THE INTERSECTIONALITY OF DOMESTIC AND GLOBAL ACCOUNTABILITY: UNHCR AND AUSTRALIAN REFUGEE STATUS DETERMINATION

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Implicit in the study of the 'global space' as a regulatory phenomenon is recognition of the fact that the 'national and international' are interconnected. Largely absent from the existing scholarship, however, is a question of how domestic accountability might influence accountability at the global level. In particular, the negative ramifications for domestic accountability caused by the failure of a State to support global accountability, by either not respecting its international law obligations or by undermining international institutions, have the potential to be a powerful stimulus for greater global and domestic accountability. Focusing on the practice of refugee status determination (RSD), this article suggests that a State's accountability concerns may be exploited as a kind of 'negative motivation' for increasing accountability at the global level and for greater domestic administrative justice.

The global accountability 'problem' that this article focuses upon is the lack of procedural protection in the RSD processes administered by United Nations High Commissioner for Refugees (UNHCR). The way that Australia's refugee policies have not only contributed to the significant workload of UNHCR but also helped concretise UNHCR's RSD standards as 'best practice' in certain circumstances will be examined in order to argue that Australian refugee policy has had negative ramifications for its domestic legal and political accountability. These negative ramifications may act as a catalyst for helping to increase the accountability of UNHCR's own RSD practices.

UNHCR and refugee status determination

RSD is the legal and/or administrative process that States or UNHCR use to determine whether an asylum seeker meets the criteria for international protection according to the definition of a 'refugee' outlined in art 1A(2) of the *Convention Relating to the Status of Refugees*[1] (Refugee Convention) and/or national or regional law. Contracting States have primary responsibility for RSD as part of their non-refoulement obligations under the Refugee Convention. Non-refoulement is the obligation to not expel or return a refugee to a country where his or her life or freedom would be threatened due to race, religion, nationality, membership of a particular social group or political opinion.[2] A State's obligation to determine refugee status stems from the need to provide fair and effective procedural safeguards against non-refoulement,[3] and each State's RSD procedures are determined by the way its domestic legislation and institutions have been designed to carry out its international protection obligations.

Whilst not an express duty under the *Statute of the Office of the United National High Commissioner for Refugees*[4] (the Statute), UNHCR conducts RSD as part of its core international protection mandate[5] and has identified RSD as one of its operational activities. In its 2000 UNHCR Note on International Protection, UNHCR states that 'undertaking determination of refugee status' in circumstances where the host State is not a signatory to the Refugee Convention or 'has not established the relevant procedures' is an 'operational activity to strengthen asylum'.[6]

Although responsibility for RSD lies with States, UNHCR has little choice but to conduct RSD in circumstances where States abdicate their protection duties — which primarily occurs where a State lacks the resources and capacity to carry out RSD — or where a host State is not a signatory to the Refugee Convention but hosts a large number of refugees within its territory. As an example of the former, UNHCR undertakes RSD in Kenya. Although Kenya is a signatory to the Refugee Convention, it hosts a large number of refugees and 'other people of concern' (615 112 as at the end of 2015[7]), which it does not possess adequate resources to process. An example of the latter is Jordan, which, although not a signatory to the Refugee Convention, hosted 689 053 'people of concern' by the end of 2015, which included 664 118 refugees and 24 935 asylum seekers.[8]

In 2015, UNHCR received 269 700 applications for asylum or refugee status, which comprised 11 per cent of applications worldwide. In the same period UNHCR made 91 800 substantive decisions, which made up 8 per cent of total substantive asylum decisions.[9] UNHCR's RSD applies to what are known as 'mandate refugees'. In contrast to RSD conducted by States, a mandate refugee is determined by the definition of a 'refugee' outlined in UNHCR's Statute. The definition of a refugee in UNHCR's Statute is similar but not identical to the Refugee Convention's definition of a refugee. A person who meets the criteria for a refugee in UNHCR's Statute will qualify for protection by UNHCR, regardless of whether or not he or she is within the territory of a party to the Refugee Convention and 1967 *Protocol Relating to the Status of Refugees* (the Protocol), or whether he or she has been recognised as a refugee under the Refugee Convention.

UNHCR develops procedural standards for State RSD practice through the creation and dissemination of its own policy documents[10] and input into the drafting processes of the Conclusions of its Executive Committee.[11] UNHCR does not, however, meet the same procedural standards in its RSD practice that it expects of States. The fact that no independent review is available for UNHCR's RSD outcomes continues to be a cause of particular concern. Writing in 1999, Michael Alexander's highly critical paper accused UNHCR of allowing its RSD procedures to operate with a lack of openness and accountability and for fostering resentment and suspicion towards it by asylum seekers and refugees.[12] One of Alexander's central arguments is that protections provided by domestic administrative law, such as merits review tribunals, judicial review, ombudsmen and freedom of information laws, had left UNHCR unacceptably behind.[13] Michael Kagan, a commentator on refugee issues who runs the US-based refugee advocacy group Asylum Access and established RSDwatch.org[14] to address what he saw as the accountability issues inherent in UNHCR RSD practice, undertook research on RSD practices in Egypt and Jordan in 2002.[15] In his findings, Kagan cited a number of procedural deficiencies in UNHCR's RSD in Cairo, including a failure to provide asylum seekers with specific written reasons for rejection, withholding of evidence from applicants, lack of in-person rehearings for rejections and a lack of transparency regarding 'standard operating procedure'.[16] Kagan ultimately argued that UNHCR should perform RSD only when it can enhance the protection provided to refugees by governments.[17]

In 2003, UNHCR produced a guidebook on procedural standards for RSD undertaken in UNHCR field offices. Whilst the procedural guide has undoubtedly brought about improvements to UNHCR's RSD processes through the clarification and the encouragement of consistency, procedural deficiencies remain. For instance, although different UNHCR Eligibility Officers (EO) carry out the initial RSD determination and the negative review, the review is conducted internally, meaning that it is neither an independent nor an impartial process. Further, access to information has been an ongoing issue. UNHCR did not initially allow applicants to view their interview transcripts and, whilst there have been some recent improvements with the introduction of the stipulation that UNHCR must share (to the extent possible) all medical, psychiatric and other expert reports as well as any other documents

submitted by or on behalf of the applicant, only legal representatives may access the transcript, which must occur on the UNHCR office premises and under supervision.[18] Procedural efficiency also remains a significant issue. Although it is clear that UNHCR appreciates the need for prompt procedures in both its own and State RSD processes,[19] whether UNHCR provides (or can provide) expeditious decision-making in practice is highly questionable. UNHCR has reported that its backlog had increased from 73 700 in 2003 to a historical high of 252 800 by 2013.[20]

Acknowledging the improvements in standards since the publication of the guide, a number of NGOs[21] expressed the following concerns in a letter to the High Commissioner for Refugees in 2006:

> Last year, we and other NGOs welcomed the publication of the Procedural Standards as a significant step forward in making UNHCR's RSD procedures more fair. But many of the Standards' most important elements, for instance on the need to give specific reasons for rejection, were made optional for UNHCR field offices. Some binding rules, for instance on the right to counsel, have still not been implemented at all UNHCR locations. Moreover, the Standards themselves contain gaps when compared to the guarantees of due process that UNHCR has advocated for governments. Most critically, they did not establish an independent appeals system, and did not end the widespread withholding of essential evidence from refugee applicants.[22]

The argument that binds the criticism is that implicit in UNHCR's ability to perform RSD is the requirement that it meet the same procedural standards expected of States, or that, by performing a role normally reserved for governments, UNHCR acquires the burden of living up to the same standard as States.[23] Certainly, this point may be disputed on both a practical and theoretical level. UNHCR may simply not have the resources to carry out RSD to the same standards expected of States. Further, RSD is ultimately the responsibility of signatory States as an implicit part of their protection obligations under the Refugee Convention.[24] However valid these objections, they do not detract from the fact that deficient UNCHR procedural standards have the potential detrimentally to affect the interests of refugees and compromise international protection.

For RSD to be consistent with international protection, one of its primary objectives must be respect for the principle of non-refoulement.[25] Non-refoulement is central to international protection and is relevant to human rights law. Non-refoulement was included in the Refugee Convention by art 33(1), which was based upon previous State practice and international agreements[26] and created a binding State obligation not to refoule refugees unless one of the national security or crime 'exception circumstances' in art 33(2) applies.[27] As RSD is the practical means through which a person becomes entitled to protection, it follows that *procedurally* sufficient RSD is a vital defence against the risk of refoulement. If RSD outcomes are substantively accurate, the risk of refoulement is significantly diminished.[28] The likelihood of substantive accuracy of RSD — being a correct determination based upon the Refugee Convention criteria and the circumstances of an individual application — is lessened if procedural standards are not in place to provide a system of checks and balances on the decision-making process. Procedural standards encourage stringent justification for findings on facts and lessen the likelihood of bias in the decision-making process. Most importantly, they provide a means for scrutiny in the form of review.

A race to the bottom: Australian refugee policies and UNHCR RSD

Adding to UNHCR's burden

A principal cause of the limited procedural protections in UNHCR's RSD is a lack of resources. UNHCR does not possess the same resources as many States, and the resources that it does have, which are largely determined by voluntary State contributions,

are increasingly thinly spread. An increase in asylum applications from developing countries, which are largely but not exclusively outside of Europe, has placed significant pressure on UNHCR's workload and capabilities.

In *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas — Global Survey 2012*[29] (Urban Refugees Report), inadequate space in UNHCR offices and the high number of refugees awaiting determinations were identified as significant challenges to providing RSD. The report states that 'the number of asylum seekers approaching UNHCR offices far exceeds the capacity of offices to register them' and gives the example of Malaysia, where at that point UNHCR faced a backlog of an estimated 30 000 to 50 000 individuals awaiting registration.[30] By the end of 2013, that figure was reported to be 42 000.[31] In the *UNHCR Statistical Yearbook 2012*, the cause of the 'relative low' decision-making capacity of UNHCR[32] was stated to be the 'significant increase in the total number of individual asylum applications registered by UNHCR'.[33] The yearbook states:

> Despite a strengthening of UNHCR's decision-making capacity, mainly through improved staffing and efficiency in the agency's RSD procedures, the number of individual asylum applications registered consistently exceeded the number of individual asylum decisions issued, at times at a ratio of 2:1. As a result, UNHCR's RSD backlog increased from 73 700 in 2003 to a historical high of 146 800 in 2012.[34]

If a lack of sufficient resources (including staff and other facilities) contributes to delays in managing large RSD workloads, it is reasonable to assume that the implementation of procedural protections such as independent and impartial review will either exacerbate those delays or place demands on field offices that UNHCR offices may not have the resources to comply with. The Urban Refugee Report intimates that resource pressures have a detrimental effect on procedural protections in UNHCR's RSD practices. In particular, the report states that 'the scarcity of reliable interpreters also slow the process, in part because it is difficult to find appropriate interpreters without vested interests in refugee communities' and '[t]he pilot practice of writing reasoned notification letters specifying reasons for rejection has also absorbed staff time and slowed RSD in a few countries'.[35] The provision of competent interpreters and written reasons reflect due process principles of participation and transparency and are procedural standards that UNHCR expects of States in their own RSD practice.[36] If, as UNHCR claims, resource pressures negatively impact on its ability to provide procedural protections, it will be likely to be resistant to more resource-demanding procedural protections such as the provision of independent review.

Despite recognition by both the Australian media[37] and members of Parliament of UNHCR's financial burden and the need for increased funding,[38] Australia has made decisions under successive governments that have either increased or have had the potential to increase the pressure on UNHCR's resources. Although Australia was to fund the cost of processing and transportation related to the 2001 Pacific Solution[39] and undertake overall responsibility for processing, which involved the provision of some staff, Nauru requested UNHCR to assist in processing the claims of the asylum seekers. UNHCR agreed to the request because of the unique humanitarian nature of the situation[40] and processed 525 of the *MV Tampa* claims. Australia did not request the assistance of UNHCR directly, but, by negotiating an agreement with a nation with limited resources, with no refugee determination process in place and that was not (at the time) a signatory to the Refugee Convention,[41] the chances that Nauru would request the assistance of UNHCR were high. The practical ramification for UNHCR was the increased processing of RSD, which, despite being undertaken to assist Nauru, would not have been undertaken *but for* the actions of Australia.[42]

If it had been successfully implemented, the Malaysia Agreement[43] would also have had the practical effect of increasing the workload of UNHCR. Like Nauru in 2001, Malaysia is not a signatory to the Refugee Convention. Unlike Nauru, it already hosts a large number of

refugees, which calls for permanent assistance from UNHCR. Under the agreement signed by the Australian and Malaysian governments, all asylum seekers returned to Malaysia by Australia would have their applications assessed by UNHCR, not the Malaysian government.[44] In a submission prepared for the purpose of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[45] (*Plaintiff M70*), the Department of Foreign Affairs and Trade answered the question 'Does Malaysia provide protection for persons seeking asylum, pending determination of their refugee status?' by stating:

> As a non-signatory to the Refugee Convention, Malaysia does not itself provide legal status to persons seeking asylum, but it does allow them to remain in Malaysia while the UNHCR undertakes all activities related to the reception, registration, documentation and status determination of asylum seekers and refugees.[46]

UNHCR's workload burden in Malaysia was already substantial. The figures quoted in UNHCR's 2010 Global Report indicate the sheer size of the 'refugee issue' in Malaysia at the time:

> In 2010, UNHCR registered almost 26 000 people, some 9500 of them through an innovative mobile registration programme, and conducted refugee status determination (RSD) for more than 23 200 applicants. The numbers of persons of concern in the country stood at over 80 600 refugees and approximately 11 130 asylum-seekers.[47]

It was noted at the time that UNHCR reported that it had 100 staff in its office in Kuala Lumpur.[48] By 2015 the 'population of concern' in Malaysia had risen to 270 621.[49]

Australia has contributed, or has made decisions that would potentially contribute, to UNHCR's workload by entering into an agreement to send asylum seekers to be processed in either a country where UNHCR already undertakes all RSD (that is, Malaysia) or a country that was likely to call upon UNHCR for assistance (that is, Nauru). According to the Australian Government, however, the problem was not adding to UNHCR's already substantial burden: 'the problem was that developed countries were spending all their money processing asylum seekers coming into the country without permission, rather than giving it to the UNHCR to process and care for refugees offshore.'[50]

'Living down' to UNHCR's RSD procedural standards

By choosing to process asylum seekers offshore according to UNHCR's procedural standards, by designating or declaring countries as suitable for offshore processing and by denying review for applications previously rejected by UNHCR, the Australian Government has reinforced the validity of processes that lack adequate procedural protections and has created the unequal treatment of asylum seekers based upon the physical location of a person's application for asylum.

Offshore processing undertaken by Australian officials in excised offshore areas and declared countries was originally formulated according to UNHCR's substantive and procedural standards. As part of its report, *Framework for Preventing Unlawful Entry into Australian Territory*, the Australian National Audit Office summarised the major features of the 2001 'post-*Tampa*' suite of legislation as including 'the possible detention and removal from those territories of unauthorised arrivals to "declared countries" where they have access to *refugee assessment processes modelled on the UNHCR's*, can be kept safe from persecution while these processes are undertaken, and that they receive continued protection if found to be refugees'.[51]

The Explanatory Memorandum to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*,* which attempted to extend offshore processing to all asylum seekers who

arrived on the Australian mainland by boat, states that 'In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR'.[52] Whilst the current Fast Track and Return (FTAR) process[53] has not been explicitly based on UNHCR's standards, simultaneous RSD models with different levels of procedural protection are by now firmly entrenched in the Australian asylum system.

Australia has also contributed to a validation of UNHCR's lower procedural standards through the Minister's ability to 'declare' or 'designate' a country as appropriate for RSD processing. Section 198A(3)(a) of the *Migration Act 1958* (since amended) gave the Minister power to declare that a specified country which met the following criteria was appropriate for offshore processing:

> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection;[54]

Whilst providing for 'effective procedures', 'protections' and 'relevant human rights standards', nothing in this power compelled the Minister to ensure that the declared country was providing a comparable level of procedural protection that would be offered to the asylum seeker should he or she have his or her claim processed on the Australian mainland. After the High Court finding in *Plaintiff M70*, s 198A was replaced with sub-div B — Regional Processing. Section 198AB now provides that the Minister may designate a country to be a 'regional processing country' where 'the Minister thinks that it is in the national interest' to do so.[55] The Minister must have regard to whether or not the country has given Australia any assurances to the effect that:

> (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
>
> (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol.[56]

Whilst the amended provision makes clear reference to the Refugee Convention, the 1967 Protocol and non-refoulement, there remains no requirement for minimum procedural standards.

Finally, Australia and other States validate UNHCR's lower procedural standards through the system of UNHCR 'referred cases'. Each year UNHCR refers a given number of asylum seekers to Australia for resettlement. Australia generally accepts approximately 6000 refugees referred for resettlement each year, which in 2013–2104 comprised 47 per cent of Australia's humanitarian program.[57] These asylum seekers have been found by UNHCR to meet the criteria of a refugee under art 1A(2) of the Refugee Convention.[58] Australian officials do not reassess the validity of UNHCR's decisions, nor do they apply legislative criteria for determining whether that person meets the definition of a refugee outlined in the Refugee Convention.[59] Instead, legislative criteria are applied to determine whether that person should be offered a visa[60] based on the appropriateness of their resettlement in

Australia.[61] The effect of this process is that Australia absorbs the accountability deficiencies inherent in UNHCR's decision-making by accepting the validity of decisions made with lower procedural protections than in its own (onshore) processes. UNHCR's decisions become a part of Australia's administrative decision-making framework yet are at odds with comparable, domestic administrative decisions in regard to procedural standards.[62] Although participation in the resettlement program is a crucial element of Australia's asylum system, the practical ramification, beside the acceptance into the Australian legal framework of what would in other circumstances be unacceptable levels of procedural protection, is the implicit recognition and support of a system where the chances of mistake, and therefore refoulement, are increased through the lack of independent review.

In 2001, the then Minister for Immigration, the Hon Philip Ruddock MP, made the following comment in Parliament:

> The fact is that you have two forms of refugee conventions: the jurisprudential model in a place like Australia, which is much wider in its coverage; and a much more rigorously enforced refugee convention administered by decision makers who use the UNHCR handbook for decision making.[63]

UNHCR's processes may have been more 'rigorously enforced', but Mr Ruddock, who was also quoted as saying, 'There is one standard for the UNHCR, and there is another standard that elements of the UNHCR impose on developed countries and I don't think it can go on',[64] failed to mention that, the FTAR and offshore processes aside, the *procedural standards* within a jurisprudential model such as Australia's are far more 'rigorous' than those implemented by UNHCR. Whilst the emphasis on UNHCR's 'tougher standards' compared to Australia may appeal to a certain populist sentiment, it is clear that an underlying motivation for offshore processing, and now the FTAR process, was to remove procedural protection for asylum seekers — or, in other words, access to Australia's tribunals and courts.

The reasons that UNHCR's own RSD processes do not include adequate procedural protection are complex, but it cannot be claimed that UNHCR holds its own standards out as best practice for States to follow. UNHCR has met suggestions that it provide the same RSD standards as States by stating that it cannot be expected to parallel the procedures put in place by 'sophisticated and resource well-endowed governments'.[65] In its response to the proposed Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, UNHCR stated:

> However, it is seriously to be questioned, in UNHCR's view, whether Australia has chosen the correct model, given the qualitative differences between the processes of a state and an international organization, with the limits the latter entails, together with the fact that an organization, obviously, is not a state with capacity to provide for protection and solutions. Clearly the more appropriate model would be that of a State, in particular Australia itself.[66]

And:

> In the context of extraterritorial processing by Australia, given that Australia is a long-time signatory to the 1951 Convention and has in place its own procedures, these procedures should be applied.[67]

UNHCR's claims of lack of resources and staff have been criticised as being limited to a comparison with wealthy industrialised States rather than developing countries[68] and that 'generous' RSD procedures such as the provision of avenues for impartial review could be considered as a 'pull-factor', which may influence UNHCR RSD officers to be strict in their RSD processes[69] in order to avoid the possibility of providing an incentive for irregular movement.[70] However true, this does not detract from the fact that UNHCR's capacity for RSD is compromised by a lack of resources, and increased procedural protection will be likely to have the effect of slowing the process further.

Best practice is reflected not in UNHCR's own processes but in the standard-setting that UNHCR undertakes as part of its supervisory role.[71] For Australia, or any country, to either model its RSD processes on UNHCR's actual practice or to engage with UNHCR's resettlement program without questioning the low procedural standards that are integral to that process is to solidify those standards in its own asylum system.

Impacting on domestic accountability

The preceding section demonstrates how the asylum policies of Australia have contributed to an acceptance of UNHCR's procedural standards as a valid part of the international refugee system. Australia has effectively 'turned a blind eye' to the lack of accountability in UNHCR's RSD procedures because those standards support its policy of offshore processing. It may seem, therefore, that any discussion on how States such as Australia might support the development of greater accountability for UNHCR RSD may be futile. However, what if the same self-interest that drives implicit support for low UNHCR RSD procedural standards were to be used as a motivator to support an increase in those standards and, as an effect, have a positive outcome for domestic administrative justice? How might accountability mechanisms be designed to achieve such an aspiration?

Accountability mechanisms that present 'solutions' for global accountability deficiencies are largely presented as a choice between 'top-down' and 'bottom-up'. A 'top-down' or 'global' approach to accountability refers to mechanisms where the decision-making power is concentrated at the global level. Participation by States, individuals and other non-governmental groups occurs within a global forum, such as an independent review body or complaint mechanism.[72] Examples of top-down mechanisms include the World Bank Inspection Panel and the International Tribunal for the Law of the Sea. 'Bottom-up' or domestic approaches to accountability involve an extension of domestic institutions and other tools of domestic administrative law to international decision-making.[73] Bottom-up mechanisms are commonly understood as the direct application of domestic administrative law to international decision-making (for example, review of international decisions by domestic courts and tribunals), the implementation of procedural safeguards on the international component of domestic decisions, and the participation of domestic actors in international forums, such as delegations to treaty-based regimes.[74]

Top-down and bottom-up approaches to accountability are generally presented as alternatives to each other,[75] the implication being that the design of accountability mechanisms inevitably involves a choice between the global and domestic contexts.[76] Neither alternative, however, comes without obstacles to successful implementation. Top-down approaches to accountability will be likely to require legalisation[77] or formalisation, which some States (particularly powerful ones) might resist on the basis of national interest. The US failure to ratify the Rome Statute of the International Criminal Court provides a good example.[78] On the other hand, weaker States may be concerned about the dominance that more powerful States will inevitably have in a globally centralised mechanism that will depend on sufficient State funding to operate. Conversely, bottom-up mechanisms are challenged by the transposition of accountability mechanisms to the global context that are based upon diverse State ideas of democratic participation, jurisdiction and standing.[79]

Perhaps a different approach is warranted. Public identification of the impact that a failure to comply with international obligations or the willingness to undermine an international institution may have on a State's domestic accountability might assist in building mechanisms that link domestic accountability with international obligations in a way that will compel States to take action at both levels. If global accountability deficits can be reframed in terms of consequences for domestic accountability, increased responsiveness by States may follow. After all, States tend not to ignore accountability issues that impact on their

political role and the expectations of their constituencies. The following discussion explores how Australia's asylum policies discussed above have had negative ramifications for domestic legal and political accountability.

Legal accountability and executive power

If the impact of global accountability deficits on the legal accountability of a State can be identified publicly at an institutional level (that is, by domestic courts), governments may be encouraged to ensure that its rule and decision-making are compliant with the expectations of the community. It is argued that successive Australian governments have used executive power as a means to achieve 'border control' — and, thus, low procedural standards for offshore processing — in ways that could be perceived by the community as arbitrary and, therefore, unaccountable.

The executive power of the Commonwealth derives from two interconnected sources. The first source is the prerogative powers that were imported into Australian law from the UK, first by implication, then by statute.[80] The second source is s 61 of the Australian *Constitution*, which states that the executive power is vested in the Queen (and exercisable by the Governor-General as her representative) and extends to the maintenance and execution of the *Constitution* and to the laws of Australia.[81] Executive power enables the government, in limited circumstances, to make decisions without the legislative authority to do so.

Two major asylum-related policy decisions in recent years have been based upon executive rather than statutory power. In the first, the *Tampa* incident, the government relied upon its executive power in s 61 to justify its actions in refusing entry to, and then detaining, asylum seekers. Whilst the executive power was not used directly to create or set procedural standards for RSD, its effect was to establish the Australian offshore processing framework, to which low RSD procedural standards are integral. The validity of the government's actions were challenged and, although those actions were initially found to be an invalid use of power,[82] the Full Federal Court found that the government's actions were a valid exercise of s 61. In brief, the Court found that, without statutory extinguishment, the power inherent in s 61 extends 'to a power to prevent the entry of non-citizens' and:

> The power to determine who may come into Australia is so central to its sovereignty that ... the government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia community, from entering ...[83]

The finding by the Court that s 61 of the *Constitution* enabled the government to rely on executive power to prevent the entry into Australia of asylum seekers[84] has been controversial. The words 'extends to' and 'maintenance' in s 61 are not defined, which raises uncertainty as to whether they are limited to the powers derived from the prerogative or extend to any activity that is appropriate to a national government.[85] Justice French's finding that s 61 could not be 'treated as a species of the royal prerogative' and that executive power 'is a power conferred as part of a negotiated federal compact expressed in a written Constitution'[86] is a position that has received significant criticism.[87] The basis for the criticism, beside the assertion that French J's opinion was based on questionable legal authority,[88] is the implication that the Imperial Parliament, by conferring coercive powers in s 61, was conferring greater powers that it itself possessed[89] or that is denied to other Commonwealth countries, such as New Zealand or UK, which do not have an executive power similarly conferred by a Constitution.[90] Justice Black's opinion that it would be a strange circumstance if the 'at best doubtful' and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the *Constitution* by virtue of general conceptions of 'the national interest' and 'it is 350 years and a civil war too late for

the Queen's courts to broaden the prerogative'[91] is considered by many commentators to be the preferable interpretation of the scope of s 61.[92]

The second major executive power based policy decision occurred after the subsequent government dismantled the Pacific Solution and asylum seekers who arrived offshore (IMAs) were brought to Christmas Island to have their claims for asylum processed as Refugee Status Assessments (RSA), which was a non-statutory process. Whilst IMAs were entitled to independent migration review (IMR), this was performed by a private consultancy company (Wizard People Pty Ltd) via a contractual arrangement and not in accordance with the review procedures available on the mainland. After the review process was completed and a person was found to meet the criteria of a refugee, a submission was made to the Minister to consider using his or her discretion under s 46A(2) of the *Migration Act 1958*[93] to grant that person a visa. The justification for relying on executive rather than legislative power was that the process was undertaken outside the migration zone and therefore was not subject to legislative control. In addition, because RSA relied on executive power, the criteria used to make decisions were not those from the *Migration Act 1958*[94] but from UNHCR's own handbook on refugee status determination. Accordingly, the procedural safeguards put in place for RSA, whilst slightly higher than UNHCR's (that is, RSA allowed provided for limited independent review), did not accord the same kind of protection that would be available if the claims were processed on the mainland.

Plaintiff M61/2010 v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia[95] (*Plaintiff M61*) addressed the government's reliance on executive power to conduct RSA offshore. In that case, two Tamil asylum seekers who were subject to RSA and IMR challenged the validity of those procedures based upon a lack of procedural fairness in the process, the failure to apply migration legislation and Australian precedents in deciding claims and (Plaintiff M69 only) the invalidity of s 46A of the Migration Act based upon the Minister's unfettered and unreviewable discretion to decide whether or not to exercise the power to deny an application for a visa.[96] The High Court found that the power to conduct RSA and IMR, although intended to be non-statutory in nature and merely an 'executive power to inquire',[97] was linked to statutory power via the Minister's discretions in ss 46A and 195A of the Migration Act.[98] Although the Minister was not under an obligation to exercise his or her discretion, the fact that asylum seekers were no longer moved to declared countries for processing pursuant to s 198 meant that ss 46A and 195A were the only statutory powers available to ensure that Australia was meeting its international obligations under the Refugee Convention. Therefore, the Minister would have to consider ss 46A and 195A in every asylum claim if prolonged detention of offshore persons were to remain lawful. In other words, for detention to be lawful, some sort of 'statutory footing' was required.[99] Consequently, despite the RSA manual stating that officers were to be guided by migration legislation as a 'matter of policy' only, the assessment and review were made in consequence of a ministerial direction that was contingent on a decision whether to exercise legislative, and not executive, powers.

The use of executive power to justify a new, untested type of government action, as occurred in the *Tampa* incident, and the reliance on executive power to defend differentiated procedural RSD standards, raise serious questions about legal accountability. Where a government has a legislative mandate, it also has a legal accountability to abide by formal rules[100] and to account for its 'respect or lack of respect for legal requirements or legal rights through processes of administrative and judicial review, judged *in accordance with law*'.[101] Where executive power exists, it is imperative that there are limitations that curb over-reliance on that power in order to prevent arbitrariness in policy and decision-making.[102] As the Court in *Plaintiff M61* said:

> It is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.[103]

The use of executive power is problematic because, although it is theoretically susceptible to judicial review,[104] its subject-matter will often make it non-justiciable.[105] The intention of s 75(v) of the *Constitution* is to provide for an entrenched minimum provision of judicial review, and it is difficult to support the proposition that that provision does not apply to decisions that affect fundamental rights and obligations. As the High Court stated in *Plaintiff S157/2002 v Commonwealth*:[106]

> Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness.[107]

'Fairness' in this context is not a reference to values of democratic aspiration; it is a reference to the ability of judicial review to ensure that decision-making is procedurally fair.

Regardless of the outcome of the cases, the identification of the potentially arbitrary use of executive power by the government has had practical ramifications for Australian asylum policy and legal accountability. Certainly there has been no improvement in the procedural standards of offshore RSD subsequent to the decisions (indeed, there has been a diminishment of procedural standards under the FTAR process), but recent asylum and refugee policy such as FTAR have been implemented via legislative power. Social attitudes expressed in public forums outside of the electoral process do not detract from the fact that, by relying on its legislative mandate and the parliamentary system, the executive government is now being *legally* accountable to its constituents.

Legal accountability and international obligations

Australia's willing engagement in bilateral and multilateral relations and its traditional readiness to ratify major human rights instruments[108] are indicative of its general commitment to respect its international law obligations. Despite its dualism, it is well established in Australian law that, unless there is parliamentary intention to the contrary, statutes are to be interpreted consistently with international law.[109] More particularly, where a statute is considered ambiguous, a construction that favours Australia's obligations under a treaty or convention should be favoured.[110] The ratification of an international treaty is, as Mason CJ and Deane J have declared, a 'positive statement of the executive government' to both Australia and the international community that it will 'act in accordance with the Convention'.[111] This commitment creates a community expectation that the executive will abide by the obligations that it has committed to. As Gaudron J stated in *Minister of State for Immigration and Ethnic Affairs v Teoh*:

> The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilized countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect.[112]

Whilst international obligations must be balanced against domestic concerns, circumstances where both a failure to respect international obligations and a denial of human rights standards can be justified by the pressing concerns of domestic affairs must be treated as rare.[113]

Offshore processing and low RSD procedural standards have been argued to infringe Australia's international obligations.[114] For example, it has been claimed that Australia's reliance on offshore processing and detention without adequate procedural safeguards such as independent review creates a risk of 'constructive refoulement' through the increased

likelihood of processing errors;[115] that an inferior processing regime may qualify as imposing a penalty, which is prohibited under art 31(1) of the Refugee Convention;[116] and that, when art 16(1) of the Refugee Convention[117] is read together with art 14 of the *International Covenant on Civil and Political Rights*, 'it guarantees refugees a right of judicial appeal to challenge the legality of a decision determining their entitlement to protection'.[118]

The impact of a proposed offshore processing policy on Australia's human rights obligations was the focus of *Plaintiff M70*[119] — a case that challenged and ultimately succeeded in defeating the proposed Malaysia Agreement. Two Afghan asylum seekers, who had arrived on Christmas Island after being picked up from a boat from Indonesia, brought the case. The plaintiffs argued that the Malaysia Agreement was unenforceable because the declaration made by the Minister under s 198A(3) of the Migration Act that Malaysia was a 'safe country' was invalid. This was because:

(i) the four criteria set out in s 198A(3)(i)–(iv) are jurisdictional facts which did not exist; or

(ii) alternatively, they are facts of which the Minister had to be satisfied before making a declaration and he was not so satisfied because he misconstrued the criteria.[120]

The Court found the Malaysia Agreement to be invalid because Malaysia did not meet the standards stipulated in s 198A(3)(a)(i)–(iii), which was the only source of power which could authorise a person's removal to a third country. Whilst no view was expressed as to whether Malaysia 'met relevant human rights standards',[121] the Court did find that Malaysia could not be declared as providing effective procedures or protection because it had no established legal framework for refugee protection and was not a signatory to the Refugee Convention. Malaysia does not recognise the status of refugee, which means that, once registered by UNHCR, refugees are still considered unlawful under Malaysian law and may be prosecuted under s 6 of Malaysia's *Immigration Act 1959–1963*, which makes it an offence to enter Malaysia without a valid entry permit.[122] As Malaysia undertakes no activities relating to 'the reception, registration, documentation and status determination of asylum seekers and refugees'[123] itself, it could not be said that its domestic law expressly provided protections or that it was internationally obliged to do so.[124] Regardless of practical arrangements, without such legal guarantees it could not be said that Malaysia provided adequate protection for asylum seekers transferred under s 198A of the Migration Act.

Although the Court made no criticism of UNHCR's procedures, implicit in its decision is a contention that UNHCR's procedures are not in themselves sufficient to meet the obligation of non-refoulement required by art 33 of the Refugee Convention. Despite the Minister's argument that, by allowing UNHCR to carry out RSD, Malaysia was ensuring both 'effective procedures' and appropriate protections,[125] UNHCR's procedures were not considered effective if they were not accompanied by a legal obligation by the State in question. Considering that the Court found that s 198 of the Migration Act had to be read in light of Australia's international obligations, it follows that Australia will not meet its international obligations by relying on UNHCR's RSD procedures alone.

By finding that Malaysia's procedures must be effective in order to meet human rights standards, the Court implicitly exposed the weakness in UNHCR's RSD procedures by requiring something *more* from them — that is, an accompanying State legal obligation. Accordingly, the Australian Government is legally accountable to ensure that it is utilising RSD procedures that are 'effective' according to human rights standards and that it meets the community's expectations that it abide by its international obligations.

Political accountability and administrative justice

The procedural values of administrative justice in Australia are reflected in the existence of mechanisms for independent merits and judicial review, both of which have been denied or diminished by government policy decisions relating to asylum seekers. In particular, a fundamental principle of merits review is that it is *de novo*, meaning that a tribunal is not limited to the information before it but may take into consideration information that comes to light subsequent to the initial application for review.[126] Full merits review is not a characteristic of offshore processing in Nauru or Papua New Guinea, but the FTAR process removes effective merits review for a significant portion of asylum seekers who would have previously been entitled to it. Although the Immigration Assessment Authority (IAA) is an independent review body, it cannot accept or consider any information other than that which was presented at the time of the initial application.[127] The government has also variously attempted to deny or reduce the constitutionally entrenched minimum provision of judicial review[128] through the limitation of grounds of review and privative clauses.

The community expects that decisions that are made within the administrative and judicial context are legally correct and fair. Without adequate, independent review, the probability that factual and reasoning errors will be made, or at least not identified, in the decision-making process is increased significantly. Further, the diminishment or denial of review for administrative decision-making creates a tiered system of administrative justice, the fullness of procedural protections dependent on the physical location and nature of the applicant.

Administrative justice in Australia is also compromised through the system of UNHCR referred cases. Although the system is a crucial element of Australia's asylum obligations, it is characterised by the fact that the cases referred to Australia for resettlement are based upon decisions that lack adequate procedural safeguards. If a person who has had an application for refugee status rejected by UNHCR makes a second application for asylum in either Australia's onshore program or as an IMA, that person may be automatically denied review by either being sent to a regional processing centre or, if extended, being classified as an excluded fast-track review applicant. A person will not be eligible for IAA review if they are assessed to be an 'excluded fast track review applicant', which includes someone who has been refused protection in another country, including UNHCR. In other words, asylum seekers will be automatically denied full review based on a procedurally flawed process that is potentially factually incorrect.

This is not merely a theoretical concern. In the US case of *Al-Bedairy v Ashcroft*[129] the applicant was denied asylum based on the fact that he had not mentioned in his UNHCR resettlement registration form that he had been tortured. The applicant testified that he had imparted this information to his interpreter, who was not from the same country as him and of whose language (Arabic) he understood very little. The dissenting judge said that, when a lack of competent translation is arguably to blame and where Al-Bedairy's testimony regarding the persecution he and his family suffered was corroborated by other witnesses, his failure effectively to communicate that he was tortured prior to his immigration hearing does not constitute substantial evidence supporting the adverse credibility finding.[130] It is likely that an independent review of UNHCR's initial RSD determination would have picked up this inconsistency. A potentially flawed decision, or a decision that an asylum seeker has not had the opportunity to have independently reviewed, can provide the basis for a resettlement decision. If a person is incorrectly found by UNHCR not to be a refugee, that person will not be referred for resettlement. In Australia, if that person makes a subsequent application for asylum within Australia, he or she may be denied any kind of review precisely because UNHCR previously rejected the application, regardless of any procedural or substantive flaws in that decision.

It is true that community expectations may call for differentiated determination procedures for those asylum seekers who arrive in Australia by boat and those who arrive via different means, but can it be said that these expectations extend to an acceptance that 47 per cent of all humanitarian arrivals are decided through a procedurally insufficient process? Does the community accept that the expected values of administrative justice do not apply in full to applicants who have had a previous determination via a procedurally insufficient process? Political accountability means responsiveness to community expectations, and the community expects administrative justice.

Conclusion: reframing global accountability in terms of consequences for domestic accountability

UNHCR RSD has an 'accountability problem'. The insufficiency in its procedural standards not only denies applicants for refugee status a procedurally fair process but also the risk of non-refoulement is heightened due to the inability to independently review factual and legal errors. This, however, is a State problem. It is States who have responsibility for RSD as part of their international protection obligations and it should be States, especially those with sufficient resources, who must unite to find a solution.

Appealing to a State's diplomacy or even its international obligations may have limited success. Perhaps signatory States can be convinced that, as it is a part of their international protection obligations to ensure that asylum seekers receive adequate procedural protections and access to independent and impartial review,[131] a truly cooperative system would ensure all asylum seekers received that same level of protection. Or perhaps the self-interest that tends to drive States' increasingly restrictive asylum policies would prevail. Whilst UNHCR's mandate can be described as 'a living phenomenon evolving dynamically through subsequent General Assembly resolutions',[132] States' obligations are restricted to the legal boundaries of the Refugee Convention. That disconnect allows States to justify the increased confinement of their own responsibilities whilst encouraging the extension of UNHCR's.

The ability to appeal not to diplomacy and international cooperation but to the very things that keep an executive government in power has the potential to link global and domestic accountability problems in a way that creates a powerful motivator for States actively to address global accountability deficits. When the ramifications of a global accountability problem are linked with domestic legal and political accountability, governments will likely do one or both of the following things. First, they will find ways to respond to the domestic accountability deficits identified by the courts or through other means. That may not mean a direct improvement in procedural standards, but governments must respond to the accountability concerns raised. Secondly, the ramifications for domestic accountability may provide motivation for States to seek ways to address the global accountability deficit directly. For UNHCR RSD, that may mean that States will cooperate to remove the role of UNHCR in RSD or at least collaborate to build its capacity to undertake RSD both in terms of resources and procedure. Whatever the outcome, recognising that accountability may emerge not from altruism but from self-interest may, despite the cynicism inherent in that suggestion, be the best way to achieve actual and measurable accountability outcomes.

Endnotes

1 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (Refugee Convention) art 1A(2), read in conjunction with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Protocol).
2 Refugee Convention art 33(1).
3 Reinhard Marx, 'Non-refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' (1995) 7 *International Journal of Refugee Law* 383, 392.
4 *Resolution on Statute of the High Commissioner for Refugees*, GA Res 428(V) UN GAOR, 5th sess, 325th plen mtg, UN Doc A/RES/428(v) (1950) (UNHCR Statute) annex (*Statute of the Office of the United National High Commissioner for Refugees*).
5 UNHCR's handbook, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate,* states that 'RSD pursuant to UNHCR's mandate is a core protection function': UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 20 November 2003 (UNHCR RSD Procedural Standards) Unit 1 Introduction, 1-1. Further, Michael Alexander states that 'UNHCR carries out this process [RSD] pursuant to the mandate given in its statute to provide international protection': Michael Alexander, 'Refugee Status Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251, 251–2. See also Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1, 16.
6 *2000 UNHCR Note on International Protection* UN Doc A/AC.96/930, 8–9.
7 UNHCR, *Global Trends — Forced Displacement in 2015* (UNHCR, 2016) 58.
8 Ibid.
9 Ibid 37–43.
10 See, for example, UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005.
11 See, for example, ExCom Conclusion No 110 (LXI) — 2010 states that 'States and UNHCR, as applicable, ensure that refugee status determination and all other relevant procedures are accessible and designed to enable persons with disabilities to fully and fairly represent their claims with the necessary support': UNHCR, *Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR*, 12 October 2010, No 110 (LXI) — 2010, (j).
12 Alexander, above n 5, 256.
13 Ibid.
14 RSDWatch <http://www.rsdwatch.org/index.htm>.
15 Kagan, above n 5, 1.
16 Ibid 11–12.
17 Ibid 4.
18 UNHCR RSD Procedural Standards, Unit 2.7, 'Legal Representation in UNHCR RSD Procedures', February 2016, 7.
19 The UNHCR RSD Procedural Standards state that the undertaking of RSD in a timely and efficient manner is a core standard: Unit 1, 'Introduction', 1.2. UNHCR has also stated that it 'c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention': UNHCR, *Detention of Refugees and Asylum Seekers*, 13 October 1986, No 44 (XXXVII) — 1986.
20 UNHCR, *UNHCR Statistical Yearbook 2012* (12th ed, 2013) ch IV, 49. More recent figures not available.
21 Africa Middle East Refugee Assistance (AMERA), Asylum Access, Christian Action, Frontiers (Ruwad) Association, Helsinki Citizens Assembly Refugee Legal Aid Program, International Refugee Rights Initiative, Jesuit Refugee Service, Legal Resources Foundation, Refugee Consortium of Kenya, Refugee Law Project, West African Refugees and IDPs Network (WARIPNET).
22 'Re: Fairness in UNHCR's RSD Procedures' (2007) 19 *International Journal of Refugee Law* 161.
23 Kagan, above n 5, 22.
24 Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, 2006) 467.
25 Paul Weis argues that the principle of non-refoulement imposes an obligation to grant at least 'temporary protection': Paul Weis, 'The International Protection of Refugees' (1954) 48 *American Journal of International Law* 193, 197. See also Reinhard Marx, above n 3, 383. Marx argues that, for States to identify their non-refoulement obligations, they must either determine RSD or examine circumstances in the third State to which they propose to transfer a refugee.
26 See the *Convention Relating to the International Status of Refugees*, 28 October 1933, CLIX LNTS 3663, art 3; the *Provisional Arrangement Concerning the Status of Refugees Coming From Germany*, 4 July 1936, 171 LNTS 75, art X; and the *Convention Concerning the Status of Refugees Coming From Germany*, 10 February 1938, CXCII LNTS 59, art 5.
27 Refugee Convention art 33(2):
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.

28 Mark Pallis argues that, when the rule of non-refoulement is combined with the 'guarantee of effective legal protection' — a general principle of law — the RSD obligation is created (that is, an obligation to conduct RSD in a manner which provides effective legal protection against the possibility of refoulement or denial or rights under the Refugee Convention): Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 *International Law and Politics* 869, 880.

29 UNHCR, *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas — Global Survey 2012* (UNHCR, 2013) (Urban Refugees Report).

30 Ibid 18.

31 Michael Kagan, 'US Faces an RSD Crisis', RefLAW, University of Michigan Law School <http://www.reflaw.org/unhcr-faces-an-rsd-crisis/>.

32 UNHCR's 'decision-making capacity' (that is, how many substantive decisions it issues in relation to applications received) was 47 per cent in 2012, compared to 80 per cent for States: UNHCR, above n 20, ch IV, 49.

33 Ibid.

34 Ibid. Similar figures are not available in the 2013 or 2014 Statistical Yearbooks.

35 Ibid.

36 UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005, states 'Best State practice ensures that the reasons for not granting refugee status are, in fact and in law, stated in the decision'. ExCom Conclusion No 8 (XXVIII) — 1977 states, '(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned'.

37 'The UNHCR has only been able to raise $800 million of the $1 billion budget it needed for this year, which has meant that it has had to cut 900 field staff, so it is losing the capacity to work in countries like Afghanistan, Iran and Pakistan': Paul McGeough, 'Australia in the Dock over its Treatment of Refugees' *Sydney Morning Herald* (Sydney) 9 July 2001, 7. 'People would stop getting on boats and paying smugglers if we increased UNHCR's capacity to process refugees within, say, three months, and guaranteed resettlement in six months': Ben Saul, 'Processing Refugees: They Get the Hits, We Get the Myths' *The Age* (Melbourne) 12 March 2014.

38 'The UNHCR's annual budget in Indonesia is around $6 million. If the government and the opposition are serious about saving lives, why not support the UNHCR in providing a safe pathway to asylum for genuine refugees. … An immediate increase in UNHCR funding of at least $10 million from Australia would at least increase the capacity to assess asylum applications': Commonwealth, *Parliamentary Debates*, Senate, 16 August 2012, 5554 (Senator Scott Ludlam).

39 The 2001 *Tampa* incident prompted the government to subsequently enact a suite of legislation, which had the combined effect of excluding certain territories from the Australian migration zone (including Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands), creating a new tiered visa scheme for asylum seekers engaged in 'secondary movement', allowing for 'unauthorised arrivals' to be detained and removed to 'declared countries' and limiting the grounds of judicial review. This was known as the 'Pacific Solution'.

40 UNHCR expressed concern that the maritime law rescue-at-sea tradition could be jeopardised. Evidence of Erika Feller, Director, International Protection, UNHCR (22 October 2003) United Kingdom, House of Lords, European Union Select Committee, Subcommittee F (Social Affairs, Education and Home Affairs) Inquiry into New Approaches to the Asylum Process <http://www.publications.parliament.uk/pa/ld/lduncorr/euf221O.pdf>.

41 Nauru became a signatory to the Refugee Convention and Protocol on 28 June 2011.

42 The following is an excerpt from an interview on ABC, 'Asylum Seekers Speak' *7.30 Report*, 24 September 2001:

MARISSA BANDHARANGSHI, UNHCR: The UNHCR's mandate is for the international protection of refugees. Where a country has the capacity to implement domestic screening procedures, then UNHCR's role would be more to monitor that that complies with international law.

Other countries do not have the local capacity to conduct refugee status determination and therefore UNHCR has a function to step in at that point.

In this case, given that Nauru does not at this time have the local capacity to screen these people and because they are not a signatory to the convention, then UNHCR has agreed to assist in that process.

BEN WILSON: But why would Australia send a group of asylum seekers to a country that has no capacity to process them?

MARISSA BANDHARANGSHI: Well Ben, you would have to ask the Australian authorities that. UNHCR can't second guess what the reasons for that are.

43 In 2011 then Prime Minister, the Hon Julia Gillard MP, announced plans for a 'refugee swap' agreement with Malaysia. Under the 'Malaysia Agreement' Australia would return refugees intercepted at sea to Malaysia for processing in exchange for taking a number of refugees who had already been found to have refugee status and were awaiting resettlement.

44 Australia–Malaysia Asylum Seeker Transfer Agreement, cl 10.2(a), states that Malaysia will provide transferees with the opportunity to have their asylum claims considered by the UNHCR and will 'respect the principle of non-refoulement'.

45 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (*Plaintiff M70*).

46 Ibid 131.

47 UNHCR, *Global Report 2010* 267.
48 UNHCR Malaysia Facebook page, accessed 5 July 2012.
49 UNHCR, *UNHCR Statistical Yearbook 2014*, 14th edition, 81.
50 Andrew Clennel, 'UN Should Fix Itself Before Criticising, says Ruddock', *Sydney Morning Herald* (Sydney) 10 July 2001.
51 Australian National Audit Office (ANAO), *Management Framework for Preventing Unlawful Entry into Australian Territory*, Audit Report No 57 (2001–2002) 80 (emphasis added).
52 Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, [56].
53 On 5 December 2014, the Parliament passed the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, which introduced the 'Fast Tracked and Return' (FTAR) process. FTAR applies to all asylum seekers (now referred to as *Illegal* Maritime Arrivals) who arrived in Australia by boat on or after 13 August 2012 and before 1 January 2014, have not been taken to a regional processing centre and who the Minister for Immigration and Border Protection has allowed to make a valid protection visa application, which he or she must have lodged on or after 19 April 2015.
54 *Migration Act 1958* s 198A(3)(a).
55 Ibid s 198AB(2).
56 Ibid s 198AB(3).
57 There was a spike in numbers of referred refugees resettled in Australia in 2012–13. In 2015 the Abbott government announced an additional 12 000 places for Syrian refugees.
58 Article I(A)(2) of the Refugee Convention states that a well-founded fear of persecution may be due to being 'persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.
59 *Migration Act 1958* s 36(2).
60 Referred cases can be offered one of four different humanitarian visas, which are Refugee (visa subclass 200); In-Country Special Humanitarian (visa subclass 201); Emergency Rescue (visa subclass 203); and Woman at Risk (visa subclass 204).
61 *Migration Regulations 1994* (Cth), Sch 2, cl 201.222:
(a) the degree of persecution to which the applicant is subject in the applicant's home country; and
(b) the extent of the applicant's connection with Australia; and
(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and
(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.
62 Merits review via the Administrative Appeals Tribunal and limited judicial review or the FTAR process.
63 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 31020 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).
64 M Christie, 'Australia blasts UN stance on illegal migration', Reuters, 21 February 2001.
65 Letter from Dennis McNamara (Director, Division of International Protection, UNHCR) to JRS Asia Pacific, 23 October 1997. Cited in Michael Alexander, 'Refugee Status Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251, 284.
66 UNHCR, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee, 22 May 2006, 6.
67 Ibid.
68 Ibid. RSDWatch, *ANALYSIS: The resource question in UNHCR RSD* <http://rsdwatch.wordpress.com/2010/05/17/analysis-the-resource-question-in-unhcr-rsd/>.
69 Ibid.
70 Kagan, above n 5, 21.
71 See, for example, UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005.
72 Duncan French and Richard Kirkman, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 *New Zealand Yearbook of International Law* 179, 189–99.
73 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 (3&4) *Law and Contemporary Problems*, 15, 54.
74 Ibid 2; Richard B Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 (3&4) *Law and Contemporary Problems* 63, 78.
75 Stewart, above n 74, 76–107.
76 Kingsbury, Krisch and Stewart, above n 73, 54–7.
77 Ibid 57.
78 Diane Orentlicher, 'Unilateral Multilateralism: United States Policy toward the International Criminal Court' (2004) 36 *Cornell International Law Journal* 415, 418–22.
79 Kingsbury, Krisch and Stewart, above n 73, 56.
80 *The Australian Courts Act 1828* (Imp).
81 Australian *Constitution* s 61.
82 *Victorian Council of Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. The Court issued the writ of habeas corpus.
83 *Ruddock v Vardarlis* (2001) 110 FCR 491, 52.

84 Ibid.
85 George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 29.
86 *Ruddock v Vardarlis* (2001) 110 FCR 491, 49.
87 Winterton, above n 85; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 281.
88 Winterton, above n 85. Winterton questions the reasoning of *Davis v Commonwealth* (1988) 166 CLR 79, which French J relied upon in coming his decision in the Tampa case. Although the Court in that case found that s 61 gave the Commonwealth the power to hold bicentennial celebrations, it did not examine its scope or justify its reasons sufficiently.
89 Sarah Joseph and Melissa Castan, *Federal Constitutional Law* (Lawbook Co, 3rd Edition, 2010) 157.
90 Zines, above n 87, 280.
91 *Ruddock v Vardarlis* (2001) 110 FCR 491, 12.
92 Joseph and Castan, above n 89, 157; Zines, above n 87, 281.
93 Section 46A(2) states:
(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (I) does not apply to an application by the person for a visa of a class specified in the determination.
94 Section 36(2)(a) states:
a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol;
95 *Plaintiff M61/2010 v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia* [2010] HCA 41 (*Plaintiff M61*).
96 Ibid 17.
97 Ibid 52.
98 Section 195A states:
Minister may grant detainee visa (whether or not on application)
(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).
99 Mary Crock and Daniel Ghezelbash, 'Due Process and the Rule of Law as Human Rights: the High Court and the "Offshore" Processing of Asylum Seekers' (2001) 18 *Australian Journal of Administrative Law* 101, 107.
100 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 1, 17.
101 Jerry Mashaw, 'Structuring a "Dense Complexity"; Accountability and the Project of Administrative Law' (2005) *Issues in Legal Scholarship* l, 19 (emphasis added).
102 See *Haitian Refugee Center, Inc v Gracey* 600 F Supp 1396 (DDC 1985); *Haitian Refugee Center, Inc v Gracey* 809 F 2d 794 (DC Cir l987) for how US courts resisted executive discretion in the form of a Presidential Executive Order which attempted to challenge the Court's exclusive power to decide whether interdicted asylum seekers (from Haiti) could have access to onshore asylum processes.
103 *Plaintiff M61* [2010] HCA 41, 64.
104 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409 (Lord Diplock).
105 See, for example, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, where prerogative power was found to be non-justiciable due to its subject-matter (international relations).
106 *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476 (*Plaintiff s157/2002*) 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
107 Ibid 513 [37] (Gleeson CJ).
108 For example, Australia has ratified the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) (ICCPR) and the *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
109 *Polites v The Commonwealth* [1945] HCA 3.
110 *Chu Kheng Lim v Minister for Immigration* (1992)176 CLR 1, 37.
111 *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 (*Teoh*) 290.
112 Ibid 6.
113 In *Thomas v Mowbray* [2007] HCA 33, the Court justified the imposition of control orders on the basis of counter-terrorism. It is arguable that the use of control orders infringes basic rights protected by the ICCPR, such as art 19 (rights of freedom of expression) and art 12 (freedom of movement). See John Von Doussa QC, 'Reconciling Human Rights and Counter-Terrorism — A Crucial Challenge' (2006) 6 *James Cook University Law Review* 104, 114.
114 Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's Excised Territory' (2011) 23 *International Journal of Refugee Law* 583, 603. Angus Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273, 276. Tanya Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13.1 *Australian Journal of Human Rights* 33, 41.

115 Susan Kneebone, 'The Pacific Plan: The Provision of Effective Protection' (2006) 18 *International Journal of Refugee Law* 696, 716.
116 Foster and Pobjoy, above n 114, 605. UNHCR, *Migration Amendment (Designated Unauthorised Arrivals) Bill, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee*, 22 May 2006, 252–3.
117 A refugee shall have free access to the courts of law on the territory of all contracting States.
118 James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 647–56.
119 *Plaintiff M70* [2011] HCA 32.
120 Ibid 16.
121 Ibid 1.
122 Ibid 33. ·
123 Ibid 135.
124 Ibid 126.
125 Ibid.
126 *Shi v Migration Agents Registration Authority* [2008] HCA 31.
127 See Immigration Assessment Authority, *The Review Process* <http://www.iaa.gov.au/the-review-process/steps-in-a-review>.
128 *Plaintiff S157/2002* [2003] HCA 2.
129 121 Fed Appx 716, 2005 WL 289952.
130 Ibid.
131 'In our experience, the core elements of an effective system for determining refugee status are … (iii) an appeal to an authority different from and independent of that making the initial decision;': Erika Feller, Assistant High Commissioner — Protection, UNHCR, 'The Work of the Refugee Protection Division in the International Context', statement presented at the Immigration and Refugee Board, Refugee Protection Division National Training Seminar, Toronto, Canada, 28 January 2008, 4–5.
132 Volker Türk, 'UNHCR's Supervisory Responsibility' (2001) 14(1) *Revue Quebecoise de Droit International* 135, 142.