Dep't of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.

consideration by the Federal Court of Australia.[208] *S99* paved the way for migrants to sue Australia using tort law.

Plaintiff S99 is from an African country. At age seven, she was subjected to an unspecified medical procedure which has caused her ongoing medical and gynecological issues. She also suffers from seizures that began when she witnessed her sister's murder at age 16. At the time, she was married to an abusive 45-year-old man with other wives, and she fled to her mother's home after becoming pregnant. Her first husband tried to force her to return after she divorced and remarried. S99 fled in fear of being stoned, first to Indonesia and then by boat to Australia. Upon arrival in 2013, she was sent to the Nauru Regional Processing Centre (RPC).[209]

In November 2014, S99 received refugee status and was released from detention pending resettlement. She was allowed to leave the detention center at will, although forbidden from leaving Nauru. Throughout this time, Australia paid for plaintiff's food, lodging, healthcare, and other services. On January 31, 2016, during or shortly after a seizure, S99 was raped and became pregnant. Because abortion is illegal in Nauru, the Australian Minister of Immigration offered to take S99 to a third country for an abortion. She agreed to go, but was not told she was being taken to PNG.[210]

Upon arrival, S99 refused to have an abortion in PNG. Although relief is ordinarily sought in Australian courts after a breach of duty occurs, S99 preemptively filed suit against Australia for negligence. She argued that a safe and legal abortion could not be obtained in PNG, and so she feared a breach of Australia's duty of care toward her.[211]

The Court held that Australia's duty of care to the plaintiff required the state to obtain a safe and lawful abortion for her. The Australian court applied a seventeen-factor test to determine the existence of a duty of care. Of note, the applicant had no means of survival independent of the services paid for or provided by Australia. By procuring medical professionals to assess the best course of treatment, including whether and where she should receive an abortion, facilitating her transfer from Nauru, procuring medical professionals and facilities in PNG, obtaining travel documents for the patient, and other actions, the Australian government had created a "specific reliance" on it by plaintiff to procure for her a safe and legal abortion.[212]

208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*

Procuring the abortion in PNG would breach the state's duty of care to S99. Abortion is a criminal offense in PNG, creating a risk that S99 could be prosecuted for having an abortion there. Furthermore, S99 required a high standard of specialized medical care unavailable in PNG. Any reasonable person in the Minister of Immigration's position could foresee that plaintiff would suffer mental or physical harm if she had the abortion in PNG, making relief from a potential breach of the duty of care appropriate.[213]

S99 marked the first case in Australian history where the Court held that Australia owed a specific duty of care to people in its third-country detention programs.[214] The Court had previously held that Australia owed certain duties of care to those detained onshore, but had not extended such duties abroad. In determining that a duty of care existed and its extent, the Court assessed the degree of control the government had over the plaintiff along with her vulnerability.[215] The fact that the plaintiff was awaiting resettlement elsewhere did not defeat her claim.

Prime Minister Peter Dutton chose not to appeal the Federal Court's decision, stressing the "specific circumstances relating to this one case."[216] By doing so, he also avoided a potentially averse High Court precedent. *S99*, bolstered by the High Court's prior holding that civil remedies to contest conditions of detention are available, opens the door to other tort cases involving breach of the duty of care in the detention context. This plaintiff's circumstances may be unique, but the principles inherent in deciding her case have broad application. The case opens a route for migrants in detention in Australia to adjudicate human rights claims without requiring the courts to interpret international human rights law, which courts have been reluctant to do. Australian courts can decline to reach international human rights law, but they cannot avoid their own tort law. All migrants in Australia's third-country processing system are dependent on Australia to pay for their housing, food, and other basic needs. Whether this alone would create a "duty of care," absent the specialized circumstances of plaintiff S99, remains to be seen.

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213 *Id.*

214 Colette Mintz, *Australian Court Restrains Government from Breaching Duty of Care to Pregnant Refugee in Nauru*, FORCED MIGRATION FORUM (Feb. 8, 2017), https://forcedmigrationforum.com/2017/02/08/australian-court-restrains-government-from-breaching-duty-of-care-to-pregnant-refugee-in-nauru/.

215 *Behrooz v Sec'y of the Dep't of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.

216 Monique Ross, *S99 Abortion Decision: Peter Button Will Not Challenge Decision Blocking Termination in PNG*, ABC NEWS (May 10, 2016, 7:19 AM), https://www.abc.net.au/news/2016-05-10/government-will-not-appeal-federal-court-s99-abortion-ruling/7402364.

vii. M68*: Upholding the Legality of the Offshore Processing System*

In 2016, the High Court of Australia upheld Australia's third-country processing program in the case of *M68/2015 v Minister for Immigration and Border Protection*.[217] The lead plaintiff, a Bangladeshi woman, had been interdicted at sea. She was taken to Christmas Island, where she claimed asylum. Lacking a valid visa, she was transferred to a processing center in Nauru, where Australia paid for her stay. Under Nauruan law, and the terms of the RPC visa later procured for her by Australia, she could leave the RPC with official permission, but would not be able to leave the RPC or Nauru freely unless she became a recognized refugee.

In August 2014, the plaintiff was brought to Australia for medical treatment that was unavailable on Nauru, and gave birth. Australian authorities planned to send her and her baby back to Nauru against her will. Plaintiff, representing 267 other similarly situated asylum seekers, sought an injunction to stop Australia from removing her to Nauru if she would be detained at the RPC, and an order to stop Australia from continuing to pay the contractors who run the processing centers.[218] The plaintiff sought an additional declaration that Australian law did not authorize her detention, nor was it a valid use of power under the Australian Constitution, and therefore, that the conduct of Australian officials related to her detention was unlawful. The contested conduct included Australia's financial and "effective control" over constraints on the plaintiff's liberty.[219]

On June 30, 2015, the Australian Parliament adopted legislation retroactively authorizing the governmental actions contested by the plaintiff.[220] The amendment empowered Australia to take any action or "make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions" abroad.[221] Just before the hearing, Nauru also announced an "Open Center Arrangement" that would grant asylum seekers freedom of movement at all times.[222] This would make the plaintiff less likely to be detained upon her return.

The Court held that Australia had the legal authority to remove the plaintiff from Australia to Nauru, detain her, and participate in her detention

217 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (Austl.).
218 *Id.*
219 *Id.*
220 *Migration Amendment (Regional Processing Arrangements) Bill 2015* (Cth) (Austl.).
221 *Id.*
222 *Id.*

in Nauru.[223] In the Court's view, the plaintiff's detention ended the moment she was transferred into Nauruan custody.[224] While Australia's subsequent role in her detention "was materially supportive, if not a necessary condition of Nauru's physical capacity to detain the plaintiff," the Court held that the plaintiff was detained by Nauru, not Australia.[225] Nauruan law authorized the RPC's detention conditions, including restrictions on the plaintiff's freedom of movement, and Australia had no authority over these laws.[226] The Court also rejected the claim that the RPC regime is punitive, because its primary purpose was to facilitate removal of unauthorized maritime migrants from Australia.[227] The court explained, "The detention in custody of an alien, for the purpose of their removal from Australia, did not infringe ... the Constitution because the authority, limited to that purpose, was neither punitive in character nor part of the judicial power . . . ."[228] The Court did hold that Australia's role in third-country detention and processing had some limits.[229] Under the Migration Act, Australia may only participate in a detention regime if and for as long as it serves the purpose of processing asylum seekers.[230]

If plaintiff M68 had prevailed, her case would have brought into doubt the constitutionality and legality of Australia's offshore processing system. The High Court left open the question of what it means for a detention program to "serve the purpose of processing," and to be "reasonably necessary for the purpose of processing," issues which will surely be adjudicated in years to come.[231]

UNHCR, human rights groups, and many Australian voters condemned the *M68* decision.[232] Allegations of unsanitary conditions and sexual

223 *Plaintiff M68/2015*, *supra* note 217, ¶ 31.
224 *Id.*
225 *Id.* ¶ 39.
226 *Id.* ¶ 34.
227 *Id.*
228 *Id.* ¶ 40.
229 *Plaintiff M68/2015*, *supra* note 217.
230 *Id.* ¶ 46.
231 *Id.*
232 *See, e.g.*, Nicholas Flack, *Detaining Asylum Seekers and Refugees in Offshore Detention Centres Subject to International Obligations, Despite High Court Decision*, U.N. INFORMATION CENTRE (Feb. 5, 2016), http://un.org.au/2016/02/05/detaining-asylum-seekers-and-refugees-in-offshore-detention-centres-subject-to-international-obligations-despite-high-court-decision/; Daniel Hurst & Ben Doherty, *High Court Upholds Australia's Right to Detain Asylum-Seekers Offshore*, THE GUARDIAN (Feb. 2, 2016), http://www.theguardian.com/australia-news/2016/feb/03/high-court-upholds-australias-right-to-detain-asylum-seekers-offshore.

harassment and assault of women and children on Nauru continue.[233] Under the holding in *CPCF*, if conditions in Nauru should be found unsafe, and especially if Nauruan authorities were unable or unwilling to prevent maltreatment of asylum seekers, returning them to Nauru would violate Australian and international law, including the Refugee Convention's prohibition of non-refoulement and the Convention Against Torture.[234] Some efforts have since been made to challenge the RPC program in Nauruan courts under the Nauruan Constitution, which contains broader human rights provisions than the Australian Constitution.

Once again, the High Court avoided direct discussion of Australia's commitments under the Refugee Convention and human rights treaties.[235] The *M68* case may also have negative implications for interpretation of the "effective control" principle common in international human rights cases. The High Court essentially ruled that Australia may legally contract out of "effective control" over an asylum seeker as soon as he enters Nauru, even if it pays for his detention and has step-in rights if something goes wrong.[236] This decision could set a precedent for Australia and other countries to contract out of their human rights obligations by relinquishing effective control over people and situations to contractors who are not bound by the same human rights standards. However, given the ECtHR's more expansive view of non-refoulement, and UNHCR's condemnation of Australia's actions, Australia's interpretation is likely to be contested.

M68 also seems to undercut the holding in *S99*. In *S99*, the Court held that Australia has a duty of care to the plaintiff, noting that it paid for the expenses of her day-to-day life on Nauru.[237] In *M68*, the Court held that the plaintiff was Nauru's responsibility, despite Australia's step-in rights and financing of her stay.[238] The holding may narrow *S99* to the "specific reliance" on Australia created by plaintiff *S99*'s particular circumstances. *S99* may still offer hope for migrants to challenge the conditions of their detention on Nauru, but perhaps only in cases where a "specific reliance" exists.

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233 *See, e.g.*, Stephanie Anderson, *Nauru Police Launch Investigation after Claims Six-Year-Old Refugee Sexually Assaulted*, AUSTRALIAN BROADCASTING CO. (Jan. 7, 2016), http://www.abc.net.au/news/2016-01-07/refugee-child-allegedly-sexually-abused-on-nauru/7073452.

234 *UN Finds Australia's Treatment of Asylum Seekers Violates the Convention Against Torture*, HUMAN RIGHTS LAW CENTRE (Mar. 9, 2015), http://hrlc.org.au/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture/.

235 Goldenziel, *supra* note 7.

236 *See Plaintiff M68/2015*, *supra* note 217.

237 *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 (Austl.).

238 *See Plaintiff M68/2015*, *supra* note 217.

viii. S195*: Upholding the Legality of the Regional Processing Program*

Shortly after the *M68* decision, the PNG Supreme Court held that Australia's detention program on Manus Island violated the PNG constitution's right to personal liberty.[239] The PNG Court found that 898 asylum seekers at the Manus RPC were being detained indefinitely, without processing, under inhumane conditions.[240] After the center closed on May 2016, the asylum seekers remained in legal limbo for a year and a half. In this context, an asylum seeker moved to challenge the entire regional processing system.[241]

Plaintiff *S195* was an Iranian national who arrived in Australia via Christmas Island in 2013 and was taken to Manus Island. While in custody, the plaintiff witnessed a murder, for which he feared reprisals. After his refugee status was denied, the relevant PNG minister detained him pending removal. Iran refused to repatriate him, and he remained in custody for years.[242]

After the PNG Supreme Court declared Australia's detention scheme to be illegal in 2016, the plaintiff challenged the legality of Australia's actions related to the detention program, including his own detention. He argued that the Australian Constitution does not permit Australia to authorize or participate in activity in another country that is unlawful under that country's domestic laws. He further argued that the effect of the PNG court decision rendered the entire regional processing arrangement to no longer meet the definition of "arrangement" under the Australian Migration Act, making Australia's support of the program illegal.[243]

The High Court held that the Australian legislative and executive branches were not constitutionally required to conform to another country's domestic laws. Quoting *M68*, the Court reiterated that "Executive Government action under Australian law or under the law of a foreign country . . . does not determine whether or not that action within the scope of the statutory capacity or authority conferred by [§ 198AHA of the Migration Act]."[244] The PNG Supreme Court held only that the treatment of migrants at the Manus RPC, and possibly the bringing of migrants to the

239 *Belden Norman Namah v Hon. Rimbink Pato*, SCA No. 84 (Apr. 26, 2016) (Papua New Guinea) [hereinafter the Namah Decision].

240 *Id.*

241 *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31.

242 *Id.*

243 *Id.*

244 *Id.* ¶ 27 (quoting *M68*, *supra* note 217).

RPC, contravened the PNG constitution, but it did not hold that Australia and PNG's entry into the regional resettlement regime were unconstitutional, beyond the power of the PNG executive and legislative branches, or otherwise contravened PNG law.[245] Thus, the regime remained an "arrangement" pursuant to the Migration Act, and Australia's actions under the regime were constitutionally and legally valid under Australian law.

After *M68*, in 2017, Australia paid USD $55.9 million to settle a class action lawsuit with 1,300 asylum seekers for false imprisonment and negligence related to their detention on Manus Island even though it refused to concede any guilt.[246] Observers noted that Australia may have wished to avoid a trial in which allegations of unsanitary conditions, violence, abuse, and poor shelter would have been made, as well as evidence about several allegedly preventable deaths.[247] However, most of these allegations have already been well publicized, so Australia likely did not want the legality of its entire offshore processing scheme at stake in court. It may have been easier for Australia to settle the case than it be to deal with challenges to the regional processing scheme on Nauru if the suit had succeeded, given similar allegations of maltreatment there. Australia continues to claim that the PNG government is responsible for detainees on its soil, and for complying with relevant international human rights treaties regarding their treatment. Australia alone, however, funded the Manus Island facility and may have maintained effective control over its operations.[248]

Australian High Court jurisprudence on migration detention reveals several trends. First, the Australian High Court has decided cases narrowly, based on the statutory text of the Migration Act and other relevant statutes. The Court has been reluctant to reach international human rights claims, except in the *M69*, where it was asked to prospectively bar a program instead of striking down an existing one. Second, the High Court generally defers to the state's power to enact immigration laws.[249] Australia has no human rights instrument or constitutional provisions involving detention that might temper these immigration laws, and the court's holding that immigration is administrative and not punitive means these cases do not implicate the criminal code. Thus, the Australian parliament has more power over immigration than parliamentary bodies in the United States or many

245 *Id.* ¶ 26.

246 Grant Wyeth, *Australia Settles $70 Million Suit with Detained Asylum Seekers*, THE DIPLOMAT (Sept. 8, 2017), https://thediplomat.com/2017/09/australia-settles-70-million-suit-with-detained-asylum-seekers/.

247 *Id.*

248 *Id.*

249 *Id.*

European states. Third, Australian courts recognize some procedural rights for migrants, including the right to challenge conditions of detention or Australia's duty of care to migrants.[250] In *M69*, it also recognized that third-country processing states must uphold migrants' procedural rights. However, the Australian High Court places less of an emphasis on the procedural rights of migrants than U.S. and European Courts.[251] While migrants to Australia must have the opportunity to assert asylum claims, they have little right to challenge their detention. Whether *S99* will spur creative tort claims against conditions of detention, or that reach the fact of detention itself, remains to be seen.

The UN Human Rights Committee ("HRC") has repeatedly found Australia's detention programs to be arbitrary, in violation of international law.[252] For example, in 1997, in the landmark case of *A v Australia*, the HRC found that Australia's prolonged and indefinite mandatory detention constitutes arbitrary detention, in violation of the ICCPR.[253] The case involved a Cambodian man who arrived in Australia by boat and was detained with his family for four years until his wife finally received refugee status. Australia rejected the Committee's interpretation of the ICCPR and refused to compensate A or his family. Interestingly, Australia has quietly allowed almost all of the claimants in HRC cases to remain in the country. As in the United States, this reveals a say-do gap between Australia's rhetoric on migration and its policies, and perhaps, a discomfort with its official stance.

C. Europe

1. European Migrant Detention Programs

Detention in the EU is governed by the domestic laws of its individual member-states, which have varying standards and definitions of detention. For this and other reasons, reliable statistics on detention in "Europe" are

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250 *Id.*

251 *Id.*

252 *See, e.g.*, *Baban v Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (Aug. 6, 2003) (holding detention of an Iraqi-Kurd asylum-seeker whose refugee claim was rejected was arbitrary and was not given the opportunity for judicial review); *FKAG et al. v Australia*, Communication No. 2094/2011, U.N. Doc. CCPR/C/108/D/2094/2011 (Aug. 20, 2013) (holding the continued detention of refugees who allegedly presented an undisclosed security risk was arbitrary and constituted inhuman and degrading treatment along with a denial of the right to be informed of the reasons for one's arrest).

253 *A v Australia*, Communication No. 560/1993, U.N. Doc CCPR/C/59/D560/1993 (Apr. 30, 1997).

difficult to obtain. Moreover, what constitutes "detention" has rapidly been changing, as hundreds of thousands of migrants have been detained pending resolution of their asylum claims since 2015.

In November 2013, the European Migration Network reported 92,575 migrants in detention throughout Europe.[254] This number has undoubtedly swelled given recent mass migration flows.[255] At that time, twenty or more European states had legislation permitting or mandating detention of migrants to prevent flight risks, and to deter avoidance and hampering with the removal process.[256] Twelve or fewer states permitted detention of migrants based on national security or public safety concerns, or for other reasons.[257]

More than the Supreme Court or Australian courts, the European Court of Human Rights ("ECtHR") has restricted refoulement and the conditions of detention, and has emphasized the procedural rights of migrants. This reflects the ECtHR's unique mandate as a human rights tribunal and not necessarily a guarantor of national security like state courts. Australia has no human rights instrument, and the rights in the European Convention of Human Rights (ECHR) are more detailed, and have been interpreted more expansively, than the rights guarantees in the U.S. Constitution or even the Refugee Convention. Because the ECtHR has the mandate to decide cases under the ECHR, it cannot directly consider violations of the non-refoulement provision of the Refugee Convention. Article 3 of the ECHR, however, prohibits the related practices of torture and inhuman or degrading treatment or punishment. Article 5 of the ECHR also places human rights restrictions on detention.

2. Migrant Detention in the European Court of Human Rights

i. Chahal v U.K.

Chahal v U.K. is the ECtHR's leading case on pre-deportation detention, and also a major decision on non-refoulement and the prohibition against torture. In it, the Court affirmed the ECHR's broad protections against deportation of foreigners who are at risk of being tortured, but also upheld

254 *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies*, EUROPEAN MIGRATION NETWORK (Nov. 2014), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

255 *Id.*

256 *Id.*

257 *Id.*

prolonged detention in cases where national security is at risk.[258] Chahal was an Indian national resident in Britain. He was arrested by the Punjabi police for Sikh separatist activity, and claimed to have been tortured while in detention in India. When he returned to the U.K., he became a leader in the U.K. Sikh community and was repeatedly detained for suspected involvement in conspiracies against moderate Sikhs in the U.K. and the Indian Prime Minister. He was eventually convicted of assault and served for nine months in prison.

In 1990, the British government detained Chahal pending deportation on grounds of national security and the fight against terrorism. Under U.K. law, Chahal had no right to appeal because he was being deported on national security grounds.[259] However, an advisory panel scrutinized and upheld the government's reasons for detention and deportation in a confidential decision. The panel also denied Chahal asylum because he was deemed a threat to national security. Chahal was not allowed to have counsel at the hearing.[260]

Chahal claimed that his deportation would violate Article 3 of the ECHR because he would be at risk of torture in India, and Article 5 because he was not afforded procedural fairness in determining his asylum claims. [261] The U.K. countered that it had received assurances from India that Chahal would not be mistreated there, and argued that the ECtHR had previously established that asylum cases involving a potential national security risk required balancing the risk posed by an individual to the national security of the State.[262] The U.K. also argued that Chahal's deportation fell under the Refugee Convention's exceptions to the principle of non-refoulement for reasons of national security.[263]

The ECtHR held that Chahal's deportation would violate Article 3 because of the risk he could be tortured. The Court held that Article 3 provides an absolute prohibition against torture that exceeds the requirements of Articles 31 and 32 of the Refugee Convention, which cover non-refoulement and its exceptions. The Court examined voluminous and conflicting evidence regarding safety and human rights conditions in India.

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258 Beate Rudolf, *International Decisions:* Chahal v. United Kingdom, *No. 70/1995/576/662, European Court of Human Rights, November 15, 1996*, 92 AM. J. INT'L L. 70 (1998).

259 *Chahal v United Kingdom* [1996] 23 Eur. H.R. Rep. 413.

260 *Chahal v United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, § 32 (1996).

261 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, 5, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

262 *Chahal v United Kingdom* .¶ 76 [1996] 23 Eur. H.R. Rep. 413.

263 *Id.*

On balance, the Court found that Chahal would face a "real risk" of torture if repatriated, and thus, his deportation would violate Article 3.[264]

The Court also found that Chahal did not have an effective remedy to contest his deportation, in violation of Article 5(4). In the Court's view, national law must ensure protection from arbitrariness by allowing judicial examination of the reasons for the lawfulness of detention. The advisory panel procedure did not meet this requirement. The confidentiality of the proceeding, the non-binding nature of the opinion, and the denial of legal representation before the panel did not protect the applicant from arbitrary detention or deportation. Pursuant to Article 13 of the ECHR, which requires an effective remedy for all rights contained in the Convention, Chahal should have received a procedure focusing exclusively on the seriousness of his being tortured.[265]

However, the ECtHR found that Chahal's continued and prolonged detention did not violate Article 5(1)(f). The advisory panel provided appropriate safeguards from arbitrary detention by ensuring that at least prima facie national security concerns warranted Chahal's continued and prolonged detention. An Article 5(1)(f) challenge would only have been successful in the absence of appropriate safeguards against arbitrariness.[266]

ii. Saadi v Italy

The ECtHR affirmed and strengthened the absolute prohibition on torture in 2008 in *Saadi v Italy*.[267] The Court also limited the use of national security as a reason for deportation. The case was considered a landmark because of the changed national security context since *Chahal* was decided. The attacks of September 11 led to global fears of terrorism and immigration as a security threat. In this context, the U.K. intervened in *Saadi v Italy* to argue that national security concerns should cause the court to revisit the *Chahal* principle.

In October 2002, Nassim Saadi, a Tunisian national residing legally in Italy, was arrested on suspicion of involvement in international terrorism. Although never found guilty in Italy, a military court in Tunis convicted him in abstentia of membership in a terrorist organization and incitement to terrorism, and sentenced him to twenty years of imprisonment in Tunisia. Saadi was released in August 2006. Four days later, he was taken into custody

264 *Id.* ¶ 107.
265 *Id.* ¶ 155.
266 *Id.* ¶ 122.
267 *Saadi v Italy*, App. no. 37201/06, 24 BHRC 123, 125-142 (2008).

pending deportation for his membership and support of terrorist organizations and conduct disturbing public order and national security.

In response, Saadi applied for asylum, claiming a risk of torture and political and religious persecution in Tunisia. Italy rejected his application on national security grounds.[268] Relying on *Chahal*, Saadi argued that his deportation would violate Article 3 of the ECHR. Italy argued that Tunisia's diplomatic assurances were sufficient to ensure Saadi's safety there. The U.K., intervening in the case, asked the Court to reconsider *Chahal* in light of the security risk involved. In the case of a terror suspect, the U.K. argued that *Chahal*'s "real risk" standard should be lowered to a standard that an applicant would be "more likely than not" to be at risk of torture or maltreatment if deported.[269]

The ECtHR rejected the U.K. and Italy's arguments, affirming the absolute nature of Article 3 and the *Chahal* standard of "real risk" of torture, inhuman or degrading treatment or punishment.[270] The Court again affirmed that the concepts of risk of torture and dangerousness to the general public or national security can only be assessed independently, and therefore cannot be subject to a balancing test. The applicant bears the burden of proof that he will face a real risk of torture if deported or refouled, although the Court may do its own research. However, diplomatic assurances alone are insufficient to prove that the applicant will not face a "real risk."[271]

Saadi's affirmation of the *Chahal* "real risk" standard at a time of war amid high fears of terrorism made a strong statement to the international community that the ECtHR was absolutely committed to protecting individuals from torture. The ECtHR also effectively held the ECHR to go far beyond the protections offered by the Refugee Convention. While the Refugee Convention's prohibition against non-refoulement provides an exception for national security reasons, Article 3 of the ECHR provides a blanket prohibition against torture, even when an individual presents national security concerns.[272] Balancing an individual's fundamental rights with the general interests of the community in protecting national security, the test suggested in prior ECtHR jurisprudence, is insufficient because of the ECHR's fundamental interest in prohibiting torture. In the face of mixed

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268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

272 *See* Aisling Reidy, *The Prohibition of Torture*, 6 HUMAN RIGHTS HANDBOOKS (2003) (explaining the scope of Article 3).

evidence as to the safety of a deportation country, the ruling suggests that a state should err on the side of presuming a risk of torture.

The rulings in *Chahal* and *Saadi* may lead to more indefinite detention. First, *Chahal* held that, in cases involving national security, prolonged detention pending deportation proceedings is legal except in very narrow circumstances. Even prima facie national security reasons appear to be sufficient grounds for detaining an applicant indefinitely. Second, and ironically, the low "real risk" standard to ensure that individuals do not face torture upon deportation or refoulement may lead to a higher number of people in indefinite detention. If terror suspects cannot be returned to their countries of origin because of a "real risk" of torture, no other country would be likely to take them. If states deemed them a threat to national security, states would not allow them to live freely in the community. Prolonged or indefinite detention, then, seems to be the only viable option for individuals who are deemed to be a threat to national security in ECHR signatory states.

The *Chahal* and *Saadi* rulings thus reflect the ECtHR's commitments to both the human rights of migrants and national security. They also set up conflict between these two principles in future cases.

3. The Test for Arbitrariness in Detention

i. Saadi v U.K.

In *Saadi v U.K.*, the ECtHR held that Article 5 of the ECHR allows detention to permit unauthorized entry.[273] Saadi, an Iraqi Kurdish doctor, claimed asylum upon arrival at Heathrow airport on December 30, 2000. Saadi had treated three fellow members of the Iraqi Workers Communist Party and helped them escape. He was given temporary admission pending transfer to a detention center, during which he complied with multiple requests to return to the airport. On January 2, 2001, immigration authorities transferred him to a detention center for asylum seekers who were considered unlikely to flee and whose applications could be "fast-tracked." However, no one explained to him that he was being detained for "fast-tracking." Only on January 5 did Saadi's representative learn that Saadi was detained because he met the criteria for this particular detention center. Saadi's asylum claim was rejected on January 8. He was released on January

273 *Saadi v United Kingdom* [2008] ECHR 79.

9 and granted asylum upon appeal. He then contested his detention in court.[274]

On July 11, 2006, a Chamber of the ECtHR held that Saadi's seven-day detention after he was granted temporary admission did not violate Article 5 of the ECHR. However, the seventy-six-hour delay in informing Saadi of the grounds for his subsequent detention in the reception center violated Article 5(2), which requires a detainee to receive prompt notification of the reasons for his detention.[275]

The Grand Chamber affirmed on January 29, 2008. The majority held that Saadi's detention did not violate Article 5(1)(f).[276] The Court noted that detention of unauthorized entries was a "necessary adjunct" to a state's "undeniable sovereign right" to control the entry and residence of noncitizens in its territory.[277] Such detention, however, must be compatible with the purpose of Article 5: to safeguard the right to liberty and ensure that no one is arbitrarily deprived of that right. The Court held that Article 5(1)(f), under which Saadi had been detained, applies to anyone seeking entry without requisite authorization, not just those evading legal entry.[278] 5(1)(f) does not require that detention should reasonably be considered necessary. Instead, detention to prevent unauthorized entry is not considered arbitrary if it meets four context-specific requirements. Detention must be: 1) carried out in good faith, 2) closely connected to the purpose to the purpose of preventing unauthorized entry, 3) in an appropriate place and under appropriate conditions, given that the detainee was an asylum seeker and not a criminal suspect, and 4) not longer than reasonably required to achieve the desired objective.[279]

Applying these factors to Saadi's case, the Court held that the applicant had been chosen for fast-track detention in good faith. The purpose of his detention was to enable the authorities to expedite his claim. The center where he was detained was specifically designed for fast-track processing, and had acceptable facilities about which Saadi had not complained. Finally, seven days of detention were reasonable given the time required for

274 *Id.*

275 *Id.*

276 *Id.*

277 *Id.* ¶ 64 (citing Amuur v. France, 22 Eur. H.R. Rep. 533, 556-57, ¶ 43 (1996); *Chahal*, *supra* note 264, at 454-55, ¶ 73; Abdulaziz v. U.K., 7 Eur. H.R. Rep. 471, 497-98, ¶¶ 67-68 (1985)).

278 *Id.*

279 *Saadi v United Kingdom* ¶ 74 [2008] ECHR 79.

processing, especially considering the U.K.'s administrative difficulties in light of a large influx of migrants.[280]

The Court then unanimously held that Article 5(2)'s promptness requirement was violated by the seventy-six-hour delay before notifying Saadi of the reasons for his detention. Neither notification of Saadi's representative, nor the representative's general knowledge of the detention center's procedures, could replace the requirement for the individual to be directly informed of the reasons for his detention, and for the individual to be able to challenge his detention.[281]

Saadi again reveals the ECtHR's emphasis on procedural rights in cases involving immigration detention. Short detention to achieve an objective was held to be permissible. However, detention without notifying an applicant of the reasons for his detention was held to violate the ECHR.

4. Expanding the Reach of Non-Refoulement

i. Hirsi Jamaa v Italy

Since *Chahal*, *Saadi v Italy*, and *Saadi v U.K.*, migration to Europe has reached historic proportions. Migrants most commonly enter Europe through Southern Europe, particularly Italy and Greece. Both states have built massive detention centers for asylum seekers. The ECtHR has decided several cases against both countries regarding improper treatment of asylum seekers in detention or under these states' effective control. In the 2011 case of *M.S.S.*, for example, the Court held that both Belgium and Greece violated Article 3 of the ECtHR when Belgium sent an asylum seeker back to Greece, where he had entered Europe, knowing that he would be at risk for maltreatment and refoulement there.[282] In doing so, the ECtHR thus effectively held that Article 3 prohibits refoulement.

In the 2012 case of *Hirsi Jamaa and Others v Italy*, the ECtHR held that Italy could not summarily refoul migrants interdicted at sea without processing their asylum claims.[283] Pursuant to a 2008 bilateral treaty, Italy and Libya had agreed to conduct joint maritime operations to interdict boats of illegal migrants and return them to Libya.[284] In 2009, eleven Somalis and

280 *Id.*

281 *Id.*

282 *M.S.S.*, *supra* note 50.

283 *Hirsi Jamaa and Others v. Italy*, 2012-II Eur. Ct. H.R. 97.

284 *See id.* ¶¶ 19-20. By July 30, 2009, Italy had pushed back 602 migrants to Libya and 23 to Algeria. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Italian Government on the Visit to Italy Carried out by the European

thirteen Eritreans traveled from Libya in three ships with 200 other individuals.[285] Italian authorities intercepted their boats in international waters, moved the migrants to military ships, and confiscated their identification and personal effects. Ten hours later, the Italians transferred the migrants to Libyan authorities in Tripoli.[286] Italian officials never tried to identify, interview, or process the migrants, and did not inform them that they were returning to Libya.[287]

The applicants claimed that Article 3 and Article 4 of Protocol No. 4 required Italy to allow them to claim asylum and process their individual claims; and also prohibited Italy from returning them to a place where they might be mistreated.[288] The applicants further alleged that they had been arbitrarily refouled and had not been allowed to challenge their refoulement or seek protection as refugees, in violation of international law.[289]

The Court held in favor of the applicants. Italy violated Article 3 by returning the migrants to Libya, where they were at risk of maltreatment and refoulement to their countries of origin.[290] The Court stressed that Article 3's prohibition against torture and inhuman and degrading treatment was "absolute."[291] Given numerous reports on dire conditions of migrants in Libya, Italy "knew or should have known" that the migrants could be exposed to maltreatment.[292] Italy also violated Article 4 of Protocol No. 4 by not allowing the migrants to make asylum claims or process their claims individually, resulting in an illegal collective expulsion of aliens.[293] Finally, Italy violated Article 13 of the ECHR, since the applicants had no effective remedy or procedural process by which they could contest their lack of asylum processing or return to Libya.

Hirsi is a landmark ruling because of the protections and procedural guarantees it extends to migrants. After *Hirsi*, states cannot refuse to individually process asylum claims of migrants interdicted at sea or summarily repatriate them to a third country where they might be maltreated or chain-refouled. States also may not claim these requirements are

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Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009 (Apr. 28, 2010), https://rm.coe.int/1680697276 [hereinafter CPT Report].

285 *Hirsi Jamaa and Others v. Italy* ¶ 9-10, 2012-II Eur. Ct. H.R. 97.

286 *Id.* ¶¶ 12.

287 *Id.* ¶ 11.

288 *Id.* ¶¶ 83-84, 87-88.

289 *Id.* ¶ 85.

290 *Id.* ¶¶ 137-38, 158.

291 *Hirsi Jamaa and Others v. Italy* ¶ 120, 2012-II Eur. Ct. H.R. 9.

292 *Id.* ¶¶ 131, 156.

293 *Id.* ¶ 186.

impossible in situations of mass influx. Migrants must also be allowed effective remedies to challenge their treatment in detention, or the decision to transfer or return them to another country. European states may not use treaties with other states to circumvent migrants' protections and procedural rights under the ECHR.[294]

The European Parliament adopted legislation extending the *Hirsi* holding to all EU member states. The legislation added protection against refoulement, chain refoulement, and protection of fundamental rights to the rules governing maritime surveillance operations.[295] The regulation also grants migrants certain procedural rights, requires states to identify and individually process the asylum claims of migrants, inform them of their destination, and give them an opportunity to assert the non-refoulement rule and challenge their asylum determinations and procedural fairness. Despite EU legislation and *Hirsi*'s precedential importance, *Hirsi* has not been followed in Italy. Italy's subsequent actions show that secret treaties and summary returns are still occurring.[296]

5. Improving and Eroding Procedural Guarantees

i. Khlaifia v Italy *and* J.R. and Others v Greece

In 2016, the Grand Chamber of the ECtHR released a landmark opinion clarifying the procedural guarantees for detainees that are required by Article 5 of the ECHR.[297] However, *Khlaifia v Italy* also called into question the procedural guarantees required by Article 4 of Protocol No. 4 when those same detainees are at risk for collective expulsion, and the extent of Article 3's prohibition on inhuman or degrading treatment in detention. In 2018, the case of *J.R. and Others v Greece* further clouded the meaning of Article 3.

In September 2011, during the Arab Spring, the Italian coast guard intercepted a group of Tunisian migrants at sea and took them to a migration "hotspot" on the island of Lampedusa. Hotspots are designated facilities for identification and fingerprinting of arrivals and some asylum procedures which are generally run by the EU. Their operations are not governed by

294 *Id.*

295 *See* Steve Peers, *New EU Rules on Maritime Surveillance: Will They Stop the Deaths and Push-Backs in the Mediterranean?*, STATEWATCH (Feb. 2014), http://www.statewatch.org/analyses/no-237-maritime-surveillance.pdf.

296 Stephanie Kirchgaessner & Lorenzo Tondo, *Italy's Deal with Libya to "Pull Back" Migrants Faces Legal Challenge*, THE GUARDIAN (May 8, 2018, 1:00 PM), https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations.

297 *Khlaifia v. Italy*, App. No. 16483/12, 2016 Eur. Ct. H.R.

Italian law.[298] There the migrants were detained for more than three days in allegedly overcrowded and unsanitary conditions, under constant surveillance, and were unable to contact the outside world. Italy claimed that officials filled in identification sheets for each individual migrant, although applicants disputed this.[299]

After an uprising by detainees left the center partially destroyed by fire, the group was flown to Palermo, Sicily, where they were forced onto two unsanitary and overcrowded ships moored in the harbor, again under permanent surveillance. There, they were allegedly mistreated by police officers. After five to seven days, they were taken to Palermo airport, where the Tunisian Consul "recorded their identities" pursuant to a secret agreement between Italy and Tunisia that was unavailable to the migrants or the public.[300] Italy claims they issued three "refusal-of-entry" orders before deporting the migrants to Tunisia.[301] The applicants claim they were never issued any documents while in Italy.[302]

Three migrants brought suit, alleging that their detention and treatment violated ECHR Article 3's prohibition on cruel, inhuman and degrading treatment, Article 5's requirement of procedural guarantees regarding detention, and the prohibition of collective expulsion in Article 4 of Protocol 4, alone and in conjunction with Article 13's guarantee of an effective remedy for every right in the ECHR.[303] They argued that Italy had deprived them of liberty for ten days without offering any reasons or legal justification, or enabling them to contest their detention. Italy argued that its actions did not deprive the migrants of liberty because Italy was attempting to help them. Italy was also acting under a secret agreement with Tunisia and its own migration laws, which required it to identify and remove the migrants. Italy argued that the Tunisians had adequate explanation for their detention because they knew they were present on Italian territory. The Tunisians also had the right to challenge their removal as a remedy against their detention.[304]

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298 On the illegality of hotspot detention, see *Italy: Beatings and Unlawful Expulsions Amid EU Push to Get Tough on Refugees and Migrants*, AMNESTY INTERNATIONAL (Nov. 6, 2009), https://www.amnesty.org/en/latest/news/2016/11/italy-beatings-and-unlawful-expulsions-amid-eu-push-to-get-tough-on-refugees-and-migrants/.

299 *Khlaifia v. Italy* ¶ 12, App. No. 16483/12, 2016 Eur. Ct. H.R.

300 *Id.* ¶ 19.

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*

The Grand Chamber found Italy in violation of Article 5, sections 1, 2, and 4. The Court held that to determine whether a person has been deprived of liberty, the person's concrete situation must be considered along with the type, duration, effects, and manner of implementation of the measure in question, among other factors.[305] Here, Italy unquestionably deprived the migrants of liberty by detaining them in emergency accommodations that were under surveillance and restricting their freedom of movement. The duration of the deprivation was significant, lasting between nine and twelve days, depending on the applicant. Italy's intention to help the migrants did not change that it had constrained their liberty.[306]

Italy violated Article 5(1) by detaining the migrants without a clear legal basis. As Italy conceded, the detention of migrants in hotspots was not conducted pursuant to Italian law, which authorizes detention only within dedicated Centers for Identification and Expulsion of Aliens that have access to judges and other procedural safeguards. The Court held that a secret agreement between Italy and Tunisia could not provide the basis for detention because the text was not public and accessible to the applicants. Without a legal basis for detention, Italy could not have informed the applicants of the reason for depriving them of liberty or how to challenge that deprivation, in violation of Article 5(2). Without knowing why they had been deprived of liberty, the migrants' right to appeal their detention did not have effective substance, in violation of Article 5(4). Thus, Italy did not offer the applicants an effective remedy to challenge the lawfulness of their deportation, in violation of Article 5(2).[307]

After this vindication of the migrants' procedural rights, the Grand Chamber took a step backward for human rights protections. The Court held that the scope of Article 3's prohibition on inhuman and degrading treatment is context-dependent.[308] The Grand Chamber held that neither conditions in the detention center nor on the boats constituted inhuman and degrading treatment.[309] Italy had argued that the migrants were detained in an exceptional humanitarian emergency, but the Grand Chamber noted its prior determination, *M.S.S.*, that the absolute character of Article 3 meant that a mass influx did not absolve a state of its Article 3 obligations.[310] However, the Grand Chamber then stated that "it would certainly be

305 *Khlaifia v. Italy* ¶ 64, App. No. 16483/12, 2016 Eur. Ct. H.R..
306 *Id.*
307 *Id.*
308 *Id.*
309 *Id.*
310 *Id.* ¶¶ 184-85.

artificial to examine the facts of the case without considering the general context in which those facts arose."[311] Given the circumstances, the migrants' treatment did not exceed the level of severity that Article 3 violations require. The duration of confinement was relatively short, and applicants did not present any objective proof of their allegations of overcrowding and extreme unsanitary conditions in Palermo. Moreover, Italy had produced an Italian court decision that directly countered the applicants' account.[312]

The Grand Chamber further noted that the applicants were not asylum seekers and did not have the "specific vulnerability inherent in that status."[313] The applicants were young males without particular health issues, not children or members of other classes traditionally considered to be vulnerable. While they may have been physically and psychologically weakened by the sea crossing, they did not suffer the burden of traumatic experiences that justified the vulnerability approach to the Article 3 claim in *M.S.S*.

The Court also found no collective expulsion in violation of Article 4 of Protocol No. 4.[314] After reviewing *Hirsi* and other cases in which the ECtHR had required individualized processing of asylum claims, the Grand Chamber noted that Article 4, Protocol No. 4 did not explicitly require individualized processing. Instead, the provision requires that each person concerned merely has an effective possibility to individually submit arguments against deportation.[315] In this case, the Tunisian applicants had undergone two identification procedures during which they would have been able to challenge their expulsion but did not do so. At no time did the applicants cite fears or other obstacles to their return to Tunisia.[316] Since no migrant challenged his expulsion, the situation did not qualify as a collective expulsion, even if it was simultaneous.[317]

While *Khlaifia* was pending, the EU's use of migration hotspots in Italy and Greece continued unabated.[318] No EU legislation or Italian law defines these hotspots or authorizes detention there, but EU agencies and staff are involved in running them. Italy continued to detain migrants at Lampedusa

311 *Khlaifia v. Italy* ¶ 185, App. No. 16483/12, 2016 Eur. Ct. H.R.

312 *Id.* ¶¶ 207-08.

313 *Id.* ¶ 194.

314 *Id.*

315 *Id.* ¶ 248.

316 *Id.* ¶ 251.

317 *See* Jill I. Goldenziel, *International Decisions: Khlaifia v. Italy*, 112 AM. J. INT'L L. 274-80 (2018) (providing further discussion of the erosion of collective expulsion).

318 *See* sources cited *supra* note 220.

and other hotspots without the national laws that the court requires. *Khlaifia* has now been sent to the Committee of Ministers of the European Council in Strasbourg, which will require Italy to show how it has implemented the ruling.

Khlaifia expands the scope of Article 5 of the ECHR by explicitly requiring states to base detention on transparent and specific domestic laws. Under the ruling, migrants and other noncitizens now must have access to the legal basis for their detention and an effective opportunity to challenge it. These laws must clearly spell out the substantive requirements and procedural guarantees for detainees. The ECHR has held that Article 5's prohibition on the deprivation of liberty will not be eroded, even in the extreme context of a migration crisis.

Conversely, the Grand Chamber's decision can be seen as eroding the rights in Article 4 of Protocol No. 4 and Article 3. *Khlaifia's* holding that the treatment of Tunisian migrants did not constitute collective expulsion is even more disturbing. *Khlaifia* seems to reduce the prohibition against collective expulsion to the theoretical requirement that a migrant can challenge his expulsion, regardless of whether he is aware of or meaningfully afforded the opportunity to do so. At best, the court's ruling is ambiguous as to what procedural guarantees are actually required, and what information the migrant must be given about his rights. Without an affirmative requirement of individual interviews, however, it is difficult to imagine how collective expulsion can be prevented. If the *Khlaifia* ruling is extended, it could erode procedural guarantees in other circumstances of detention.

Full discussion of the meaning of "inhuman and degrading treatment" under Article 3 lies beyond the scope of this paper. However, the fact that the ECtHR appeared willing to allow any ECHR right to be more flexibly interpreted in an emergency context, when it had explicitly refused to do so in the past, is troubling. In the 2018 case of *J.R. and Others v Greece*, the ECtHR relied on *Khlaifia* to hold that poor conditions in the Vial center on Chios, Greece during a mass influx of migrants did not rise to the level of an Article 3 violation.[319] The Court noted that a mass influx situation did not absolve states of the absolute prohibitions in Article 3. However, the Court compared the case to *Khlaifia*, where the difficult conditions in the center appeared to be the direct result of the mass influx itself. In this regard, the Court cited reports from several prominent NGOs that visited the Vial center at the time of the applicants' alleged violations and noted poor

319 *J.R. and Others v Greece* (no. 22696/16)(Jan. 25, 2018).

conditions there.[320] The Court compared these to reports by the European Committee for the Prevention of Torture, which had not expressed severe criticism of the conditions during its two visits in 2016. Furthermore, the Court stressed that the applicants' short period of detention before the center became semi-open mitigated against an Article 3 violation.[321]J.R. extends *Khlaifia*'s ambiguity regarding Article 3 during a time of mass influx or other emergency. While the Court says that a mass influx does not exonerate states from their Art. 3 violations, the decision effectively seems to do just that. The decision left open the question of whether the Court would have found an Article 3 violation if applicants had suffered directly from the poor conditions noted by the NGOs during the mass influx, such as lack of potable drinking water. Moreover, if applicants' stay had been prolonged, the Court may have held differently.

IV. ANALYSIS

Political pressures to protect both the human rights of migrants and national security are greater than ever. Images of those fleeing violence and persecution have riveted the world, spurred European countries to adopt generous asylum policies, raised outcry against restrictions on migrants and refugees entering the United States, and caused global outrage against their treatment in Australia. Meanwhile, recent terrorist attacks in the United States and Europe, as well as perceptions of uncontrolled borders, have raised fears of migration as a threat and political pressures for states to restrict it on national security grounds.

In the face of these competing pressures, detention of migrants has become a default solution for many states. Detention in the United States, Australia, and Europe comes with procedural guarantees designed to protect the human rights of migrants. Alternatives to detention, from Australia's third-country processing program, to "catch and release" programs in the United States, can be expensive and politically controversial, particularly in the face of perceived or actual concerns about releasing migrants into a community. UNHCR has stated that third-country processing is legally permissible, so long as the transferring state ensures that the human rights of migrants and refugees are not violated in the third country.[322] UNHCR's position thus matches the ECtHR's rulings in *M.S.S. v. Belgium and Greece* and

320 *Id.*
321 *Id.*
322 *See supra* note 177.

Hirsi. However, the "effective control" standard announced in these cases and reflected in UNHCR's position is difficult for states to enact. To my knowledge, no extraterritorial processing program has ever been successful in avoiding violations of the human rights of refugees and migrants over the long term.

Thus, in spite of expense, controversy, and the high potential for human rights violations, states are likely to continue to err on the side of detention as a default treatment when noncitizens enter their countries without authorization. Despite international efforts to make detention a last resort, it is clearly not so. Given this reality, national courts have been struggling to find the appropriate balance between protecting the human rights of migrants, preserving the sovereign rights of states to protect their borders, and protecting national security. Courts have reached some convergence in their interpretations of these laws, particularly in their holdings that detained migrants must have procedural rights. However, courts have left some rights more vulnerable to interpretation, confounding human rights advocates. Courts have also left open crucial questions involving national security.

A. Convergence

Courts have continued to affirm the sovereign right of states to determine who may enter and exit their borders. The Supreme Court and the Australian High Court have repeatedly deferred to their states' broad detention powers under relevant legislation governing migration. Whether detention is mandatory, pre-entry, or prolonged, courts have generally found it permissible if allowed by state law. Even the ECtHR has been reluctant to determine when detention is "prolonged."

Courts in all three jurisdictions have affirmed the high importance of procedural safeguards for detainees. Detainees must have the meaningful opportunity to contest their detention. They must also be informed of the basis for their detention as a prerequisite for being able to contest it. The ECtHR and the Supreme Court place a strong and explicit emphasis on procedural rights to challenge detention and removal. The ECtHR, faithful to its mission as a human rights court, has placed the strongest procedural safeguards on detention in *Chahal*, *Saadi v. Italy*, and *Khlaifia*. Since *Khlaifia*, the ECtHR has heard at least four other major cases on detention, and has consistently held that migrants must have a meaningful opportunity to challenge their detention and receive specific information about the basis for their detention and how to challenge it in a language they can

understand.[323] By remanding a case involving procedural rights back to an appellate court for consideration of constitutional claims, the Supreme Court held that detention of immigrants without bail hearings—and therefore procedural rights to challenge their detention—implicates a serious constitutional problem. While the Australian High Court has hewed to the text of the Migration Act in holding that indefinite detention is permissible, this may be because the country has no human rights instrument or constitutional provisions governing detention of migrants.

Courts in the United States and Europe also agree that the principles of necessity and proportionality apply to the legality of detention. Detention must be necessary to achieve a specific purpose, such as to prevent a flight or security risk or to ensure that migrants attend relevant administrative proceedings. Detention must also be proportional, given international and constitutional guarantees against restrictions on individual liberty. While these principles are broad and give states leeway to determine the legality of detention, they nonetheless provide important limitations on states' power to detain. They also reject less stringent standards that detention be only "reasonably necessary," and that case-specific determinations are not required.[324] Given the need for case-specific determinations, high courts are also unlikely to place a limit on what exactly a permissible length of detention is. Instead, they will consider the length of detention in light of the purpose of that detention, and the risks inherent in releasing the individual.

Courts have continued to hold that the prohibition against non-refoulement when a person is at risk of torture is absolute. Their opinions reflect the consensus of political theorists that torture must be prohibited, even in emergency circumstances.[325] The ECtHR has made this claim most strongly and repeatedly, establishing a low "real risk" of torture standard when determining whether a detainee can be refouled. Although the Supreme Court has interpreted non-refoulement very narrowly, it would be unlikely to allow torture of noncitizens in situations where the United States has effective control. In decisions made since *Sale*, the Supreme Court has

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323 *S.K. v Russia* (no. 52722/15) (Feb. 14, 2017) (holding that Russia violated Art. 5 § 1 and Art. 5 § 4 because no procedure existed by which a Syrian national could challenge his detention or removal order); *J.R. and Others v Greece* (no. 22696/16)(Jan. 25, 2018) (holding Greece violated Art. 5 § 2 because applicants were not informed why they were arrested or how to challenge the arrest); *O.S.A. and Others v Greece* (no. 39065/16)(Mar. 21, 2019) (holding that Greece violated Art. 5(4) because the detention decisions were written only in Greek and included only vague references regarding options to challenge the decision, especially considering that applicants did not have access to counsel).

324 *Id.*

325 *See* WALDRON, *supra* note 30.

held that international legal obligations and procedural rights guaranteed by the Constitution apply to the United States' extraterritorial actions in cases involving noncitizens detained in Guantanamo.[326] Even in Australia, the High Court's rejection of the Malaysia Solution suggests that it is prospectively unwilling to send migrants to a place where they might be tortured or mistreated.

However, other than in non-refoulement cases involving the risk of torture, courts in all three jurisdictions have been unwilling to declare detention to be illegal based on the conditions of that detention. High courts have consistently denied claims that migrant detention is penal, despite the similarities of conditions between administrative and criminal detention. In all three jurisdictions, complaints of mistreatment and horrible conditions in detention are common and well-known. Only claims involving procedural rights violations, not human rights violations, have yet been decided by the Supreme Court. Notably, in a rare case where it directly considered claims pursuant to international human rights law, the High Court of Australia struck down the proposed Malaysia Solution. This case also shows that the Australian court is willing to interpret international human rights law as it relates to detention, since it could have decided the Malaysia case based on federal powers alone. However, given its upholding of the legality of third-country processing in Nauru and Manus Island, despite wide condemnation of conditions there, it is questionable whether the Australian High Court would have struck down the Malaysia Solution retroactively, rather than prospectively. It is easier for the Court to block a hypothetical program than end one that has come into effect.

All three courts allow migrants to challenge the conditions of their detention. However, courts generally have been willing to defer to states regarding the conditions of detention, or have declined to reach such issues. The ECtHR directly considered the question of whether conditions of detention violate Article 3 guarantees against cruel, inhuman, and degrading treatment in the *Khlaifia* and *J.R.* cases. Here, the Court showed deference to state practices. In *Khlaifia*, the Court weighed Italy's version of events against the mistreatment claims of multiple migrants. In both cases, the ECtHR also declared the context of Italy's and Greece's administrative difficulties relevant to the conditions of detention, despite having said that context did not limit Article 3 rights in other cases. In Australia, avenues for challenging the conditions of detention are limited by the country's lack of

326 *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 725-28 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

human rights laws. It now remains to be seen whether the *S99* case will open the door for more challenges to the conditions of detention using tort law.

B. Erosion of Rights?

Although courts have consistently held that migrants must receive procedural safeguards to challenge their detention, its conditions, and deportation, it remains unclear what procedural safeguards are required to ensure that detention is not arbitrary. The Supreme Court has made context-specific determinations without pronouncing a general test. By remanding *Jennings*, it may force the Ninth Circuit to delineate a new standard for procedural safeguards, or to direct legislators to create one. The ECtHR's position has been contradictory. On one hand, the ECtHR has provided the clearest guidance of any court as to what states must do to provide appropriate procedural safeguards, as discussed above. However, in *Khlaifia*, the Court also held that migrants are only required to have the opportunity to contest their detention, stopping short of requiring states to conduct individual determinations.[327] This appears to erode Article 4 of Protocol 4's guarantees of individual processing, as well as the individually-based guarantees of international human rights law as a whole.

While courts have repeatedly affirmed the distinction between asylum seekers and migrants, courts have also blurred the line between the two categories where procedural rights are concerned. In the United States and Australia, mandatory detention can apply even to asylum seekers. Detention of asylum seekers is supposed to be a last resort. However, de facto state practice is to detain asylum seekers as a first resort, at least until their claims can be processed. *Sale* effectively required no meaningful distinction between migrants and asylum seekers when upholding interdiction at sea without asylum screening.[328] The Supreme Court did not distinguish between migrants and asylum seekers in *Jennings*.[329] In his dissent, Justice Breyer did distinguish asylum seekers from the other immigrants involved in the case.[330]

The ECtHR has preserved the distinction between migrants and asylum seekers in some cases and blurred it elsewhere. In *Saadi v U.K.* the ECtHR established a test for arbitrariness of detention that considers whether

327 *Khlaifia v. Italy*, App. No. 16483/12, 2016 Eur. Ct. H.R.
328 *Sale*, 509 U.S. 155.
329 *Jennings*, 138 S. Ct. 830.
330 *Id.* at 860 (Breyer, J., dissenting).

migrants are asylum seekers. Detention is not considered arbitrary if it meets four context-specific requirements. Detention must be: 1) carried out in good faith, 2) closely connected to the purpose to the purpose of preventing unauthorized entry, 3) in an appropriate place and under appropriate conditions, considering whether a detainee is an asylum seeker and not a criminal suspect, and 4) not longer than reasonably required to achieve the desired objective. The ECtHR noted that the migrants in *Saadi v U.K.* and in *Hirsi* were asylum seekers, and thus required heightened rights protections.

The migrants in *Khlaifia*, by contrast, were not asylum seekers, and therefore were not considered to be inherently vulnerable. Their lack of vulnerability may have affected the ECtHR's determination that the contested detention conditions did not violate Article 3's prohibition on inhuman and degrading treatment. The *Khlaifia* Court also noted that its decision might have been different if the migrants had claimed asylum at any point during their detention. However, the six dissenters in *Khlaifia* found that the majority failed to give asylum seekers adequate protections, by violating the presumption against detention of asylum seekers, failing to give them individual processing, and holding that Article 5(1) was applicable to all noncitizens, regardless of the reasons for their entry, including asylum seekers who entered for reasons that could have been lawful.

The *Khlaifia* decision can thus be seen to erode protection of asylum seekers in Europe. Subsequent ECtHR jurisprudence will need to specify exactly what it means for states to afford migrants with a meaningful opportunity to claim asylum. Clarifying this is crucial for asylum seekers to be able to exercise their international human rights.

C. Solutions?

Courts should mandate legislative fixes for many of the cases that they face involving detention of migrants. Many high court cases involving detention of migrants could have been avoided by better legislative drafting. The Supreme Court in *Zadvydas*, for example, would not have had to impose a six-month limit on post-removal detention if the law had included a provision on what should occur when a ninety-day post-removal detention period had expired. Instead, poor drafting meant indefinite detention for Zadvydas and other similarly situated noncitizens. Poor drafting also caused the Supreme Court to remand *Jennings* to the Ninth Circuit, largely because the lower court had effectively rewritten the statute. Recognizing the necessity of clearer laws involving detention of migrants, the court in *Khlaifia*

held that detention must be based on publicly available domestic laws of the detaining state, which would effectively require Italy and other European states to redraft their state laws regarding migration and detention.

Given that bad drafting can have such tremendous and indefinite consequences, other courts would do well to follow suit and require the promulgation of clear, accessible laws regarding migration and detention. By providing Waldron's "structured arguments" for justification of detention, Courts would comply with international human rights guarantees. Courts should also guide legislatures to include provisions for mandatory updates to the laws, given rapidly changing circumstances of refugee and migration flows and practices of migrant detention.

Legislatures should also follow the meaningful limitations that courts have created on states' sovereign rights to detain and expel migrants. Courts in the United States, Europe, and Australia have consistently held that detention cannot be arbitrary, that procedural safeguards are required, and that detention is bounded by the principles of necessity and proportionality. Legislatures would do well to use these holdings as the basis for migrant detention laws that will comply with international human rights standards. In the absence of clear guidance from legislatures, courts must also consider these limits when creating their own tests for the legality of detention.

When deciding whether a detention is arbitrary, legislatures and courts should consider the standards established by *Saadi v U.K.* and *Khlaifia v Italy*, which encompass and exceed the standards established in U.S. and Australian jurisprudence. According to these cases, detention is not arbitrary if it is carried out in good faith; closely connected to the purpose of the detention; conducted in an appropriate place and under appropriate conditions, considering that detention is not penal and that the detainee may be an asylum seeker or otherwise vulnerable; for a duration not longer than is reasonably required to achieve the desired objective; and includes appropriate procedural safeguards for the detainee to contest his continued detention or treatment in detention. When considering these factors, courts should consider the individual, concrete circumstances of the person and his deprivation of liberty. While *Saadi v U.K.* and *Khlaifia* involved pre-entry detention, these standards easily apply to all forms of detention.

States should also provide Waldron's "structured arguments" to justify detention. Combining tests from the ECtHR and the Supreme Court, detainees must be promptly and directly informed of why they are being detained, must have a meaningful opportunity to contest their detention at every stage, and must have a meaningful opportunity to appeal their initial

determinations. U.S. and European courts also agree that continued or prolonged detention must be subject to periodic review, and that the state bears the burden to show why detention is justified. In *Khlaifia*, the ECtHR explicitly set forth two additional standards that are implicit in the Supreme Court's jurisprudence. *Khlaifia* requires that detention be based on clear criteria defined by law and accessible to those who are detained, a requirement compatible with the Supreme Court's holding that detention under an ambiguous statute was not justified in *Zadvydas*. The ECtHR also specified that hearings must consider the *individual, concrete situation* of the detainee, along with the type, duration, effects, purpose and manner of implementation of the measure in question, among other factors. The Supreme Court has also considered these factors in the immigration detention cases discussed above.

To comply with the principles of necessity and proportionality upon which the Supreme Court and the ECtHR agree, detention must be necessary to serve a specific purpose. Continued or prolonged detention is not necessary or justifiable when that purpose is no longer being served. Proportionality requires weighing the liberty interests of the individual with the purpose of the detention and/or the risk of releasing the individual.

VI. CONCLUSION

Despite some consensus, courts in the United States, Europe and Australia have left open larger questions of how to balance national security and human rights. Courts have not decided what exactly states can do with people who cannot be repatriated or deported after prolonged periods of detention. The definition of "prolonged" has not been determined. In Australia, the Court simply allows indefinite detention. In the United States and Europe, people cannot be held indefinitely, although courts have not placed a time limit on how long is humane. The ECtHR has consistently deemed thirty days to be "short," but has upheld detentions for a year or more so long as they are based on a legitimate purpose.[331] Breyer's imposition of a six-month limit on pre-removal detention in *Zadvydas* has been criticized for its own arbitrariness. However, states may be in real situations where they cannot send migrants to any other country, and where

331 *See, e.g.*, *K.G. v Belgium* (no. 52548/15)(Nov. 6 2018) (upholding 13 month detention on national security grounds).

authorities may feel that they present a security risk. The Supreme Court and the ECtHR have, thus far, not afforded a remedy to these people.

Still broader questions remain unanswered: How much does context matter when interpreting international human rights laws? Are the rights of migrants and asylum seekers absolute or dependent on whether a migration emergency is in progress? What constitutes a national security exception that would allow states to violate the rights of migrants?

Courts may never provide satisfying answers to these questions. Courts are reluctant, particularly outside of wartime, to declare that national security overrides individual rights guarantees. Given the legacy of decisions like *Korematsu v. United States*, the Supreme Court would be understandably unwilling to declare when national security circumstances justify detention of any category of noncitizens.[332] The ECtHR is probably similarly reluctant, given colonial legacies and the numbers of noncitizens present in Europe. Moreover, given that national security matters are the province of other branches, high courts are reluctant to draw lines that could constitute legislation in this area.

More generally, courts need to maintain their own legitimacy and position as guarantors of fundamental rights. Drawing a line may pose consequences for their own legitimacy as guarantors of individual rights for either noncitizens or the general public—and major backlash if any threat to society or flight risk should actually occur. Courts generally do not like to make law, and may be likely to let inadequately drafted statutes stand as a result, as the Supreme Court did in *Jennings*. Courts also are reluctant to create precedent that grants broad rights to noncitizens, given that this is the province of other branches of government, and can easily become a hot-button political issue. Courts can continue to punt the question by requiring states to conduct regular procedural hearings to determine whether an individual still presents a security or a flight risk; however, the Supreme Court in *Jennings* was unwilling to interpret the statutory text to require this. Courts seem unwilling to decide what constitutes a national security exception to individual rights, except in extreme circumstances.

Like their courts, other branches of government in the United States, Australia, and European states reflect unease and ambivalence with the balance between national security and human rights. State practice is often disconnected from official positions on migration and detention. As a matter of policy, the United States conducts credible fear screenings upon interdiction of migrants at sea, despite The Supreme Court's ruling in *Sale*.

332 *See* 323 U.S. 214 (1944).

Australia has refused to compensate successful claimants to the Human Rights Committee, but has quietly allowed almost all of them to remain in Australia. European state practice also routinely contradicts ECtHR decisions, as bilateral migrant control agreements and use of migration hotspots continue despite the *Hirsi* and *Khlaifia* decisions.

Through their state practices, states are continuing to assert their sovereign rights to control their borders, whether or not this means deferring to courts. To avoid this gap between law and practice, and to preserve the rights of migrants and citizens alike, states would do well to heed implicit and explicit calls by the Supreme Court and the ECtHR to create clear, specific laws justifying reasons for detention of migrants. Those wishing to protect the rights of migrants would do well to advocate for such laws. More precise drafting by legislatures can go a long way to protect the human rights of migrants and citizens alike. Poor drafting can lead to poor human rights outcomes, with potentially global consequences.

Cases involving migrant detention pit fundamental human rights against the fundamental rights of states. For plaintiffs, these cases implicate the human rights to liberty, against arbitrary detention, and against torture and cruel, unusual, and degrading treatment. For states, their sovereign rights to regulate their borders and protect the human rights and security of their own citizens are at stake. Judicial and philosophical answers to these cases may never be satisfying given the clash of fundamental rights involved.[333] However, more precise drafting by legislatures and more precise judicial balancing tests can better protect human rights.

333 WALDRON, *supra* note, 30, at 32 (noting these questions present a challenge for moral philosophers that they have only begun to address).

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