The Regulation of Administrative Detention and Removal of Irregular Migrants under General International Law

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Abstract

In matters concerning immigration control the doctrine of territorial sovereignty is the prevailing norm authorising states to implement policy on broad grounds of public order, security, health, economic interests and morals. The unauthorised presence of non-citizens in the host state is invariably viewed as being incompatible the abovementioned public goods which has justified administrative detention and removal as a conventional immigration control response to irregular migration.

The activities of international institutional arrangements has led to a proliferation of "hard" and "soft" legal instruments in the field of migration broadly defined. These instruments attempt to regulate the response of the state and the relevant monitoring mechanisms provide broad guidance concerning compliance. However, these instruments, which codify relevant norms also preserve sovereign authority in this field providing states with a broad latitude to respond to irregular migration. The scope of norms as recognised by general international law is therefore determined primarily through the practice of states. State practice may be viewed as a relinquishment of sovereignty in order to adhere to relevant norms or provide evidence of the need to maintain authority to protect public goods. The immigration control response of states is therefore determined by varying degrees of interpretation concerning the perceived nature of compliance or through an exercise of sovereign discretion independent of international obligations.

The objective of this inquiry is to define the parameters of permissible conduct concerning administrative detention and removal as regulated by general international law. As these functions are performed by the executive branch the extent to which the

jurisdiction of the courts may be ousted under the domestic immigration regulatory framework is a fundamental part of my inquiry. Norms associated with liberty and security of person encompassing a prohibition against arbitrary detention, the right to challenge the lawfulness of detention and an obligation to ensure that detainees are treated with humanity are of particular relevance in examining the immigration control response of the state. While international institutional mechanisms provide broad guidance concerning the scope of permissible conduct, understanding the actions of states is critical to identify sufficiently widespread and uniform practice, which coupled with the subjective element of international custom *opinio juris* provides compelling evidence that such a response falls within the "reserved domain of domestic jurisdiction".

To achieve this objective I have elected to undertake a comparative examination of the immigration control response of two distinct sets of jurisdictions "specially affected" by irregular migration. One set has historically supported the universality of human rights and the other has generally been reticent to participate in international regulatory regimes. As recognised by the International Court of Justice in the *North Seas Continental Shelf Cases*, the practice of states whose interests are specifically affected by a particular phenomenon is especially influential in assessing how legal rules develop to bind the broader international community. All of the jurisdictions examined in this research are specially affected by irregular migration. In a legal system in which the sovereign equality of states constitutes the basic and fundamental principle in international law and international relations, the practice of states examined in this inquiry are equally influential in determining the state of international law in this field.

1. Introduction

1.1. Scope and Purpose of Inquiry

In the era of globalisation, the international community of states has become increasingly engaged in establishing integration regimes to facilitate international and regional trade and investment. In spite of international and regional commitments to the opening of markets, major receiving countries of migrant workers have been less willing to liberalise immigration policy to respond to the dynamics of supply and demand for unskilled and semi-skilled labour and services. While the demand for this level of labour stems from the need to promote social and economic development, immigration policies of host states are generally orientated towards regulating the legal entry of highly skilled migrants.[1] Where supply and demand exist for various forms of labour and services but is frustrated by barriers preventing the supply meeting the demand then this results in irregular migration.

The doctrine of territorial sovereignty is the prevailing norm authorising states to admit and exclude non-citizens. Although regulatory barriers may operate contrary to labour dynamics the conventional response of administrative detention and removal is often employed to safeguard public goods including order, security, health, economic interests and morals. Sovereign authority is however subject to limitations. International law has evolved in this field, initially through customary law norms governing state responsibility for injury to aliens and subsequently through the codification of human rights norms.

[1] The domestic labour force is often unable to meet the demand for lower-end positions due to an ageing population, increased educational and professional opportunities and recourse to social welfare support.

Immigration control measures are within the "reserved domain of domestic jurisdiction" to the extent which international law imposes limitations on state authority. The degree to which these norms have encroached upon the authority of the state however remains a contentious issue. Although a range of instruments including progressive treaties such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) is evidence of an intrusion of human rights considerations in the domestic sphere, those same instruments expressly preserve the sovereign authority of states in their dealings with unauthorised entrants.

In spite of international institutional arrangements, which have been successful in drafting international instruments and establishing monitoring mechanisms, the scope of human rights norms is determined primarily through the actions of states. Domestic measures reveal the extent to which states perceive to owe international obligations whether conventional or customary in origin or even if such measures are adopted either exclusively or partially pursuant to sovereign policy considerations, such practice contributes to the crystallisation or reinforcement of applicable norms or provides evidence of a departure from accepted practice for that state. A more accurate and substantive account of the scope of norms associated with irregular migration can therefore only be achieved by undertaking a comparative examination of state practice. This constitutes evidence of what states deem to be reasonable and justifiable to secure the territorial integrity of the state and to protect public goods. In contrast to state practice, international institutional monitoring mechanisms provide only a broad interpretation of norms and afford states a residual "margin of appreciation" to carry out

their international commitments. This illuminates only a general understanding of the scope of permissible conduct.

General international law comprises of legal rules binding on the broader international community derived from recognised sources of international law as opposed to rules which are applicable to a particular section of the international community. International custom and conventions constitute the primary sources of international law. These sources are of particular importance in determining whether a rule has acquired the status of being generally accepted by states.

In determining the legality of measures to combat irregular migration, norms associated with the liberty and security of person encompassing a prohibition against arbitrary detention, the right to challenge the lawfulness of detention and an obligation to ensure that detainees are treated with humanity are of particular relevance in demarcating the bounds of permissible state conduct. The objective of my research is to determine the extent to which these norms have developed and are recognised by general international law specifically focusing on administrative detention and removal of irregular migrants who have entered the host state as opposed to persons "stopped at the border". As the executive branch is responsible for performing these functions, the extent to which the judiciary may be ousted from jurisdiction is a fundamental part of my inquiry. The criminal law response to irregular migration is excluded from the scope of my inquiry.

The author does not intend to undertake an in-depth assessment as to whether these states comply or violate applicable norms. Rather the intention is to undertake an objective inquiry based on relevant practice from a sample range of states specially affected by irregular migration in an effort to define the parameters of permissible

conduct, which it is claimed, is binding on the broader international community. The immigration control responses of these states specially affected by the phenomenon of irregular migration are particularly relevant in defining the state of international law in this field.[2]

Although the legality of decisions to remove encompass the issue of *non-refoulement,* the substantive scope of this principle will not be subject to examination. Rather, for this inquiry the issue of removal is confined to public law principles governing standards of administrative review and the right to appeal and review administrative decisions. The right to return to one's own country is clearly associated with the issue of detention and removal i.e. to effect repatriation, however this is an independent area of inquiry excluded from the scope of this research. Similarly, the scope of the right to leave one's country and by implication enter another country also does not fall directly within the ambit of my research.

The reasons *why* each state responds in its own way to irregular migration is also not directly relevant to this inquiry. Rather, the *manner* in which states respond is critical in understanding how international law regulates this field. Domestic legislation, regulations, case law and policy pronouncements are measures adopted by the respective branches of government power providing the raw evidence as to how states perceive to meet their international obligations and/or exercise their sovereign authority, partially or in toto, to respond to this phenomenon.

The jurisdictions examined in this research are grouped into two distinct identifiable sets. One set comprises of Western states namely Australia and the United

[2] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands)*, [1969] I.C.J. Rep. 3, para.73-74

States, which have ratified many of the important instruments in this field. As affluent nations, both states have attracted unauthorised entrants from all corners of the globe, resulting in the authorities developing sophisticated and complex domestic regulatory frameworks to respond to irregular migration. The second set of jurisdictions comprising of Hong Kong S.A.R., Malaysia and Singapore constitute some of the major destinations of choice for irregular migrants in Southeast Asia. As with the Western set, these states are also specially affected by irregular migration, particularly at an intra-regional level. However, unlike Australia and the United States, the jurisdictions in Southeast Asia are not party to many of the relevant international instruments and have advocated that human rights norms are culturally relative. This research offers an opportunity to compare and contrast the practice of Western liberal democracies bound by conventional law regimes and the practice of Southeast Asian states not party to many of these legal regimes although bound by customary law norms, the scope of which is not particularly clear. The aim is not merely to identify consistent practice among these jurisdictions but also to identify variation in practice within and between each set of jurisdictions, which may limit the scope of obligations as recognised by general international law.

In a region in which leaders and public officials of Southeast Asian states have advocated that human rights norms are culturally relative, comparing and contrasting domestic practice with Western states traditional supporters of universalism generates greater objectivity for this inquiry. In a legal system in which the sovereign equality of states constitutes the basic principle of international law, the author does not discriminate

or place greater weight or importance concerning the practice of one or more jurisdictions in this research.[3]

The author does not proclaim to establish an absolute standard. Proof that the scope of particular rule is binding on the broader international community is "relative, not absolute".[4] The standard of treatment identified in this research may vary with contrary widespread and uniform practice of other states, including the practice of states whose interests are specially affected. I would argue however that this would prove to be a difficult assignment given that the selected jurisdictions are highly influential in regulating international law in this field and the two sets of jurisdictions are seemingly diametrically opposed concerning the perceived nature of their human rights commitments.

It is acknowledged that the inclusion of other states specially affected by irregular migration would generate greater support from advocates who adopt a more traditional view as to how international custom evolves. However, by including a greater number of states it is only possible to undertake a superficial examination of these jurisdictions, which would undermine the desired outcome to engage in a detailed analysis of the findings of this inquiry.

1.2. Terminological Issues

[3] The sovereign equality of states is recognised as a fundamental principle of international law and international relations. *See infra*, chap. 2.1. It is not possible to assert that the practice of certain jurisdictions is more important than others in the formation of international law. However, the International Court of Justice (ICJ) in the *North Seas Continental Shelf Cases* acknowledged that the practice of certain states *on a given issue* is more influential than others in establishing international custom due to the interests those states being specially affected; *North Sea Continental Shelf Cases, supra* n.2

[4] Michael Akehurst, "Custom as a Source of International Law", *British Year Book of International Law* 147 (1974-75), p.1, at p.14

Consistent with contemporary discourse on this topic, the term "irregular" migration is preferred to "illegal" migration.[5] Although "irregular" migration is the preferred term for intergovernmental organisations such as the International Organisation for Migration (IOM) and the International Labour Organisation (ILO), states are generally reluctant to adopt terminology, which undermines their sovereignty and capacity to deal with this phenomenon.[6] In contemporary literature, there is a general movement against employing language which may lead to adverse connotations being drawn against persons unauthorised to enter and remain on the territory of the host state. The term "illegal" is invariably equated with criminality.[7] However, unauthorised entry or presence in the host state does not always constitute a criminal offence or if it does, it is not always treated as a criminal offence in practice.[8] Moreover, the adoption of the term "illegal" may also connote participation in an ongoing illegal enterprise. In the eyes of the law, illegality is a final and conclusive status whereas in practice, receiving states

[5] The International Organization for Migration (IOM) defines irregular migration as the "movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is illegal entry, stay or work in a country, meaning that the migrant does not have the necessary authorization or documents required under immigration regulations to enter, reside or work in a given country." International Organization for Migration, *Glossary on Migration*, (Geneva: IOM, 2004) pp. 34-35 http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/Glossary_eng.pdf
Other terms commonly employed include clandestine and undocumented migration.

[6] An example of the reluctance of states to adopt neutral terminology has been demonstrated during the drafting of the UN transnational organised crime legal regime in which the term "illegal entry" was adopted to refer to the "act of crossing borders without complying with the necessary requirements for legal entry into the receiving State". *See* Art. 3(b), UN *Migrant Smuggling Protocol*

[7] *See*, David Weissbrodt, *Final Report of the UN Special Rapporteur on the Rights of Non-Citizens*, UN Doc. E/CN.4/Sub.2/2003/23, para.29, where the Special *Rapporteur* noted: "Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals."

[8] In Australia, unlawful entry is not legislated as a criminal offence. Instead, irregular migration is dealt with on an administrative level. Schloenhardt asserts that the "decision to decriminalise illegal migration must also be seen as a way to save Australian authorities from investigating the arrivals, to prevent the activation and involvement of the criminal justice system, and ultimately to facilitate the immediate removal of illegal immigrants." *See*, Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region*, (Leiden: Martinus Nijhoff, 2003), p. 190

often adopt amnesties and regularisation programmes as a means to address irregular migration.[9] Other commentators note that a person cannot be "illegal" as it would contravene established norms of the right of everyone to recognition everywhere as a person before the law (UDHR Art. 6) and the right of all persons to equality before the law and without discrimination to equal protection of the law (UDHR Art. 7).[10] As such, the unauthorised status of the migrant in the host state should not undermine the right of that person to benefit from the rights all persons are entitled to under contemporary international law.

The term "irregular migrant" is used interchangeably throughout the course of this research with other terms commonly employed to refer to a non-citizen's unauthorised status such as "undocumented migrant" and "unauthorised entrant". The terms "non-citizen" and "alien" are also used interchangeably given that both terms have been employed as international regulation in this field has evolved. The removal of persons who have entered a state unlawfully is referred to in the literature as return "*refouler*" rather than "expulsion" which is employed where the non-citizen is removed following lawful entry.[11] In this research, I will employ the general term "removal" to refer to persons who have unlawfully entered the territorial jurisdiction of the host state.

[9] *See*, Kees Groenendijk, "Introduction", in Barbara Bogusz et.al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff, 2004), xix

[10] *See*, Ryszard Cholewinski, "Identifying and Clarifying Concepts on 'Irregular' Migration", (paper presented at the 10th Regional Conference on Migration Current Perspectives and Strategies in Addressing 'Irregular' Migration, Singapore, 6-10 November, 2006), p.4 http://www.mfasia.org/mfaResources/RCholewinski-Concepts.pdf cited in Luca Bicocchi and Michele LeVoy, *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (Brussels: Platform for International Cooperation on Undocumented Migrants, 2007), p.5. http://www.picum.org/data/Undocumented%20Migrants%20Have%20Rights%21.pdf ;
See also, Patrick Taran, "Human Rights of Migrants: Challenges of the New Decade", 38(6) *International Migration* 7 (2000), p. 23

[11] *See*, Isabel Hörtreiter and David Weissbrodt, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties," 5 *Buffalo Human Rights Law Review* 1 (1999), at p.7

However, I will also refer to the terminology used in domestic jurisdictions, which will be used interchangeably with "removal" when examining those jurisdictions.

1.3. Who are Irregular Migrants for the Purpose of this Inquiry?

Domestic legislation rarely provides a definition of persons unauthorised to enter and remain in receiving states.[12] Instead, the status of a non-citizen is determined through a failure to comply with the domestic immigration control requirements. In general, irregular migrants fall into four major categories. Firstly, persons who arrive on the territory of the host state by bypassing immigration control. Secondly, persons who stay beyond the time authorised. Thirdly, persons who violate their condition of stay e.g. undertaking remunerative activity. Fourthly, persons who enter the territorial jurisdiction of the receiving state by deception or false pretences. The common feature associated with these forms of irregular migration is that the non-citizen has already entered the territorial jurisdiction of the host state.

The distinction between entry and admission is relevant with respect to the conferral of rights at the domestic level. However, for this inquiry it is not relevant in determining whether the non-citizen may be categorised as having an irregular status. Non-citizens in an irregular situation may never be formally admitted but are afforded *de facto* recognition of this status due to their long-term residence, familial ties and social and economic contribution, which they provide to the host state. Unauthorised non-citizens may be granted reprieve by the host state in the form of regularisation or the authorities tacitly tolerate their unlawful presence.

[12] *See*, Elspeth Guild, "Who Is an Irregular Migrant?" in Barabara Bogusz et.al. (eds.), s*upra* n. 9, pp.3-4 where the author notes that under domestic regulatory frameworks illegality is normally determined by those who are not legal.

This research is therefore concerned with how the domestic immigration control response deals with non-citizens who are unlawfully *present* in the territorial jurisdiction of the receiving state. Persons "stopped at the border" are excluded from the scope of this inquiry. Persons seeking asylum may fall within one or more of the abovementioned categories given that not all asylum claims are lodged on arrival in the host state. However, the author has elected to exclude this category of non-citizen from this inquiry given the significant variation among states with regard to recognition of international asylum/refugee law. Similarly, non-citizens subject to administrative detention and removal on national security grounds will also not form part of this inquiry given that measures employed by states during emergency situations is a discreet field of inquiry, especially more so post-9/11. The same reasons are applicable for not undertaking an inquiry concerning the mass expulsion of aliens. It should be noted however, that there are seminal cases involving persons claiming asylum and persons who are detained and removed on national security grounds. These cases cannot be overlooked given the relevance it has in international migration law including defining the scope of norms associated with administrative detention and removal. Finally, it should be noted that the abovementioned categories are adopted to impose a limit for this specific inquiry. It is acknowledged that a more liberal or restrictive definition may be employed to regulate the category of person recognised as an irregular migrant.

2. Historical Foundations: State Authority v. Protection of Nationals Abroad

2.1. Sovereignty as a Basis of Authority to Control Immigration

In a legal system where states[13] are classically viewed as the sole subjects of public international law, the sovereign equality of states is regarded as the "basic constitutional doctrine of the law of nations."[14] Sovereignty may be defined as the "lawful control over territory generally to the exclusion of other states, authority to govern in that territory and authority to apply law in there."[15] The principle is expressly referred to in the UN Charter[16] and other international instruments.[17]

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[13] Art. 1, Montevideo Convention on the Rights and Duties of States (Inter-American)1933, 49 Stat. 3097, Treaty Series 881 provides: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other states." It is widely accepted that the abovementioned criteria for statehood forms part of international custom.

[14] Ian Brownlie, *Principles of Public International Law*, 5th ed., (Oxford: Clarendon Press, 1998), at p. 289

[15] *See*, American Law Institute, *Restatement of the Law, Third: the Foreign Relations Law of the United States*, (St. Paul, Minn: American Law Institute Publishers, 1987) (hereinafter: Restatement), § 206; In *The Island of Palmas (United States of America* v. *The Netherlands)* case, *Reports of International Arbitral Awards* (R.I.A.A.), Vol. XI, p.831, at p.838, Arbitrator Huber of the Permanent Court of Arbitration (PCA) noted: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it a point of departure in settling most questions that concern international relations."

[16] Article 2(1), *Charter of the United Nations* (UN Charter), 59 Stat. 1031, T.S. 993, 3 Bevans 1153 http://www.un.org/en/documents/charter/index.shtml

[17] For example, the principle of sovereign equality of states is referred to Art. 5 of the draft UN *Declaration on the Rights and Duties of States* G.A. Res. 375 (IV), 6 December 1949, which provides: "Every State has the right to equality in law with every other State." *See also*, Art. 14. The UN *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* G.A. Res. 2625 (XXV) provides: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

(a) States are juridically equal;
(b) Each state enjoys the rights inherent in full sovereignty;
(c) Each state has the duty to respect the personality of other states;
(d) The territorial integrity and political independence of the state are inviolable;
(e) Each state has the right freely to choose and develop its political, social, economic and cultural systems;
(f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states."

Although sovereign authority entails the competence to perform functions of government to the exclusion of other states, an expression of sovereignty is also evident through the implementation of legislative and policy measures dealing with issues of international concern. The adoption of such measures may generate international obligations under international custom and thus regulate the authority of the legislative, judicial and executive branches of government power in the exercise their respective constitutional functions to prescribe, adjudicate and enforce. Sovereignty should not necessarily be regarded as being incompatible with international law but rather as evidence of its exercise.[18]

The scholarly writings of Emer de Vattel have been highly influential in establishing the formative principles in domestic jurisprudence regarding the competence of the state to control immigration. Such authority includes the right to prohibit the entry of non-citizens "in general or in particular cases, or to certain persons or for certain particular purposes, according… (to what is) advantageous to the state."[19]

In the *Chinese Exclusion Case*, *Chae Chang Ping* v. *United States*, the US Supreme Court declared that it was not open to controversy that Congress is authorised to adopt legislative measures to exclude non-citizens. In delivering the opinion of the Supreme Court, Justice Field asserted that jurisdiction over territory is "an incident of

[18] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge: Grotius Press, 1987), p. 29; In the *Case of the S.S. Lotus*, P.C.I.J., Ser. A., No. 10, 1927, 18 the PCIJ noted: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."

[19] Emer de Vattel and Joseph Chitty, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct Affairs of Nations and Sovereigns,* (Philadelphia: T. & J. W. Johnson, 1852), bk. 2, § 94

every independent nation... If it could not exclude aliens, it would be to that extent subject to the control of another power."[20]

Sovereign authority includes a power of the state to impose conditions on the right to enter[21] and to remove non-citizens where deemed necessary.[22] In referring to the writings of Vattel, the US Supreme Court acknowledged that it is an established maxim of international law that as an attribute of sovereignty states possess an inherent right "essential to self-preservation" to decide which non-citizens are entitled to become members of its community and to impose conditions of stay as it sees fit.[23] The state is therefore obliged to ensure its preservation by doing "everything" which can help "ward off imminent danger, and keep at a distance whatever is capable of causing its ruin; and that from the very same reasons that establish its right to the things necessary to its preservation."[24] The PCIJ[25] and the US Supreme Court have endorsed the principle.[26]

Domestic legislative and policy initiatives regulating on matters of immigration control are a *prima facie* reasonable exercise of sovereignty if it is directed to ensure the security and territorial integrity of the host state. Vattel acknowledges that states may send aliens elsewhere "if it has just cause to fear that they will corrupt the manners of the citizens, that they will create religious disturbances, or occasion any other disorder,

[20] *Chae Chang Ping* v. *United States* 130 U.S. 581 (1889), at pp. 603-604
[21] Vattel, *supra* n. 19, bk. 2 § 100
[22] *Fong Yue Ting* v. *United States* 149 U.S. 698 (1893), at p. 707
[23] *Nishimura Ekiu* v. *United States* 142 U.S. 651 (1892), at p. 659
[24] Vattel, *supra* n. 19, bk. 1 §§19-20
[25] "The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation." *Case of the SS Wimbledon*, P.C.I.J., Ser. A., No. 1, 1923, at p. 37, dissenting opinion of Judge Anzilotti and Judge Huber
[26] "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinate." *Chae Chan Ping*, *supra* n. 20, at p. 606

contrary to the public safety."[27] Aliens who enter the territory of the Sovereign do so on the "tacit condition" that they are subject to its laws.[28] However, Vattel acknowledges that measures seeking to exclude or remove aliens should be "free from unnecessary suspicion and jealousy; it should not be carried so far as to refuse a retreat to the unfortunate, for slight reasons, and on groundless and frivolous fears."[29] Respect for human rights norms and standards associated with immigration control is by its nature a matter of international concern which invokes a "corollary duty" to respect the rights of other states including those that a state may claim to protect their nationals abroad.[30] In practice, however the applicant is required to overcome a significant onus of establishing the impermissibility of a government measure, which without compelling reasons to the contrary is invariably accepted as a legitimate exercise of state authority.

Judicial decisions in Commonwealth countries closely follow US case law. In *Musgrove* v. *Chun Teeong Toy*, the Privy Council reversed the majority decision of the Supreme Court of Victoria, which had rejected the claim of prerogative power to prevent aliens from entering the British Empire.[31] The respondent could only maintain an action if he could establish that he had an enforceable legal right to enter British territory, the Colony of Victoria. The Privy Council deemed it inappropriate to detail the "rights of the executive government… under the Constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be

[27] Vattel, *supra* n. 19, bk. 1 § 231
[28] *See*, ibid., bk. 2 § 100
[29] *See*, ibid., bk. 1 § 231
[30] *The Island of Palmas case*, *supra* n. 15, at p. 839
[31] [1891] AC 272

properly discussed when the several interests concerned were represented, and which may never become of practical importance".[32]

The authority to refuse admission of aliens, including friendly aliens, has been reaffirmed in a line Commonwealth cases.[33] According to these decisions, aliens do not possess a common law right to enter which Beaumont J in *Ruddock* v. *Vadarlis* regards as "beyond argument" settled law.[34]

In the *Attorney-General for Canada* v. *Cain and Gilhula*, the Privy Council approved the decision in *Musgrove* by declaring that the sovereign had authority to exclude aliens.[35] However, unlike the decision in *Musgrove*, *Cain* may be cited as authority to support the claim that a state, which has the authority to exclude aliens, possesses ancillary powers of detention and expulsion.

> "One of the rights preserved by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, or good government, or to its social or material interests."[36]

The Privy Council reasoned that the "power of expulsion is in truth but the complement of the power of exclusion."[37] Where authority to exclude exists, such

[32] Ibid., at p. 283
[33] *Ah Yin* v. *Christie* (1907) 4 CLR 1428 per Griffith CJ at 1431; *Johnstone* v. *Pedlar* [1921] 2 AC 262 ; [1921] All ER Rep 176 per Viscount Cave at AC 276; All ER Rep 182) and per Lord Phillimore at AC 296; All ER Rep 192; *Ex parte* Kisch per Evatt J at 223 *R* v. *Bottrill; Ex parte Kuechenmeister* [1947] KB 41 per Scott LJ at KB 51; *Koon Wing Lau* v. *Calwell* (1949) 80 CLR 533 per Latham CJ at 555-6; *Chu Kheng Lim* v. *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; 110 ALR 97 per Brennan, Deane and Dawson JJ at CLR 29-31, per Gaudron J at CLR 57 cited by Beaumont J in *Ruddock* v. *Vadarlis* (2001) 110 FCR 491, paras.116-124
[34] *Vadarlis*, ibid., at para.125
[35] [1906] AC 242
[36] Ibid., at p. 246
[37] Ibid., at p. 247

authority should extend to the removal of persons who enter the territory of the state unlawfully which would justify an exercise of "extra-territorial" constraint.[38]

In *Robtelmes* v. *Brenan*, the High Court of Australia noted that under the Federal Constitution the Commonwealth Parliament has the power "to make laws for the peace, order and good government of the Commonwealth" under broad heads of power including "naturalisation and aliens", "immigration and emigration" and "external affairs".[39] The Commonwealth Parliament exercising authority acquired through a delegation of power has "the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it."[40] Laws enacted by Parliament, which it "thinks fit" for that purpose is not for "the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise."[41]

In *Chu Kheng Lim* v. *Minister for Immigration, Local Government and Ethnic Affairs*, the High Court of Australia held that the legislative power as authorised by the Constitution to make laws with respect to non-citizens encompasses a conferral of authority upon the executive to detain those persons for the purpose of expulsion or deportation.[42] The authority of the executive to detain non-citizens for this purpose as well as detaining those persons to enable the executive to "receive, investigate and determine" applications for admission constitutes an incident of executive power.[43]

[38] Ibid., at p. 247
[39] (1906) 4 CLR 395
[40] Ibid., at p. 404, per Griffith CJ
[41] Ibid., at p. 404, per Griffith CJ
[42] *Chu Kheng Lim*, *supra* n. 33
[43] Ibid., at p. 10, per Mason CJ, at p. 32, per Brennan, Deane and Dawson JJ

The abrogation or modification of the executive prerogative where there is an express intention on the part of the legislature is consistent with the principle of parliamentary sovereignty. However, as noted by the separate judgments in *Vadarlis* there is a lack of consensus as to whether the executive prerogative has been abrogated or abridged in matters concerning immigration. In his dissenting judgment, Black CJ asserts that an executive prerogative to undertake immigration control measures ancillary to its authority of exclusion has been abrogated by legislation, namely, the Migration Act 1958 (Cth).[44] Conversely, French J opined that executive authority had not been abrogated or abridged by the Act which if Parliament had intended could be achieve with "clear words".[45]

> "In my opinion the Act, by its creation of facultative provisions, which may yield a like result to the exercise of Executive power, in this particular application of it cannot be taken as intending to deprive the executive of the power necessary to do what it has done... The Act confers power. It does not in the specific area evidence an intention to take it away. The term "intention" of course is a fiction. What must be asked is whether the Act operates in a way that is necessarily inconsistent with the subsistence of the Executive power described."[46]

Similar to the position in the United States and Commonwealth case law, the European Court of Human Rights (ECtHR) has recognised the "undeniable sovereign right to control aliens' entry into and residence in their territory."[47] The European human rights protection regime has consistently recognised that states subject to international obligations are authorised to control entry, residence and removal of aliens.[48]

[44] *Vadarlis*, *supra* n. 33, at para.64
[45] Ibid., at para.204
[46] Ibid., at para.202, per French J
[47] ECtHR 20 May 1996, Case No. 17/1995/523/609, *Amuur* v. *France*, para.41
[48] ECtHR 30 October 1991, Case No. 45/1990/236/302-306, *Vilvarajah and Others* v. *The United Kingdom*, para.102; ECtHR 25 October 1996, Case No. 70/1995/576/662, *Chahal* v. *United Kingdom*, para.73

The concept of sovereignty in matters of immigration control has been reformulated to prohibit the intervention in matters, which form part of the "reserved domain of domestic jurisdiction."[49] In contemporary scholarly discourse, matters not subject to international regulation are regarded as falling within the reserved domain. This principle is referred to in the UN Charter, which prohibits the intervention "in matters which are essentially within the domestic jurisdiction of any state."[50] The principle of non-intervention in domestic affairs is reiterated in the draft UN Declaration on the Rights and Duties of States[51] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[52]

As a dynamic concept the reserved domain does not endorse an unfettered response in protecting the territorial integrity of state borders as classically envisaged but obliges states to respect the rights of both non-citizens and states in the protection of their nationals abroad. The discretion of states to determine what matters fall within their domestic jurisdiction is limited by the international obligations owed by that state, whether conventional or customary in origin. Where such obligations exist, the dispute assumes an international character and ceases to fall within the reserved domain of domestic jurisdiction. In spite of the increased codification of human rights norms in this field, international instruments continue to afford host states a significant degree of

[49] James Nafziger, "The General Admission of Aliens under International Law", 77 *American Journal of International Law* 804 (1983), at p. 819
[50] UN Charter, *supra* n. 16, Art. 2(7)
[51] *See*, *supra* n.17, Arts 1, 2, 3 and 4
[52] *See*, *supra*, n.17

authority to employ measures deemed necessary to secure the integrity of its territorial borders and to ensure the welfare of its citizens.[53]

2.2. Traditional Customary Law Norms Governing the Treatment of Aliens

The traditional regime comprising of customary law norms authorising states to protect their nationals abroad from abuses incurred by the host state predates the contemporary international regime protecting the human rights of non-citizens.[54] The development of customary law doctrines governing state responsibility for injury to aliens and diplomatic protection of nationals abroad coincided with the emergence of the nation-state as the principal actor in international relations. Increased transnational mercantile activity prompted Vattel to postulate that the right of the state of nationality is violated in situations where its citizens abroad suffer harm. The basis of Vattel's theory is

[53] For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) provides: "Nothing in the present part of the Convention (Part III governing the rights of all migrant workers and members of the families, including irregular migrants) shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment …" G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), Art. 34; The CMW authorises state parties to maintain significant control over immigration procedures: "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention." CMW, Art. 79; The United Nations Convention against Transnational Organised Crime (TOC) required to be read in conjunction with the supplementary Trafficking in Persons and Migrant Smuggling Protocols, refers to the protection of sovereignty and non-interference in domestic affairs: "(1) States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. **(**2) Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law." G.A. Res. 55/25, Annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001), Art.4(1)(2)

[54] *See*, Ryszard Cholewinski, *Migrant Workers in International Human Rights Law Their Protection in Countries of Employment*, (Oxford: Clarendon Press, 1997), at pp. p. 40-43 for an overview of the history leading to the crystallisation of customary norms establishing the doctrines of diplomatic protection and state responsibility for injury to aliens; *See also*, Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (The Hague: Martinus Nijhoff Publishers, 2001), Chapter II; *See also*, Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984), at pp. 5-8; *See also*, Myers McDougal et al., "Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights", 70(3) *American Journal of International Law* 432 (1976), at p. 440

that there is a fundamental duty of the state to protect its citizens, especially given that at the time of expounding his theory the individual was not regarded as a subject in international law.

> "Whoever offends the state, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, obliged him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety."[55]

In proclaiming its right to protect their nationals from incurring personal and economic harm while abroad the Western hemisphere states promoted an international minimum standard of treatment to be respected by host states which was endorsed by the P.C.I.J.,[56] the I.C.J.,[57] international arbitral bodies,[58] Western jurists[59] as well as in treaties in the field of friendship, commerce and navigation.[60]

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[55] Vattel, *supra* n. 19, bk. 2 §71

[56] In the *Mavrommatis Palestine Concessions Case* (*Greece* v. *Britain*), P.C.I.J., Ser. B., No. 3, 1924, at p. 12 the P.C.I.J. declared: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law." In the *Panevezys-Saldutiskis Railway Case* (*Estonia* v. *Lithuania*), P.C.I.J., Ser. A./B., No. 76, 1939, at p. 16 the P.C.I.J. noted that by resorting to diplomatic protection: "[A] State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged."

[57] *Nottebohm Case* (*Liechtenstein* v. *Guatemala*), I.C.J. Reports 1955, p. 4 at pp. 23-24

[58] *See*, McDougal et al., *supra* n. 54, at p. 448 n. 71 citing the *Roberts* case which involved the arbitrary arrest and mistreatment of a U.S. citizen by Mexican authorities. The General Claims Commission declared: "Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the *ultimate test* of the propriety of the acts of authorities in the light of international law. The test is, broadly speaking, *whether aliens are treated in accordance with ordinary standards of civilization*." (emphasis added) *See also*, McDougal et al., *ibid.*, at p. 448 n. 69 citing the *Neer case* in which the General Claims Commission declared: "[T]he propriety of governmental acts should be put to the test of international standards, and … that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to insufficiency of governmental action so

Critics of the international standard cite historical abuses of the institution of diplomatic protection as evidence of Western economic imperialism.[61] Arguably, there is merit to such claims as smaller states have historically refrained from the exercise of diplomatic protection to avoid repercussions from stronger and more powerful host states.[62] Critics claim that the institution is not assessed according to a minimum standard but rather to a significant extent by political considerations:

> "Conclusive evidence of this is provided by the fact that, on occasions, the State concerned has refused to grant protection although requested to do so by the interested party and although the claim was justified; on the other hand, there have been cases in which no application had been made and yet protection was exercised, sometimes even against the will of the interested

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far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."

[59] *See*, Elihu Root, "The Basis of Protection to Citizens Residing Abroad", 4 *American Journal of International Law* 517 (1910), at pp. 521-522. "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilisation. There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of that country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."

[60] *See*, McDougal et al., *supra* n. 54**,** at pp. 448-449 n.74-75,77

[61] *See*, John Dugard, "First Report on Diplomatic Protection", UN Doc. A/CN.4/506, para.14. In his role as Special *Rapporteur* on Diplomatic Protection, Professor Dugard while not criticising the institution of diplomatic protection noted the historical abuses of the institution by Western powers. *See also*, SN Ghua Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?", 55 *American Journal of International Law* 863(1961), at p. 866. Ghua Roy subscribes to the "Western imperialistic hypothesis" by noting: "The contacts of the members of the restricted international community of the past with other states and peoples of the much larger world outside its own charmed circle were not governed by any law or scruples beyond what expediency dictated. The history of the establishment and consolidation of empires overseas by some of the members of the old international community and of the acquisition therein of vast economic interests by their nationals teems with instances of a total disregard of all ethical considerations. ... Rights and interests acquired and consolidated during periods of such abuse cannot for obvious reasons carry with them in the mind of the victims of that abuse anything like the sanctity the holders of those rights and interests may and do attach to them. To the extent to which the law of responsibility of states for injuries to aliens favours such rights and interests, it protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils."

[62] Garcia-Amador, F.V. et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, (Dobbs Ferry: Oceania, 1974), at p. 4.

party, and this for purely political reasons far removed from the purposes of the institution of diplomatic protection."[63]

In response to such abuses, Argentine jurist Carlos Calvo asserted that aliens who establish themselves in a foreign country are "entitled to the same rights of protection as nationals, but they cannot claim any greater measures of protection."[64] The Calvo doctrine was justified on the basis that the host state is required to issue consent to be bound by international obligations. In the absence of consent, domestic courts were considered the appropriate forum to determine such matters.[65] The principle of equality received widespread support throughout Latin America as evidenced by its inclusion in domestic constitutions, legislation and inter-American regional conventions.[66]

As with the international minimum standard, the standard of national treatment has also had its detractors. The authority of a state to exercise diplomatic protection on behalf of their nationals abroad is significantly restricted due to the largely unfettered authority of the host state to determine the standard of treatment to be afforded to nationals and aliens alike.[67]

The nearly universal membership of states in the United Nations as well membership in regional organisations and associated activities of codifying international law and adopting declarations and resolutions has contributed greatly to the development of all areas of international law. In fulfilling its role of promoting "universal respect for,

[63] Ibid., at p. 4
[64] Ibid., at p. 3, n.132; *See also*, McDougal et al., *supra* n. 54, at p. 444, n.55
[65] Cholewinski, *supra* n. 54, at p. 43
[66] Garcia-Amador, F.V. et al., *supra* n. 62, at p. 3
[67] *See*, McDougal et al., *supra* n. 54, at p. 445. "In a world in which many states are tyrannical or totalitarian or otherwise oppressive such an outcome is not to be desired nor lightly accepted."; *But see*, Cholewinski, *supra* n. 54, at p. 45 where the author notes that in certain states national treatment standard may provide greater protection to aliens compared with the minimum standard of treatment.

and observance of human rights and fundamental freedoms"[68] the UN since its establishment has engaged in an unprecedented effort to codify diverse fields of human rights. The general non-binding provisions of the UDHR has been supplemented by a conventional law regime in which the individual is protected by express rights, owes obligations and has recourse to treaty monitoring mechanisms once local remedies are exhausted provided that the state ratifies the instrument conferring authority on the monitoring body to hear individual petitions.[69]

The progressive codification of legally binding and non-binding instruments has facilitated the process of the crystallisation of international custom, which imposes obligations on states to respect and to ensure human rights norms. Unlike traditional international aliens law commentators today note that the individual is recognised as a subject under contemporary international human rights law which protects the human person regardless of nationality.[70]

> "[T]he principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard under the earlier customary law."[71]

[68] Art. 55, UN Charter, *supra* n. 16

[69] At least at the time of its adoption the UDHR was regarded as a non-binding instrument. Many commentators today regard the UDHR either in its entirety or specific provisions to form part of international custom.

[70] The traditional interpretation of the scope of the doctrine of diplomatic protection was influenced by the dualist theory, which established a distinction between relations at international and domestic levels. If the individual was unsuccessful in a claim for reparation in the domestic sphere then the state of nationality at its discretion may invoke responsibility of the host state at the international level through the exercise of its personal jurisdiction for the injury it has sustained as a result of the manner in which their nationals have been treated abroad. As the individual was not deemed to be a subject in the international sphere direct claim for reparations terminate following the exhaustion of domestic remedies. The foreign national relies on its state of nationality to exercise its own right and to distribute compensation received from the exercise of diplomatic protection.

[71] McDougal et al., *supra* n. 54, at p. 464

The proliferation of human rights instruments and monitoring bodies both at international and regional levels has lead many commentators to question the continued relevance as to whether the national treatment or the international minimum standard will prevail as the recognised standard of protection. This is because the individual is now recognised as a subject under the contemporary human rights framework.[72] As such, there has been a movement in academic literature to establish a synthesis between traditional and contemporary regimes or to lessen the importance of the former regime by promoting the merits of the latter. Other commentators in an effort to preserve the traditional doctrine emphasise that both regimes complement and reinforce the protection of the individual.[73]

> "It does not follow ... that these new developments in substantive prescription about human rights have rendered obsolete the protection of individuals through traditional procedures developed by the customary law of the responsibility of states to injury to aliens … Rather, the traditional channels of protection through a State, together with the newly developed procedure under the contemporary human rights program of claims by individuals, would appear to achieve a cumulative beneficent impact, each reinforcing the other, in defence and fulfilment of the human rights of the individual."[74]

In spite of the acknowledged advancements in the recognition of the rights of the individual, commentators advocate the need to preserve the integrity of the traditional doctrine. International instruments maintain a distinction between diplomatic protection

[72] *See*, F.V. Garcia-Amador, "State Responsibility Some New Problems", in Vol. 94 *Recueil des Cours*, (The Hague: Martinus Nijhoff, 1958), at p.421. Garcia-Amador observed: "In the same line of thought it may be further said that the traditional view (of diplomatic protection) is *a fortiori* incompatible with the present international recognition of the fundamental human rights and freedoms. … Strictly speaking, the nationality link was the basis of those rights, and their only *raison d'être*. But the position in contemporary international law is completely different. Aliens, and so stateless persons, are on a par with nationals in that all enjoy these rights not by virtue of their particular status but purely and simply as human beings. In the recent international recognition of the right of the individual, nationality does not enter into consideration. This means that the alien has been internationally recognized as a legal person independently of his State: he is a true subject of international rights. Accordingly, there is sufficient basis to consider him also as having the qualifying status of a passive subject of international responsibility."

[73] McDougal et al., *supra* n. 54, at p. 456

[74] Ibid., at pp. 464-465

and individual rights protection. Moreover, jurists draw attention to the less than adequate remedial capacity of human rights monitoring bodies. A complaint lodged by a state seeking to protect one of its nationals abroad may prove more beneficial in obtaining a remedy than if the non-citizen lodged a claim against the host state directly to an international monitoring body.[75]

> "To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which ... has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions."[76]

The Vienna Convention on Consular Relations (VCCR) preserves the traditional regime in which rights and obligations are owed among states while recognising that the

[75] *See,* Art.23, CMW, *supra* n. 53 "Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right."; *See also,* Art. 10, UN Declaration on the Human Rights of Individual Who are not Nationals of the Country in Which they Live, G.A. Res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985), provides: "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides." *See also,* Art. 36, Vienna Convention on Consular Relations, 24 April 1963, U.N.T.S. vol. 596, p. 261; *See also,* Cholewinski, *supra* n. 54, at p. 47 n. 44 citing D.J. Harris, *Cases and Materials on International Law*, 4th ed., (London: Sweet & Maxwell, 1991), at pp. 499-500: "That the law of State responsibility for aliens is not made redundant by the emergence of international human rights law follows from the uncertainty as to the rules on the enforcement of customary human rights law and the less than perfect remedies and universal acceptance of human rights treaties. For the time being at least, the possibility of diplomatic protection by one's national State is a valuable alternative and supplement to such guarantees and procedures under international human rights law as may exist." *See also,* Dugard, *supra* n. 61, at p.10, para.31 where the Special *Rapporteur* on Diplomatic Protection asserts, "most States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body."

[76] Dugard, ibid., at p. 8, para.25

individual is at least a "participant" in relations among states.[77] Article 36 (1) of the VCCR, governing communication and contact with nationals of sending states provides:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."[78]

The I.C.J. case *Avena and Other Mexican Nationals* (*Mexico* v. *United States of America*) is evidence of the continued relevance of the doctrine of diplomatic protection in international law in the modern era.[79] The I.C.J. held that the United States had violated Article 36 (1) (b) of the VCCR in that it had failed to inform Mexican nationals

[77] *See*, Preamble, paras.5-6, Vienna Convention on Consular Relations, *supra* n. 75, provides "privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States ... (and that the) rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." *See also*, Dugard, ibid., at p.8, para.24 where the Special *Rapporteur* on Diplomatic Protection refers to the individual as a "participant" in the international legal order rather than as a "object" or "subject". The former description reflects the traditional view of the status of the individual under international law while the latter description recognises that today the individual possesses rights and owes obligations. Referring to the individual as a "subject" in the same category as states however does not accord with reality as individuals are generally barred from lodging a claim whether due to not having the capacity to exhaust local remedies or due to non-ratification of the relevant instrument conferring authority on the relevant treaty monitoring body to consider individual petitions. Although individual indisputably possess rights in international law being able to enforce those rights and obtain satisfactory remedial measures remains another matter.

[78] Art. 36, VCCR, ibid.

[79] I.C.J. Reports 2004, p. 12

"without delay" of their rights following their arrest and detention and to notify consular post officials of the incarceration of their nationals.

Article 36 (1) of the Vienna Convention is described by the I.C.J. as "an interrelated regime" in which a violation of subparagraph (b) of the provision may affect the exercise of rights under subparagraphs (a) and (c).[80] The failure to notify the consular post of the detention of their nationals prevented Mexico from exercising its rights under subparagraphs (a) and (c) to communicate, to have access to and to visit their nationals in detention.[81] Furthermore, the failure to inform "in a timely fashion" also deprived the Mexican government of its right to arrange legal representation for its nationals.[82]

The I.C.J. rejected the assertion of the United States government that the case was inadmissible as local remedies had not been exhausted. The I.C.J. acknowledged that individual rights are protected by subparagraph 1(b) and that the individual is first required to exhaust local remedies before the state of nationality is entitled to espouse a claim on behalf of its nationals. In the present case, the Mexican government claimed that it "*suffered, directly and through its nationals*, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1(a), (b) and (c)."[83] In rejecting the obligation to exhaust local remedies the I.C.J. referred to the "special circumstances of interdependence" between state rights and individual rights which permits the state to lodge a claim of its own for a violation of a right it has suffered directly as well as through the violation of the rights of its nationals.[84]

[80] Ibid., p. 52, para.99 citing *LaGrand* case I.C.J. Reports 2001, p. 492, para.74
[81] Ibid., pp. 53-54, para.106
[82] Ibid., p. 57, para.113; *See*, Art. 36(1)(c) VCCR, *supra* n. 75
[83] Ibid., pp. 35-36, para.40
[84] Ibid., p.36, para.40

The debate as to whether the state or the individual is the possessor of rights under the doctrine of diplomatic protection is beyond the scope of this inquiry as are considerations of priority of claims where both the state and the individual are recognised as possessing a valid legal claim.[85] The important conclusion for the purpose of this research is that the traditional institution continues to be utilised, albeit not consistently applied, and exists independently of an evolving codified individual rights regime. The distinction is of practical importance given that the traditional institution is likely to be more effective in securing satisfactory remedial measures.

[85] *See*, Dugard, *supra* n. 61, pp. 7, 25, 26 paras.19, 69, 70, 72. According to the Special *Rapporteur* on the Diplomatic Protection of Aliens, the general interest or right of the state may arise where it has demonstrated that the host state has adopted a "systematic" policy of discrimination against foreign nationals of a particular state. In situations where a state intervenes for isolated injuries to their nationals, it acts as a representative to assist the national in asserting his or her own claim. In asserting this position, Professor Dugard referred to research conducted by Orrego Vicuña for the International Law Association, who claimed that a state could generally only intervene to the extent that international procedures were not open to the injured national. Professor Dugard, noted that Garcia-Amador asserted that a state could intervene only where there is evidence of a systematic violation of human rights directed against a substantial number of its nationals. While Jessup, Sohn and Baxter proposed that, the state has priority to lodge a claim and that, the right of the individual to assert his or her claim arises after the state of nationality decides not to intervene or until consideration of the claim lodged by the state has been finalised.

3. Influence of Human Rights Regimes in Defining Scope of Permissible Conduct

3.1. Principle of Equality and Non-Discrimination

The principle of equality and non-discrimination is recognised by the Human Rights Committee (HRC) to constitute "a basic and general principle relating to the protection of human rights."[86] The principle is referred to in the International Bill of Human Rights and in regional and thematic-based human rights instruments.

In recent history, the origin of the principle may be traced to the Preamble of the UN Charter, which "reaffirms faith in fundamental human rights, in the dignity and worth of the human person, (and) in the equal rights of men and women."[87] One of the purposes of the UN is to promote and encourage "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[88] Article 55(c) and 56 of the Charter reinforces this broadly framed objective.[89]

Although the legal status of the Universal Declaration of Human Rights (UDHR)[90] has been subject to protracted debate, some jurists assert that the Declaration is "evidence of the interpretation and application of the relevant Charter provisions."[91]

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[86] General Comment 18(37) on Non-Discrimination, para.1, in *Report of the Human Rights Committee Vol. I*, (New York: United Nations, 1990), Annex VI at p. 173, Supplement 40, UN Doc. A/45/40

[87] Preamble, para.2, UN Charter, *supra* n. 16

[88] Ibid., Art. 1(3)

[89] Ibid., Art. 55(c) provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: … c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."; Art. 56 of the UN Charter provides that member states of the UN be required to "pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

[90] G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948)

[91] *South West Africa Cases* (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*) I.C.J. Reports 1966, p. 6, dissenting opinion of Judge Tanaka, at p. 293; The UDHR, as a resolution of the UN General Assembly, does not in itself constitute a binding international legal instrument. Scholars have argued however, that over time the international community has accepted the Declaration either in its entirety or specific provisions to have crystallised to form part of international custom. *See*, Lillich, *supra* n. 54, at p.44 where the author describes the process of crystallisation as being "one of juridical osmosis, there being no identifiable instant at which a resolution suddenly burst forth as a binding legal norm. As the process is

The UDHR declared to be a "common standard of achievement for all peoples and all nations,"[92] recognises "the inherent dignity and of the equal and inalienable rights of all members of the human family … (as) the foundation of freedom, justice and peace in the world."[93] The UDHR declares, "all human beings are born free and equal in dignity and rights."[94] "Everyone" is entitled to the rights and freedoms referred to in the Declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[95] Moreover, there is a prohibition on distinctions based on "the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[96]

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reiterates Paragraph 1 of the Preamble of the UDHR. However, unlike the UDHR, the ICCPR and the ICESCR more explicitly promote an arguably Western orientated Universalist posture by declaring that those rights "derive from the inherent dignity of the human person."[97]

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necessarily a gradual one, disagreement will often occur over whether, at any given time, the magic point has been attained." The author continued by noting: "In the case of the Universal Declaration, there is fairly persuasive authority which maintains that that point has been reached, at least with respect to many of the rights guaranteed by the Declaration. It has been invoked so frequently in the thirty-five years since its adoption, and in such varying contexts (from domestic and international court cases to State practice to the constitutions of various States) that certainly its key provisions may now be said to represent customary international law." (footnotes omitted)

[92] Preamble, para.8, UDHR, *supra* n. 90

[93] Ibid., Preamble, para.1

[94] Ibid., Art. 1

[95] Ibid., Art. 2

[96] Ibid., Art. 2

[97] Preamble, para.2, International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/63616 (1966), (*entered into force* Mar. 23, 1976); Preamble, para.2, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (*entered into force* Jan. 3, 1976)

Although conventional law defines "discrimination" only in the context of race and gender,[98] the general principle of non-discrimination encompassing equality in the enjoyment of rights and formal and substantive equality in the protection of the law are referred to in core universal, regional and thematic-based instruments.[99] Moreover, unless a contrary intention is expressed,[100] the majority of substantive human rights provisions are generally framed in inclusive language with words such as "everyone" and "all persons".

In a General Comment concerning the position of aliens under the ICCPR, the HRC concluded that, "in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[101] In

[98] *See*, Art. 1, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, (*entered into force* Jan. 4, 1969) (ICERD) defines "racial discrimination" to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."; *See*, Art. 1 of the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, (*entered into force* Sept. 3, 1981), (CEDAW) defines "discrimination against women" to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

[99] *See*, B.G. Ramcharan, "Equality and Nondiscrimination," in Louis Henkin (Ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at p. 252 where the author notes that equality and non-discrimination are regarded as the positive and negative formulation of the same principle. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion of 19 Jan. 1984, Separate Opinion of Judge R.E. Piza Escalante cited in Anne Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", 11 *Human Rights Law Journal* 1 (1990) at p. 2 where it was noted that the terms should be regarded as "reciprocal, like the two faces of one (and the) same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality."

[100] *See*, Arts 25 and 27, ICCPR, *supra* n. 97 which are reserved for citizens and members of minority groups respectively.

[101] General Comment 15(27) on the position of aliens under the Covenant, para.1, in *Report of the Human Rights Committee*, (New York: United Nations, 1986), Annex VI at p. 117, Supplement 40, UN Doc. A/41/40

spite of the fact that a definition of discrimination is rarely codified, treaty monitoring bodies have been willing to define the principle.[102]

A breach of a non-discrimination clause necessitates a violation of an independent substantive right. Conversely, a provision guaranteeing equality before the law and equal protection of the law is an independent substantive right as opposed to a provision of an accessory character.[103]

3.2. Grounds Established for Impermissible Distinctions

Compared to the UN Charter, the UDHR provides a comprehensive non-exhaustive category of grounds in which it is impermissible to establish distinctions concerning the application of rights.[104] These grounds include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[105]

General non-discrimination clauses requiring state parties "to respect and to ensure" rights enshrined in the ICCPR to "all individuals within its territory and subject to its jurisdiction"[106] and to "undertake to guarantee" that rights referred to in the ICESCR "will be exercised without discrimination of any kind"[107] repeat the category of

[102] HRC General Comment 18(37), para.7, *supra* n. 86. The term "discrimination" has been interpreted under the ICCPR to mean: "Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."
[103] *See*, Art.7, UDHR, *supra* n. 90; *See*, Art. 26, ICCPR, *supra* n. 97
[104] *See*, Lillich, *supra* n. 54, at pp. 41-42 where the author asserts that the impermissible grounds for distinction in the UN Charter were intended to be illustrative rather than exhaustive. *See*, Cholewinski, *supra* n. 54, at p. 48 n. 51 concerning the decision to amend the *travaux preparatories* of the UDHR to indicate that the list of grounds was not intended to be exhaustive.
[105] *See*, Art.2, UDHR, *supra* n. 90
[106] Art. 2(1), ICCPR, *supra* n. 97
[107] Art. 2(2) ICESCR, *supra* n. 97

grounds contained in the UDHR.[108] The notable differences among the provisions in the three instruments are that the UDHR and ICCPR adopt the phrase "without distinction" whereas the ICESCR employs the phrase "without discrimination".[109] Furthermore, the ICCPR, unlike the UDHR and ICESCR, expressly provides a nexus between obligations and jurisdiction.[110] Although "sex" is expressly referred to as an impermissible ground for distinction, the ICCPR and the ICESCR include an independent provision ensuring the equality of rights between men and woman.[111]

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) includes "association with a national minority" to the catalogue of grounds provided in the International Bill of Human Rights.[112] The African (Banjul) Charter on Human and Peoples' Rights (ACHPR) and the American Convention on Human Rights (ACHR) recognise that every individual shall benefit from the rights and freedoms provided in these instruments on the same grounds provided in the International Bill of Human Rights. The exception being that reference is made to "fortune" and "economic status" respectively as opposed to "property".[113] The ACHPR includes "ethnic group" as an express ground and the ACHR adopts the phrase "any other social condition" rather than "other status".[114]

[108] Art. 2(1), ICCPR, *supra* n. 97; Art. 2(2), ICESCR, *supra* n. 97
[109] *See*, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Ed. (Kehl: N.P. Engel, 2005) at p. 45 for discussion; *See* also, Ramcharan, *supra* n. 99 at pp. 258-259
[110] *See*, ibid., Nowak, at p. 43
[111] *See*, Art. 3, ICCPR, *supra* n. 97; Art. 3, ICESCR, *supra* n. 97
[112] *See*, Art. 14, European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
[113] *See*, Art. 2, African (Banjul) Charter on Human and Peoples' Rights (ACHPR), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986; *See*, Art. 1, American Convention on Human Rights (ACHR), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978
[114] *See*, ibid., Art. 2, ACHPR; *See*, ibid., Art. 1, ACHR

The non-exhaustive catalogue of grounds referred to in the CMW is revealed with the inclusion of phrases "such as" and "other status" as an express ground. However, unlike the International Bill of Human Rights, the CMW expressly provides "religion or conviction", "age", "economic position", "ethnic origin", "marital status", and "nationality" as additional grounds in which it is impermissible to make a distinction.[115]

The Convention on the Rights of the Child (CRC) does not include the phrase "such as" prior to categorising the grounds for impermissible distinctions but maintains "other status" as an express ground. "Ethnic origin" and "disability" are included in the CRC as additional grounds.[116] The African Charter on the Rights and Welfare of the Child (ACRWC) include "ethnic group" and "fortune" as additional grounds.[117]

In the field of international refugee law, the Convention Relating to the Status of Refugees (CSR) guarantees that its provisions shall apply "without discrimination as to race, religion or country of origin."[118] The Africa Union Convention Governing the Specific Aspects of Refugee Problems in Africa does not refer to "country of origin" as a ground but includes "nationality", "membership of a particular social group" and "political opinions" as additional grounds.[119]

The right to equality before the law and equal protection of the law is intended to ensure both formal and substantive equality. The grounds for impermissible distinctions

[115] CMW, *supra* n. 53, Arts 1 and 7; *See*, Cholewinski, *supra* n. 54, at p. 155 where the author notes that Article 1of the CMW was included to impose obligations on a broader class of person such as companies and employers. Article 1 replicates the grounds for impermissible distinctions provided in Article 7.
[116] Art.2(1), Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.
[117] Art. 3, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999
[118] Art. 3, Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954
[119] Art. 4, Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, *entered into force* June 20, 1974

provided in Article 7 and Article 26 of the UDHR and ICCPR respectively replicate the grounds provided in the general non-discrimination clauses.[120] The ACHR and the ACHPR recognises the right of all persons to equality before the law and equal protection of the law without categorising grounds.[121] Although not equivalent to the preceding provisions, Protocol No. 12 of the ECHR provides that the "enjoyment of any right set forth by law" be secured without discrimination on the same grounds as provided in the ECHR.[122] The provision expressly applies to public authorities.[123]

With a few notable exceptions, such as the CMW, "nationality" is not expressly recognised as ground.[124] However, some commentators acknowledge that "nationality" may fall within the ambit of "other status".[125] The general rule is that rights enumerated

[120] The grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[121] *See*, Art. 24, ACHR, *supra* n. 113; Art. 3(1)(2), ACHPR, *supra* n. 113
[122] Art. 1(1), Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedom, (ETS No. 177), Rome,4.XI.2000
[123] Ibid., Art. 1(2)
[124] *See*, Ramcharan, *supra* n. 99, at p. 263. The author notes that during negotiations in drafting the ICCPR it was revealed that apart from provisions, which did not apply to non-citizens, distinctions between citizens and aliens would only be permissible to the extent to which it is "strictly necessary". The general rule is that the rights and freedoms enumerated in the ICCPR are applicable to all unless there is a justifiable reason to exclude a certain category of person, which compels the authorities to exclude that person from the scope of its protection. "National origin" is expressly referred to as an impermissible ground for distinction under the general non-discrimination clauses contained in the UDHR, ICCPR and ICESCR. An inclusive interpretation of "national origin" would require states not to distinguish between nationals and aliens in the application of rights enumerated in the Covenant. However, Special *Rapporteur* Baroness Elles in her report on the human rights of non-citizens did not accept that distinctions based on nationality contravened the norm of non-discrimination as "national origin" was adopted in reference to national characteristics as opposed to citizenship. *See*, Cholewinski, *supra* n. 54, at p. 48.
[125] As the grounds for prohibiting discrimination in Articles 2(1) and 26 of the ICCPR was not intended to be exhaustive, nationality as an impermissible ground for distinction is likely to be protected by the phrase "other status". *See*, Nowak, *supra* n. 109, at pp. 619-620 citing *Gueye et al. v. France*, No. 196/1985, where the HRC observed that nationality was not explicitly prohibited as a ground of discrimination but nationality fell within the scope of protection provided by the phrase "other status". *See also*, Matti Pellonpää, *Expulsion in International Law: a Study in International Aliens Law and Human Rights with Special Reference to Finland* (Helsinki: Suomalainen Tiedeakatemia, 1984), at p.118. Pellonpää asserts, "nationality, although not specifically mentioned in Articles 2(1) and 26 of the Covenant, is also a ground for discrimination prohibited by the Covenant. Indeed, equality between citizens and non-citizens is the general starting point in the Covenant."

in the ICCPR and by extension to other international instruments are to be guaranteed to citizens and non-citizens alike without discrimination.[126]

Compliance with the principle of non-discrimination is highly relevant in the administrative decision-making process and the enactment and amendment of legislation. For example, a legislative provision, which confers an administrative official with a discretionary authority to apply rules of natural justice for non-citizens of a particular religion or persons of an "inferior" economic position during removal proceedings, would constitute a *prima facie* case of discrimination. Similarly, the personal belief of the executive decision-maker that human trafficking rings can exploit only women and not men will also constitute a *prima facie* case of discrimination if it leads to the refusal of a protection visa. Another example where a discretionary decision may be discriminatory is where a minor is not afforded the opportunity to detail evidence to support an application for a visa and the administrative decision-maker subsequently makes an adverse decision without regard to all relevant material.

In addition to the principle of non-discrimination being a fundamental component of conventional law regimes, it is also widely considered by jurists to form part of international custom. The principle is enshrined in national constitutions and domestic legislation and protected by international agreements, non-binding resolutions and recognised in the judgments of the P.C.I.J. and the I.C.J.[127]

[126] *See*, General Comment 15(27), para.2, *supra* n. 101; *See also*, Weissbrodt, *supra* n. 7, at p. 4, para.1, where the Special *Rapporteur* on the Human Rights on Non-Citizens recognised that exceptions may be made to the principle of equal treatment however it must "serve a legitimate State objective and are proportional to the achievement of that objective."
[127] *See*, McDougal at al., *supra* n. 54, at pp. 432-434

3.3. Limitations and Restrictions

The case law of international and regional courts has unequivocally declared that not every distinction is unlawful under international law.[128] It should be recognised however that differential treatment "creates a 'presumption of irrationality' or places a heavy burden of proof upon those who seek to establish that the treatment can be justified in the light of human rights obligations."[129] In the determination of claims of alleged discrimination, it is necessary to balance the interest of the host state in preventing unauthorised entry and residence and preserving the principle of equality and non-discrimination as a fundamental component of international human rights law.

Differential treatment on grounds identified above must be reasonable and not arbitrary in character.[130] Distinctions established on certain grounds such as race can never be justified and therefore will always be discriminatory.[131] International case law, the conclusions of human rights monitoring bodies and academic opinion confirm that states are required to demonstrate that differential treatment is justifiable in that it is pursuing a legitimate aim, it has has an objective and reasonable justification and

[128] *Advisory Opinion on the Minority Schools in Albania* (*Greece* v. *Albania*), P.C.I.J., Ser. A./B., No. 64, 1935 at p. 19. The P.C.I.J. distinguished equality in law from factual equality: "Equality in law precludes discrimination of any kind: whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."; In the *Advisory Opinion concerning the treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, P.C.I.J., Ser. A./B., No. 44, 1933 at p. 28, the P.C.I.J. noted that the "prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law."

[129] *See*, Pellonpää, *supra* n. 125, at p. 114

[130] *South West Africa Cases*, Dissenting Opinion of Judge Tanaka, *supra* n. 91, at p.313

[131] *Barcelona Traction Light and Power Company Limited* (*Belgium* v. *Spain*), I.C.J. Reports 1970, p. 3, at p. 32, paras.33-34. Distinctions established exclusively on the basis of race, violates a *jus cogens* norm, a non-derogable norm ranked above "normal" customary rules, which creates obligations *erga omnes* – an obligation that all states owe to the international community of nations. *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p.16 at p. 57, paras.130-13; *South West Africa Cases*, dissenting opinion of Judge Tanaka, *supra* n. 91, at p. 313 where it was declared: "Discrimination according to the criterion of 'race, colour, national or tribal origin' in establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour, etc., do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language religion, etc."

reasonable proportionality exists between the means and the aims of the impugned measure.[132]

The state is required to establish that the impugned measure pursues a legitimate aim. This may be based on one or more of the following considerations such as national security, public safety, prevention of public disorder, crime etc.[133] Measures adopted in the interests of national security have been held to pursue a legitimate aim.[134] The expulsion of long-term residents due to the commission of serious criminal offences is widely accepted as pursing a legitimate aim to prevent crime and disorder.[135] Similarly, legislation preventing the lifting of a permanent exclusion order for persons unauthorised to enter and reside in a state has been held to pursue a legitimate aim, requiring persons to respect the immigration regulatory framework.[136]

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[132] *Case "Relating to Certain Aspects of the Laws and the Use of Languages in Education in Belgium"* (*Belgian Linguistics Case*) at p. 31 where the European Court of Human Rights declared "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles, which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised." *See also*, General Comment 18(37), para.13, *supra* n. 86 where the HRC interpreted the ICCPR as not to prohibit all distinctions between citizens and aliens provided that the "criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." *See also*, Guy Goodwin-Gill, *International Law and the Movement of Persons Between States*, (Oxford: Clarendon Press, 1978), at p. 78, where the author notes that the decision of the European Court of Human Rights in the *Belgian Linguistic Case* and the dissenting opinion of Judge Tanaka in the *South West Africa Cases* are authority for the following presumptions: "Differential treatment is not unlawful (1) if the distinction is made in pursuit of a legitimate aim; (2) if the distinction does not lack an 'objective justification'; (3) provided that a reasonable proportionality exists between the means employed and the aims sought to be realized." *See also*, Nowak, *supra* n. 109 at p. 619 where the author notes: "Distinctions between citizens and aliens or between different categories of aliens are, therefore, permissible only when they are based on reasonable and objective criteria." *See also*, Cholewinski, *supra* n. 54, at p. 51 where the author expressed the view that "the general consensus which emerged from the drafting process was that states parties may discriminate against aliens so long as such distinctions are considered strictly necessary, or justified in accordance with objective and reasonable criteria."

[133] For example, *see* Art. 8(2), ECHR, *supra* n. 112

[134] Application No. 42086/05, *Liu and Liu* v. *Russia*

[135] For example, *see* Application No. 22070/93, *Boughanemi* v. *France*, Para. 38 and Case No. 112/1995/618/708, *Bouchelkia* v. *France*, Para.44

[136] Application No. 26102/95, *Dalia* v. *France*

States are afforded a "margin of appreciation" though "not an unlimited power of appreciation" regarding the scope of application of a Convention guarantee.[137] In determining whether a measure is "proportionate to the legitimate aim pursued,"[138] the role of the Court is to determine whether a "fair balance (has been struck) between the relevant interests" i.e. the interests of the individual and the legitimate aim/s of the state.[139] In matters concerning the criminal conduct of non-citizens, if the applicant is fully integrated in the host state from cultural, social and linguistic perspectives and there is only a tenuous tie to the country of birth that would indicate that deportation may not be proportionate to the legitimate aim pursued.[140] Conversely, if the state can establish that the applicant has maintained a connection with the country of birth such measures may be justified.[141]

The justification for the denial or limitation of rights of persons in breach of the domestic regulatory framework is obvious. However, such measures must be weighed against the nature of the right, which the state seeks to limit or deny. Distinctions between citizens and non-citizens as well among particular categories of non-citizens are authorised by numerous international conventions. However, where human rights norms are of a fundamental character they should be guaranteed to all persons regardless of their

[137] Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, *Silver v United Kingdom*, Para.97; Application No. 5493/72, *Handyside* v. *United Kingdom*, Para.49
[138] *Silver* v. *United Kingdom*, ibid., Para.97; Application No. 12083/86, *Beldjoudi* v. *France*, Para.74; *Dalia* v. *France*, *supra* n. 136, Para.52; Application No. 25017/94, *Mehemi* v. *France*, Para.34; *Bouchelkia* v. *France*, *supra* n. 135, Para.48
[139] *Mehemi v France*, ibid., Para.35
[140] In *Beldjoudi v France*, ibid., Para. 77, the applicant lived his entire life in France and apart from nationality had no connection with Algeria, not even the ability to communicate in Arabic.
[141] In *Dalia v France*, *supra* n. 139, the applicant arrived in France at the age of 18 but maintained a connection with the country of nationality. Similarly, in *Boughanemi v France*, *supra* n. 135, Para. 44, the Court agreed with the Government's submission that the applicant maintained a connection with his country of birth since his arrival in France at the age of 8 as evidenced by his decision not to seek French citizenship and by not denying that he could not speak Arabic. Deportation was therefore not considered to be unreasonable.

legal status as there are no reasonable or justifiable reasons for a state to selectively respect these norms.

There is no universal consensus as to the corpus of norms recognised as being "fundamental". This is primarily due to divergent and conflicting state practice concerning the scope of those norms. At the very least however, norms from which no derogation is permitted, even in times of public emergency threatening the life of the nation, may be categorised as "fundamental".[142]

Human rights norms of a fundamental character which are of particular relevance in the context of migration control management include the right to life,[143] the prohibition against torture and cruel, inhuman, or degrading treatment or punishment[144] and the right to recognition as a person before the law.[145] The lives of non-citizens may be endangered due to a lack of or inadequate services in detention centres. The duration and conditions of detention may constitute a form of inhuman or degrading treatment. Expeditious removal from the territorial jurisdiction of the host state without a hearing before an impartial court of law or administrative tribunal may contravene the right of all persons to be recognised as a person before the law.

Although fundamental rights are guaranteed to all, the residual rights permit states to make distinctions between citizens and non-citizens as well as amongst non-citizens. A category of persons may either be expressly of impliedly excluded from the protection of a codified right or freedom. For instance, the ICCPR expressly limits political rights to

[142] *See*, Art. 4(2), ICCPR, *supra* n. 97
[143] *See*, Art. 6, ICCPR, ibid.
[144] *See*, Art. 7, ICCPR, ibid.
[145] *See*, Art. 16, ICCPR, ibid.

citizens.[146] Procedural safeguards to prevent arbitrary expulsion are guaranteed to non-citizens "lawfully in the territory of a State Party."[147] Liberty of movement and freedom of residence is limited to those "lawfully within the territory of a State."[148] As Article 12(4) of the ICCPR provides that "no one shall be arbitrarily deprived of the right to enter his own country", nationals are nearly always considered to have entered the territory of their home state lawfully and unlike aliens are deemed to have "*de facto* absolute right of residence."[149] Liberty of movement and freedom of residence is therefore dependent on non-citizens complying with the requirements governing entry and stay. Human rights regimes at universal and regional levels codify norms, which deal with both established and emerging issues. However, with the exception of entrenched fundamental norms the exercise and enjoyment of "residual" rights are seldom absolute.

The UDHR expressly provides that "everyone has duties to the community."[150] Moreover, states are justified in imposing "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[151] Similarly, the ICESCR permits state parties to impose limitations, which are "compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[152] In the ICCPR, limitations are generally referred to in specific provisions. For example, the right to liberty and security of person may be restricted where "necessary to protect national

[146] *See*, Art. 25, ICCPR, ibid.
[147] *See*, Art. 13, ICCPR, ibid.
[148] *See*, Art. 12(1), ICCPR, ibid.
[149] *See*, Nowak, *supra* n. 109, at p. 263
[150] Art. 29(1), UDHR, *supra* n. 90
[151] Art. 29(2), UDHR, ibid.
[152] Art. 4, ICESCR, *supra* n. 97

security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised" in the Covenant.[153]

The ACHR authorises restrictions if they are applied "in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[154] The ACHR further recognises that all persons have responsibilities to their family, community and mankind.[155] Moreover, individual rights are "limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."[156]

The ACHPR provides that all persons have duties to their "family and society, the State and other legally recognised communities and the international community."[157] Similar to the abovementioned instruments, the ACHPR may restrict the exercise of rights by having "due regard to the rights of others, collective security, morality and common interest."[158]

Limitations and restrictions may be imposed on the rights of non-citizens in an irregular situation if such measures are aimed at protecting the rights of their own citizens. For instance, the host state has an international obligation under the ICESCR to guarantee the right to work.[159] It is often argued that the presence of undocumented migrants in the host state deprives citizens and lawfully entered migrants from working in low-skilled or semi-skilled positions. This argument assumes that employers are more likely to hire undocumented non-citizens as they can be easily exploited to work below

[153] Art. 12(3), ICCPR, *supra* n. 97
[154] Art. 30, ACHR, *supra* n. 113
[155] *See*, Art. 32(1), ACHR, ibid.
[156] Art. 32(2), ACHR, ibid.
[157] Art. 27(1), ACHPR, *supra* n. 113
[158] Art. 27(2), ACHPR, ibid.
[159] *See*, Art. 6, ICESCR, *supra* n. 97

the award wage and in conditions not meeting minimum health and safety standards. The state may also claim that limitations or restrictions are justified because irregular migrants are more likely to engage in criminal conduct given their unauthorised status and they are involved in activities incompatible with public standards of morality and public health.

3.4. Derogation

A state may derogate from their responsibilities "in times of public emergency which threatens the life of the nation."[160] Any derogation from responsibilities must be to the "extent strictly required by the exigencies of the situation," it must not be incompatible with "other obligations under international law" and the measures must not discriminate "solely on the ground of race, colour, sex, language, religion or social origin."[161] Furthermore, a state is prohibited from derogating from certain rights outlined in Article 4(2) of the ICCPR, which I have classified above as being fundamental.

"Political or other opinion", "national origin", "property", "birth" and importantly "other status" are excluded from non-discrimination component of the derogation provision. While Article 2(1) of the ICCPR prohibits distinctions against non-citizens, which have no objective and reasonable basis, state parties may discriminate against non-citizens when invoking the derogation clause. Although a state may only invoke the derogation provision under restrictive circumstances, which "threatens the life of the nation," the provision is particularly relevant in circumstances where the state has adopted a policy leading to the mass expulsion of aliens.

[160] Art. 4(1), ICCPR, *supra* n. 97
[161] Art. 4(1), ICCPR, ibid.

3.5 Deprivation of Liberty and the Prohibition of Arbitrary Detention

Core international, regional, and thematic-based instruments refer to norms associated with liberty and security of person.[162] The ICCPR requires that the arrest or detention of any person must not be arbitrary and that deprivation of liberty should only occur "on such grounds and in accordance with such procedure as are established by law."[163] The HRC has expressly declared that aliens possess "full right to liberty ... of the person"[164] and that Article 9(1) of the Covenant applies to deprivation of liberty in the context of immigration control.[165]

In a separate provision from that protecting the right to liberty and security of person, the UDHR prohibits arbitrary arrest and detention.[166] The ACHPR prohibits arbitrary arrest and detention whereas the ACHR refers to "arbitrary arrest or imprisonment."[167] The former instrument provides that the right to liberty and security of person may only be denied "for reasons and conditions previously laid down by law."[168] Whereas the ACHR requires that, no person shall be deprived of "physical liberty" except for "the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."[169]

The right to liberty under the ECHR shall be afforded to all persons unless they fall into one of the exceptions referred to in Article 5 (1). In the case of persons who are

[162] *See*, Art. 3, UDHR, *supra* n. 90; Art. 9(1), ICCPR, ibid.; Art. 5(1), ECHR, *supra* n. 112; Art. 6, ACHPR, *supra* n. 113; Art. 7(1), ACHR, *supra* n. 113; Art. 16(1), CMW, *supra* n. 53; Art. 37(b), CRC, *supra* n. 116
[163] Art. 9(1), ICCPR, ibid.
[164] *See*, General Comment 15(27), para.7, *supra* n. 101
[165] *See*, General Comment 8(16) of the HRC on the right to liberty and security of persons, 1982, UN Doc. A/37/40, para.1
[166] Art. 9, UDHR, *supra* n. 90
[167] Art. 6, ACHPR, *supra* n. 113; Art. 7, ACHR, *supra* n. 113
[168] Art. 6, ACHPR, ibid.,
[169] Art. 7(2), ACHR, *supra* n. 113

not authorised to enter and remain in the host state, detention may be imposed to prevent a person "effecting an unauthorized entry" or "against whom action is being taken with a view to deportation or extradition" provided that it is "lawful" and that it is "in accordance with a procedure prescribed by law."[170]

The CMW provides that migrant workers and members of their families shall not be subjected to "arbitrary arrest or detention" either "individually or collectively" ... (nor shall they be) "deprived of their liberty except on such grounds and in accordance with such procedures as are established by law."[171] The CRC guarantees that children shall not be unlawfully or arbitrarily deprived of their liberty and that detention "shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[172] Similarly, "soft" non-binding instruments stipulate that detention should "only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."[173]

Compliance with substantive and procedural rules of domestic law is not in itself sufficient to guarantee the right to freedom of liberty. The individual should also be protected from "arbitrariness".[174] Any measure seeking to deprive a person of their liberty must not only be authorised by domestic law but the legislative provision in

[170] Art. 5(1)(f), ECHR *supra* n. 112
[171] Art. 16(4), CMW, *supra* n. 53
[172] Art. 37(b), CRC, *supra* n. 116
[173] Principle 2, Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment (BOP), G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); *See also*, Art. 5(a), Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, *supra* n. 75
[174] ECtHR Application No. 69273/01, *Galliani v. Romania*, para.43; *Amuur*, *supra* n. 47, para.50

question must possess the "quality of law" requiring that it is "sufficiently accessible and precise in order to avoid all risk of arbitrariness."[175]

In *Sunday Times* v. *the United Kingdom*, the ECtHR interpreted the phrase "prescribed by law" consistently with the phrase "in accordance with the law" due to variations in the English and French texts in a number of provisions.[176] The ECt.HR has confirmed that the phrase requires a basis in domestic law to authorise interference on the part of a government authority.[177] European human rights case law has held that the phrase "in accordance with law" is not limited to having a basis in domestic law but that it possesses the "quality of law" requiring it to be compatible with the rule of law, a term referred to in the Preamble of the ECHR.[178] The phrase "in accordance with the law" "thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights" safeguarded by the Convention.[179]

The "quality of law" implies that it is "adequately accessible" enabling persons to have a knowledge of the legal rules in a given situation[180] and that it is to be formulated

[175] *Galliani*, ibid., para.44; *Amuur*, ibid, para.50
[176] Application No. 6538/74, *Sunday Times v United Kingdom*, Para.48
[177] *Sunday Times v United Kingdom*, Para.47, ibid.; See also *Silver v United Kingdom*, Para.86, *supra* n. 137
[178] *See*, *Liu and Liu v Russia*, Para.56 *supra* n. 134, where it was noted: "The Court has consistently held that the expression "in accordance with the law" does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures."; *See also*, Application No. 10465/83, *Olsson v Sweden*, Para. 61; Application No. 8691/79, *Malone v United Kingdom*, Para. 67; In Application No. 5029/71, *Klass v Germany* , Para.55, the Court noted that the "rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."
[179] *Malone v United Kingdom*, Para. 67, ibid.
[180] *Sunday Times v United Kingdom*, Para.49 *supra* n. 176; *Silver v United Kingdom*, *supra* n. 137, Para.87

with "sufficient precision" which would enable persons to "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[181] It is unreasonable to expect that the law should be "excessively rigid" which would allow a higher degree of precision and achieve greater foreseeability but unable to "keep pace with changing circumstances."[182] Discretion in administrative decision-making is not necessarily incompatible with foreseeability provided that the scope of the discretion is not so broad that it arbitrarily interferes with the rights of the individual and thereby cease to possess the "quality of law".[183] Legislation which confers "discretion must indicate the scope of that discretion."[184]

European human rights case law has established key principles rather than advance a universal definition to describe the type of activities considered arbitrary.[185] The Court has noted that detention would be considered arbitrary in character in cases where "despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities."[186] Moreover, to avoid arbitrariness it is necessary for "both the order to detain and the execution of the detention ... (to) genuinely conform with the purpose of the restrictions permitted ... (and) in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention."[187]

The detention of persons "against whom action is being undertaken with a view to deportation or extradition," an exception to the right of liberty under the second limb of

[181] *Sunday Times* v. *United Kingdom*, Para.49, ibid.; *Silver* v. *United Kingdom*, Para.88, ibid.
[182] *Sunday Times* v. *United Kingdom*, Para. 49, ibid.; *Olsson* v. *Sweden*, Para. 61, *supra* n. 178
[183] *Olsson* v. *Sweden*, ibid.
[184] *Silver* v. *United Kingdom*, Para. 88, *supra* n. 137
[185] ECtHR Application No. 13229/03, *Saadi* v. *France*, para.68
[186] Ibid., para.69
[187] Ibid., para.69

Article 5 (1)(f), will not be regarded as an arbitrary measure if the action being undertaken is to achieve that purpose.[188] The Court noted that the provision did not require the detention to be "reasonably considered necessary, for example to prevent ... (the commission of) an offense or fleeing."[189] The principle of proportionality as it applies to Article 5 (1)(f) relates only to an assessment as to whether the proceedings are carried out with due diligence and whether they last for a prolonged duration.[190]

The prohibition of arbitrariness is equally applicable under the first limb of Article 5 (1)(f) which authorises the detention of a person to prevent "effecting an unauthorized entry into the country." The Court declared that it "would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of the person already in the country."[191]

The safeguards identified by the ECt.HR to ensure that deprivation of liberty is not arbitrary can be summarised as follows. The authorities are required to act in good faith, to ensure that the purpose of detention is closely connected with the authority to detain, that the place and conditions of detention are suitable and that detention lasts for only a reasonable duration requiring its length "not exceed that reasonably required for the purpose pursued."[192]

Similar to ECt.HR case law, HRC jurisprudence and the *travaux preparatoires* of the ICCPR reveal that "arbitrariness" is not to be equated with being "against the law", rather the term has a broad meaning to include "elements of inappropriateness, injustice

[188] *Chahal*, *supra* n. 48, para.112
[189] Ibid., para.112
[190] Ibid., para.113
[191] *Saadi*, *supra* n. 185, para.73
[192] Ibid., para.74

and lack of predictability."[193] The HRC has observed that detention "must not only be lawful but reasonable in all the circumstances."[194] For detention to be reasonable, it is required to be "necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."[195] It is also reasonable to detain a non-citizen to carry out investigations and to facilitate cooperation with authorities. However, the period of detention should not extend beyond a justifiable period.[196]

A state party seeking to affirm the legality of continued detention must demonstrate that there are not less "invasive means" to ensure that the applicant does not abscond.[197] Such measures could include the imposition of reporting obligations or sureties on the applicant who had suffered a psychiatric condition following two years of incarceration under the mandatory detention policy for unlawful non-citizens.[198] Similarly, the HRC determined that the state could not justify the four-year detention of a non-citizen who had been transferred on numerous occasions to different immigration detention centres.[199] Although deprivation of liberty may be initially justifiable for unauthorised entrants, the prolonged detention of persons without recourse to substantive

[193] *Van Alphen* v. *The Netherlands*, UN Doc. CCPR/C/39/D/305/1988 (1990), para.5.8; *A* v. *Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997), para.9.2. *See also*, Nowak, *supra* n. 109, at p. 225, para.29 the author notes: "Whereas some delegates were of the view that the word *'arbitrary'* ... meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principle of *due process of law*. ... Thus, in light of the historical background of Art. 9(1), a systematic interpretation of the second and third sentences shows that, in conformity with comparable provisions in Arts. 6(1), 12(4) and 17(1), the prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."
[194] *Van Alphen*, ibid., para.5.8
[195] *Van Alphen*, ibid., para.5.8
[196] *A* v. *Australia*, ibid., para.9.4; *C v. Australia*, UN Doc. CCPR/C/76/D/900/1999 (2002), para.8.2
[197] *C* v. *Australia*, ibid., para.8.2
[198] *C* v. *Australia*, ibid., para.8.2
[199] *A* v. *Australia*, *supra* n. 193, para.9.4

judicial review indicates that detention is arbitrary and hence a breach of Article 9 (1) of the ICCPR.[200]

It has been noted above that substantive matters exclusively connected with asylum/refugee law does not form part of this inquiry. However, it is nevertheless important to refer to minimum standards with respect to detention as it provides a valuable source of evidence revealing areas of cohesion with other regimes. This source of information *contributes to a process*, which defines the scope of permissible conduct.

The CSR requires state parties not to impose penalties on applicants if they "present themselves without delay to the authorities and show good cause for their illegal entry or presence."[201] It has already been noted that not all asylum applications are lodged on arrival. It is not uncommon for asylum seekers to enter and reside in the host state without authorisation prior to seeking asylum. Depending on the circumstances of the case, this may not necessarily undermine the claim. The detention of persons seeking asylum, especially vulnerable groups like women and children is "inherently undesirable" and the UNHCR Executive Committee recommends "detention should normally be avoided."[202] However, the UNHCR Executive Committee recognise that states may need to resort to detention "on grounds prescribed by law" to await verification of identity, to deal with situations where fraudulent documents have been utilised or identification documents have been destroyed.[203]

[200] *C* v. *Australia*, *supra* n. 196, para.8.2; *A* v. *Australia*, ibid., para.9.4
[201] Art. 31(1), CSR, *supra* n. 118
[202] *See*, Office of the United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999), para.1, http://www.unhcr.org/3bd036a74.pdf
[203] *See*, Conclusion No. 44, (b), Detention of Refugees and Asylum-Seekers, UNHCR Executive Committee , 37th Session

The refugee law regime therefore reinforces the findings of the ECt.HR and the HRC in that detention at least during the initial stages of investigation will not contravene the prohibition against arbitrary detention. However, prolonged detention without recourse to administrative review or judicial oversight is arguably a form of penalisation especially in cases where there is no foreseeable prospect of release. At least from the perspective of executive competence, as opposed to that of the judiciary, such a measure aimed at penalisation is a departure from the acknowledged authority of states to control their territorial borders.

3.6. Challenging the Lawfulness of Detention

Persons deprived of their liberty are entitled to bring proceedings before a competent court without delay to determine the lawfulness of their detention.[204] The HRC has concluded that the amendment of legislation limiting the authority of the judiciary to review the lawfulness of detention involving a determination as to whether a detainee is a "designated person" within the meaning of the Act did not comply with Article 9(4).[205] Compliance with domestic law is therefore not decisive to satisfy the requirements of the ICCPR as court review of executive detention "in its effects, (must be) real and not merely formal."[206]

The ECt.HR has developed criteria governing compliance with the right to challenge the lawfulness of detention before a court of law under Article 5 (4). In a test applicable not only in the context of immigration control, the Court requires that the

[204] Art. 9(4), ICCPR, *supra* n. 97; Art. 5(4), ECHR, *supra* n. 112; Art. 16 (8), CMW, *supra* n. 53; Art. 37 (d), CRC, *supra* n. 116
[205] *A v. Australia*, para.9.5, *supra* n. 193
[206] *A v. Australia*, para.9.5, ibid.

domestic procedure "followed has judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question."[207] In the author's view, such a test imposes a heightened level of scrutiny in cases where detention is indefinite and prolonged especially in cases where there is limited possibility of administrative review at domestic level. As will be revealed below, the states examined in this research have to varying degrees sought to oust the jurisdiction of the courts. This would appear to be incompatible with the requirements established under the European human rights framework.

The Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment (BOP) provides that persons deprived of their liberty shall be "subject to the effective control of a judicial or other authority"[208] and "given an effective opportunity to be heard promptly by judicial or other authority."[209] The BOP recognises the authority of the judiciary to review cases of continued detention[210] and further provides that detained persons are "entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of ... detention in order to obtain ... release without delay, if it is unlawful."[211] It must be acknowledged that the extensive provisions outlined in the BOP are non-binding "soft" law. However, the combination of "soft" and "hard" legal instruments is of relevance in a determination as to whether human rights norms form part of international custom or

[207] *De Wilde, Ooms and Versyp v. Belgium "Vagrancy Cases'"*[1971] Yearbook of the European Convention on Human Rights 788 at pp. 821-822 cited in Carlton R. Stoiber, "The Right to Liberty: A Comparison of the European Convention on Human Rights with United States Practice" 5 *Human Rights* 333 (1975-76) at p. 344
[208] Principle 4, BOP, *supra* n. 173
[209] Ibid., Principle 11(1)
[210] Ibid., Principle 11(3)
[211] Ibid., Principle 32 (1)

whether such initiatives reveals an insight into the future state of the law given its evolving nature.

3.7. Detained Persons to Be Treated with Humanity and Dignity

The ICCPR provides "persons deprived of their liberty are entitled to be treated with humanity and with respect for the inherent dignity of the human person."[212] A determination as to whether there has been a violation of this right is essentially an evidentiary issue. However, Nowak has identified certain aspects of detention, which has led the HRC to conclude would lead to a violation of the right to treat persons in detention with humanity and dignity. For instance, "deplorable general conditions (overcrowded cells, shortage of beds and mattresses forcing the inmates to sleep on the floor, inadequate food, lack of light, deplorable hygienic conditions, no work, education or recreational facilities, inadequate medical treatment, etc.)" are recognised to be a violation of Article 10 (1) of the ICCPR.[213]

The UN Working Group on Arbitrary Detention has provided a specific example in the immigration control context by concluding that indefinite detention resulting from unsuccessful attempts to repatriate following a final decision to remove have "detrimental effects on ... physical health and mental integrity."[214] The UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers notes "the very negative effects of detention on the psychological well-being of those detained"

[212] Art. 10 (1), ICCPR, *supra* n. 97; *See also*, HRC General Comment 15(27), para.7, *supra* n. 101; Principle 1, BOP, *supra* n. 173
[213] Nowak, pp. 246-247, *supra* n. 109
[214] Report of the Working Group on Arbitrary Detention, Visit to Australia, UN Doc. E/CN.4/2003/8/Add.2, para.18

and "active consideration" should be given to alternatives to detention for vulnerable categories of persons.[215]

A closely associated norm is the prohibition against torture, cruel, inhuman or degrading treatment or punishment, forming both part of international custom and codified in the ICCPR and numerous regional and thematic-based instruments.[216] As Nowak observes, although the norm prohibiting torture and like practices is codified in the ECHR there is no provision, which establishes a direct relationship between persons deprived of their liberty and an obligation to treat those persons with humanity and dignity.[217] At a regional level, the ACHR does provide for this relationship by requiring all persons in detention to be "treated with respect for the inherent dignity of the human person."[218] While a thematic-based instrument establishes a more direct relationship expressly requiring detainees not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.[219]

The CMW expands the scope of protection for detained persons. The expansive nature of this provision requires state parties to afford migrant workers and members of their families respect for "cultural identity" while in detention.[220] The CMW further requires that migrant workers and members of their families be kept separate "in so far as

[215] Guideline 7, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, *supra* n. 202
[216] For example, *see* Art. 3, UDHR, *supra* n. 90; Art. 7, ICCPR, *supra* n. 97; Art. 10, CMW, *supra* n. 53; Art. 3, ECHR, *supra* n. 112; Art. 5, ACHPR, *supra* n. 113; Art. 5(2), ACHR, *supra* n. 113; Art. 37(a), CRC, *supra* n. 116; Art. 16, SMP, *supra* n. 6; Art. 6, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, *supra* n. 75. *See also*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987. The prohibition against torture or cruel inhuman or degrading treatment or punishment is protected by international custom and is widely regarded by the international community as constituting a *jus cogens* norm from which no derogation is permitted.
[217] Nowak, p.241, *supra* n. 109
[218] Art. 5(2), ACHR, *supra* n. 113
[219] Principle 6, BOP, *supra* n. 173
[220] Art. 17(1), CMW, *supra* n. 53

practicable" from convicted persons and persons awaiting trial.[221] Other requirements include an obligation for the authorities to pay attention to the problems faced by spouses and minor children.[222]

Children in detention are required to be treated "in a manner which takes into account the needs of persons of his or her age."[223] The UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum recommends that children seeking asylum, particularly unaccompanied children should not be kept in detention.[224] However, if states choose to maintain a policy of detention it shall comply with Article 37 of the CRC and it shall "only be used as a measure of last resort and for the shortest appropriate period of time."[225] The UNHCR Guidelines expressly provides that children must not be detained in prison-like conditions.[226] To ensure that juveniles are protected from "harmful influences and risk situations", the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty requires the conditions of detention "take full account of their particular needs, status and special requirements according to their age, personality, sex ... mental and physical health".[227]

3.8. Removal

Recognised as a principle of international custom, the authority of the state to determine the demographic composition of its population including the right to define the

[221] Ibid., Art. 17(3)
[222] Ibid., Art. 17(6)
[223] Art. 37(c), CRC, *supra* n. 116
[224] Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February, 1997), para.7.6, http://www.unhcr.org/3d4f91cf4.pdf
[225] Ibid., para.7.7
[226] Ibid., para.7.7
[227] United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990), para.28

grounds for removal is an uncontroversial expression of its sovereignty.[228] Although states have discretionary competence to remove non-citizens, the limits placed on this authority require that it is not "abused" or "arbitrary".[229] For instance, the removal of a non-citizen to effect a *de facto* extradition will constitute an abuse of the host state's authority.[230] The mass removal of non-citizens from the host state without reason or being given an opportunity to individually challenge a decision will be regarded as an arbitrary measure.[231]

The maintenance of public order (*ordre public*) in the domestic sphere is universally accepted as a ground to justify the removal of non-citizens in an irregular situation.[232] The security of the state, public health and the preservation of public morals are other legitimate grounds commonly cited to justify removal.[233] While the state may enjoy a "margin of appreciation" under international law to determine whether a non-

[228] *See*, Maurice Kamto, Special Rapporteur, Preliminary Report on the Expulsion of Aliens, UN Doc. A/CN.4/554 (2005), para.15

[229] *See*, Maurice Kamto, Special Rapporteur, Third Report on the Expulsion of Aliens, Special Rapporteur Maurice Kamto, UN Doc. A/CN.4/581 (2007), para.7: "The right to expel is not granted to the State by any external rule; it is a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, which may be restricted under international law only by the State's voluntary commitments or specific *erga omnes* norms. What is involved in this case is only a restriction rather than a condition for the existence of the rule. In other words, the right to expel is a right inherent in the (territorial) sovereignty of the State; but it is not an absolute right, as it must be exercised within the limits established by international law."; *See also*, ibid., para.16

[230] *See*, Guy Goodwin-Gill, "The Limits of the Power of Expulsion in Public International Law" 47 *British Yearbook of International Law* 54 (1974-75) at p. 79

[231] However, in cases of large-scale forced migration caused by a short-term humanitarian crisis the host state is generally accepted as having the competence to determine when repatriation is possible without resorting to individual determination of cases.

[232] ECtHR 18 February 1991, Case No. 26/1989/186/246, *Moustaquim v. Belgium*, para.43; *Bouchelkia v. France*, para.48, *supra* n. 135; *Union Inter Africaine des Droits del'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others* v. *Angola*, Communication Number 159/96 (1997), http://www1.umn.edu/humanrts/africa/comcases/159-96.html, para.20 cited in UN Doc. A/CN.4/565, para.190. The African Commission on Human and Peoples' Rights declared that it did not wish "to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent court so decide."

[233] *See*, Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, (The Hague: Kluwer Law International, 1995) at p. 30

citizen falls within one of those abovementioned grounds due consideration must also be afforded to the interests of the individual.[234]

States are required to ensure that the procedural aspects of expulsion comply with international standards safeguarding against arbitrariness. For example, Article 13 of the ICCPR provides:

> "An alien lawfully in the territory of the state party ... may be expelled ... only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."[235]

The ECHR also provides that only lawfully present aliens may be expelled "in pursuance of a decision reached in accordance with law," that they may be afforded the opportunity to submit reasons against expulsion, to have the case reviewed and be represented before a competent authority.[236]

In contrast to the ICCPR and the ECHR, the CMW provides that *all* migrant workers and members of their families, either having regular or *irregular status*, may be expelled "only in pursuance of a decision taken by the competent authority in accordance with law."[237] The reasons for the decision should generally be communicated in writing.[238] The person subject to the expulsion order shall be afforded the opportunity to submit reasons why the state should refrain from taking such measures, to have his or her

[234] *See*, Goodwin-Gill, *supra* n. 132, at p. 262. The author notes: "The principle of good faith in the requirement of justification, or 'reasonable cause', demand that due consideration be given to the interests of the individual, including his basic human rights, his family, property, and other connections with the State of residence, and his legitimate expectations. These must be weighed against the competing claims of 'ordre public'."
[235] Art. 13, ICCPR, *supra* n. 97
[236] Art. 1, Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* Nov. 1, 1988
[237] Art. 22 (2), CMW, *supra* n. 53
[238] Ibid., Art. 22 (3)

case reviewed by a competent authority and to have the right to seek a stay of the decision pending a review.[239]

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) does not contain an express provision concerning the removal of non-citizens from the host state. However, the Committee on the Elimination of Racial Discrimination requires laws authorising the removal of non-citizens "do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to issue such remedies."[240]

3.9. The Paramount Role of the State in Defining the Scope of Norms

The intended purpose of this chapter is not to engage in a lengthy comparative analysis of the jurisprudence developed by international and regional organisations. Rather, the purpose is to examine the role of these regulatory regimes in developing a general framework in which states are able to operate within a "margin of appreciation" enabling one to define the scope of applicable norms with greater specificity.

State practice not only reveals adherence to conventional law obligations, but also reinforces existing customary law norms and aids in the identification of emerging norms. For example, unlike the ICCPR, the CMW requires state parties to allow irregular migrant workers to have their case reviewed by a "competent authority" and to seek a stay of execution of the removal order pending the review.[241] The author does not assert

[239] Ibid., Art. 22 (4)
[240] *See*, General Recommendation No. 30(65) on discrimination against non-citizens, in Report of the Committee on the Elimination of Racial Discrimination, UN Doc. A/59/18 (2004), p.93 at p. 96, para.25
[241] Art. 22(4), CMW, *supra* n. 53

that this necessarily represents the contemporary state of international custom. However, if such developments are supported by ratification of relevant instruments and/or through relevant domestic practice, which is compatible with granting non-citizens in an irregular situation greater latitude during the immigration control process, the specific examples derived from this policy orientation provides real substance concerning the scope of these norms.

As asserted at the commencement of this research, the ambit of human rights norms are primarily determined by how states respond to a particular phenomenon rather than through the general conclusions of treaty monitoring bodies and decisions of regional courts. Undoubtedly, such institutions may play an influential and guiding role in regulating state behaviour. However, the authority of states in spite of increased international regulation remains paramount in the international law making process. The broad legal prescriptions and general conclusions and findings of these bodies need to be supplemented by specific examples of state practice to properly comprehend how a given field is regulated by international law. The thesis will now proceed by examining the process involved in generating rules of general international law followed by undertaking a comparative analysis of domestic jurisdictions to provide greater accuracy and substance concerning the scope of norms applicable to this inquiry.

4. The Minimum Standard as Regulated by General International Law

The minimum standard of treatment afforded to irregular migrants with respect to administrative detention and removal is determined by rules, which are generally accepted by states from recognised sources of international law.[242] Rules, which form part of general international law, are distinguishable from legal prescriptions, which bind only a particular section of the international community.

International conventions and international custom constitute the primary sources of international law. The *scope* of permissible conduct with respect to immigration control is therefore primarily defined by these sources. General principles of law are regarded as a secondary source, which may be resorted to where a particular principle has not been regulated by the aforementioned sources.[243] The "teachings of the most highly qualified publicists of the various nations" is regarded as a subsidiary means of interpretation.[244]

4.1. International Custom

International custom established by "evidence of a general practice" "accepted as law" comprises of a "quantitative" "material and objective" factor and a "qualitative"

[242] Art. 38(1), Statute of the International Court of Justice, annex to the UN Charter, 59 Stat. 1031; T.S. 993; 3 Bevans 1153 provides:
"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
The above provision is widely regarded as an authoritative pronouncement on the sources of public international law.

[243] Restatement, *supra* n.15, § 102 Comment l

[244] Ibid., § 103 Reporters' Notes 1

"psychological and subjective" factor.[245] The former being state practice the latter *opinio juris sive necessitas* - a sense of legal obligation to follow the practice.[246] Unlike conventional law, customary rules bind all states except for those states that have persistently objected to the rule from the time of its formation or until a time that an old rule is replaced by a new rule.[247]

Traditionally international custom is interpreted as evolving progressively through an *inductive* process. State practice characterised by widespread, uniform, repetitive and settled practice takes priority over *opinio juris* in which evidence of the subjective element is derived from the practice.[248]

> "What international courts and tribunals mainly did in fact was to trace the subjective element by way of discerning certain recurrent patterns within the raw material of State practice and interpreting those patterns as resulting from juridical considerations."[249]

The onerous task of proving the existence of customary rules under the traditional standard has led the I.C.J. and jurists to develop a contemporary interpretation concerning

[245] *North Sea Continental Shelf Cases*, *supra* n. 2, dissenting opinion of Judge Tanaka in which quantitative and qualitative factors were referred to, to describe state practice and *opinio juris*. *See also*, HCM Charlesworth, "Customary International Law and the Nicaragua Case," 11 *Australian Year Book of International Law* 1 (1984-1987), p. 4

[246] *North Sea Continental Shelf Cases*, ibid., para.77 The I.C.J. noted that the practice must be "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."

[247] *Fisheries Case (United Kingdom* v. *Norway)*, [1951] I.C.J. Rep. 116. The persistent objector rule does not relieve states of their international obligations in cases where there is a violation of a peremptory norm of international law (*jus cogens* norm). *See*, Restatement, *supra* n.15, § 102 Comment K

[248] *S.S. Lotus case*, *supra* n. 18, referring to the evidence required to establish international custom under the traditional standard. *See*, Philip Alston and Bruno Simma, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" 12 *Australian Year Book of International Law* 82 (1988-1989), at p. 88; *See also*, Anthea Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," 95(4) *American Journal of International Law* 757 (2001), at p. 758

[249] Alston and Simma, ibid., at p. 88

the formation of international custom.[250] According to this view, international custom is developed through a *deductive* process in which rules and principles are derived from statements emphasising the subjective element of *opinio juris* supported by practice but not necessarily of the durable and progressive kind required under the traditional standard.[251] An extreme version of this process has led some writers to declare that customary rules can be formed instantaneously – "instant custom" in spite of conflicting practice.

Entering international agreements,[252] the enactment of legislation[253] and national case law[254] are common examples cited as evidence of state practice. Evidence of *opinio juris* may be acquired from official statements released by government officials. However, it is not necessary to prove that states genuinely hold those beliefs for the subjective element to be established.[255] The I.C.J. has recognised that the "attitude" of parties to certain non-binding General Assembly resolutions distinguishable from conventional law commitments may establish *opinio juris*.[256]

> "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment

[250] *See*, Restatement, *supra* n. 15, § 102 Comment b; *see also*, Akehurst, *supra* n. 4, at p.18 The author notes, "the number of States in the world is now much higher than it was in the nineteenth century and for the first half of the twentieth century; many of them have been independent for only a short period of time, with the result that their practice on many topics is non-existent or at least unpublished. To require practice by a high proportion of States in these circumstances is to make the establishment of new customary law an intolerably difficult process."
[251] *See*, Roberts, *supra* n. 248, at p.758
[252] *See*, Restatement, *supra* n. 15, § 102 Comment i, citing *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark & Netherlands)*, [1969] I.C.J. Rep. 3, 28-29, 37-43
[253] *See*, *Yearbook of the International Law Commission*, Vol. II, 1950 (New York: United Nations, 1957), at p.370, para.60. The UN International Law Commission (ILC) adopts a broad interpretation of national legislation to include "constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies."
[254] Ibid., at pp. 368, 370, paras.30, 54. The ILC notes that the "practice of a State may be indicated by the decisions of its national courts."
[255] *See*, Akehurst, *supra* n. 4, at pp. 36-37
[256] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Merits, 1986 I.C.J. Rep. 14 (June 27), para.188; *See*, Restatement, supra n. 15, §103 Comment c

> undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter."[257]

The emphasis on the establishment of *opinio juris* under the contemporary deductive process has raised concern regarding the unintended abrogation of sovereign authority. For instance, the acquiescence of states may result in the adoption of non-binding declarations, which could have the unforeseen consequence of crystallising customary law norms.

> "International treaties, creating new international law, have traditionally been negotiated at international conferences, signed, subjected to careful review both in the executive branch and in the legislature, and finally submitted for ratification. An equal obligation can apparently be created under the Court's new theory, when a representative to an international organisation permits a resolution passed by consensus, failing to record an express negative vote. This is an act of a much lower official, preceded by much less consideration of the obligations incurred, confined almost exclusively to the executive branch and made without opportunity for public review or comment."[258]

The formalistic approach favoured by the World Court in its earlier cases requiring proof of widespread, uniform and settled state practice before international custom is formed has generally been adjudicated in matters where there has been conflict in state practice.[259] This raises the issue as to whether such a regimented interpretation is necessary where there is no conflict or where there are only minor inconsistencies in state practice so that practice even if it is not widely followed or it has not lasted for a

[257] Ibid., *Nicaragua* v. *United States*, para.188
[258] Fred Morrison, "Legal Issues in the Nicaragua Opinion," 81(1) *American Journal of International Law* 160 (1987), at p.162
[259] Akehurst, *supra* n. 4, at p. 18 "All the judicial *dicta* requiring practice by a large number of States have been uttered in cases where practice conflicted, which casts doubt on their relevance to cases where there is no conflicting practice."

significant duration may crystallise into binding rules. In such cases, what is transpiring is the development of a new customary rule rather than an encroachment on a pre-existing rule. Consistent with an increased recognition among many jurists of the need to adopt a less formalistic approach the relevant practice should not have to meet that high standard required to replace an established rule.[260] In the words of Professor Michael Akehurst, "proof of customary law ... is relative, not absolute."[261]

> "Nevertheless the fact remains that the quantity of practice needed to create a customary rule is much greater in some circumstances than others.
> In particular, a great quantity of practice is needed to overturn existing rules of customary law. The better established a rule is (i.e. the more frequent, long standing and widespread the practice which supports it), the greater the quantity of practice needed to overturn it. Conversely, a new rule which differs only slightly from a pre-existing rule can be established more easily than a rule which is radically different from the pre-existing rule."[262]

The integrity of a customary law norm will not be threatened if state practice is not in absolute "rigorous conformity." It is sufficient for the conduct of states to be "consistent" with a customary rule.[263] Cases of inconsistency should be treated as "breaches of that rule, not as indications of the recognition of a new rule."[264] The proviso being that international custom already regulates on a particular issue for a period of time so that the rule is sufficiently entrenched.

It is indisputable that the presence of elements traditionally regarded as essential to the formation of international custom provides cogent evidence of its existence. However, these factors alone will not suffice unless the practice of states whose interests

[260] *North Sea Continental Shelf Cases*, *supra* n. 2, para.74; The I.C.J. recognised that minor inconsistencies in practice did not bar the formation of international custom. *See also*, Akehurst, ibid., at p. 20, where the author notes: "A small amount of inconsistency does not prevent the establishment of customary rules; practice must be virtually uniform, not absolutely uniform."
[261] Akehurst, ibid., at p. 14
[262] Akehurst, ibid., at p. 19
[263] *Nicaragua* v. *United States*, *supra* n. 256, at para.186
[264] Ibid., at para.186

have been *specially affected* are included in the pool of states conforming to the practice in question. In the *North Seas Continental Shelf cases,* the majority recognised that a conventional law provision may crystallise into a customary rule by noting that "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[265]

In his dissenting opinion in the *North Seas Continental Shelf cases,* Judge Tanaka stressed the need to include states whose interests had been specially affected in transforming a conventional rule into a customary rule.

> "What I want to emphasise is that what is important in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or State practice represented by its concluding an agreement on the basis of the equidistance principle, as having the exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf."[266]

The opinions in the *North Seas Continental Shelf cases* do not categorically state that the practice of states whose interests are specially affected are more important than those states not so affected. It is clear however that the classical interpretation of state practice promoting repetition, uniformity and the widespread participation of states over an extended period should be read in conjunction with the practice of states specially affected by a particular phenomenon in determining whether a customary rule has been established. Scholarly writings support the assertion that where one or more of the abovementioned elements are not sufficiently established the uniform practice of states

[265] *North Sea Continental Shelf Cases, supra* n. 2, para.73
[266] Ibid., pp. 175-176

whose interests are specially affected is especially influential in determining whether a given matter is regulated by international custom compared with the practice of other states not so affected.[267]

4.2. International Conventions

International conventions while contractual in origin may generate rules of general international law if they are widely accepted by the international community of states. This is especially the case if these instruments are open to universal membership and/or there are counterpart instruments created under the auspices of regional regulatory regimes. The UN International Law Commission (ILC) has declared that customary rules may be established through such a process.[268]

> "A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law."[269]

The Vienna Convention on the Law of Treaties (VCLT), which itself is deemed to be representative of international custom, requires states party to international conventions to respect the doctrine of *pacta sunt servanda* - obligations are required to be

[267] Akehurst, *supra* n. 4, at p. 23.
[268] Art. 24, Statute of the International Law Commission, adopted by the G.A. Res. 174 (II), 21 November 1947, authorises the UN International Law Commission "to consider ways and means for making the evidence of customary international law more readily available."
[269] *ILC Yearbook* 1950 Vol. II, *supra* n. 253, at p. 368, para.29; *See also*, *Restatement*, *supra* n. 15, § 102 Comment i; *North Seas Continental Shelf Cases*, *supra* n. 2, at p. 41, para.71, where the I.C.J recognised that a conventional rule could be norm creating.

performed in good faith.[270] Moreover, states are obliged to "refrain from acts" which would defeat the "object and purpose" of the instrument after it has been signed.[271]

General multilateral conventions, which are binding for many states, will result in a more expeditious generation of rules of general international law than conventions that apply to a particular section of the international community in that it binds only a limited number of states.[272] Even if a multilateral convention is not restrictive concerning membership, the number of ratifications and the time that has passed since it was adopted until it has entered into force is important in determining whether rules of general international law are established independently of conventional law obligations.

The CRC which entered into force within one year after the instrument was concluded and today is almost universally ratified may be compared with the CMW which has taken a decade to enter into force and is today ratified by only a limited number of host states.[273] The conventional law norms outlined in the CRC are more likely to represent rules of general international law than conventional law norms contained in the CMW.

In the previous chapter it was noted that norms associated with liberty and security of person encompassing a prohibition against arbitrary detention, an obligation to treat detainees with humanity and a right to challenge the lawfulness of detention before a court is extensively regulated by core international, regional and thematic-based

[270] Art. 26, Vienna Convention on the Law of Treaties, 23 May 1969, U.N.T.S. vol. 1155, p. 331
[271] Ibid., Art. 18
[272] J.L. Brierly, *The Law of Nations: an Introduction to the International Law of Peace*, 6th ed., (Oxford: Clarendon, 1991), at pp. 57-58
[273] CMW, *supra* n. 53; CRC, *supra* n. 116; At the time of writing only 44 states are party to the MWC. With the exception of certain countries in South America and Africa, which are host states at a regional level none of the major migrant receiving counties are party to the CMW. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (last accessed, 6 May 2011)

instruments. The origin of these conventional law norms may be traced to international custom predating codification.[274] As these norms are entrenched in general international law variation in widespread established uniform practice should be seen as a departure from rather than being compatible or consistent with generally accepted practice. The issues to be addressed in the following chapters are what is accepted practice establishing a minimum standard? And, what examples can be provided as evidence of deviation rather than compatibility with that standard?

[274] *See*, Nowak, *supra* n. 109, at p. 211 where the author notes that liberty of person as a procedural guarantee is one of the oldest human rights dating back to the *magna carta* in 1215.

5. Australia

5.1. Constitutional Authority

The Federal Constitution of Australia vests Parliament with power "to make laws for the peace, order, and good government of the Commonwealth" in matters pertaining to "immigration and emigration,"[275] "naturalization and aliens"[276] and "external affairs."[277] In the referring to the scope of the aliens power Brennan, Deane and Dawson JJ in the seminal High Court case *Chu Kheng Lim* v. *The Minister for Immigration, Local Government and Ethnic Affairs* recognised the authority of the legislature to "exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and (to) ... provide for their expulsion or deportation."[278]

The executive is conferred with authority extending to "the execution and maintenance" of the Constitution and "the laws of the Commonwealth".[279] Executive authority encompasses a common law prerogative power, which may be abrogated or abridged by statute. The prerogative power grants the executive authority to take measures to prevent persons entering Australian territorial jurisdiction.[280]

The Federal Judicature is conferred power under Chapter III of the Commonwealth Constitution.[281] The High Court is vested with original jurisdiction in

[275] Section 51 (xxvii), Federal Constitution of Australia
[276] Ibid., section 51(xix)
[277] Ibid., section 51 (xxix)
[278] *Chu Kheng Lim*, *supra* n. 33, at p. 26 citing *Robtelmes* v. *Brenan*, *supra* n. 39, at pp. 400-404, 415, 420-422; *Ex parte Walsh and Johnson; In re Yates*(1925), 37 CLR, at pp. 83, 94, 108, 117, 132-133; *O'Keefe* v. *Calwell* (1949), 77 CLR 261, at pp. 277-278, 288; *Koon Wing Lau* v. *Calwell* (1949), *supra* n. 33, pp. 555-556, 558-559; *Pochi* v. *Macphee* (1982), 151 CLR 101, at p. 106.
[279] Section 61, Federal Constitution of Australia, *supra* n. 275
[280] *Ruddock* v. *Vadarlis*, para.197, *supra* n. 33
[281] Sections 71-80, Federal Constitution of Australia, *supra* n. 275

matters arising under treaties,[282] in matters where "the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party",[283] and in matters in which "a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth."[284]

The Federal Constitution establishes a clear division regarding the competence of the respective branches of government power. However, in matters relating to immigration control which concerns human rights issues subject to international regulation, it is inevitable that defining the limits of authority would prove contentious. In this chapter, the author seeks to identify pertinent case law and legislative amendments highlighting this tension.

5.2. General Requirements for Admission and Inspection

The Migration Act requires that non-citizens within the migration zone[285] are to possess a valid visa to be categorised as a "lawful non-citizen".[286] An alien who is not a "lawful non-citizen" is referred to by the Act as an "unlawful non-citizen".[287] The Act vests authorised officers to obtain evidence from persons reasonably suspected of being non-citizens to ascertain whether their presence is lawful or for the purpose of identification.[288]

5.3. Categories of Non-Citizens in an Irregular Situation

[282] Ibid. Section 75(i)
[283] Ibid., section 75(iii)
[284] Ibid., section 75(v)
[285] Section 5(1), Migration Act 1958 (Cth)
[286] Ibid., section 13(1)
[287] Ibid., section 14(1)
[288] Ibid., section 188

The status of "unlawful non-citizen" under the Act is compatible with the four broad categories of irregular migrants referred to in the introductory chapter. This status may be acquired in the following ways:

5.3.1. Bypassing Immigration Control

A non-citizen who fails to comply with the prescribed procedure outlined in section 166 of the Migration Act regarding presentation of evidence of identity to a clearance officer is deemed to have bypassed immigration clearance.[289] A visa will cease to be in effect if the holder remains without immigration clearance[290] or enters Australia other than at a port or on a pre-cleared flight.[291]

5.3.2. Cancellation of Visas

A visa will cease to be in effect following its cancellation.[292] An alien will therefore become an unlawful non-citizen while in the migration zone following the cancellation of the visa.[293] As referred to in the introductory chapter this may occur for two broad categories of irregular migrants i.e. non-citizen who enters by false pretences or deception and the non-citizen who violates the condition of stay. The latter category includes the requirement that non-citizens are of "good character" while residing in the host state.

[289] Ibid., section 172(4)
[290] Ibid., section 174
[291] Ibid., section 173
[292] Ibid., section 82(1)
[293] Ibid., section 15

With regard to the former category, the Minister is authorised to cancel a visa due to the applicant providing incorrect information.[294] The Minister *may* provide a notice of incorrect applications from persons who have been immigration cleared and offer an opportunity for those persons to respond in writing to those allegations.[295] The notice should detail the "particulars of possible non-compliance" concerning visa applications,[296] passenger cards,[297] the presentation of bogus documents,[298] the failure to notify change in circumstances either prior to or after the granting of a visa[299] and the failure notify incorrect answers after learning of its inaccuracy.[300] Cancellation may also occur due to incorrect information given by the holder of the visa in an attempt to clear immigration.[301]

In cases where the non-citizen violates a condition of stay, it may result in the cancellation of a visa.[302] This includes situations where the circumstances initially justifying the issuance of the visa no longer exist e.g. remaining in Australia on a prospective spouse visa after an engagement ends.[303] Another ground for cancellation within this broad category includes the conduct of the visa holder demonstrating that s/he poses "a risk to the health, safety or good order of the Australian community".[304] This ground is compatible with the acknowledged authority of sovereign states to impose limitations on human rights where public goods are threatened. Irregular migrants

[294] Ibid., section 109
[295] Ibid., section 107
[296] Ibid., section 101
[297] Ibid., section 102
[298] Ibid., section 103
[299] Ibid., section 104
[300] Ibid., section 105
[301] Ibid., section 116(1)(d)
[302] Ibid., section 116(1)(b),(c)
[303] Ibid., section 116(1)(a)
[304] Ibid., section 116(1)(e)

engaged in activities breaching domestic law impose an additional justification for removal beyond their unauthorised status in that it is implied condition for all non-citizens residing in the territorial jurisdiction of the host state to respect the laws of that state. Other situations where irregular status commonly arises regarding breach of condition of stay includes situations where the holder of a student visa is not a genuine student or the visa holder engages or is likely to engage in activities not contemplated by the visa.[305]

The visa may be cancelled prior to entering Australia, during immigration clearance or while the non-citizen is in the migration zone.[306] The Minister issuing an order to cancel a visa under section 116 is required to notify the holder of the visa of the grounds of cancellation and offer an opportunity either to refute the existence of those grounds or to explain why the visa should not be cancelled.[307] Moreover, the Minister is required to furnish the visa holder with "relevant information" which was relied upon to cancel the visa, to ensure that the visa holder understands the relevance of the information in the decision to cancel and to provide the visa holder with an opportunity to comment on the information.[308]

The Minister may cancel a visa where s/he "reasonably suspects" that the visa holder does not pass the character test and that person does not satisfy the Minister otherwise.[309] A visa may also be cancelled in a personal exercise of the Minister's authority where s/he "reasonably suspects" that the non-citizen does not pass the

[305] Ibid., section 116(1)(fa)
[306] Ibid., section 117(1)(a),(b),(d)
[307] Ibid., section 119
[308] Ibid., section 120
[309] Ibid., section 501(2)

character test and the Minister is satisfied that the decision to cancel the visa is in the "national interest".[310]

A non-citizen is deemed not to have passed the character test where:

> "(a) the person has a substantial criminal record (as defined by subsection (7)); or
> (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
> (c) having regard to either or both of the following:
> (i) the person's past and present criminal conduct;
> (ii) the person's past and present general conduct;
> the person is not of good character; or
> (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
> (i) engage in criminal conduct in Australia; or
> (ii) harass, molest, intimidate or stalk another person in Australia; or
> (iii) vilify a segment of the Australian community; or
> (iv) incite discord in the Australian community or in a segment of that community; or
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way."[311]

The legislative regime vesting the executive with broad authority to cancel visas on a character grounds is compatible with the sovereign authority of states to impose limitations or restrictions on recognised rights where public goods are undermined. The character test is heavily influenced by the need to protect the state and its residents from non-citizens who have propensity to engage in violent or criminal conduct. Arguably, the primary motive for enacting the character test is to safeguard public order and security as opposed to ensuring broader public goods considerations are realised e.g. the protection of economic interests, public health and morals. It should be noted that the character test

[310] Ibid., section 501(3)(b)(c)(d); 501(4)
[311] Ibid., section 501(6)

contains a potential "catch all" provision to protect these additional public goods in which past or present conduct demonstrates that a person is not of good character.[312]

An original decision not to exercise authority to cancel a visa based on character grounds may be set aside by the Minister and substituted with an adverse decision.[313] The Minister acting personally may revoke the original decision where the applicant satisfies the Minister that he or she passes the character test as defined by section 501.[314]

The Migration Act is silent concerning the factors the primary decision-maker should consider before exercising discretion. However, Ministerial Policy Directions serve as an aid to assist in administrative decision-making. The Ministerial Policy Direction for visa cancellation under section 501 of the Migration Act recognises three primary considerations.[315] (i) "the protection of the Australian community, and members of the community";[316] (ii) "the expectations of the Australian community";[317] and (iii) "in all cases involving a parental or other close relationship between a child or children and the person under consideration, the best interests of the child or children."[318] In balancing the abovementioned primary considerations with other considerations *Policy Direction No. 21* states:

> "The Government is mindful of the need to balance a number of important factors in reaching a decision whether or not to refuse or cancel a visa. In making such a decision, a decision-maker should have regard to three primary considerations and a number of other considerations. ... Decision-makers must have due regard to the importance placed by the Government on the

[312] Ibid., section 501(6)(c)(ii)
[313] Ibid., section 501A(2)(3)
[314] Ibid., section 501C
[315] Direction No 21: Visa Refusal and Cancellation under s 501 of the Migration Act 1958, http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/95DC3CD189CCA6B0CA25723B007F1417/$file/COPYDirection21character.pdf
[316] Ibid., para.2.3(a)
[317] Ibid., para.2.3(b)
[318] Ibid., para.2.3(c)

> three primary considerations, but should also adopt a balancing process which takes into account all relevant considerations."[319]

The Ministerial Direction notes that international obligations such as the right to life and the prohibition against torture, cruel, inhuman or degrading treatment or punishment are absolute. If visas are cancelled on character grounds under section 501 and the non-citizen is subsequently returned to a country where his or her life or freedom is threatened this would violate the principle of *non-refoulement*.[320] However, the Ministerial Policy Direction concludes by affirming Australian sovereignty:

> "Notwithstanding international obligations, the power to refuse or cancel must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister."[321]

This official pronouncement clearly indicates that while international obligations as broadly defined by international monitoring mechanisms weigh into the administrative decision-making process, ultimately sovereign considerations regulate the nature of compliance with these obligations.

5.3.3. Overstaying

A non-citizen may also acquire irregular status by overstaying his or her visa. In Australia, this constitutes the most common way in which a person becomes an unlawful non-citizen.[322] The Act provides that a person remaining in Australia following a

[319] Ibid., para.2.2
[320] Ibid., paras.2.21-2.23
[321] Ibid., para.2.24
[322] John Vrachnas et al., *Migration and Refugee Law Principles and Practice in Australia*, 2nd ed. (Port Melbourne: Cambridge University Press, 2008) at p. 163

particular period or date specified on the visa will become an unlawful non-citizen.[323] A non-citizen who overstays his/her visa is subject to the same mandatory detention regime as other categories of irregular migrants. At least in the case of innocent oversight, administrative practice is to grant a bridging visa enabling the non-citizen to depart voluntarily. This however is a discretionary executive decision, which depends on the facts of the case and arguably the nationality of the applicant.

5.4. Detention

The Migration Act confers significant authority on the executive to detain unlawful non-citizens. This authority, which is instrumental in implementing the Australian government's policy of mandatory detention, has been subject to extensive judicial scrutiny. The legislative regime requires authorised officers to detain persons who they know or reasonably suspect to be an unlawful non-citizen.[324] The duration of detention for unlawful non-citizens under section 189 of the Act is dependent on the time it takes to remove or deport that person from Australia or to grant that person a visa.[325] The Minister has a discretionary non-delegable authority to grant a visa to persons detained under section 189 when it is deemed to be in the "public interest", including in cases where the detainee has not applied for a visa.[326] In the exercise of this power, the

[323] Migration Act, *supra* n. 285, section 82(7)
[324] Ibid., section 189
[325] Ibid., section 196(1) provides: "An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
(a) Removed from Australia under section 198 or 199; or
(b) Deported under section 200; or
(c) Granted a visa"
[326] Ibid., section 195A(1),(2) and (4)

Minister is not bound by legislation and regulations governing the application and grant of visas.[327]

Although the legislature vests the executive with broad powers with respect to immigration control the High Court in *Chu Kheng Lim* v. *The Minister for Immigration, Local Government and Ethnic Affairs*[328] affirmed that acts of the executive and legislature must be in accordance with the Constitution requiring measures to be compatible with the doctrine of separation of powers. In *Lim*, the plaintiffs were Cambodian nationals who were detained following their unauthorised arrival by boat. Five members of the High Court bench, Brennan, Deane, Dawson, McHugh JJ and Mason CJ declared that public officials are not authorised to detain non-citizens absent a statutory authority notwithstanding that they may have entered unlawfully.[329] The High Court recognised that section 51 (xix) of the Federal Constitution authorises Parliament to make laws with respect to aliens which is subject to the Constitution and therefore subject to Chapter III conferring judicial powers on the courts. In a joint decision Brennan, Deane and Dawson JJ stated:

> "The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine insofar as divesting of judicial power is concerned. Its provisions constitute 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap.III'. Thus, it is well settled that the grants of legislative power contained in s. 51 of the Constitution, which are expressly 'subject to' the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively

[327] Ibid., section 195A(3)
[328] *Chu Kheng Lim*, *supra* n. 33
[329] Ibid., 13, per Mason C.J.; 19, per Brennan, Deane and Dawson JJ; 63, per McHugh J

> vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power."[330]

The majority held that a legislative scheme of mandatory detention for unlawful non-citizens was not punitive in character, which would otherwise require an exercise of judicial function. Mason CJ, Brennan, Deane and Dawson JJ declared:

> "In this Court, it has been consistently recognised that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective."[331]

A legislative scheme to detain will not contravene the Constitution and violate the separation of powers if it is "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered." Conversely, if the legislative provisions are not limited for such purposes then it cannot be regarded as an "incident of the executive powers to exclude, admit and deport" and as such it will be of a "punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."[332]

Mason C.J. concluded that the authority to detain will constitute an incident of executive powers if it is "conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport." According to the Chief Justice, this "limited authority to detain an alien in custody can be conferred upon the Executive

[330] Ibid., 26-27
[331] Ibid., 30-31citing *Koon Wing Lau v. Calwell*, *supra* n. 33
[332] Ibid., 32

without contravening the investment of judicial power of the Commonwealth in Ch. III courts."[333]

5.4.1. Prohibition of Arbitrary Detention

The High Court in *Chu Kheng Lim* held that the scheme of mandatory detention was in accordance with the Constitution after it had affirmed that the conferral of authority to detain unauthorised entrants is an incident of executive powers. The appellant in *Al-Kateb* v. *Godwin* challenged the legislative scheme authorising the exercise of this authority where release from detention could only occur if the unlawful non-citizen is removed, deported or granted a visa.[334] If there are circumstances, in which there is no reasonable prospect that the non-citizen could be removed in the foreseeable future, due to circumstances beyond the control of the Australian government, does this render executive detention unconstitutional?

In *Al-Kateb*, the appellant a stateless Palestinian man lived most of his life in Kuwait but was ineligible for citizenship or permanent residency had been detained under the Australian government's mandatory detention regime after he arrived without authorisation. The Department of Immigration, Multicultural, and Indigenous Affairs refused the appellant's application for a protection visa. The Refugee Review Tribunal (RRT) upheld the decision and an application for judicial review was dismissed by the Federal Court. The authorities were unsuccessful in removing the appellant to the Middle East due to his stateless status. The appellant was unsuccessful in the Federal Court in obtaining a declaration that he had been unlawfully detained and an order of *habeas*

[333] Ibid., 10
[334] (2004) 219 CLR 562

corpus directing the Minister to secure his release from detention. Von Doussa J noted that the authorities had made reasonable efforts to remove the appellant but there was no real prospect of securing removal in the near future.[335] The appeal against the judgment of von Doussa J was removed from the Full Court of the Federal Court to the High Court of Australia.

The main consideration addressed by the High Court was whether Parliament had the authority to order the detention of unlawful non-citizens for an indefinite period in cases where there is no prospect of removal in the foreseeable future. The appeal concerned two key issues. Firstly, whether sections 189, 196 and 198 properly construed could authorise detention of this nature and secondly, whether the provisions which purported to authorise such detention, were beyond the legislative power of the Commonwealth.

An officer who knows or reasonably suspects that a person may be an unauthorised non-citizen is required by the Act to detain that person and that person shall be kept in detention until removed, deported or granted a visa.[336] An officer is required to remove an unlawful non-citizen "as soon as reasonably practicable" if that person makes a request to the Minister in writing.[337] Although the appellant made such a request, the authorities were unable to remove the appellant due to his status as a stateless person.

The majority deferred to the reasoning of Hayne J in construing the parameters of sections 189, 196 and 198 of the Migration Act.[338] Detention is prescribed for the purpose

[335] Ibid., 563
[336] Migration Act, *supra* n. 285, sections 189, 196
[337] Ibid., section 198(1)
[338] *Al-Kateb*, *supra* n. 334, 581 per McHugh J; 663 per Heydon J; 661, per Callinan J where his Honour opined that "the words 'as soon as reasonably practicable' in s 198 of the Migration Act are intended to ensure that all reasonable means are employed to remove an illegal entrant, and not to define a period or event beyond which his detention should be deemed to be unlawful."

to effect removal, deportation or to process a visa application. Detention must continue "until" one of those three events takes place. The Act imposes an obligation on an officer to remove an unlawful non-citizen "as soon as reasonably practicable" which may be influenced by a number of factors before it can be achieved. According to Hayne J, the period in which a non-citizen can be removed cannot be predicted, as the Australian government is required to rely on cooperation with other states to effect removal. Although these matters are outside the Australian government's influence and control it does not mean that removal to any country willing to accept that person cannot be achieved in the future.[339] The period in which a duty to remove must be performed will not expire until circumstances arise to allow the authorities to effect removal.

> "Because there can be no certainty about whether or when the non-citizen will be removed, it cannot be said that the Act proceeds from a premise (that removal will be possible) which can be demonstrated to be false in any particular case. And unless it has been practicable to remove the non-citizen it cannot be said that the time for performance of the duty imposed by s 198 has arrived. All this being so, it cannot be said that the purpose of detention (the purpose of removal) is shown to be spent by showing that efforts made to achieve removal have not so far been successful. And even if, as in this case, it is found that 'there is no real likelihood or prospect of [the non-citizen's] removal in the reasonably foreseeable future', that does not mean that continued detention is not for the purpose of subsequent removal. The legislature having authorised detention until the first point at which removal is reasonably practicable, it is not possible to construe the words used as being subject to some narrower limitation..."[340]

As the intention of the legislature is "clear and unambiguous" it is not possible to accept the appellant's assertion that statutory provisions should be subject to implied limitations regulating the length of detention as had been the case in the seminal UK decision, *R* v. *Governor of Durham Prison, ex p Singh (Hardial)*.[341] Moreover, the

[339] Ibid., 639
[340] Ibid., 640
[341] [1984] 1 All ER 983

majority did not accept that the statutory scheme conflicted with international obligations prohibiting arbitrary detention so as to curtail legislative authority.[342]

The majority held that the legislative scheme authorising mandatory detention of unlawful non-citizens was not beyond the legislative power of the Commonwealth due to it infringing Chapter III of the Commonwealth Constitution vesting judicial power in the courts. The legislative scheme authorising administrative detention of unlawful non-citizens for securing their removal was regarded by the majority to be constitutional as the courts have traditionally accepted the authority of the executive to detain non-citizens for the purpose of immigration control and that the detention in question was not punitive in character. The relevant provisions therefore did not contravene the Constitution as it was regarded by the majority to be law made in accordance with the legislative power of Parliament with respect to aliens.[343]

In his dissenting judgment, Gleeson CJ acknowledged that it may not be possible to ascertain the length of administrative detention. However, that does not mean that the Migration Act intended in those exceptional cases to authorise indefinite or permanent

[342] Ibid., at pp. 661-662 where Callinan J concluded: "There is certainly no basis for an implication to the effect that the ability to detain aliens in accordance with the Migration Act is limited to detention for a 'reasonable' period. Nor is a presumption, assuming it should be made, against legislation that is contrary to an international obligation, sufficient to displace the clear and unambiguous words of Parliament. It is a matter for the Australian Parliament to determine the basis on which illegal entrants are to be detained. So long as the purpose of detention has not been abandoned, a statutory purpose it may be observed that is clearly within a constitutional head of power, it is the obligation of the courts to ensure that any detention for the purpose is neither obstructed nor frustrated." *See also*, p. 581 where McHugh J noted: "the words of the three sections are too clear to read them as being subject to our purposive limitation or an intention not to affect fundamental rights." *See also*, pp. 642-643 per Hayne J.

[343] Commonwealth Constitution, *supra* n. 275, section 51 (xix); *Al-Kateb*, ibid., p. 584 where McHugh J concluded: "A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive. The Parliament of the Commonwealth is entitled, in accordance with the power conferred by s 51 (xix) and without infringing Ch III of the Constitution, to take such steps as are likely to ensure that unlawful non-citizens do not enter Australia or become part of the Australian community and that they are available for deportation when that becomes practicable."

detention where through no fault of the appellant or the authorities it is not possible to effect removal. The principle of legality requires the judiciary to give effect to the will of the legislature by interpreting what Parliament intended to enact. Where removal is not reasonably practicable, the purpose of detention is "in suspense".[344] Gleeson CJ concluded that the courts presume that the legislature does not intend to curtail or abrogate fundamental rights and freedoms including the right to personal liberty, unless Parliament "clearly manifested by unambiguous language" such an intention.[345]

Kirby J regarded the common law presumption favouring personal liberty as well as binding obligations under international law to prevent an interpretation of the relevant statutory provisions, which would permit the executive to detain the appellant indefinitely.[346] Although foreign judicial authority imposing limitations on the use of executive detention is "not concerned with an elaboration of the language or structure of the Australian Constitution or the meaning of an Australian statute", it does not mean that seminal cases are without influence in the High Court.[347]

> "In different courts the resistance leads to different techniques of decision-making and to different powers and outcomes. But the common thread that runs through all these cases is that judges of our tradition inclined to treat unlimited executive detention is incompatible with contemporary notions of the rule of law. Hence, judges regard such unlimited detention with vigilance and suspicion. They do what they can within their constitutional functions to

[344] Ibid., at p. 576; at p. 608, per Gummow J where his Honour concluded: "If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed there is a significant constraint for the continued operation of s 198. In such a case s 198 no longer retains the purpose of facilitating removal from Australia which is reasonably in prospect and to that extent the operation of s 198 is spent. If that be the situation respecting s 198, then the temporal imperative imposed by the word 'until' in s 196(1) loses a necessary assumption for its continued operation. That assumption is that s 198 still operates to provide for removal under that section."
[345] Ibid., at p. 577
[346] Ibid., at pp. 616-617
[347] Ibid., at p. 618 referring to *Zadvydas* (2001) 533 US 678, *Hardial Singh*, *supra* n. 341, *Tan Te Law* [1997] AC 97

> limit it and to subject it to express or implied restrictions defensive of individual liberty."[348]

The use of administrative detention may be regarded as a form of punishment if its duration is prolonged. The judiciary vested with power under Chapter III of the Constitution is responsible for imposing punitive sanctions.[349] The legislature therefore cannot treat detention for the purpose of removal as a matter exclusively for the executive branch.[350] Moreover, legislation detaining non-citizens for the purpose of segregating those persons from the Australian community without the commission of an offence or a connection to a immigration control measure will also be an impermissible executive measure.[351]

The same issues were raised in the High Court decision, *Minister for Immigration and Multicultural and Indigenous Affairs* v. *Al Khafaji*,[352] which was heard at the same time as *Al-Kateb*. The respondent, an Iraqi national, was detained on arrival in Australia under section 189 of the Act due to his status as an unlawful non-citizen. The respondent was refused a protection visa under section 36 of the Act. Although the delegate of the Minister acknowledged that the respondent held a credible fear of persecution if he were to be returned to Iraq, the Australian government's protection obligations did not extend to persons who could avail themselves to the protection of another country. The delegate concluded that the respondent could be afforded effective protection in Syria his country of long-term residence.

[348] Ibid., at p. 620
[349] Ibid., at p. 617 citing *Chu Kheng Lim*, *supra* n. 33, at p. 33
[350] Ibid., at p. 613 per Gummow J: "The reason is that it cannot be for the executive government to determine the placing of from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of the boundary line itself is a question arising under the Constitution or involving its interpretation."
[351] Ibid., at p. 613
[352] *Minister for Immigration and Multicultural and Indigenous Affairs* v. *Al Khafaji* (2004) 219 CLR 664

As in *Al-Kateb*, the majority deferred to the reasoning of Hayne J on the issue of statutory construction concerning sections 189, 196 and 198 of the Act. In the dissenting opinion of Gummow J, his Honour concluded that the continued detention of the respondent was no longer authorised by the Act.

> "Section 198 no longer retained a present purpose of facilitating removal from Australia as an end reasonably in prospect; as a result, the temporal imperative imposed by the word 'until' in s 196 (1) lost the necessary condition or assumption for its operation that s 198 still operates to provide for removal under that section."[353]

Kirby J supported the reasoning of Gummow J in declaring that legislation should be interpreted where language permits to conform with international human rights law as this "principle ensures that Australian law is construed so that it is not needlessly in breach of the obligations binding on Australia under international law."[354] Gleeson CJ reaffirmed the position he adopted in *Al-Kateb*.[355]

In the abovementioned cases, the majority has deferred to executive authority, which has been widely criticised for being incompatible with the international norm prohibiting arbitrary detention. While it is beyond dispute that detention for the purpose of identification and initial screening is a justifiable immigration control response, prolonged indefinite detention with no foreseeable prospect of removal has been referred to as detention for "administrative convenience".[356] Detention for this purpose is therefore outside the conferral of authority, which Parliament has provided under the Migration Act. The risk of an unauthorised entrant absconding or fleeing is a legitimate concern of the state. In the author's view, the government is required to meet a higher

[353] Ibid., para.22
[354] Ibid., para.27
[355] Ibid., para.2
[356] *R (Saadi and others)* v. *Secretary of State for the Home Department* [2002]1 WLR 3131 at p. 3139, per Lord Slynn

threshold to justify detention as measure authorised by the Act following initial processing and screening and prior to a decision to remove. It is argued that it is less likely for a non-citizen to flee or abscond while proceedings are underway compared with the situation where a decision to remove has been finalised.

5.4.2. Persons Deprived of Liberty to be Treated with Humanity

The High Court had an opportunity in *Behrooz* v. *Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*[357] to address a claim alleging that conditions in an immigration detention centre had breached an obligation to ensure that persons deprived of their liberty are treated with humanity. At issue was whether escape from the centre due to harsh and inhumane conditions could be a defence under section 197A of the Migration Act, which attracted a five-year term of imprisonment. As raised in *Al-Kateb*, the appellant asserted that detention was penal in nature and therefore not authorised by the Act. The conditions of detention rendered this a sanction reserved for the judiciary under Chapter III of the Constitution. The majority concluded that the appellant escaped from "immigration detention" within the meaning of the Act.[358] In cases where a detainee is exposed to abusive conditions, s/he may have recourse to the protection of civil or criminal law however that does not render immigration detention unlawful.[359]

The sole dissenting judge, Kirby J, contended that legislation should be interpreted to be consistent with international law not only where there is ambiguity but

[357] [2004] HCA 36
[358] Ibid., paras.21-22, per Gleeson CJ,; para.53, per McHugh, Gummow and Heydon JJ; paras.174-176, per Hayne J; para. 223, per Callinan J.
[359] Ibid., para.21, per Gleeson CJ,; paras.51-53, per McHugh, Gummow and Heydon JJ; para.174, per Hayne J; para.219 per Callinan J

also to the extent to which language permits.[360] The ICCPR, which was ratified by the Australian government prior to the enactment of section 197A, is of particular relevance as it requires contracting parties to ensure that persons deprived of their liberty are to be treated with humanity and to refrain from acts which are deemed to violate the prohibition against torture, cruel, inhuman or degrading treatment or punishment.[361] Kirby J referred to the "absurdity" of restricting unlawful non-citizens to collateral remedies to ensure that fundamental rights are protected. The lack of legal expertise, financial capacity, language skills or even because the unlawful non-citizen has been removed from the territorial jurisdiction of the host state are some of the factors which threaten the realisation this right.[362]

> "This Court should not answer the appellant's endeavour to defend himself from prosecution for such offence by alluding to his 'rights' to legal redress that are devoid of any real content or protection. Doing so would involve the Court not only in refusing a forum to determine the 'lawfulness of his detention' in a way critical to the determination of his actual legal position. ... In such circumstances, to deny the appellant the argument that he now propounds would, in practice, involve the Australian judiciary washing its hands of his case and of any unlawfulness that he could show in the conditions of his detention in answer to the criminal charge that his detainers now wish to bring against him. In my view, this Court should answer the present case in a realistic way, informed by the preceding considerations that I have identified. We should not give a legal answer that future generations will condemn and that we ourselves will be ashamed of."[363]

The international obligation of states to treat detainees with humanity not only concerns general conditions relating suitable shelter, facilities and services but also extends to the psychological well-being of detainees, which may be influenced by the circumstances of their incarceration. There is an obvious overlap between prolonged

[360] Ibid., para.127, per Kirby J
[361] Ibid., para.128, per Kirby J
[362] Ibid., paras.136-137, per Kirby J
[363] Ibid., paras.138-139, per Kirby J

arbitrary indefinite detention and the psychological effects resulting from an uncertain future. It is argued that such cases may violate the international norm requiring the authorities to treat detainees with humanity. The psychological welfare of detainees is especially acute for vulnerable groups such as children who require a minimum level of socialisation and education to foster their development. The High Court was provided with an opportunity in *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* to determine the legality of the mandatory detention scheme as it applied to children.[364]

Re Woolley concerned the detention of four Afghani children who along with their parents were classified as unlawful non-citizens. The father was involved in an ongoing legal challenge after he was initially denied a protection visa. The applicants asserted that as minors, they did not have the capacity to end detention by requesting removal from Australia independently from their parents. Moreover, it was argued that detention was particularly harmful for the development of children rendering their detention to be punitive in nature.

The High Court unanimously held that the mandatory detention scheme applied to children who were unlawful non-citizens. Gleeson CJ considered that there is "no ambiguity" as to whether sections 189 and 196 is applicable to persons under the age of 18 as there would be "a gap in the legislation in its application to an obvious and important group of non-citizens."[365] If the legislative scheme was held not to apply to children then they will be in a "legal limbo" as their parents, their primary carers are

[364] (2004) 225 CLR 1
[365] Ibid., para.8, per Gleeson CJ

subject to the mandatory detention regime.[366] McHugh J notes that there is nothing in sections 189 and 196 to suggest that it does not apply to unlawful non-citizen children. As other provisions in the Act expressly refer to children in immigration detention, it would not be permissible to read down the general terms of the mandatory detention scheme to exclude children.[367] Similarly, Kirby J concluded that where the language of legislation permits it should be construed to comply with international law and not to derogate from fundamental rights.[368] The legislative scheme authorising mandatory detention was deemed sufficiently clear to include unlawful non-citizens below the age of 18.[369]

Gleeson CJ rejected the argument that children did not have the legal capacity to end detention by issuing a request for removal under section 198 (1) of the Act.[370] His Honour also noted that the majority in *Chu Kheng Lim* did not consider that the legislative scheme was intended to give consideration to the particular circumstances of individual non-citizens.

> "Nowhere was it suggested ... that the power of detention conferred by the legislation in that case would take on a different character if, in its application to some particular detainees, or some class of detainees it was capable of causing particular hardship. One of the most obvious features of the system of mandatory detention considered in *Chu Kheng Lim*, as of the system with which this case is concerned, is that it does not address the particular circumstances of individual detainees. That is the difference between mandatory and discretionary detention."[371]

Gleeson CJ concluded that if the operation of a system of mandatory detention were particularly severe for an individual applicant or a class of applicant resulting in the

[366] Ibid., para.8, per Gleeson CJ
[367] Ibid., para.46, per McHugh J; para.129, per Gummow J
[368] Ibid., para.195-196, per Kirby J,
[369] Ibid., para.196, per Kirby J,
[370] Ibid., para.30, per Gleeson CJ,
[371] Ibid., para.29, per Gleeson CJ

executive performing extrajudicial functions and thereby constituting a form of punishment then it would have been found to have been unconstitutional. Moreover, his Honour considered that it would be impossible to establish criteria to measure severity, which would render detention unlawful.[372]

McHugh J regarded the object of the law authorising detention as a strong indicator as to whether detention is penal in nature:

> "Hence, the issue of whether the law is punitive or non-punitive in nature must ultimately be determined by the law's purpose, not an *a priori* proposition that detention by the Executive other than by judicial order is, subject to recognised or clear exceptions, always punitive or penal in nature."[373]

His Honour recognised that it is often difficult to draw the dividing line as to whether a law is protective or punitive in nature. Although protective laws may have a deterrent aspect, they will not be regarded as punitive unless it is a principal object of the legislation.[374]

Gummow J contended that for a law to be constitutionally valid its purpose must be connected with the entry, investigation, admission and deportation of aliens rather than as a measure to segregate non-citizens from the "Australian community".[375] Hayne J with whom Heydon J agreed[376] regarded the legislative powers of Parliament with respect to aliens and immigration under the Constitution to support laws enacted for the purpose of excluding aliens from the Australian community:

> "Once it is accepted, as I do, that the aliens and immigration powers support a law directed to excluding a non-citizen from the Australian community (by segregating that person from the community) the effluxion of time, whether

[372] Ibid., para.29, per Gleeson CJ,
[373] Ibid.,para.60, per McHugh J
[374] Ibid., para.61, per McHugh J
[375] Ibid., para.150, per Gummow J
[376] Ibid., para.270, per Heydon J

> judged alone or in the light of the vulnerability of those who are detained, will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment."[377]

Callinan J concluded that detention pending a determination as to whether a non-citizen should be granted entry or excluded is not in itself punitive in nature. The authorities must "formally and unequivocally" abandon that purpose before it can be considered unconstitutional.[378] As the father's application had not been finally determined, it may be that the time for effecting that purpose had yet to arrive. The fact that the applicants are children is relevant only with respect to policy authorising the detention, which the courts cannot interfere. As a matter of law the "purpose of detention remains the deciding factor."[379]

Kirby J acknowledged the adverse consequences that mandatory detention may have on the development of vulnerable groups such as children. His Honour however did not accept that the executive encroached on the powers reserved to the judiciary in the particular circumstances of the applicants.

> "An argument based upon detention as 'inhumane' (and therefore as 'punishment') must be proved by reference to the impact on, and consequences for, the particular parties. Without in any way minimising the complaints of the applicants as to the conditions of their former detention and its duration and its effect on their intellectual, social and emotional development as children, evidence presented in the proceedings, because of its limitations, falls short of sustaining the legal foundation upon which this Court was invited to intervene on this basis."[380]

Following the decision in *Re Woolley* the Migration Act was amended affirming the principal that minors should be detained only as a measure of last resort.[381] Although

[377] Ibid., para.227, per Hayne J
[378] Ibid., para.262, per Callinan J
[379] Ibid., para.263, per Callinan J
[380] Ibid., para.189, per Kirby J
[381] Migration Act, *supra* n. 285, section 4AA

children are no longer detained in immigration detention centres they are subject to other forms of immigration detention such as immigration residential housing.[382]

5.4.3. Developments to Address Arbitrary Nature and Conditions of Detention

In spite of recommendations by the Commonwealth Human Rights and Equal Opportunity Commission (HREOC), minimum standards for the treatment of immigration detainees are not codified in domestic legislation rather it is referred to in the Department of Immigration and Citizenship's *Key Immigration Detention Values*.[383] These key values attempt to balance the interests of the individual by recognising the "inherent dignity of the human person"[384] and the interest of state by acknowledging the need to protect public goods.

> "1. Mandatory detention is an essential component of stronger border control.
> 2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
> a. all unauthorised arrivals, for management of health, identity and security risks to the community
> b. unlawful non-citizens who present unacceptable risks to the community and
> c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions."[385]

In an effort to achieve this balance, the government has attempted to minimise the harsh consequences of an "automatic and indiscriminate" scheme through greater flexibility.[386] Areas of reform include an acknowledgment that detention which is "indefinite or otherwise arbitrary is not acceptable and the length and conditions of

[382] Australian Human Rights Commission, "Immigration detention report - Summary of observations following visits to Australia's immigration detention facilities," December 2008, http://www.humanrights.gov.au/human_rights/immigration/idc2008.html at p. 79
[383] *See*, ibid., at p. 18; *See also*, Key Immigration Detention Values, http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm
[384] Ibid., Key Values, 7
[385] Ibid., Key Values
[386] Working Group on Arbitrary Detention, *supra* n. 214, III A, paras.13-15

detention, including the appropriateness of both the accommodation and services provided would be subject to regular review."[387] An acknowledgement that detained persons are to be treated "fairly and reasonably within the law."[388] The detention of the children and the ruling in Re Woolley has been subject to particularly virulent criticism from activists and sections of the Australian community. The enactment of the Migration Amendment (Detention Arrangements) Act 2005 prescribing that the detention of minors should be employed as a last resort has to a certain extent pacified some of the critics of the scheme.[389]

The Migration Amendment (Immigration Detention Reform) Bill 2009 will amend the Migration Act if it is passed by both Houses of Parliament in its current form to include the Key Immigration Detention Values. The amendment and incorporation of provisions into the Migration Act which are of particular relevance in diminishing the harsh effects, but still maintaining a mandatory detention regime include expanding the definition of "immigration detention" under section 5(1) of the Act to include "temporary community access" without being in the company of authorities.[390] The Bill specifies examples of places other than immigration detention centres, which may be used for that purpose.[391] A non-citizen may only be detained in an immigration detention centre "as a measure of last resort" and for the "shortest practicable time."[392] Moreover, minors should not be detained in immigration detention centres even if detention is a measure of

[387] Key Values, *supra* n. 383, 4
[388] Ibid., Key Values, 6
[389] Migration Amendment (Detention Arrangements) Act, 2005 No. 79 (Cth); See also Key Values, *supra* n. 383, 3
[390] Item 5, Schedule 1, Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth)
[391] Ibid., Item 6, Schedule 1
[392] Ibid., Item 1, Schedule 1

last resort and the best interests of the minor should be given primary consideration.[393] Given that any reform of the Migration Act is a divisive issue it remains to be seen whether any of these reforms are enacted in its entirety or diluted to the point that it provides no real substance to remedy injustice.

5.5. Removal

Orders of removal and deportation are the two options available to the executive to effect the removal of unlawful non-citizens. An order of removal rather than a deportation order is issued where the non-citizen enters without being immigration cleared and an application for a substantive visa, which could be made by the non-citizen while in the migration zone has been unsuccessful.[394] The Migration Act provides that detained unlawful non-citizens be removed from Australia "as soon as reasonably practical" after making a request to the Minister in writing.[395] In cases where the unlawful non-citizen is removed or removal is pending, the spouse and dependent children may request to be removed as soon as reasonably practicable.[396]

The Minister is authorised to order the deportation of certain categories of non-citizens.[397] An order of deportation may be issued to remove non-citizens whose presence in Australia is not desirable due to their involvement in crime or conduct considered a threat to order or security.[398] A person subject to a deportation order is classified as an unlawful non-citizen as he or she is no longer in possession of a valid visa commonly due

[393] Ibid., Item 3, Schedule 1
[394] Migration Act, *supra* n. 285, section 198
[395] Ibid., section 198 (1)
[396] Ibid., section 199
[397] Ibid., section 200
[398] Ibid., Part 2, Division 9

to not passing the character test or failing to comply with a condition of the visa.[399] The spouse and dependent children of unlawful non-citizens subject to a deportation order may request to be removed from Australia.[400]

The Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT) may undertake a merits review of an administrative decision. The MRT is authorised to review decisions concerning the refusal to grant or cancel substantive visas. The MRT has jurisdiction to review decisions where a visa could be granted while the non-citizen is in the migration zone or where an application has been made while in the migration zone.[401] Decisions made while the non-citizen is in immigration clearance or has been refused immigration clearance are not subject to review by the MRT.[402]

The AAT is authorised to review a decision to cancel a visa on character grounds. The AAT has jurisdiction to review a decision of a delegate of the Minister to refuse or cancel a visa on character grounds under section 501 of the Act.[403] A decision to refuse to grant or cancel a protection visa due to conduct referred to in the Refugee Convention as amended by the 1967 Refugee Protocol to which obligations for protection do not apply is subject to review by the AAT.[404] Applicants wishing to review a decision based on character grounds under section 501 or a decision concerning the refusal to issue or cancel a protection visa must be entitled to seek a review of the decision under Part 5 or 7 of the Migration Act if the decision was based on another ground.[405] The AAT is not

[399] Ibid., section 82(1)
[400] Ibid., section 205
[401] Ibid., section 338(2)(a)(b)
[402] Ibid., section 338(2)(c)
[403] Ibid., section 500(1)(b)
[404] Ibid., section 500(1)(c)
[405] Ibid., section 500(3)

authorised to review a decision made personally by the Minister where a certificate has been issued under section 502 based on "national interest" declaring a non-citizen to be an excluded person.[406]

The RRT has jurisdiction to review a decision concerning the refusal to grant or cancel a protection visa.[407] However, the RRT does not have jurisdiction to review decisions where the non-citizen is "not physically present in the migration zone" at the time of the decision.[408] In addition to submitting an application to the abovementioned bodies, issues pertaining to immigration control may also be referred to the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission and in certain cases, an appeal may be made directly to the Minister.

5.6. Judicial Review

The exercise of executive authority to make decisions under legislation, which confers power, is required to be in accordance with law otherwise the courts may set aside the decision. Common grounds of review include jurisdictional error, failure to comply with rules of procedural fairness/natural justice, unreasonableness, considering irrelevant considerations and not considering relevant considerations. The courts are not authorised to review the merits of the case. Rather the courts are restricted in their review to ensure that the decision-maker follows the correct legal reasoning and procedure.[409]

[406] Ibid., section 500(1)
[407] Ibid., section 411(1)(c)(d)
[408] Ibid., section 411(2)(a)
[409] Administrative Review Council, "The Scope of Judicial Review Discussion Paper" (2003) at 1.9, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_The_Scope_of_Judicial_Review

The authority of the judiciary to review administrative decisions is regulated by the doctrine of separation of powers. This authority is derived from three sources of power namely, the common law,[410] the original jurisdiction vested in the High Court of Australia by the Commonwealth Constitution[411] and legislation.

Immigration laws and regulations have been subject of frequent amendments in recent history resulting from well-publicised events such as the Tampa incident and a political perception that the judiciary has encroached upon the authority of the executive by undertaking a merits review of cases. The scope of judicial review concerning immigration decisions has therefore been subject to significant limitations over different eras of legislative reform.

The Migration Legislation Amendment (Judicial Review) Act 2001 was enacted to introduce the privative clause scheme into the Migration Act to limit the scope of judicial review. The former Minister for Immigration and Multicultural Affairs, Philip Ruddock, declared that the privative clause scheme is intended to:

> "Expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently. In practice, the decision is lawful provided:
> - the decision maker is acting in good faith;
> - the decision is reasonably capable of reference to the power given to the decision maker—that is, the decision maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
> - the decision relates to the subject matter of the legislation—it is highly unlikely that this ground would be transgressed when

[410] *See*, Vrachnas et al., *supra* n. 322 at p. 409 referring to the use of "prerogative writs of prohibition, *certiorari* and *mandamus* and the equitable remedies of injunction or declaration."
[411] Commonwealth Constitution, *supra* n. 275, Art.75

making decisions about visas since the major purpose of the Migration Act is dealing with visa decisions; and

- constitutional limits are not exceeded — given the clear constitutional basis for visa decision making in the Migration Act, this is highly unlikely to arise."[412]

The Migration Act defines a privative clause decision as:

> "[A] decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)."[413]

Section 474 (1) further provides that a "privative clause decision":

(a) is final and conclusive; and
(b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and
(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

In *Plaintiff S157/2002* v. *Commonwealth*, the High Court unanimously held that the privative clause scheme did not violate s 75 (v) of the Constitution vesting the High Court with original jurisdiction "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". In determining, whether a purported decision of an administrative authority is immune from judicial review involves an exercise of statutory construction.

In the joint judgment of the case, Gaudron, McHugh, Gummow, Kirby and Hayne JJ identified "two basic rules construction which apply to the interpretation of privative clauses."[414] The first basic rule derived from the seminal Hickman case is that "if there is an opposition between the Constitution and any such provision, it should be resolved by

[412] Parliament of Australia Hansard, House of Representatives, Number 15, 2001 Wednesday, 26 September 2001, Second Reading, Philip Ruddock, Minister for Immigration and Multicultural Affairs, 31,561
[413] Migration Act, *supra* n. 285, section 474(2)
[414] *Plaintiff S157/2002* v. *Commonwealth* (2003) 211 CLR 476, at p. 504 para.71, per Guadron J et al.,

adopting (an) interpretation (consistent with the Constitution if) that is fairly open."[415] The legislative scheme should therefore be read subject to the Constitution.[416]

As a general principle governing privative clauses the jurisdiction of the High Court "to grant relief under section 75 (v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant ... relief" under this provision cannot be removed where there is a "jurisdictional error by an officer of the Commonwealth."[417] Moreover, a privative clause scheme, which has the effect of the conferring judicial authority on a non-judicial body such as the RRT, will contravene Chapter III of the Constitution.[418] It is therefore constitutionally impermissible for an administrative tribunal to make a conclusive decision concerning the limits of its own jurisdiction.[419]

The second basic rule of construction is that there is a presumption that "Parliament does not intend to cut down the jurisdiction of the courts say to the extent that the legislation in question expressly so states or necessarily implies. Accordingly privative clauses are strictly construed."[420] As a rule of statutory interpretation, it is presumed that Parliament "does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied."[421]

[415] Ibid., at p. 504 para.71, per Guadron J et al., citing *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at p. 616
[416] Caron Beaton-Wells, "Restoring the Rule of Law-Plaintiff S157/2002 v. Commonwealth of Australia", 10 *Australian Journal of Administrative Law* 125 (2003), at p. 129
[417] *Plaintiff S157/2002*, *supra* n. 414, at pp. 511-512, para.98, per Gaudron J et al.,
[418] Ibid., at p. 484, para.9, per Gleeson CJ; at pp. 511-512, para.98, per Gaudron J et al.,; at p. 535, para.162, per Callinan J
[419] Ibid., at pp. 505-506, para.75 per Guadron J et al.,
[420] Ibid., at p. 505, para.72, per Guadron J et al.
[421] Ibid., per Gleeson CJ, at p.492-493, para.32 citing *Public Services Association (SA) v Federated Clerks Union* (1991) 173 CLR 132 at 160, per Dawson and Gaudron JJ

Whether a purported decision is immune from judicial review involves a determination based on the construction of the Act as a whole, including section 474 in which a limitation on the decision-making authority of the administrative review body is inviolable.[422] The process of reconciliation between the privative clause and the rest of the Act is undertaken, however "the task is not to be performed by reading the rest of the Act as subject to s 474, or by making s 474 the central and controlling provision of the Act."[423]

The High Court reiterated its earlier ruling in *Bhardwaj* in which it was held that a decision affected by jurisdictional error "is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all."[424] Rather, such "decisions" are regarded by the High Court as "purported" decisions and are therefore not protected by the privative clause scheme.[425]

> "Once it is accepted, as it must be, that section 474 is to be construed conformably with Ch III of the Constitution, specifically, section 75, the expression 'decision(s)... made under this act must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus, if there has been jurisdictional error because, for example, the failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in 474 (2) as 'a decision... made under this Act' and is, thus, not a 'privative clause decision' as defined in sections 474 (2) and (3) of the Act."[426]

[422] Ibid., at pp. 490-491, para.26, per Gleeson CJ
[423] Ibid., at p. 493, para.33, per Gleeson CJ
[424] Ibid., per Gaudron J et al., p. 506, para.76 citing *Minister for Immigration and Multicultural Affairs* v. *Bhardwaj* (2002) 209 CLR 597, para.51, per Gaudron and Gummow JJ; para.63, per McHugh J, para.152 per Hayne J
[425] Ibid., pp. 488 and 495, paras.19 and 41, per Gleeson CJ; pp.505-506, paras.75-77, per Gaudron J et al.; *S134/2002* v. *The Commonwealth of Australia* (2003) 211 CLR 441, p. 453, para.15, per Gleeson CJ et al.; p. 464, para. 61, per Gaudron and Kirby JJ
[426] *Plaintiff S157/2002*, ibid., per Gaudron J et al., at p. 506, para.76

In *S157/2002*, the High Court was silent as to the kind of jurisdictional error which may lead to judicial review, except to say that a decision reached in breach of the rules of natural justice would not be regarded as privative clause decision under section 474 (2) of the Act.[427] It has been suggested by Beaton-Wells that the High Court may have been referring to broad jurisdictional error as it had done in its previous decisions *Craig* v. *South Australia*[428] and *Minister for Immigration and Multicultural Affairs* v. *Yusuf*,[429] which would leave limited room for the operation of the privative clause scheme.[430]

In *Yusuf*, McHugh, Gummow and Hayne JJ recognised that jurisdictional error may involve overlapping errors of a different kind.

> "The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision maker both asking the wrong question and ignoring relevant material. What is important, however, is identifying a wrong issue, asking the wrong question, ignoring relevant material or relying on you relevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or power is given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it."[431]

Since *S157* there has been a series of cases in which judicial review has been sought for unfavourable decisions on broad grounds including, a breach the rules of natural justice, error of law,[432] factual error[433] and unreasonableness.[434] The following cases have been identified as examples in which jurisdictional error has been established

[427] Ibid., p. 494, para.38, per Gleeson CJ; p. 508, para.83 per Gaudron J et al.
[428] (1995) 184 CLR 163
[429] (2000) 206 CLR 323
[430] *See*, Beaton-Wells, *supra* n. 416, at p. 138
[431] *Yusuf , supra* n. 429, p. 351, para.82, per McHugh, Gummow and Hayne JJ
[432] *S395/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473
[433] *SFGB v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231
[434] *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59

to enable unlawful non-citizens to seek judicial review of decisions, which would otherwise result in removal.

In *WAEJ* v. *Minister for Immigration and Multicultural and Indigenous Affairs*,[435] the appellant who had been smuggled into Australia from Indonesia sought asylum claiming that he had been arrested and tortured for being a member of an illegal organisation in Iran. An application for a protection visa, which was rejected by a delegate of the Minister, was subsequently affirmed by the RRT. The delegate of the Minister acknowledged that the appellant had left Iran illegally and he accepted the appellant's account of his involvement in the July 1999 political disturbance. However, the administrative official did not consider the appellant's involvement in the demonstrations to give rise to a risk of persecution as required by the Refugee Convention. The Federal Court ordered the matter to be remitted to the RRT for a redetermination requiring a further inquiry as to why the appellant had been detained and subsequently released by the authorities. Instead, the RRT found that it would be "implausible" for the appellant to be released so easily if he had been involved in the demonstrations and that his demeanour during proceedings suggested that claims that he had been detained and tortured were fabricated.[436] The RRT also expressed doubt as to whether the appellant had left Iran illegally suggesting that he was not wanted by the authorities for political reasons.[437]

The Court noted, "reliance upon demeanour as a determinant of credibility requires the exercise of great care, even by the most experienced arbiters of fact, and it may be unsafe to do so where the witness provides evidence in a foreign language and the

[435] [2003] FCAFC 188
[436] Ibid., para.16
[437] Ibid., para.26

tribunal receives only interpreter's understanding of the witness's account."[438] The Tribunal is therefore required to demonstrate that it is justified in discarding the claims of the applicant, either in whole or in part, on the ground of demeanour to ensure that a decision is not made "arbitrarily or capriciously."[439] Furthermore, rules of procedural fairness require that if the RRT is to rely on documentation, which is unfavourable to the asylum claim the RRT should afford the applicant an opportunity to respond so that the Tribunal is not in error when making its decision.[440] The facts reveal that the RRT failed to consider information provided by the applicant concerning the dissident activities of members of the organisation from abroad following his departure from Iran.[441] The RRT failed to consider whether the applicant's involvement with the organisation would attract the attention of the Iranian security forces, which would give rise to a risk of persecution on his return. The Court held that the review procedure resulted in a decision "flawed by jurisdictional error" and therefore not a decision under the Act.[442]

In *VXAJ* v. *Minister for Immigration & Anor*,[443] the appellant a Thai national had been trafficked into Australia for work in the sex industry. The applicant claimed that she had voluntarily entered an agreement to come to Australia as she believed her work would be legal and that she would have freedom of movement. Instead, the appellant was forced to work as a "sex slave" in a locked apartment with other young women prior to being rescued by the police. The applicant was initially granted a criminal justice stay visa for assisting the authorities prosecute those involved in the trafficking network. The

[438] Ibid., para.17
[439] Ibid., para.18
[440] Ibid., para.34
[441] Ibid., para.46
[442] Ibid., para.47
[443] [2006] FMCA 234

delegate of the Minister subsequently refused to grant the appellant a protection visa. The applicant appealed to the RRT claiming that she feared persecution if she was returned to Thailand due to her cooperation with law enforcement authorities, due to the debt owed to the trafficking network and the loss of profits resulting from her rescue and the inability of the Thai authorities to provide protection.

The Tribunal acknowledged that sex workers in Thailand are a "particular social group" as referred to in the definition of "refugee" in Article 1A (2) of the Refugee Convention. However, section 91R (1) (a) of the Act requires that membership of a particular social group to be an "essential and significant reason" for the persecution feared.[444] The RRT concluded that the essential and significant reason of the applicant's fear of harm was due to her debt and betrayal of the human trafficking network rather than due to her membership in a particular social group.[445] Pascoe CFM rejected the Tribunal's construction of section 91R (1) (a) holding that it had "treated specific factors as precluding the characterisation of the reason for the applicant's fear of persecution at a more general level... I am thus not satisfied that the Tribunal properly considered section 91R (1) (a) given that the applicant was a sex worker and there appears to be a fundamental connection between being a sex worker, the debt and her giving evidence against the traffickers."[446]

The applicant contended that the Tribunal was in error in finding that there was no evidence that Thai officials were involved in her trafficking notwithstanding that country information available to the Tribunal supports the applicant's claim that the authorities are involved in the trafficking of persons into Thailand. The "no evidence finding" of the

[444] Ibid., para.25
[445] Ibid., para.25
[446] Ibid., para.26

Tribunal constitutes an error of law as the involvement of officialdom is of relevance in assessing whether adequate protection could be provided to victims of trafficking after they have been repatriated.[447] Pascoe CFM held that the Tribunal's decision was affected by jurisdictional error as it had failed to consider information which was relevant to the claims of the applicant and that the "findings of fact were reached without any supporting probative evidence."[448]

In *SFGB* v. *Minister Immigration and Multicultural and Indigenous Affairs*,[449] the appellant a national of Afghanistan had arrived in Australia as an unlawful non-citizen. The appellant had his application for a protection visa rejected initially by the delegate of the Minister and subsequently by the RRT for differing reasons. The Tribunal accepted that the applicant was a Shi'a Hazara from the Oruzgan province in Afghanistan and at the time of his departure, he had a well-founded fear of persecution due to race, religion and "imputed political opinion".[450] The Tribunal acknowledged that the historical marginalisation of the Hazaran people in Afghani society, however with the overthrow of the Taliban regime since the applicant's departure the Tribunal concluded that the applicant was no longer at risk of persecution on one or more of the Convention grounds. The RRT reached its decision by stating that it was unable to locate any reports since the fall of the Taliban, which would indicate that the applicant due to his ethnicity, religion or political allegiances would be subject to mistreatment.

[447] Ibid., para.34
[448] Ibid., para.36. Pascoe CFM observed, "In the present case it is clear that the Tribunal failed to assess the information before it. The Tribunal's reference to a lack of evidence is confined to evidence in support of the claim that Thai officials aided the trafficking of the applicant herself. It is agreed that the country information before the Tribunal did not relate specifically to the applicant herself. However, in my view it would have been impossible for the applicant given her personal circumstances to appear before the Tribunal and prove the existence of official State corruption in her particular case given that her circumstances appear to have involved endemic corruption amongst State officials."
[449] *Supra* n. 433
[450] Ibid., para.5

The Federal Court noted that the appellant was unable to claim protection where the conditions in the country of nationality leading to a claim for asylum cease to exist.[451] The appellant claimed that the Tribunal had made a jurisdictional error in concluding that he was not at risk of persecution and therefore the court's jurisdiction was not ousted by the privative clause outlined in section 474 of the Act.[452] The Court found that the Tribunal had made a jurisdictional error by concluding that the interim government had control over Oruzgan province, which would protect the appellant from persecution. The evidence available to the Tribunal was that "the Taliban remain viable in the area from which the appellant came and that the security situation is uncertain."[453] The RRT purported to answer, without evidence either way, fundamental questions concerning whether the Taliban was present in the part of the province where the appellant formerly resided and if so, does their presence pose a real risk that the appellant would be subject to persecution on his return.[454]

The foregoing cases are evidence that the High Court has maintained respect for legislative authority by recognising that the privative clause scheme is constitutional in spite of its operation being curtailed where constitutional and administrative law issues arise. The decision in *S157* has enabled lower courts to review "undesirable" results following the review of administrative decisions. In spite of the political perception that the courts have attempted to engage in an impermissible review of the merits of particular cases, the abovementioned cases underscore the ingenuity of the High Court decision in

[451] Ibid., para.12; *See also*, Art. 1C (5), CSR, *supra* n. 118
[452] Ibid., para.16; *S134/2002*, *supra* n. 425; S157/2002, *supra* n. 414
[453] *SFGB*, ibid., para.28
[454] Ibid., para.28

S157 in that it preserves the integrity of the scheme while ensuring that there is judicial scrutiny where administrative authorities act beyond jurisdiction.

6. United States of America

6.1. Constitutional Authority

Although not expressly referred to in the Constitution, the authority of the United States government to regulate on matters of immigration is acquired due to its status as a sovereign nation.[455] The Supreme Court has consistently recognised that the political branches of government are afforded broad plenary powers in relation to matters of exclusion and removal.

The first of these cases, the "Chinese Exclusion case", *Chae Chan Ping* v. *United States*, the Supreme Court elaborated on the scope of Congressional authority.[456] The Supreme Court rejected an appeal to release the appellant from a sea vessel entering US waters who previously lived in the United States for 12 years and was in possession of a re-entry certificate. The enactment of legislation banning the entry of Chinese workers following the appellant's departure and prior to his attempt to re-enter the United States was recognised as falling within the competence of the legislature. This remained the case even though the legislation conflicted with an international agreement between the United States and China.

> "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from a foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so

[455] Art. 1, section 8 cl. 4 of the United States Constitution vests Congress with power to establish a "uniform Rule of Naturalization … throughout the United States." The Constitution does not expressly referred to matters of expulsion and exclusion.
[456] *Chae Chan Ping*, *supra* n. 20

> far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers."[457]

The Supreme Court in *Fong Yue Ting* v. *United States* similarly recognised the broad power of Congress to enact legislation authorising the deportation of permanent resident Chinese labourers who had failed to apply for or were ineligible to receive a certificate of residency.[458] In the case of one appellant the details of a witness "other than one of the Chinese race" who could swear that they were lawfully within the United States during the prescribed period could not be provided. In deferring to the political branches of government power Justice Gray summarised the limited scope of judicial power in dealing with matters of immigration:

> "In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government. ... The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."[459]

The judicial reasoning in *Fong Yue Ting* and *Chae Chan Ping* supported the decision in *Nishimura Ekiu* v. *United States* where the Supreme Court deferred to the authority of the political branches.[460] In *Nishimura Ekiu* the Supreme Court upheld the decision of an immigration official acting pursuant to broad discretionary powers

[457] Ibid., at p. 606
[458] *Fong Yue Ting, supra* n. 22
[459] Ibid., at pp. 712-713
[460] *Nishimura Ekiu, supra* n. 23

provided by Congress to exclude a Japanese national from the United States in situations where representations made by the applicant were not deemed truthful. Justice Gray asserted that unless Congress authorises review by the courts the executive officer is "the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."[461]

6.2. General Requirements for Admission and Inspection

An "alien" is defined by the Immigration and Nationality Act 1952 (INA) as a person who is not a citizen or national of the United States.[462] Aliens seeking admission to the United States are required to be inspected by an immigration officer.[463] An alien is deemed to be "admitted" following "lawful entry... after inspection and authorisation by an immigration officer."[464] The term "admission" replaced the previous term of "entry" following the enactment of the Illegal Immigration Reform and Responsibility Act (IIRRA) of 1996.

In the seminal case *United States ex rel. Knauff* v. *Shaughnessy*,[465] the authorities sought to permanently exclude a German born wife of a US citizen without a hearing due to security reasons. The Supreme Court declared that a non-citizen "who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government."[466] In spite of

[461] Ibid., at p. 660
[462] Immigration and Nationality Act 1952, § 101(a)(3)
[463] Ibid., § 235(a)(3)
[464] Ibid., § 101 (a) (13) (A)
[465] 338 US 537 (1950)
[466] Ibid., at p. 542

increased judicial activity in matters of immigration control as detailed below, the general rule is that the executive maintains broad powers to determine whether a non-citizen should be admitted or excluded. Admission should be viewed as a privilege rather than a right.

The executive maintains broad powers with respect to inspection of non-citizens. For example, the INA authorises immigration officials to interrogate aliens without warrant regarding the right of those persons to be present in the United States.[467] Immigration officials are authorised to arrest aliens entering or attempting to enter the United States in violation of immigration laws or regulations who are within their presence or view.[468] If there is, reason to believe that aliens are present in the United States without authorisation they may be arrested without warrant by immigration officers if there is a likelihood that those persons would escape before a warrant is issued.[469] Those persons however are required to be taken for examination without unnecessary delay.[470]

6.3. Categories of Non-Citizens in an Irregular Situation

The four categories of irregular migrants identified for the purposes of this research are captured by the provision classifying particular classes of non-citizens as ineligible for admission.[471] The possession of a visa or other entry documentation does not authorise admission on arrival if the alien is found to be inadmissible.[472] An alien

[467] INA, *supra* n. 462, § 287(a)(1)
[468] Ibid., § 287(a)(2)
[469] Ibid., § 287(a)(2)
[470] Ibid., § 287(a)(2)
[471] Ibid., §212
[472] Ibid., § 221 (h)

wishing to enter the United States has the burden of proving that he or she is not inadmissible.[473]

6.3.1. Bypassing Immigration Control

Non-citizens who are present in the United States without being admitted or who arrive at a time or place which is not designated are inadmissible.[474] The failure to present oneself for inspection constitutes *prima facie* evidence that the alien has landed in the United States at a time or place other than that designated by an immigration officer.[475]

6.3.2. Fraud and Misrepresentation

Non-citizens who employ fraud or wilfully misrepresent a material fact to gain admission into the United States are inadmissible.[476] Persons found to have committed document fraud under § 274C are held to be inadmissible.[477] The INA also provides that non-citizens who have violated a condition of their student visas are excludable for a period of five years.[478]

Sham marriages are deemed an abuse of the admission process. The admission of aliens into the United States based on marriage, which is less than two years in duration prior to entry and has subsequently been annulled or terminated within two years post-admission will be regarded as a marriage for the purpose of evading immigration laws unless the alien proves otherwise.[479] The failure or refusal of the alien to fulfil the

[473] Ibid., § 291
[474] Ibid., § 212(a)(6)
[475] Ibid., § 271(b)
[476] Ibid., § 212(a)(6)(C)(i)
[477] Ibid., § 212(a)(6)(F)(i)
[478] Ibid., § 212(a)(6)(G)
[479] Ibid., § 237(a)(1)(G)(i)

"marital agreement" will likewise indicate that the marriage was entered to evade immigration laws. Those persons will be deportable under the domestic regulatory framework.[480]

6.3.3. Other Inadmissible Aliens

In this subsection, the term "other inadmissible aliens" captures persons who violate the condition of stay and non-citizens who overstay their visas. The status of inadmissibility may be acquired on a ground which is health-related.[481] Involvement in serious criminal activity also constitutes a ground which would prevent a non-citizen remaining in the United States. This may include the broad concept of persons involved in a crime involving "multitude turpitude"[482] or more specific examples such as involvement in "prostitution and commercialised vice"[483] and trafficking in controlled substances.[484] Grounds of security,[485] persons likely to become a public charge,[486] maintenance of labour standards[487] and aliens previously been removed[488] are inadmissible and ineligible to remain. The INA deals with persons who stay beyond time authorised by requiring non-citizens to be in possession of a "valid unexpired immigrant visa, re-entry permit, border crossing identification card, or other valid entry document."[489]

[480] Ibid., § 237(a)(1)(G)(ii)
[481] Ibid., § 212(a)(1)
[482] Ibid., § 212(a)(2)(A)(i)(I)
[483] Ibid., § 212(a)(2)(D)
[484] Ibid., § 212(a)(2)(C)
[485] Ibid., § 212(a)(3)
[486] Ibid., § 212(a)(4)
[487] Ibid., § 212(a)(5)
[488] Ibid., § 212(a)(9)
[489] Ibid., § 212(a)(7)

6.4. Detention

A determination as to whether an alien is to be afforded the constitutional right of due process prohibiting indefinite administrative detention has historically been based on the immigration status of the non-citizen. Aliens who entered the United States were afforded constitutional rights whereas those safeguards were not extended to aliens "stopped at the border". In *Shaughnessy* v. *United States ex rel. Mezei*,[490] a non-citizen who had previously lawfully resided in the United States sought re-entry after he attempted to visit his dying mother in Romania. The authorities sought to remove the petitioner based on security grounds but were unsuccessful in their efforts, as no other country would accept him. The petitioner was subject to prolonged detention on Ellis Island, New York, which was not regarded as a place of entry for immigration purposes. The continued exclusion of the petitioner was held not to have infringed any statutory or constitutional right.

> "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.... But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorised by Congress is, it is due process as far as an alien denied entry is concerned.'"[491]

In the Supreme Court decision of *Zadvydas* v. *Davis*,[492] the petitioners were two resident non-citizens who due to criminal conduct were ordered to be removed. The 90-day removal period prescribed by §241(a)(1)(A) of the INA expired due to the inability of the authorities to effect removal. The petitioners subsequently sought an order of *habeas corpus* claiming that their detention was unlawful as there was no foreseeable

[490] 345 US 206 (1953)
[491] Ibid., at p. 212 citing *Knauff* , *supra* n. 465, at p. 544
[492] 533 US 678 (2001)

prospect of removal. The Act authorises the continued detention of inadmissible and removable aliens and aliens the Attorney General has identified as being "a risk to the community or unlikely to comply with the order of removal after the removal period has expired."[493] The issue, which the court had to determine, was whether legislation authorising indefinite detention after the removal period had expired was constitutionally permissible or was there an implied limitation restricting detention for a reasonable period.

Legislative measures preventing judicial review of discretionary administrative decisions does not prevent the petitioners from initiating *habeas corpus* proceedings as the authority to detain following the post-removal period is not exclusively a matter of discretion. Legislation authorising detention after the removal period is subject to an implied limitation to avoid constitutional invalidation. The majority concluded that legislation authorising indefinite detention contravened the Fifth Amendment's Due Process Clause protecting the right to personal liberty, which would be violated in non-criminal matters where the detention is punitive in character.[494]

The government asserted that the legislative measures were aimed at ensuring non-citizens appear at future immigration proceedings and for the community to be protected from such persons.[495] The majority concluded that the prevention of flight justification is "weak or nonexistent where removal seems a remote possibility at best."[496] The second justification of preventative detention has been held to be "limited to

[493] Ibid., § 241(a)(6)
[494] *Zadvydas*, *supra* n. 492, at p. 690
[495] 8 Code Federal Regulations (CFR) § 241.4(e)
[496] *Zadvydas*, *supra* n. 492, at p. 690

especially dangerous individuals and subject to strong procedural protections."[497] As an additional requirement for cases involving detention of a potentially indefinite duration, it is necessary to establish another factor, which would support the assertion that the non-citizen posed a danger to the community e.g. a history of mental illness.[498]

The majority concluded that once an alien enters the United States then that person is entitled to the protection of the Constitution regardless of their legal status.[499] Although it was acknowledged that Congress has "plenary power" with respect to matters of immigration, the judiciary is not obliged to defer to the executive and legislature where those measures raises concerns over constitutional limitations.[500] Where the legislature clearly and unambiguously expresses an intention in a statute the judiciary should give effect to that intention. Rather than ruling the legislation to be unconstitutional, the majority concluded that it had failed to find a congressional intent, which would authorise indefinite and potentially permanent detention.[501]

A determination as to whether a writ of *habeas corpus* should be granted requires the court to review the particular circumstances of the case to ascertain whether the detention is reasonable and therefore pursuant to a statutory authority.

> "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold

[497] Ibid., at p. 691
[498] Ibid., at p. 691
[499] Ibid., at p. 693 distinguishing *Shaughnessy v United States ex rel Mezei*, *supra* n. 490 where the applicant had not entered but only arrived.
[500] Ibid., at p. 695
[501] Ibid., at p. 697; The majority judgment referred to the use of the word "may" in section 241(a)(6) of the INA resulting in ambiguity as to the scope of its application – "But while 'may' suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous. Indeed, if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."

> continued detention unreasonable and no longer authorised by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. ... And if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period."[502]

The majority concluded that the statutory 90-day removal period did not demonstrate an intention on the part of Congress that all removals should occur during this period. Instead, the majority deemed that there is a presumption that removals should occur within a six-month period.[503] If the petitioner can demonstrate that, there is no reasonable prospect of removal after this period the onus is on the authorities to justify the lawfulness of detention.[504]

In the dissenting judgment of Kennedy J who was joined by Rehnquist CJ and joined in part by Scalia and Thomas JJ it was argued that the majority misunderstood the principle of constitutional avoidance.[505] Although it was acknowledged that the courts in interpreting legislation must respect the intention of Congress, Kennedy J opined that the majority avoids a constitutional question by "(waltzing) away from any analysis of the language, structure, or purpose of the statute."[506] Although the court should choose where possible, a statutory construction that would avoid a constitutional question, it is not permitted to favour an interpretation which avoids this conflict where it would defeat the intention of Congress.

[502] Ibid., at pp. 699-700
[503] Ibid., at p.701 citing *United States* v. *Witkovitch* O.T.1956, No.295, pp. 8-9 where the court held that detention for more than six months was constitutional.
[504] Ibid., at p. 701
[505] Ibid., at p. 707
[506] Ibid., at p. 707

> "The majority announces it will reject the Government's argument 'that the statute means what it literally says,' but then declines to offer any other acceptable textual interpretation. The majority does not demonstrate an ambiguity in the delegation of the detention power to the Attorney General. It simply amends the statute to impose a time limit tied to the progress of negotiations to effect the aliens' removal. The statute cannot be so construed. The requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design."[507]

Kennedy J accepted the conclusion of the majority that once an alien enters the United States, even illegally, that person should be afforded the protection of the Constitution including the Fifth Amendment's Due Process Clause prohibiting arbitrary detention. Kennedy J opined that it "is neither arbitrary nor capricious to detain... aliens when necessary to avoid the risk of flight or danger to the community."[508] Conversely, Scalia and Thomas JJ cited the Supreme Court decision of *Shaughnessy* v. *United States ex rel. Mezei* where no Judge recognised that there was a substantive constitutional right for inadmissible aliens to be released from detention into the broader community.[509]

> "The Court expressly declines to apply or overrule *Mezei* but attempts to distinguish it-or, I should rather say, to obscure it in a legal fog.... We are offered no justification why an alien under a valid and final order of removal - which has *totally extinguished* whatever right to presence in this country he possessed - has any greater due process right to be released into the country than an alien at the border seeking entry."[510]

Following *Zadvydas*, an issue subject to judicial scrutiny was whether non-citizens who had entered the United States without authorisation were entitled to the same constitutional protection as Ketutis Zadvydas and Kim Ho Ma. Prior to the enactment of the IIRRA, non-citizens entering the United States either legally or illegally were classified as "deportable" as opposed to "excludable" aliens. The latter category

[507] Ibid., at p. 707
[508] Ibid., at p. 721
[509] Ibid., at p. 703
[510] Ibid., at pp. 703-704

was reserved for persons who were detained at the border or who had physically entered the United States under parole but not formally recognised as entering under the domestic regulatory framework.[511] Persons entitled to a "deportation hearing" received greater procedural protection than they would have otherwise received at an exclusion hearing. Following the enactment of the IIRRA removal proceedings became the applicable scheme and the issue was no longer whether the alien had entered the United States but whether he or she was admitted.

Non-citizens entering without inspection as well as those persons deemed "excludable" are categorised as "inadmissible". The focus of the IIRRA on admission rather than entry led to debate as to whether Congress intended to abrogate constitutional safeguards for undocumented migrants who bypassed inspection. The majority decision in *Zadvydas* arguably contributed to this uncertainty by construing legislation to be subject to an implied limitation concerning the length of detention for aliens who had been admitted so as not to infringe the Due Process Clause.[512] The majority then noted that certain constitutional protections are afforded to persons within the United States and not at the border i.e. after entry including persons whose presence is unlawful.[513]

Whether aliens who enter the United States without authorisation are to be afforded protection of the Due Process Clause to prohibit detention of a potentially indefinite duration was in issue in the District Court decision of *Lin* v. *Ashcroft*.[514] In *Lin*, the petitioner a national of the People's Republic of China entered the United States

[511] *See*, Allison Wexler, "The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas", 25 *Cardozo Law Review* 2029 (2003-2004), at p. 2058 in referring to the "entry fiction" doctrine and the right of the authorities to detain.
[512] *Zadvydas*, *supra* n. 492, at p. 682
[513] Ibid., at p. 693; *See also*, Wexler, *supra* n. 511, at p. 2062
[514] 247 F.Supp.2d 679 (2003)

without inspection by an immigration officer. Following a term of imprisonment for smuggling Chinese non-citizens, Lin was issued with a notice that he was to be removed from the United States, as he was present without being admitted or paroled.[515] The Chinese authorities refused to issue Lin with travel documents to expedite his removal. Five months after the petitioner was detained following the removal order he requested a release from detention claiming that his removal was not reasonably foreseeable.

The petitioner, citing the majority decision in *Zadvydas*, claimed that the failure of the INS to secure travel documents from the Chinese authorities to effect his removal meant that it was unlikely he would be released from detention in the reasonably foreseeable future. The continued detention therefore violated his due process rights under the Fifth Amendment. Although the petitioner under the authority of *Zadvydas* has the initial burden of establishing that his repatriation cannot be achieved in the reasonably foreseeable future, the INS did not even conduct a review determination of Lin's request for release as required by the Code of Federal Regulations.[516]

In *Clark* v. *Martinez,*[517] the Supreme Court extended the ruling in *Zadvydas* by holding that the INA imposes a time limit in which inadmissible non-citizens may be detained. The petitioners were granted parole to enter the United States and therefore not classified as being "admitted". In a 7 – 2 majority decision, Scalia J concluded that section 241 (a) (6) of the INA applied to three categories of non-citizens including inadmissible aliens under section 212: "To give these same words a different meaning for each category would be to invent a statute rather than interpret one."[518] The majority held

[515] INA, *supra* n. 462, § 212(a)(6)(A)(i)
[516] 8 CFR, *supra* n. 495, §241.13
[517] 543 US 371 (2005)
[518] Ibid., at p. 378

that the phrase "may be detained beyond the removal period" of 90 days is subject to an implied limitation.[519]

Unlike the situation in Australia, the US Supreme Court has recognised an implied limitation regarding the length of immigration detention. The case law referred to above concerns detention following a decision to remove as opposed to detention pending a decision to remove. In such cases there is arguably are stronger claim to justify continued detention on the ground that the person to be removed, having exhausted appeal rights, is more likely to abscond or flee. However, the majority in *Zadvydas* rejected this contention, regarding it as a "weak" justification for continued detention where the possibility of effecting removal is remote.[520] The Supreme Court has therefore demonstrated that it will intervene where the executive has not been able to effect removal following a specified period after the statutory prescribed period has expired.

6.5. Removal

As mentioned above removal orders should normally be carried out within a 90-day period.[521] This period commences on the date in which the order becomes administratively final,[522] or the date of the final order of a court where the order is subject to judicial review and there has been a stay on an order of removal.[523] In general, aliens are removed to countries in which they boarded a vessel or aircraft.[524] If those countries refuse acceptance, removable aliens are returned to the country in which they are a

[519] INA, *supra* n. 462, §241(a)(6)
[520] *See also* C v. Australia, *supra* n. 196, where the HRC concluded that there are "less invasive means" to prevent a non-citizen from fleeing or absconding than prolonged indefinite detention.
[521] INA, *supra* n. 462, § 241(a)(1)(A)
[522] Ibid., § 241(a)(1)(B)(i)
[523] Ibid., § 241(a)(1)(B)(ii)
[524] Ibid., § 241(b)(1)(A) and (B)

citizen, subject or national,[525] their country of birth,[526] residence,[527] or a country which will accept those persons if the return of an alien to an alternative country is "impracticable, inadvisable, or impossible."[528] In limited circumstances an alien may designate the country to which they want to be removed.[529]

The inadmissibility or deportability of an alien is determined in proceedings conducted by an immigration judge.[530] Following the enactment of the IIRRA in 1996 exclusion and deportability hearings were consolidated into a unified removal proceeding. Persons who are not admitted, also known as "applicants for admission"[531] have the burden of proving "clearly and beyond doubt" that they are entitled to be admitted and that they are not inadmissible under any of the grounds outlined in section 212.[532] In contrast, persons subject to a deportation order have already been admitted or entered the United States. There are six broad classes of deportable aliens, which comprise: persons inadmissible at the time of entry, adjustment of status or violates status;[533] persons involved in specified criminal offences;[534] persons who fail to register or falsify documents;[535] non-citizens implicated in matters pertaining to security and related grounds;[536] persons who have become a public charge;[537] and unlawful voters.[538]

[525] Ibid., § 241(b)(1)(C)(i)
[526] Ibid., § 241(b)(1)(C)(ii)
[527] Ibid., § 241(b)(1)(C)(iii)
[528] Ibid., § 241(b)(1)(C)(iv)
[529] Ibid., § 241(b)(2)(A)
[530] Ibid., § 240 (a)(1); 8 CFR, *supra* n. 495 § 1240.1
[531] Ibid., § §101(a)(4), § 235 (a)(1) Aliens who are present in the United States without being admitted or who attempt to arrive in the United States other than at a designated port of arrival are deemed for the purposes of the immigration laws to be "applicants for admission".
[532] Ibid., § 240(c)(2)(A)
[533] Ibid., § 237(a)(1)
[534] Ibid., § 237(a)(2)
[535] Ibid., § 237(a)(3)
[536] Ibid., § 237(a)(4)
[537] Ibid., § 237(a)(5)
[538] Ibid., § 237(a)(6)

In removal proceedings, aliens have the burden of establishing by "clear and convincing evidence" that they are lawfully present following a prior admission or by "clear and convincing evidence" that they are "entitled to be admitted and... not inadmissible under section 212".[539] If the non-citizen establishes that he or she has been admitted the burden of proof regarding deportability lies with the INS, which must base its decision on "reasonable, substantial, and probative evidence."[540] If the alien is unsuccessful in removal proceedings, it is possible for that person to apply for discretionary relief or to lodge an appeal or review at administrative and judicial levels to prevent removal being enforced.

At the administrative level, a removable alien may apply to the immigration judge for an application for relief from removal if the eligibility requirements have been established and that the alien "merits a favourable exercise of discretion."[541] In determining whether to grant relief, the immigration judge will assess whether "the testimony is credible... persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record."[542] A motion to reconsider may be filed by the applicant based on errors of law or fact.[543] Similarly, a motion to reopen may be filed by the applicant stating new facts "supported by affidavits and other evidentiary material."[544]

[539] Ibid., § 240(c)(2)(A)(B)
[540] Ibid., § 240(c)(3)(A)
[541] Ibid., § 240(c)(4)(A)
[542] Ibid., § 240(c)(4)(B)
[543] Ibid., § 240(c)(6)
[544] Ibid., § 240(c)(7)

The final avenue of administrative appeal lies with the Board of Immigration Appeals (BIA), an appellate body authorised to review administrative adjudication under the Act.[545] The BIA is entrusted to resolve "questions before it in a manner that is timely, impartial, and consistent with the Act and regulations."[546] Moreover, the BIA through recourse to "precedent decisions ... provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations."[547] The BIA is authorised to review decisions of immigration judges in removal proceedings.[548] Review of determinations concerning detention of aliens,[549] decisions concerning asylum[550] and temporary protection[551] falls within the appellate jurisdiction of the BIA.

6.5.1. Categories of Persons Where Removal is Prohibited

The expedited removal procedure applies to non-citizens arriving in the United States and aliens present in the United States, without authorisation, for a continuous period of up to two years. Those persons are inadmissible due to misrepresentation or due to not possessing the required immigration documentation.[552] Immigration officers are required to remove the abovementioned categories of non-citizens except persons who are "a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a

[545] 8 CFR, *supra* n. 716, § 1003.1(d)(7)
[546] Ibid., § 1003.1(d)(1)
[547] Ibid.
[548] Ibid., § 1003.1(b)(3)
[549] Ibid., § 1003.1(b)(7)
[550] Ibid., § 1003.1(b)(9)
[551] Ibid., § 1003.1(b)(10)
[552] Ibid., §§ 235(b)(1)(A)(i); 212 (a)(6)(C); 212 (a)(7); 8 CFR, *supra* n. 495, § 235.3

point of entry."[553] Relief from expedited removal will be granted where the non-citizen can demonstrate an intention to apply for asylum. The non-citizen is required to establish a "credible fear of persecution"[554] to prevent an order of removal being enforced.[555] If such a fear is established that person shall be detained so that the application is considered further.[556]

Removal of a non-citizen is prohibited where the life or freedom of that person is threatened on account of his or her "race, religion, nationality, membership in a particular social group, or political opinion."[557] It is impermissible to "expel, extradite or otherwise effect the involuntary return" of aliens in danger of being subjected to torture.[558] Exceptions to the principle of non-return of removable aliens include those persons who have "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion."[559] Other categories of aliens excluded from receiving protection include persons convicted by final judgment of a "particularly serious crime",[560] persons believed to have committed "a serious non-political crime"[561] or there are "reasonable grounds to believe" that the non-citizen poses a "danger to the security of the United States."[562]

[553] INA, ibid., §§ 235 (b)(1)(A); 235(b)(1)(F)
[554] Ibid., § 235(b)(1)(B)(v) A "credible fear of persecution" is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208."
[555] Ibid., § 235(b)(1)(B)(ii)
[556] Ibid., § 235(b)(1)(B)(ii)
[557] Ibid., § 241(b)(3)(A)
[558] § 2242(a), Foreign Affairs Reform and Restructuring Act 1998
[559] Ibid., § 241(b)(3)(B)(i)
[560] Ibid., § 241(b)(3)(B)(ii)
[561] Ibid., § 241(b)(3)(B)(iii)
[562] Ibid., § 241(b)(3)(B)(iv)

Aliens who are nationals of a designated foreign state who are granted temporary protected status in the United States shall not be removed while this status is recognised.[563] Foreign nationals from a designated state who are subject to removal proceedings shall be notified of the possibility of applying for temporary protection status.[564]

Victims of a severe form of trafficking in persons as defined in section 7102 of Title 22 of the US Code shall not be removed from the United States on account of being subjected to such practices.[565] The victim is required to comply with reasonable requests for assistance in matters pertaining to the prosecution of persons responsible for trafficking in persons or for crimes associated with human trafficking. Protection is guaranteed for victims of trafficking under the age of 18.[566] The victim of trafficking is required to establish that he or she would suffer "extreme hardship involving unusual and severe harm upon removal."[567]

6.5.2. Alternatives to Involuntary Removal

Applications for admission may in the discretion of the Attorney General be withdrawn.[568] Inadmissible non-immigrant applicants may be offered the opportunity to withdraw an application for admission rather than being detained for a removal hearing or being subject to the expedited removal procedure.[569] Given the harsh consequences of expedited removal, including a prohibition of entry for five years, immigration officials

[563] Ibid., § 244(a)(1)(A)
[564] Ibid., § 244(a)(3)(B)
[565] Ibid., §§ 101(a)(15)(T);1101(a)(15)(T)
[566] Ibid., §§ 101(a)(15)(T)(aa)(bb);1101(a)(15)(T)(aa)(bb)
[567] Ibid., §§ 101(a)(15)(T)(IV);1101(a)(15)(T)(IV)
[568] Ibid., § 235(a)(4)
[569] United States Department of Justice, Immigration & Naturalization Services, *Inspector's Field Manual*, ch. 17.2

are encouraged to allow applicants to withdraw their application where it is in "the best interest of justice."[570]

Aliens subject to removal proceedings or prior to the initiation of removal proceedings under section 240 may be afforded the opportunity to depart the United States voluntarily provided that they do not fall into a category of alien deportable following a conviction for aggravated felony, involved in terrorist activities or have been associated with a terrorist organisation.[571]

Voluntary departure may also be authorised following the conclusion of removal proceedings if the alien "was present in the United States" for at least one year "immediately preceding the date of notice to appear was served".[572] Additional requirements are that the alien is of "good moral character",[573] not deportable on security and related grounds,[574] or following a conviction for aggravated felony post-admission and has established by "clear and convincing evidence" an intention to depart.[575] Aliens present in the United States without being admitted who have previously been permitted to depart voluntarily are no longer eligible to benefit from the voluntary departure procedure.[576]

6.6. Judicial Review

Removal orders are not regarded as a criminal sanction and therefore judicial review of such measures are not constitutionally guaranteed. The authority to remove

[570] Ibid., ch. 17.2
[571] INA, *supra* n. 462, § 240B(a)(1)
[572] Ibid., § 240B(b)(1)(A)
[573] Ibid., § 240B(b)(1)(B)
[574] Ibid., § 240B(b)(1)(C)
[575] Ibid., § 240B(b)(1)(D)
[576] Ibid., § 240B(c)

aliens is essentially a power reserved for the political branches of government. Congress therefore determines the scope of authority in which the courts may undertake review of administrative decisions.[577]

The INA of 1952 contained no provision dealing with review before the Federal Court. In 1961, the INA was amended to allow petition for review in the courts of appeal of "final orders of deportation".[578] In matters, which were not classified as a "final order of deportation", the courts maintained judicial oversight through consideration of petitions for *habeas corpus* and other prerogative writs. The enactment of Antiterrorism and Effective Death Penalty Act (AEDPA) and the IIRIRA of 1996 abolished the petition for review established in the 1961 amendment of the INA.[579] The deportation of non-citizens due to the commission of many criminal offences referred to in the INA was no longer subject to judicial review.[580] In addition to other areas, the IIRIRA eliminated judicial review for final orders of removal.[581] Applicants seeking to challenge impugned measure relied on a petition for a writ of *habeas corpus* following the 1996 enactments, which led to floodgate litigation in the federal district courts.[582]

The enactment of the REAL ID Act of 2005, which made further amendments to the INA, attempted to reduce *habeas corpus* litigation by authorising the federal appeals courts to consider petitions for review. A key reason for the reintroduction of a system of appellate review as seen prior to the 1961 amendments was due to the need to limit

[577] *Carlson* v. *Landon*, 342 US 524, 537
[578] Pub. L. No. 87-301, §5, 75 Stat. 650, 651
[579] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA); Pub. L. No.104-208, 110 Stat. 3009 (1996) (IIRIRA)
[580] Section 440, AEDPA, ibid.
[581] Section 306, IIRIRA, *supra* n. 579
[582] Sections 1361, 1651, 2241 of Chapter 158 of title 28 of the United States Code

habeas corpus litigation before the federal district courts after the 1996 amendments.[583] The intent of Congress to prevent federal district courts from considering *habeas corpus* petitions is revealed with the inclusion of a phrase in a number of provisions including the denial of discretionary relief and deportation of criminal aliens under section 242(a)(2)(B) and section 242(a)(2)(C) respectively.[584] Following the 2005 legislative amendments the court of appeals however are not precluded from reviewing "constitutional claims or questions of law."[585]

The scope and standard of review of orders of removal require courts of appeals to "decide the petition only on the administrative record,"[586] to recognise that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,"[587] and that a decision on eligibility for admission is "conclusive unless manifestly contrary to law."[588]

The applicant must also comply with prescribed procedure before a review of a final order of removal is undertaken.[589] In cases where judicial review of a final order of removal is authorised the courts will only hear applications if administrative remedies are exhausted and apart from a few exceptions another court has not determined whether the order is valid.[590]

[583] Richard A. Boswell , *Essentials of Immigration Law*, (Washington: American Immigration Lawyers Association, 2006) at p. 164
[584] § 306 of the REAL ID Act amended §§ 242(a)(2)(B) and 242(a)(2)(C) of the INA with the inclusion of the phrase dealing with matters which the courts do not have jurisdiction to review: "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other *habeas corpus* provision, and sections 1361 and 1651 of such title"
[585] INA, *supra* n. 462, § 242(a)(2)(D) amended by §106 of the REAL ID Act (2005)
[586] Ibid., § 242 (b)(4)(A)
[587] Ibid., § 242 (b)(4)(B)
[588] Ibid., § 242 (b)(4)(C)
[589] Ibid., § 242 (b)
[590] Ibid., § 242(d)

Apart from limited exceptions for review outlined in section 242(e) the courts are not permitted to "enter declaratory, injunctive or other equitable relief" regarding the exclusion of non-citizens who are subject to expedited removal procedure.[591] In *American-Arab Anti-Discrimination Committee* v. *Ashcroft*,[592] the petitioners were successful in *habeas corpus* proceedings challenging expedited removal. The petitioners were granted "advanced parole", which was obtained due to a fraudulent scheme without the knowledge of the petitioners. Under the "entry fiction" doctrine, aliens who have been granted parole are not deemed to be admitted.

In *American-Arab Anti-Discrimination Committee*, the District Court reasoned that expedited removal was not lawfully applied to the petitioners under the authority of section 242 (e)(5). The respondents were unable to show that the procedure was intended for "arriving" aliens "*simply or solely* by virtue of the application of the entry fiction doctrine" who have been residing within the United States for a period of time.[593] Although the District Court acknowledged that the petitioners are entitled to less process than formally admitted aliens that did not mean that they were not entitled to the protection of the Due Process Clauses in the Fifth and Fourteenth Amendments.[594]

In contrast to the decision *American-Arab Anti-Discrimination Committee*, the Court of Appeals in *Sukwanputra* v. *Gonzales*,[595] held that a removal order for a married couple from Indonesia who had been admitted but had overstayed their visa and failed to apply for asylum within one year of arrival did not violate the right to due process. The petitioners claimed to fear persecution based on their Chinese ethnicity and Catholic

[591] §242(e)
[592] 272 F.Supp.2d 650 (2003)
[593] Ibid., at pp. 665, 668
[594] Ibid., at p. 650, 669
[595] 434 F.3d 627 (2006)

faith. In challenging the removal order, the petitioners argued that the one-year statutory period required to file an asylum application under section 208 (a)(2)(B) of the INA violated the Due Process Clause. The Court of Appeals concluded that it is permissible to "erect reasonable procedural requirements for triggering the right to an adjudication."[596] A one-year statutory limitation and the barring of judicial review therefore did not violate the Due Process Clause.[597]

[596] Ibid., at p. 632 citing *Logan* v. *Zimmerman Brush Co.*, 455 US 422, 437
[597] Ibid., at p. 632

7. **Interim Comparative Analysis: United States and Australia**

7.1. Constitutional Authority, Admission, Exclusion and Removal

In both the United States and Australia, the judiciary has traditionally deferred to the political branches of government power on issues of admission, exclusion and removal of non-citizens. In Australia, such authority is expressly referred to in the Constitution while in the United States, domestic case law has recognised that Congress has plenary power to create immigration laws in the absence of an express provision in the Constitution.[598]

The powers vested with the political branches is compatible with the writings of Vattel, Ortolan, Phillimore and Bar cited in *Fong Yue Ting*, the US Supreme Court deportation case in which admission and residence in the host state is viewed as a privilege and not a right.[599] Judicial deference to political branches is justified given that issues pertaining to sovereignty, national security and self-preservation are primarily the responsibility of elected officials accountable to the citizens of the state. Such practice is also compatible with international law, which demands respect for the sovereign equality of states.[600] Whether a non-citizen is classified as having irregular status is therefore determined by the operation of a regulatory framework distinctive to each state from which the judiciary is generally excluded. However, as evidenced through seminal case law, where circumstances require the judiciary has been willing to intervene.

[598] *Chae Chang Ping*, *supra* n. 20; *Fong Yue Ting*, *supra* n. 22; *Nishimura Ekiu*, *supra* n. 23; *Robtelmes*, *supra* n. 39

[599] *Fong Yue Ting*, ibid., at pp.708-709; *See also*, *United States ex. Rel. Knauff* v. *Shaughnessy*, *supra* n. 465

[600] Art. 2(1), *Charter of the United Nations*, *supra* n. 16; Art. 5, draft UN *Declaration on the Rights and Duties of States*, *supra* n. 17; Art. 14, UN *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, *supra* n. 17

With the exception of complying with international protection obligations, the practice of United States and Australia indicates that there are no limitations, which would influence a determination as to persons who should be admitted and persons who should be excluded. However, in cases where non-citizens are excluded on criteria, which discriminates those persons from other applicants, does this impose a limitation on an executive decision? One particularly contentious area concerning admission and exclusion of non-citizens is on a ground, which is health-related. Arguably, exclusion on this ground raises greater concern regarding respect for the principle of non-discrimination than exclusion based on a reasonable suspicion that a non-citizen could threaten national security or undermine public order.

Although it has been recognised that there is no general right to admission, is it possible to infer that international regulation obliges host states not to discriminate among non-citizens in consideration of their applications for admission? The domestic regulatory process is integral in defining the borders of irregularity. On what ground/s is discrimination alleged to be based? For persons from sub-Sahara Africa who have contracted HIV/AIDS, could discrimination be based on grounds on race, birth, sex or "other status"? What "right" is alleged to have been violated - the protection of the right to privacy or family life?[601] Does the process and criteria employed in administrative decision-making violate this right? To what extent does a communicable health condition constitute a reasonable and justifiable reason to exclude based on public health considerations? Does a different standard apply to non-citizens who have contracted HIV/AIDS compared to tuberculosis? Does state practice implicitly endorse discrimination by regarding issues associated with admission and exclusion as falling

[601] Art.17, ICCPR, *supra* n. 97

exclusively within the "reserved domain of domestic jurisdiction" or does the state seek to justify differential treatment based on a need to comply with international obligations by applying the test of proportionality where fundamental rights are involved? In other words, does the state by enacting an impugned provision operate exclusively under sovereign authority or does it seek to justify the provision based on a perceived obligation with reference to the protection of public goods? Whether such obligations exist is critical in determining how the regulatory frameworks of each state categorise migrants in an irregular situation post entry.

In his minority judgments in seminal High Court cases, Kirby J held that legislation is not intended to curtail and abrogate fundamental rights and freedoms[602] and that legislation should be read as being consistent with international law to the extent the language permits not just in cases of ambiguity.[603] Admittedly, these views were expressed in the context of issues involving deprivation of liberty, however in these cases leave to enter had also not been obtained. The issue, which is therefore raised, is whether persons who have not lawfully been admitted should be afforded presumptions in their favour where there is a *prima facie* case established that the administrative decision-making process or exercise of discretion appears to discriminate among non-citizens.

In spite of these common law presumptions, there is no explicit evidence within the respective regulatory frameworks to conclude that there are limitations imposed on sovereign authority to exclude particular categories of non-citizens from entering the territorial jurisdiction of the host state. Unlike the Migration Act, the INA enumerates specific categories of inadmissible non-citizens who are ineligible for admission or if

[602] *Al-Kateb*, *supra* n. 334, at p. 577
[603] *Behrooz*, *supra* n. 357, para.127

they have entered, remain.[604] In Australia, the Migration Act arguably allows for a greater exercise of executive discretion although where public goods are threatened it will most likely yield the same result as in the United States.[605] It could be argued that although in many instances the Minister in Australia has a non-compellable authority to grant a visa, the Migration Act generally requires the Minister to communicate with the applicant and provide reasons for the decision.[606] Arguably, there is an implied limitation on sovereign authority in situations where the legislative regime stipulates that the executive should provide reasons to justify its decision. Moreover, in the United States, the fact that an inadmissible alien has recourse to a removal hearing granting an opportunity to prove "clearly and beyond doubt" that s/he is "*entitled* to be admitted" (emphasis added) reinforces this claim.[607] Arguably, this demonstrates a limitation of sovereign authority where the applicant can provide details of his or her specific circumstances to overcome the onus of establishing admissibility.

7.2. Categories of Irregular Migrants

The domestic regulatory frameworks for both jurisdictions recognise the four broad categories irregular migrants identified for the purpose of this research. These categories are: 1/persons who enter the territorial jurisdiction of the host state by bypassing immigration control, 2/ non-citizens who stay beyond the time authorised by

[604] INA, *supra* n. 462, §§ 212, 237(a)
[605] It should be noted however that the INA contains waivers to inadmissibility and removal and therefore in spite of the rigid categories established under the domestic regulatory framework executive discretion is still maintained.
[606] For example, *see* section 57, *supra* n. 285
[607] INA, *supra* n. 462, §240(c)(2)(A)

the authorities, 3/ persons who violate a condition of their stay and, 4/ the use of deception or false pretences to gain admission.[608]

In both the United States and Australia, the fact that the non-citizen has previously obtained a visa prior to immigration clearance does not guarantee admission.[609] The failure to present the relevant identification documents at a prescribed port of entry is deemed a bypass of immigration clearance. This will result in the visa ceasing to be in effect and being categorised either, as an unlawful non-citizen or an inadmissible alien.[610] Similarly, non-citizens who enter by false pretences, deception or misrepresentation will have their visas cancelled and hence classified as an "unlawful non-citizen" or an inadmissible alien.[611] Non-citizens who violate a condition of stay will have the same classification.[612]

An examination of both regulatory frameworks reveals that there is no fixed limit which may be imposed on the conditions of stay. Rather, broad executive authority exists in determining whether the conduct of non-citizens poses "a risk to the health, safety or good order".[613] This broad authority is clearly associated with the sovereign authority of states to protect public goods recognised by international custom and conventional law or as Vattel asserted an obligation for all sovereign states to ensure its self-preservation.[614]

7.3. Prohibition of Arbitrary Detention

[608] *See*, Introduction at p. 16
[609] Migration Act, *supra* n. 285, section 174; INA, *supra* n. 462, §221(h)
[610] Migration Act, ibid., section 172(4); INA, ibid., §212(a)(6)(A)
[611] Migration Act, ibid., section 109; INA, ibid., §212(a)(6)(C)
[612] For example, *see*, Migration Act, ibid., section 116(1)(fa); INA, ibid., §237(a)1(C)(i)
[613] Migration Act, ibid., section 116(1)(e)
[614] Vattel, *supra* n. 19, bk. 1 §§19-20

The High Court of Australia has recognised that the power to detain non-citizens for the purpose of determining applications for admission is an incident of executive authority. However, detention must be employed for an immigration control purpose as opposed to utilising this authority for "administrative convenience".[615] In Australia, the legislative scheme of mandatory detention requires all unlawful non-citizens to be detained. The duration of this detention is dependent on the time it takes to remove or deport that person from Australia or to grant a visa.[616] The legislative scheme requires the authorities to remove a person "as soon as reasonably practicable" after the unlawful non-citizen issues a request for removal.[617] The realities of regional relations however have demonstrated that it is problematic to effect removal. The legislative scheme authorising mandatory detention has therefore emerged as a contentious issue due to its propensity to result in detention of an indeterminate and unjust duration.[618] Determining the point where the executive has exceeded its own constitutional limits has been subject to judicial scrutiny with the majority in the High Court ruling that the practice of mandatory detention is constitutional as its purpose is directly associated with immigration control.

Australian practice reveals that mandatory detention of unlawful non-citizens is constitutional. However, it is of significant importance to note the dissenting judgments as this may indicate the future direction of the law given the division in the High Court on this issue. A change in the balance of the bench may result in the imposition of greater limitations being placed on the political branches and thus overriding the present proclivity of the majority in deferring to the legislature and the executive on perceived

[615] *Chu Kheng Lim*, *supra* n. 33; *See also, R (Saadi and Others)* v. *Secretary of State for the Home Department*, [2002] 1 WLR 3131, at p. 3139 per Lord Slynn
[616] Migration Act, *supra* n. 285, section 196(1)
[617] Ibid., section 198(1)
[618] For example, *see*, *A* v. *Australia*, *supra* n. 193; *Al-Kateb*, *supra* n. 334

"exclusive political issues". Such developments in the law may include identification of circumstances where the Migration Act should be subject to an implied limitation where executive detention results in significant injustice. Another area where the law may evolve concerns the extent to which the legislative scheme authorising mandatory detention is to be interpreted with the common law presumption that the legislature does not intend to curtail or abrogate fundamental rights. Moreover, foreseeable developments in judicial decision-making include increased reliance on foreign case law and greater respect for international obligations, even if such obligations are not enacted in domestic law.

The most just and reasonable interpretation of the scope of operation of the legislative scheme is offered by Gleeson CJ who asserts that where there is no reasonable prospect of removal the purpose of detention is "in suspense."[619] Such an interpretation preserves the integrity of the mandatory detention scheme, which respects the competence of the legislature while not overstating the influence of foreign case law and findings of international monitoring mechanisms. In the author's opinion, the more the legislative scheme deviates from its intended purpose, the common law presumption favouring personal liberty dictates that such measures should be subject to an elevated level of judicial scrutiny.[620] The scope of this common law presumption in the author's view is regulated in part by the broad guidance offered by international monitoring mechanisms on the issue of compliance.

As the law stands at present, the legality of the mandatory detention scheme is confirmed with the Minister having a non-compellable and non-delegable authority to

[619] *Al-Kateb*, ibid., at p.576
[620] Ibid., per Gleeson CJ at p.577

grant a visa to an unlawful non-citizen to remedy prolonged indefinite detention in cases where removal cannot be effected.[621] In these cases, the legislative regime should not vest the Minister with such comprehensive authority. This is not merely, because it is unjust and a potential breach of fundamental rights for a non-citizen having to rely on the discretion of the Minister acting in his or her personal capacity to terminate indefinite detention. Rather, when such situations arise executive detention can no longer be considered an incident of executive power as its purpose to control immigration is frustrated. Detention in such cases is employed to segregate unlawful non-citizens from the broader community and therefore it should be regarded as detention for "administrative convenience".

It could be argued that the intention of Parliament would permit potentially indefinite detention given the absence of a time limit such as Congress has provided in the form of a 90-day removal period after an order for removal has been issued.[622] I would reject this argument as legislation is frequently interpreted as being subject to implied limitations.[623] Furthermore, even if an intention could be established it would be apparent that the legislature has acted beyond the scope of its constitutional powers. Parliament is not authorised under the Constitution to confer the executive with authority to impose penal sanctions. Such authority is reserved for the judicial branch of government power. In the author's view, the continuation of detention where there is no reasonable prospect of removal for the purpose of preventing the applicant from entering

[621] Migration Act, *supra* n. 285, section 195A
[622] INA, *supra* n. 462, §241(a)(1)(A)
[623] For example, *see R v. Governor of Durham Prison, ex p Singh (Hardial), supra* n. 341 where Woolf J held that although the legislation provided no time limit concerning the authority to detain, such authority was subject to an implied limitation that detention be for a reasonable period to effect deportation.

the broader community is by its nature a punitive measure. This is especially the case if alternative arrangements to detention remain a possibility.

Similar to the division in the Australian High Court, the US Supreme Court has also been divided on the legality of prolonged administrative detention. In *Zadvydas*, the majority held that a legislative intent could not be established to authorise indefinite or potentially permanent detention. The majority did not consider that Congress expected all removals to occur within the 90-day period but there is a presumption that a six-month period should be sufficient in cases where deportation cannot be effected.[624] Beyond that time, the government bears a significant onus to establish that detention is reasonable and justifiable e.g. a substantial risk to the community if the detainees are released. Prevention of flight is regarded as a "weak" justification where the possibility of effecting removal is remote.[625] In contrast, Kennedy J in his minority judgment asserted that the majority were incorrect to invoke the principle of constitutional avoidance as such an interpretation regarding scope of the authority to detain defeats the intention of Congress.[626]

The division on the bench of the highest court in each country is of value in that it is possible to foresee potential variation in the future direction of state practice which enables one to obtain a more comprehensive understanding as to how general international law regulates this field. Arguably, given the division on the High Court bench concerning whether prolonged indefinite detention is arbitrary in nature it is not possible to conclusively assert that it is representative of state practice due to its susceptibility to change. Likewise, the US Supreme Court in spite of its apparent

[624] *Zadvydas*, *supra* n. 492, at p.701
[625] Ibid., at p. 690
[626] Ibid., at p.707

preference to promote fundamental liberties rather than deferring to executive authority the bench has also not be unanimous on this issue. However, in cases where the executive has failed to comply with its procedural requirements, which benefit the applicant, the judiciary has been willing to hold that continued detention will violate the right to due process.[627] I would argue however, in the case of the United States, that practice is more stable given that the 90-day removal period is evidence that Congress did not intend to confer authority which would justify the detention of removable non-citizens for a duration which a reasonable and objective person would find unjust.

The HRC has concluded that a state requires "appropriate justification" to ensure that detention is not arbitrary in character. Fraudulent statements evidence that the applicant was at risk of absconding and prior knowledge of the likelihood of detention due to established and well-publicised laws was deemed insufficient to provide appropriate justification. The HRC concluded there was "less invasive means" to secure the same end.[628] In contrast, the ECt.HR has concluded that an exception to the right to liberty and security of person authorising detention while "action is being taken with a view to deportation or extradition" under the second limb of Article 5 (1)(f) of the ECHR is justified while deportation proceedings are in progress.[629] The Court observed that there was no additional requirement of detention being necessary to prevent an offence or preventing the applicant from fleeing.[630] The Court held that detention, which commenced in August 1990 and ended in March 1994, was not excessive either during individual periods where applications for appeal and judicial review were lodged or for

[627] *Lin*, *supra* n. 514
[628] *C* v. *Australia*, *supra* n. 196, para.8.2
[629] *Chahal*, *supra* n. 48, para.113
[630] Ibid., para.112

the collective period.[631] It could be argued however that the Court in *Chahal* was willing to accept the duration of detention due to the alleged involvement of the applicant in terrorism and crime, preferring to defer to sovereign authority to protect public order and safety.

The selected case law nevertheless reveals that international monitoring bodies are not uniform in their findings as to the circumstances where a balance is required to be struck to guarantee the rights of the individual while also preserving the sovereign authority of states in dealing with matters of immigration control. Arguably, the HRC is more likely to respond favourably to applicants where a *prima facie* case has been established compared with the ECt.HR which has arrived at a balanced conclusion based on a detailed examination of the facts, submissions and arguments of the parties to the proceedings. The main conclusion derived from these cases is that both monitoring bodies require detention to be proportional and reasonable though providing scant information as to the circumstances where this requirement is met.

The ECt.HR has held that to avoid the risk of detention being arbitrary, the same standard of proportionality applicable under the second limb of Article 5(1)(f) is also required under the first limb authorising detention to prevent non-citizens "effecting an unauthorized entry."[632] The Court considered that "it would be artificial to apply different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country."[633]

As an incident of executive power, domestic case law acknowledges that the executive may detain persons for initial screening and processing to determine

[631] Ibid., para.117
[632] Saadi v UK, para.73
[633] *Saadi*, *supra* n. 185, para.73

applications for admission as well as to make deportation effective.[634] Although Congress in the United States has plenary power to create immigration laws which encompasses an authority to detain non-citizens this is not without limitations. After non-citizens have entered the United States those persons, regardless of their legal status, receive the protection of the Constitution including the right to due process.[635]

The objective of this research is to supplement the general findings of international monitoring mechanisms with evidence of state practice to provide greater substance to aid our understanding of the scope of norms in this field. Based on seminal case law referred to above, if the host state is to avoid employing arbitrary detention, the *purpose* for which it is employed must be respected. In the author's view, given that fundamental rights are at stake, this requires an intimate and tangible connection with that purpose rather than a general connection, which lacks specificity. This remains the case even if there is a perception that such matters are best reserved for the political branches of government power. If detention is no longer justifiable, its purpose is "in suspense" and hence the executive is acting beyond the scope of its authority.[636] Essentially this is evidentiary issue, which varies from case to case. However, to avoid the risk of arbitrariness, the regulatory regime should ensure that such matters are not beyond the purview of the courts.

7.4. Conditions of Detention

In cases where the conditions of detention have been raised to challenge the constitutionality of the measure, the High Court of Australia has been uniform in its

[634] *Chu Kheng Lim*, *supra* n. 33, at pp. 30-31
[635] *Zadvydas*, *supra* n. 492, at p. 693
[636] *Al-Kateb*, *supra* n. 334, at p. 577

decision-making when compared with situations involving prolonged indefinite detention. Rather than accepting that the executive is performing judicial functions where conditions of detention are penal in character, the majority of the High Court has held that such detention for the purpose of controlling immigration remains a lawful exercise of executive power. According to the majority, the appropriate remedial course open to the detainee where conditions are alleged to be harsh or inhumane is to pursue an action in tort or criminal law.[637] Kirby J, the sole dissenting judge in *Behrooz,* refers to this as an "absurdity" given that unlawful non-citizens have limited or no resources to wage a successful legal challenge in a foreign country.[638] An important aspect of his Honour's reasoning is that legislation should be interpreted to be consistent with international law to the extent which language permits not merely to resolve ambiguity.[639]

International norms associated with liberty and security of person imposes an obligation on the host state to treat persons deprived of their liberty with humanity and to respect the inherent dignity of the human person. If any branch of government power imposes a sanction or measure, which violates a standard of treatment generally accepted by the international community, then this imposes an obligation on the host state to rectify and refrain from such practice. However, as evidenced by the decision in *Behrooz,* there is an indication that the courts expect the aggrieved individual to seek civil or criminal remedial measures to address conditions of detention preferring not to address systemic problems associated with the mandatory detention regime. If the practice in Australia is a reliable indicator, domestic courts will only recognise the existence of this

[637] *Behrooz, supra* n. 357, para.21, per Gleeson CJ,; paras.51-53, per McHugh, Gummow and Heydon JJ; para.174, per Hayne J; para.219 per Callinan J
[638] Ibid., paras.136-137, per Kirby J
[639] Ibid., para.127, per Kirby J

standard in straightforward cases where *jus cogens* norms are breached during immigration detention. Such examples may include a violation of the right to life and the prohibition against torture and like treatment.

In *Beehrooz*, the majority concluded that the statutory purpose for immigration detention was not punitive in character and therefore still regarded as "immigration detention" for the purposes of the Act.[640] Detention of unlawful non-citizens remains an exercise of executive authority authorised by law. In the author's view if the appropriate remedial action open to the applicant is to be found in tort or criminal law against detention officers this imposes an artificial barrier on accountability. The government is therefore protected from judicial scrutiny from harsh and unjust practices which have been allowed under the mandatory detention scheme.

The emphasis of the majority on the statutory purpose of immigration detention to guarantee the scheme's constitutionality neglects the need to identify systemic problems, which may be exposed through enhanced accountability. The limitation of remedial action against individuals in tort or criminal law is therefore inadequate and unsuitable. Such practices should be assessed against a minimum standard defined by the practice of other states, which is generally deemed acceptable. Judicial scrutiny in matters of public law may reveal cases where there are entrenched practices that are not compatible with this standard. In such cases, this may reveal that the executive has acted beyond the conferral of power granted by the legislature.

A possible explanation as to why there is greater division on the High Court bench with respect to the constitutionality of detention, which is of a prolonged and

[640] Ibid., paras.21-22, per Gleeson CJ,; para.53, per McHugh, Gummow and Heydon JJ; paras.174-176, per Hayne J; para. 223, per Callinan J.

indefinite duration, and detention involving harsh and inhumane conditions is that in the case of former it is a more accurate barometer for determining whether the executive is performing extrajudicial functions. As recognised by Gleeson CJ if the applicant can establish that the operation of mandatory detention is particularly severe resulting in the executive imposing a form of punishment on the unlawful non-citizen then it would be held to be unconstitutional. Establishing criteria to measure severity to render detention unlawful however is problematic if not impossible to establish.[641] Arguably, the duration of detention and the prospects of removal in the foreseeable future enable judges to determine whether such a measure is lawful as it permits a greater degree of objectivity in the decision-making process. This is compared with the primarily subjective determination as to whether the conditions of detention, often linked with the vulnerability of particular groups, is in accordance with the Constitution. The judiciary has demonstrated that in most cases it will defer to other branches of government power. Elected politicians are entrusted to remedy injustice. Only in extreme cases is there a realistic prospect that the judiciary will intervene. Providing children with alternative accommodation arrangements during the processing of applications rather than at immigration detention centres is evidence of a response initiated by popular demand.[642]

7.5. Judicial Review

In both jurisdictions, it is generally recognised that the role of the judiciary is to undertake review in matters involving questions of law as opposed to undertaking a review of the merits of the case. The division between a review on issues of law and fact

[641] *Re Woolley*, *supra* n. 364, para.29
[642] Migration Amendment (Detention Arrangements) Act, 2005 No. 79 (Cth), *supra* n. 389

is subject to varying degrees of interpretation revealing a tension between the judiciary and political branches of government.[643] The US regulatory framework does acknowledge however that the judiciary may in certain instances encroach upon the executive sphere of competence. For example, in the context review of orders of removal the INA provides, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[644] In Australia, while the courts do not formally accept that it is permissible to engage in a review of the merits of a case, the seminal High Court case *S157* has led some commentators to assert that in spite of the enactment of a privative clause scheme the courts may intervene in cases where there is broad jurisdictional error.[645] In such cases, judicial oversight will not be ousted where the executive decision-maker identifies the wrong issue, asks the wrong question, ignores relevant material and relies on irrelevant material etc.[646] Executive decisions in such circumstances are not reached in accordance with law. Where the executive is purported to act outside its jurisdiction the distinction between issues of law and fact has the potential to be blurred and therefore a review on the law and the merits is not easily maintained.

The introduction of the privative clause scheme into the Australian Migration Act was intended to confirm the legal validity of executive decision-making by ousting the

[643] In *Attorney-General (NSW) v Quin*, Brennan J offers an interpretation of the parameters of judicial review in an oft-cited quote: "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government... The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law, which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error." *Attorney-General (NSW)* v. *Quin* (1990) 170 CLR 1, 35-36 cited in Administrative Review Council, "The Scope of Judicial Review Discussion Paper", 2003, *supra* n. 409, at p. 9
[644] INA, *supra* n. 462, § 242 (b)(4)(B)
[645] Beaton-Wells, *supra* n. 416, at pp.137-140
[646] *See*, *Minister for Immigration and Multicultural Affairs* v. *Yusuf* , *supra* n. 429

jurisdiction of the courts in broad areas of admission, exclusion and removal. In *S157*, the High Court confirmed the constitutionality of the scheme by favouring an interpretation compatible with the concept of constitutional supremacy. The High Court declared that it is a basic rule of statutory construction that if there is opposition between a legislative provision and the Constitution it should be resolved by adopting an interpretation consistent with the Constitution which is "fairly open".[647] The privative clause scheme was therefore read subject to the Constitution.

The US Supreme Court has also favoured the principle of constitutional supremacy over parliamentary supremacy in judicial decision-making in this field. In *Zadzydas*, the majority interpreted a legislative provision to be subject to an implied limitation to prevent prolonged arbitrary detention, which according to the majority would infringe the right to due process under the Fifth Amendment. In contrast, Kennedy J opined that principle of constitutional avoidance could not be invoked because it defeated the intention of Congress.[648] Similarly, in *American-Arab Anti-Discrimination Commission* due process rights were afforded to petitioners who had previously been granted advanced parole but were subsequently subject to an expedited removal order for a fraudulent scheme that they were not aware of.[649] In contrast to the decision in *American-Arab Anti-Discrimination Commission*, Congress is recognised as possessing authority to impose a time-limit to claim asylum following entry into the United States which has been held not been to violate the right to due process.[650]

[647] *S157*, *supra* n. 414, at p. 504 para.71, per Guadron J et al., citing *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at p. 616
[648] *Zadvydas*, *supra* n. 492, at p.707
[649] *American-Arab Anti-Discrimination Commission*, *supra* n. 592
[650] *Sukwanputra*, *supra* n. 595

In conclusion, the highest courts in both jurisdictions have demonstrated a preference to interpret legislation in accordance with the Constitution. Rather than striking down a legislative provision, *S157* and *Zadvydas* is authority to interpret constitutionally "dubious" legislative schemes as being subject to the Constitution. Notably however the courts have been reticent to engage in direct conflict with the political branches preferring to invoke the principle of constitutional avoidance where possible.

8. Hong Kong Special Administrative Region

8.1. Constitutional Authority

The Hong Kong Special Administrative Region (SAR) was established following the end of British colonial rule. Matters involving citizenship were vested with the Peoples' Republic of China following resumption of sovereignty. The Special Administrative Region maintained authority in matters of immigration whereas Beijing maintained authority in matters of foreign affairs. However, the Special Administrative Region may remain party to international agreements, which are not in force in mainland China.[651]

8.2. General Requirements for Admission and Inspection

Persons who land and remain in Hong Kong are required to obtain the permission of an immigration official unless they are exempt from such a requirement under the Immigration Ordinance.[652] In cases where an immigration official grants a person leave to land and remain he or she may impose a limitation on the period of stay and stipulate the conditions he or she "thinks fit".[653] Conditions of stay may be varied or cancelled at any time.[654] The Immigration Ordinance also authorises the curtailment of the period of stay where that person has been notified in writing.[655] The Director of Immigration is

[651] Joint Declaration of the Government of the United Kingdom and the People's Republic of China on the Question of Hong Kong 1984, Annex I, Constitution, Annex XI Foreign Affairs, and Annex XIV Right of Abode ,Travel and Immigration, http://www.cmab.gov.hk/en/issues/jd2.htm
[652] Immigration Ordinance Cap 115, 1972, section 7(1)(2); Persons who are exempt from obtaining permission to land include those persons who have a right to abode in Hong Kong (section 7 (1) (aa)) and persons who have a right to land by virtue of section 2AAA (section 7 (1) (ab)). The term "land" means "(a) enter by land or disembarked from a ship or aircraft; and (b) in the case of a person who arrives in Hong Kong otherwise than by land or in a ship or aircraft, land in Hong Kong;" (section 2)
[653] Ibid., section 11(3)
[654] Ibid., section 11(5A) (a)(b)
[655] Ibid., section 11(6)

authorised to allow persons who have landed unlawfully to remain on conditions of stay which the Director "thinks fit".[656]

Immigration officials are authorised to examine persons at any time if there is "reasonable cause for believing" that a non-citizen has landed in Hong Kong unlawfully,[657] is "contravening or has contravened a condition of stay", or remains without the permission of an immigration official.[658] The Immigration Ordinance presumes that a person requiring permission to enter who fail to produce an identity card on request to have landed unlawfully.[659] This presumption may be rebutted where evidence is produced to the contrary.[660] Similarly, there is a presumption that persons entering Hong Kong waters without the permission of an immigration officer or immigration assistant are seeking to enter unlawfully.[661]

8.3. Categories of Non-Citizens in an Irregular Situation

The Chief Executive in Council is authorised to declare by order "any class or description of persons, other than persons who enjoy the right of abode... or have the right to land ... to be unauthorised entrants."[662] Exceptions may be made to persons categorised as unauthorised entrants.[663] The Hong Kong Government is responsible for maintenance and removal expenses of the person subject to removal, which may be recovered as a civil debt from the person removed.[664]

[656] Ibid., section 13
[657] Ibid., section 4(1)(a)
[658] Ibid., section 4(1)(b)
[659] Ibid., section 62(1)
[660] Ibid., section 62(1)
[661] Ibid., section 62(2)
[662] Ibid., section 37B(1)
[663] Ibid., section 37B(2)
[664] Ibid., section 25(5), (5A)

8.4. Detention

Due to its colonial heritage, Hong Kong SAR has adopted a common law legal system in which the Judicial Committee of the Privy Council was the highest judicial authority for the colony until the 1997 handover. To the present-day precedent from the United Kingdom is influential if not a binding source of authority in many Hong Kong courts. The right to personal liberty constitutes a fundamental principle of the common law, which the former colonies seek to protect through good governance.

In an oft-cited passage, which reinforces the protection of personal liberty under the common law, Lord Atkin declared, "every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned."[665] Compliance with the doctrine of separation of powers requires that the use of administrative detention is not penal in nature.[666]

The duration, which the executive is conferred with authority to detain unauthorised entrants under the legislative framework, is dependent on a number factors including whether detention is for the purpose of undertaking initial investigations,[667] general investigations,[668] whether a person has been refused permission to land,[669]

[665] *Liversidge* v. *Anderson* [1942] AC 206, at pp. 245-246
[666] *Liyanage & Others* v. *The Queen* [1967] 1 AC 259
[667] Immigration Ordinance, *supra* n. 652, section 27
[668] Ibid., section 26
[669] Ibid., section 32(1),

whether it is pending a decision to remove[670] or whether it is pending removal.[671] Other factors governing the length of detention include, whether a person is in breach of a deportation order,[672] whether there are "reasonable grounds for inquiry" concerning the possible deportation of an immigrant,[673] whether legislation authorises the continuation of detention following the end of statutory prescribed period,[674] whether the period of detention can be extended by court order.[675] The rank of the official authorising detention may also be an important factor in determining the length of detention.[676]

8.4.1. Prohibition of Arbitrary Detention

Provisions in the Immigration Ordinance authorising detention are required to be read in conjunction with the Hong Kong Bill of Rights Ordinance (HKBOR).[677] The HKBOR referred to as, "an Ordinance to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for ancillary and connected matters."[678] The HKBOR refers explicitly to the right to liberty and security of person encompassing a prohibition against arbitrary detention. If persons are to be detained the state has an obligation to ensure that

[670] For example, *see* ibid. section 32(2)(b) pending a decision to remove an "undesirable immigrant"; *See also* ibid. section 32(2A) pending a decision to remove persons who have unlawfully landed in Hong Kong or have breached a condition of stay
[671] For example, *see* ibid. section 32(3) pending removal of an "undesirable immigrant"; *See also* section 32(3A) pending removal of persons refused permission to land. Section 32(3B) of the Ordinance provides that detention "pending removal" includes the time awaiting a response from the relevant authorities in the country where that person is to be removed.
[672] Ibid., section 31
[673] Ibid., section 29
[674] For example, *see* ibid. section 31(2) which authorises the continuation of detention for persons in contravention of a deportation order
[675] *See*, ibid. section 32(4)(b)
[676] For example, *see* ibid. section 26(b) enabling immigration officials and police officers of a higher rank to detain persons for longer duration than officials of an inferior rank.
[677] Hong Kong Bill Of Rights Ordinance Cap 383, 1991
[678] Ibid., Long Title

it is "on such grounds and in accordance with such procedure as are established by law."[679] An application for a writ of *habeas corpus* may be made to the Court of First Instance.[680] The High Court Ordinance authorises a right to appeal for both parties to the proceedings.[681]

In *A (Torture Claimant)* v. *Director of Immigration*,[682] the applicants sought judicial review of removal and deportation orders arguing that it was policy not to remove persons where there is an outstanding claim under CAT and that it was unlikely that removal could be effected in "reasonable time" which rendered these orders invalid. Given the facts of the case, the authority to detain pending removal or deportation was alleged to be unlawful. Although the Court Of Appeal confirmed the legality of deportation and removal orders, the detention was ruled to be incompatible with the right to liberty and security of person enshrined in the HKBOR.[683]

In order for the domestic law authorising detention to be lawful it must possess the "quality of law" requiring it to be "sufficiently accessible and precise"[684] so as to "enable the individual to foresee the consequences of the restriction."[685] Section 32 of the Immigration Ordinance is silent as to the "grounds and procedure" authorising the authorities to detain persons pending removal. Consequently, the legislation and lack of

[679] Ibid., Art. 5(1)
[680] Section 22A, High Court Ordinance Cap 4, 1975
[681] Ibid., section 22A
[682] [2008] 4 HKLRD 752
[683] HKBOR, *supra* n. 677, Art. 5(1)
[684] *A (Torture Claimant)*, *supra* n. 682, at pp.764-765, para.34 citing *Amuur* v. *France*, *supra* n. 47, at para.50
[685] Ibid., at pp.764-765, para.34 citing *R v Governor of Brockhill Prison, ex p Evans* (No. 2) [2001] 2 AC 19, at p.38

policy was deemed not to be "sufficiently certain and accessible" for the applicant to avoid being detained.[686]

Although the limits of the power to detain may be ascertained with sufficient certainty with reference to the principles established in *Hardial Singh*, this alone would not satisfy the requirement that the grounds and procedure for the detention are "reasonably accessible" for the applicant.[687] It is for the authorities to justify the imposition of detention as an acceptable immigration control response rather than for the applicant to prove otherwise. A detailed and freely available policy citing relevant considerations and factors in the decision-making process would assist the applicant in avoiding detention. Being informed after-the-fact does not satisfy the requirement that the grounds and procedure are "reasonably accessible".[688]

The Immigration Ordinance explicitly states that the detention of persons pending removal or deportation is not unlawful because of its duration. The proviso being that it is "reasonable having regard to all the circumstances affecting that person's detention including, ... the extent to which it is possible to make arrangements to effect ... removal; and ... whether or not the person has declined arrangements made or proposed for ... removal."[689] Moreover, detention is expressly limited for the purpose of removal rather than for another administrative purpose.[690] Sureties are generally permitted as an alternative to detention for many provisions in the Immigration Ordinance.

The case law recognises that in particular situations it may not always be desirable to authorise the detention of persons, as the regulatory framework allows for the

[686] Ibid., at pp.767-768, paras.41, 43
[687] Ibid., at p.770, para.51
[688] Ibid., at pp.772-773, para.63
[689] Immigration Ordinance, *supra* n. 652, section 32(4A)
[690] Ibid., section 32(3C)

suspension of deportation orders and prohibits removal until appeal rights have been exhausted.[691] However, in exercising the power of detention it is only necessary for the authorities to show that it "is intent upon removing the applicant at the earliest possible moment... and it is not apparent... (that) removal within a reasonable time would be impossible."[692] Moreover, in cases where removal to a particular country may be frustrated it does not prevent the authorities removing the applicants to another country.[693]

In *Chieng A Lac & Ors* v. *Director of Immigration & Ors (No. 2)*, the prolonged detention of Vietnamese nationals lasting for a duration of between 74 and 103 months in an effort to repatriate those persons was subject to *habeas corpus* proceedings. [694] The applicants challenged the legality of a new legislative provision authorising detention "pending removal" to include the time awaiting the response from the Vietnamese Government to a request from the Hong Kong Government or the United Nations High Commissioner for Refugees to accept the repatriation of its nationals.[695] The applicants claimed that as detention predated the enactment of the new legislative provision it had violated the presumption against retrospectivity. The applicants contended that if detention was held to be unlawful due a breach of the principles established in *Hardial Singh*[696] then there could be no retrospective validation of unlawful detention. Moreover, the applicants queried the extent to which "arrangements" referred to in section 13D (1A)

[691] *A (Torture Claimant), supra* n. 682, at p.762, para.25
[692] Ibid., at p.764, para.31
[693] Ibid., at pp. 761-762, paras.21-25
[694] [1997] 7 HKPLR 243
[695] Immigration Ordinance, *supra* n. 652, section 13D(1AA)
[696] *Hardial Singh, supra* n. 341

(b) (i) and (ii) would be sufficient so as not to render detention unlawful due to its prolonged duration.[697]

The High Court held that the new section 13D (1AA) did not limit the principles established in *Hardial Singh* as the courts in applying section 13D (1A) maintained authority to determine whether a person had been detained for an unreasonable period.[698] Although section 13D (1AA) could not be applied retrospectively, the new provision should be used to assess the lawfulness of current detention even for those persons who were originally detained prior to its enactment. Consequently, detention previously regarded as unlawful could be rendered lawful under the new section 13D (1AA). Reasons beyond the control of the Director preventing "arrangements" being made to effect removal of the detainee under section 13D (1A)(b)(i) is not in itself sufficient justification to authorise detention but a factor to determine whether detention was reasonable.

The refusal of the applicants to accept voluntary repatriation could be taken into account in a determination as to whether the period of detention is reasonable and compatible with Article 5(1) of the HKBOR. The fact that the applicants had never volunteered or had withdrawn their application for voluntary repatriation were factors the court had to consider in determining whether the period of detention was reasonable under section 13D (1A) (b). The High Court concluded that the period of detention was not unreasonable and therefore did not infringe the second principle established by

[697] Immigration Ordinance, *supra* n. 652, sections 13D (1A)(b)(i) and (ii) provides: "The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting the person's detention, including - (b) in the case of a person being detained pending his removal from Hong Kong –(i) the extent to which it is possible to make arrangements to effect his removal; and (ii) whether or not the person has declined arrangements made or proposed for his removal."

[698] *Chieng A Lac*, *supra* n. 694, at p. 244; ibid., section 13D(1AC)

Hardial Singh, which imposes a limitation on the power to detain pending removal to a "reasonable time".[699]

The High Court rejected the argument that the Director failed to comply with the third principle established by *Hardial Singh* requiring "all reasonable steps" to be taken to ensure "that the purpose for which the detention... (is) authorised is achieved within a reasonable time."[700] The High Court recognised that reasonable steps to repatriate detainees were taken following the establishment of the Orderly Repatriation Programme however, that was a general observation, which may not always apply to individual cases. The policy of automatic detention of Vietnamese asylum seekers, which is authorised by section 13D (1) of the Immigration Ordinance, was held not to amount to arbitrary detention and therefore did not violate Article 5(1) of the Hong Kong Bill of Rights Ordinance.

8.4.2. Challenging the Lawfulness of Detention

The Hong Kong Bill of Rights Ordinance provides the persons who are deprived of their liberty are entitled "to take proceedings before a court, in order... (to) decide without delay on the lawfulness of... detention and order... release if the detention is not lawful."[701] The Immigration Ordinance expressly provides that the courts maintain jurisdiction to determine whether a person has been detained for an unreasonable period.[702]

[699] *Chieng A Lac*, *supra* n. 694, citing *Tan Te Lam* [1996] 2 WLR 863 at 873E
[700] Ibid., citing *Tan Te Lam* [1996] 2 WLR 863 at 873E
[701] HKBOR, *supra* n. 677, Art. 5(4)
[702] Immigration Ordinance, *supra* n. 652, section 32(3D)

8.4.3. Persons Deprived of Their Liberty to be Treated with Humanity and Dignity

The HKBOR requires that detained persons subject to detention are "treated with humanity and with respect for the inherent dignity of the human person."[703] In a petition for *habeas corpus*, the traditional view is that the conditions of detention cannot be used to challenge the lawfulness of detention when a person is otherwise legally detained. *Habeas corpus* is therefore **"**concerned with the fact of... detention, and not the conditions... The fact that the conditions in which the detainee is detained are unlawful does not make... detention unlawful."[704] However, a legislative provision authorising detention may be interpreted to render detention unlawful where the time element is considered in conjunction with the conditions of detention.

> "The words 'all the circumstances affecting that person's detention' are, in my view, wide enough to include the conditions in which he is detained. Accordingly, the conditions in which a detainee is detained can render his detention unlawful, but only to the extent that those conditions mean that the period of time in which he has been in detention has become unreasonable. The true question, therefore, is not whether the conditions in which the applicants are detained is unlawful. The question is whether the nature of those conditions is such that it has rendered their detention unlawful having regard to the length of time that their detention has lasted."[705]

In *Chieng A Lac*, Keith J of the High Court expressed the view that the conditions of detention should not be assessed by Western standards, rather it should be assessed relative to "the social, cultural and economic conditions in which the applicants grew up."[706] His Honour acknowledged that some of the rules in the Standard Minimum Rules for the Treatment of Prisoners relate to persons subject to administrative detention

[703] HKBOR, *supra* n. 677, Art. 6(1)
[704] *Chieng A Lac*, *supra* n. 694, at p.275, "The remedies which a detainee has in those circumstances were summarised in *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58 at 66E-F, per Lord Ackner. They do not include his release from detention by *habeas corpus*."
[705] Ibid., at p.276
[706] Ibid., at p.277

however, he rejected absolute standards. Rather, the Standard Minimum Rules should be viewed as "aspirational" and must be applied "in the light of local conditions".[707]

8.5. Removal

An immigration official may remove persons who have been refused permission to land in Hong Kong under section 11 (1) following an examination under section 4(1) (a) of the Ordinance.[708] However, the immigration official should not remove that person following a period of two months after he or she landed.[709] Those persons may be removed by the Director of Immigration notwithstanding that the two-month period after landing has expired.[710]

The Director of Immigration may order the removal of persons if "it appears to him" that they have landed in Hong Kong unlawfully or that they have contravened or are contravening a condition of stay.[711] The Chief Executive, not the Director of Immigration, may order the removal of a person who he or she regards as "an undesirable immigrant who has not been ordinarily resident in Hong Kong for three years or more."[712] Persons who have contravened section 42 with respect to making false statements and utilising forged documents and persons remaining in Hong Kong without the permission of an immigration official may also be removed by order of the Director of Immigration.[713]

[707] Ibid, at p.278
[708] Immigration Ordinance, *supra* n. 652, section 18(1)(a)
[709] Ibid., section 18(2)
[710] Ibid., section 19(1)(b)(i)
[711] Ibid., section 19(1)(b)(ii)
[712] Ibid., section 19(1)(a)
[713] Ibid., section 19(1)(b)(iii) and (iia)

In *Kong Sau Mei & Others* v. *Director of Immigration*[714] the three applicants arrived in Hong Kong claiming to be the wife (first applicant) and stepdaughters (second and third applicants) of a Hong Kong permanent resident and Thai nationals by birth. Following their entry into Hong Kong the applicants were granted leave to remain based on being a dependent of a Hong Kong permanent resident. The authorities were subsequently informed by the Royal Thai Consulate-General that the applicants were from mainland China and that their passports had been illegally obtained. Moreover, the stepdaughters were in fact the daughters of the Hong Kong permanent resident. The Deputy Director issued a removal order in respect of the wife under section 19 (1)(b)(iia) on the basis that it appeared to him that she had contravened section 42 by making of false statements or representations to an immigration official. The Deputy Director ordered the removal of the two daughters under section 19 (1) (b) (ii) on the ground that it appeared to him that they landed unlawfully in Hong Kong.

Under section 19 of the Immigration Ordinance, the Deputy Director is only required to establish that "it appears to him" that a particular event has occurred prior to issuing a removal order. Keith J noted that this did not authorise the Deputy Director to "act on a whim or caprice or on inadequate grounds."[715] The authority to issue removal of orders under section 19(1)(b) "must be construed as being subject to the implied limitation that it may only be exercised if his belief that the events have taken place was based on reasonable grounds."[716] The first applicant contended that the representation made under section 42 (1) (a) is required to be "false in a material particular" under section 42 (5). The Court concluded that if the immigration official was aware of the

[714] [1998-1999] 8 HKPLR 844
[715] Ibid., at p. 848
[716] Ibid., at p. 848

applicant's real name and country of birth then that may have led to further inquiries, which would have revealed that she obtained her Thai passport illegally bypassing the more onerous immigration control requirements for persons entering Hong Kong from mainland China.[717]

The daughters of the Hong Kong permanent resident were ordered to be removed under section 19 (1) (b) (ii) on the ground that it appeared to the Deputy Director that they landed unlawfully in Hong Kong. The deception on arrival rendered the permission of the immigration officer to be invalid. This contravened section 38 (1) (a) which prohibited persons from landing in Hong Kong without the permission of an immigration official.

Written notice is required to be served "as soon as is practicable" on the person against whom the removal order is made. The removal order should specify the ground/s on which the order is made and inform that person of the procedure for appeal.[718]

8.5.1. Deportation

The Chief Executive is authorised to issue a deportation order against an immigrant, defined as a person who is not a permanent resident, who is found guilty of an offence in Hong Kong punishable to a term of imprisonment of at least two years[719] or where the Chief Executive deems deportation "conducive to the public good."[720] The

[717] Ibid., at p. 852
[718] Immigration Ordinance, *supra* n. 652, section 19(5)(a)(b)
[719] Ibid., section 20(1)(a)
[720] Ibid., section 20(1)(b)

deportation order may prohibit that person from returning to Hong Kong or prohibit that person from returning for a specified period.[721]

8.5.2. Appeal

Persons aggrieved by a decision, act or omission of a public officer under the Ordinance may lodge an appeal within the prescribed time.[722] The Chief Executive or the Chief Executive in Council may "confirm, vary or reverse the decision, act or omission... or substitute there for such other decision or make such other order as he thinks fit."[723] Persons who lodge an application challenging the decision of a public officer to refuse permission to land does not entitled that person to remain pending the outcome of the review.[724] A person is not entitled to object under section 53 to a decision, act or omission of the Chief Executive, the Chief Executive in Council or of any court.[725]

In the provision dealing with review of decisions of public officers, it is expressly stated that no objection shall be made by a person aggrieved by a decision concerning an order for removal made by the Director, Deputy Director or any Assistant Director of Immigration.[726] However, in section 53A dealing with an appeal against removal orders made by the Director or Deputy Director of Immigration a person who is the subject of a removal order may lodge an appeal to the Immigration Tribunal. The grounds of appeal are that he/she enjoys the right to abode, the right to land under section 2AAA or he had permission to remain in Hong Kong at the time of the removal order.[727] The Immigration

[721] Ibid., section 20(5)
[722] Ibid., section 53(1)(2)(3)
[723] Ibid., section 53(4)
[724] Ibid., section 53(7)
[725] Ibid., section 53(6)
[726] Ibid., section 53(8)(b)
[727] Ibid., section 53A(1)

Tribunal is required to dismiss an appeal if the appellant cannot establish one of these grounds.[728]

In *Li Fu Shan* v. *Director of Immigration & Another*,[729] the applicant came to Hong Kong to be united with his adopted family. In his application for a one-way permit, he failed to disclose that he was adopted and provided misinformation about his residence in mainland China prior to entering Hong Kong. Under section 19 (1)(b)(ii) of the Ordinance the Director may issue a removal order where "it appears to him" that the person has landed in Hong Kong unlawfully or has contravened or is contravening a condition of stay. The role of the Immigration Tribunal is to determine on the facts whether the appellant had obtained the immigration permit unlawfully which would justifying the Director setting aside his earlier permission. If such a finding is made the Tribunal is required under section 53D (1)(a)(ii) to dismiss the appeal.

Persons subject to a removal order made by the Director, Deputy Director or any Assistant Director of Immigration are not to be removed until the prescribed time limit for an appeal has passed or where that person has declared in writing that he or she does not wish to appeal.[730] In cases where an appeal has commenced the appellant must not be removed until the appeal is determined by the Immigration Tribunal or until a time where the appellant declares in writing that he or she is abandoning the appeal.[731]

8.6. Judicial Review

[728] Ibid., section 53D(1)
[729] [2002] HKEC 1370
[730] Immigration Ordinance, *supra* n. 652, section 53B(a)
[731] Ibid., section 53B(b)

The High Court Ordinance regulates the forms of relief, which may be opened to an applicant. The applicant is required to obtain leave from the Court of First Instance to seek an order either of *mandamus*, prohibition or *certiorari*.[732] As mentioned above, an applicant may seek a writ of *habeas corpus* from the Court of First Instance in matters concerning detention.[733]

In *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*, the applicant who was born in China in 1951 and resided in Macau since the age of three illegally entered Hong Kong from Macau in 1967.[734] Although having previously been removed from Hong Kong in March 1976 the applicant returned to Hong Kong without authorisation the following month. In October 1980, the Hong Kong Government announced that it would abandon its "reached base" policy in which illegal entrants were permitted to remain provided they reach the urban areas of Hong Kong without being arrested. Although the policy was intended to curb illegal migration from the Chinese mainland, the group of illegal immigrants from Macau sought clarification from the government of their position under the change of policy. A senior immigration officer publicly announced:

> "Those illegal immigrants from Macau will be treated in accordance with procedures for illegal immigrants from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits."[735]

Although the applicant was not present when the announcement was made the applicant saw a television programme on the subject. The applicant registered with the Department of Immigration. Following an interview with an immigration official, the applicant was detained and the Director of Immigration issued an order for removal. An

[732] High Court Ordinance, *supra* n. 680, section 21K
[733] Ibid., section 22A
[734] [1983] 2 AC 629
[735] Ibid., at p. 635

application for an appeal to the Immigration Tribunal was dismissed without hearing. The Court of Appeal granted an order prohibiting the execution of the removal order until the applicant was provided with an opportunity of putting his case to the Director of Immigration. The Attorney-General of Hong Kong appealed to the Privy Council. Although the rules of natural justice generally do not require unauthorised entrants to be afforded a right to a hearing, the facts of this case gave rise to a legitimate expectation that the person subject to the removal order would be granted a hearing. In order for a legitimate expectation to arise there must be a "reasonable basis" for such expectation.[736] The public statement made by a senior immigration official that each case involving "illegal immigrants" from Macau "will be treated on its merits" gave rise to the expectation that the applicant would be provided an opportunity to explain the humanitarian grounds, which could influence the Director's discretion.[737] The applicant had been deprived of the opportunity of explaining that he was a partner in a business and an employer of a number of workers.[738] An order of *certiorari* was granted quashing the removal order.[739]

The issue of legitimate expectations was raised again in judicial review proceedings in *Choy Siu Hung* v. *Attorney General*.[740] The applicant unlawfully entered Hong Kong from mainland China in November 1979. The applicant was granted a right to stay which was periodically extended until November 1985. The applicant returned to China in January 1984 and claimed that he had been detained for a year and that the Chinese authorities seized his Hong Kong identity card and travel documents. The

[736] Ibid., at p. 636
[737] Ibid., at pp. 638-639
[738] Ibid., at p. 639
[739] Ibid., at p. 639
[740] [1987] 3 HKC 365

applicant re-entered Hong Kong without authorisation in September 1986. The Director of Immigration refused to exercise discretion under section 13 of the Ordinance and issued a removal order under section 19(1) (b). The Immigration Tribunal dismissed the appeal under section 53D (1). The applicant claimed that it was "manifestly arbitrary and unreasonable" for the Director not to exercise discretion which would allow him to stay. Orders of *certiorari* and *mandamus* were sought to quash the decision and require the Director to reconsider the case. Jones J rejected the applicant's claim that he had a legitimate expectation to remain notwithstanding that he re-entered Hong Kong unlawfully. A legitimate expectation may arise in cases where a renewal of the right to stay is sought. However, in the present case the applicant sought to remain having entered Hong Kong unlawfully. Jones J noted that under section 13, the Director had an unfettered discretion and that interference by the judiciary was only possible where it could be established that the Director exercised discretion "unfairly or unreasonably or contrary to the rules of natural justice."[741] The Court held that the applicant was unable to overcome the onus of establishing that the decision of the Director "was so unreasonable that no reasonable person could have made it."[742]

Further illustration of the courts refusing to accept legitimate expectations to challenge the issuance of a removal order is provided by the case *Ngo Thi Minh Huong (an infant), by her next friend, Ngo Van Nghia* v. *The Director of Immigration*.[743] The applicant's father a Vietnamese national who came to Hong Kong as a refugee had been granted right to remain and work. The mother of the applicant who remained in Vietnam transferred custody of their daughter to the father following the dissolution of their

[741] Ibid., at p. 370
[742] Ibid., at p. 370
[743] [2000-01] 9 HKPLR 186

marriage. The applicant was arrested for unlawfully entering Hong Kong prior to the commencement of custody proceedings. The Director of Immigration issued a removal order against the applicant, which was not objected to by the UNHCR.

The Court of First Instance dismissed an application for leave to apply for judicial review. Yeung J held that an illegal immigrant has no right to have a hearing in compliance with rules of natural justice prior to the issuance of a removal order. The application of the CRC is subject to a reservation reserving the right to "apply such legislation in so far as it related to the entry into, stay on and departure from the HKSAR of those who did not have the right under the laws of the HKSAR to enter and remain in the HKSAR."[744]

Section 13 of the Immigration Ordinance authorises the Director of Immigration to exercise discretion to enable illegal immigrants to remain in Hong Kong. However, Yeung J recognised that it is for the Director and not the court to determine how discretion should be exercised. It was held that the Director is under no obligation to disclose information concerning reasons for his decision and therefore it could not be argued that it failed to take into account relevant considerations. The legislative regime regulating the lawful entry and stay of persons in Hong Kong on both temporary and permanent basis meant that the applicant, an unauthorised entrant, could not argue that there was a legitimate expectation for her to remain. The removal order was not Wednesbury unreasonable.

Chan To Foon & Others v. *Director of Immigration & Another*[745] is a further example of the rejection of legitimate expectations in judicial review proceedings. In this

[744] Ibid., at p. 190; *Choy Siu Hung*, *supra* n. 740
[745] [2001] 3 HKLRD 109

case, the applicants alleged that legitimate expectations arose from obligations derived from membership in human rights conventional law regimes. The wife of a permanent resident and their two children who were also permanent residents of Hong Kong applied for judicial review of a decision to remove her to mainland China after she had overstayed her visa. The case addressed the refusal of the Director of Immigration to exercise discretion, which would permit the applicant to remain in Hong Kong under section 13 of the Immigration Ordinance. The husband and children were a party to the proceedings as they claimed that their right to protection of the family codified in Article 23 (1) of the ICCPR, Article 10 of the ICESCR and Article 3(1) of the CRC had been breached.

The Court of First Instance rejected the applicant's assertion that Hong Kong's accession to international human rights conventions gave rise to a legitimate expectation that the authorities would respect fundamental rights including the protection of the family. According to Hartmann J, in order for a legitimate expectation to arise, it "must be based upon some clear and unambiguous representation."[746] The ratification of international conventions may give rise to legitimate expectations unless they have been curtailed by acts of the executive or the legislature.[747] Reservations made under international conventions "pre-empt (in respect of all persons) emergence of any legitimate expectation in matters concerning illegal immigrants."[748]

The HKBOR is subject to a reservation which "does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the

[746] Ibid., at p. 128
[747] Ibid., at p. 129 citing *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273
[748] Ibid., at p. 130

application of any such legislation" for persons who are not authorised to enter and remain in Hong Kong.[749] Similarly, Hong Kong's accession to the CRC is subject to a reservation concerning the application of legislative measures for persons not authorised to enter and remain in Hong Kong.[750]

Legitimate expectations were also held not to arise under the ICESCR notwithstanding that no reservation had been made with respect to the instrument. Hartmann J opined that the Covenant should be regarded as a "promotional convention" in which rights and obligations are not required to be implemented immediately. Rather, for state parties it "lists standards which they undertake to promote and... pledge themselves to secure progressively, to the greatest extent possible, having regard to their resources."[751] Hartmann J supports his decision by referring to the geographical location of Hong Kong in the region and the necessity to curb unauthorised immigration to protect the "social fabric" of the territory. This reasoning provides a justification as to why rights codified in the ICESCR are not respected and provides a foundation to reject the existence of legitimate expectations.

> "Hong Kong may therefore recognise the rights protected by the ICESCR. But they are rights which, having regard to this Territory's existing social difficulties, may only be guaranteed progressively; that is, as and when those difficulties are overcome. Matters of immigration, as our courts have recognised, remain a major problem. If unchecked, it is clear that, in the informed opinion of the Director, the problem will threaten the Territory's social fabric. As a result, in respect of immigration matters, the Government of Hong Kong is unable at this time to guarantee the rights protected in the

[749] HKBOR, *supra* n. 677, section 11
[750] CRC, *supra* n. 116, Territorial Application, para.5.2: "The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the Hong Kong Special Administrative Region of those who do not have the right under the laws of the Hong Kong Special Administrative Region to enter and remain in the Hong Kong Special Administrative Region, and to the acquisition and possession of residentship as it may deem necessary from time to time."
http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf
[751] *Chan To Foon*, *supra* n. 744, at p. 131

Covenant when they relate to matters of immigration. I believe it may be taken that it is for this reason that no reservation was entered in respect of the ICESCR: it is an aspirational covenant, not one that creates absolute obligations."[752]

[752] Ibid., at p. 132

9. Malaysia

9.1. Constitutional Authority

As a former British colony, Malaysia's Constitution is modelled on the Westminster parliamentary system of government adhering to the doctrine of separation of powers. The "fundamental liberties" enumerated in Part II include a protection for all persons against deprivation of personal liberty unless it is "in accordance with law."[753] The Constitution also guarantees equality before the law and equal protection of the law.[754] Only citizens are protected against banishment or exclusion from the Federation.[755] States within the Federation, which are "in a special position compared with other states", may impose restrictions on residence and movement.[756] The States of Sabah and Sarawak have control over matters of immigration.[757] A person may either renounce[758] or be deprived[759] of citizenship which may subject those persons to immigration control measures.

The "four walls" doctrine in constitutional interpretation was first pronounced in the Federal Court decision *Government of the State of Kelantan* v. *Government of the Federation of Malaya*.[760] Thomson CJ declared that the "Constitution is primarily to be interpreted within its four walls and not in the light of analogies drawn from other countries such as Great Britain, United States of America or Australia."[761] The common law of the United Kingdom is applicable "so far only as the circumstances of the States of

[753] Art. 5(1), Federal Constitution of Malaysia, 1957
[754] Ibid., Art. 8(1)
[755] Ibid., Art. 9(1)
[756] Ibid., Art. 9(3)
[757] Ibid., Art. 161E(4)
[758] Ibid., Art. 23
[759] Ibid., Arts. 24, 25, 26, 27
[760] [1963] MLJ 355
[761] Ibid., at p. 358

Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances rendered necessary."[762] Moreover, there is a strong presumption that legislation is constitutionally valid.[763] Attempts to broaden the scope of "fundamental liberties" under Part II of the Constitution are undermined by judicial deference to the political branches of government power and a reluctance to have recourse to international law and foreign case law in judicial decision-making.

9.2. General Requirements for Admission and Inspection

The Minister has authority under the Immigration Act to designate approved routes, control posts, landing places airports and points of entry deemed necessary.[764] Non-citizens wishing to enter Malaysia are required to hold or have his or her name endorsed on a valid entry permit or be in possession of a lawfully issued pass unless exempted by the Minister under section 55.[765]

Persons arriving in Malaysia by air, sea and land are required to appear before an immigration officer to determine whether they have the right to enter the country.[766] Persons entering or leaving Malaysia are required to "fully and truthfully" answer all questions and inquiries put forward by an authorised officer and to disclose and produce relevant documents in that person's possession.[767] The answers and documents are

[762] Section 3, Civil Law Act 1956 (revised 1972) Act 67
[763] *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128; *Datuk Haji Harun Bin Haji Idris* v. *Public Prosecutor* [1977] 2 MLJ 155
[764] Section 5(1), Immigration Act 1959/63 (revised 1975) Act 155
[765] Ibid., sections 6(1), 55; An "Entry Permit" is defined as "a permit to enter and remain in Malaysia issued under section 10" whereas a "Pass" is defined as "any Pass issued under any regulations made under this Act entitling the holder thereof to enter and remain temporarily in Malaysia." (section 2(d))
[766] Ibid., sections 24 and 26
[767] Ibid., section 28(1)

admissible as evidence in any proceedings.[768] Immigration officers are authorised to ascertain whether the holder of a document granting the right to enter and stay in Malaysia is a prohibited immigrant as well as to inquire whether any statement made in the application of such document is false or misleading.[769] In cases where an immigration officer considers that a person is prohibited from entering Malaysia that person "shall in accordance with instructions of immigration officer forthwith leave and depart from Malaysia."[770] In situations where the right of a person to enter Malaysia is in doubt, an immigration officer may direct that person to an immigration depot for further examination.[771]

Inquiries may also be made to ascertain whether a person is lawfully present in Malaysia[772] and generally to carry out any duties as an immigration officer.[773] Immigration officers are authorised to question persons "reasonably believed" to be liable for removal under the Act.[774] The Immigration Act vests immigration officers with the same powers as a police officer to enforce provisions of the Act concerning arrest, detention and removal.[775] Statements and documents produced because of such inquiries may be used as evidence in proceedings.[776]

9.2.1. Powers of the State Authority for Sabah and Sarawak

[768] Ibid., section 28(2)
[769] Ibid., section 39A(1)(c)
[770] Ibid., section 26(3)
[771] Ibid., section 27(1)
[772] Ibid., section 39A(1)(d)
[773] Ibid., section 39A(1)(e)
[774] Ibid., section 50(1)
[775] Ibid., section 39(1)
[776] Ibid., sections 39A(3); 50(2)

The Director General is required to comply with directions given by a State Authority of the States of Sabah and Sarawak concerning matters of immigration.[777] The directions given by the State Authority may include whether a Permit or Pass should be issued and if so the duration and conditions of the Permit or Pass.[778] Restrictions may be imposed on making endorsements on a Permit, Pass or Certificate.[779] The State Authority may also give directions to the Director General requiring that he or she cancel any Permit, Pass or Certificate "issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare a specified persons' presence... is unlawful, or to order a specified person's removal from the State."[780]

9.3. Categories of Non-Citizens in an Irregular Situation

9.3.1. Member of a Prohibited Class

A member of a prohibited class of person who is not a citizen of Malaysia is classified as a prohibited immigrant.[781] Unless exempted by the Minister under section 55 prohibited immigrants who are subject of an order prohibiting entry into the Federation or whose pass or permit has been cancelled under section 9 are not permitted to enter or remain in Malaysia.[782] Other prohibited immigrants may be eligible to hold a valid pass

[777] Ibid., section 65
[778] Ibid., section 65(1)(a)
[779] Ibid., section 65(1)(b)
[780] Ibid., section 65(1)(c); In *Pihak Berkuasa Negeri Sabah* v. *Sugumar Balakrishnan* [2002] 3 MLJ 72, the case concerned state authority to issue directions to the Director of Immigration, Sabah to cancel an entry permit of the respondent.
[781] Ibid., section 8(1)(a)
[782] Ibid., section 8(2)(a)

issuable to that category of person under the Regulations.[783] The burden of proof that a person is not a prohibited immigrant lies with that person.[784]

The Director General shall cancel a permit or certificate where he or she is satisfied that the holder is a prohibited immigrant at any time during the period of its validity.[785] The Director General may declare that a person is a prohibited immigrant at any time after entry and the presence of the person in Malaysia is unlawful.[786]

The Immigration Act details an extensive list of persons categorised as a member of a prohibited class based on conventional grounds to justify the exclusion or removal of persons where it is in the interest of national security, protection of public order, economic interests, public health and morals. Members of a prohibited class include persons who are likely to become a public charge,[787] persons who suffer from a mental health condition or a contagious or infectious disease rendering his or her presence "dangerous to the community", or persons who refuse to submit to a medical examination.[788] The conviction of a person for a criminal offence in any country,[789] unlawful entry into Malaysia,[790] persons involved or profiting from prostitution or other "immoral" activity,[791] vagrancy and begging,[792] engagement in political violence, seditious activity or destruction of property will also render those persons a member of a prohibited class.[793]

[783] Ibid., section 8(2)(b)
[784] Ibid., section 8(4)
[785] Ibid., section 14(3)
[786] Ibid., section 14(4)(b)
[787] Ibid., section 8(3)(a)
[788] Ibid., section 8(3)(b)(c)
[789] Ibid., section 8(3)(d)
[790] Ibid., section 8(3)(h)
[791] Ibid., section 8(3)(e)(f)
[792] Ibid., section 8(3)(g)
[793] Ibid., section 8(3)(i)(j)

The Minister also possesses broad powers to classify a person as a prohibited immigrant "in consequence of information received from any source deemed by the Minister to be reliable, or from any government, through official or diplomatic channels."[794] Persons previously removed from another country[795] or persons not in possession of valid travel documents or in possession of forged or altered documents may also be classified as a prohibited immigrant.[796] Family members and dependents of a prohibited immigrant may be classified as a member of a prohibited class.[797] Persons who are prohibited from entering Malaysia either permanently or for a specific period or persons whose pass or permit has been cancelled by the Director General will also be a member of a prohibited class.[798]

9.3.2. Order Issued by the Director General under Section 9

The Director General is authorised where he or she considers that it is "in the interests of public security or by reason of any economic, industrial, social, educational or other conditions" to prohibit "any person or class of persons" from entering or re-entering Malaysia either permanently or for a specified period.[799] The Director General is authorised in his or her "absolute discretion" to cancel at any time a Pass authorising entry and stay in Malaysia.[800] Similarly, a permit may be cancelled at any time if the Director General is satisfied that the presence of that person is "prejudicial to public order, public security, public health or morality."[801] The term "satisfied" in section

[794] Ibid., section 8(3)(k)
[795] Ibid., section 8(3)(l)
[796] Ibid., section 8(3)(m)
[797] Ibid., section 8(3)(n)
[798] Ibid., section 8(3)(o)
[799] Ibid., section 9(1)(a); *See also*, section 9A
[800] Ibid., section 9(1)(b)
[801] Ibid., section 9(1)(c)

9(1)(c) necessitates an objective as opposed to subjective assessment.[802] Spouses and dependents are required to be removed where the primary pass or permit holder has had their visa cancelled.[803]

The abovementioned class of persons who are subject to an order made by the Director General under section 9 are classified as prohibited immigrants.[804] Persons subject to an order referred to in section 9 are prohibited from entering or remaining in Malaysia after they become a member of the prohibited class.[805] The holder of a Pass or Permit, which has been cancelled under subsections 9(1) (b) and 9(1) (c) is required to be removed from Malaysia in accordance with the Act.[806] Persons entering or re-entering in Malaysia in contravention of an order made by the Director General prohibiting a class of persons entering or remaining in Malaysia under section 9(1) (a) are required to be removed.[807] Orders made by the Director General under section 9 are required to be exercised personally.[808] Persons who are dissatisfied with those orders have a right to appeal to the Minister in accordance with prescribed procedure.[809]

9.3.3. False Representation or Concealment of a Material Fact

The Director General may cancel a permit or certificate where inquiries made on arrival reveal that the documentation was issued because of false representation or concealment of a material fact.[810] The Director General may declare that a material

[802] *Sugumar Balakrishnan* v. *Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, 309
[803] Immigration Act, *supra* n. 764, section 9(6)
[804] Ibid., section 8(3)(o)
[805] Ibid., section 8(2)(a)
[806] Ibid., section 9(4)(a)
[807] Ibid., section 9(5)
[808] Ibid., section 9(7)
[809] Ibid., section 9(8)
[810] Ibid., section 14(2)

statement made in relation to an application for a permit or certificate was false or misleading at any time following entry and that the presence of that person in Malaysia is unlawful.[811] Persons who have had a permit or certificate cancelled, or who the Director General has made a declaration under section 14(4) are not permitted to remain in Malaysia.[812]

9.3.4. Expiration of Pass or Notification of Cancellation of Pass

Persons who overstay the period allowed by their pass or who are notified of the cancellation of their pass are not permitted to remain in Malaysia.[813] In *J.P. Berthelsen* v. *Director General of Immigration, Malaysia & Ors*,[814] the respondent issued a notice of cancellation of the appellant's employment pass authorised by section 19 of the Immigration Regulations. It was stated that the appellant had "contravened or failed to comply with the Immigration Act and the Regulations, that he had failed to comply with the conditions imposed in respect of the Pass or the instructions endorsed thereon and his presence in the Federation was or would be prejudicial to the security of the country."[815]

In granting an order of *certiorari* to quash the cancellation of the employment Pass, the Supreme Court held that the respondent was required to observe the rules of natural justice. This would allow the appellant an opportunity to challenge the grounds on which the order of cancellation was based and to raise matters of special hardship on the appellant should the order stand. In the judgment delivered by Abdoolcader SCJ, it was noted that "the appellant was lawfully in the country under the sanction of an

[811] Ibid., section 14(4)
[812] Ibid., section 15(1)(a)(b)
[813] Ibid., section 15(1)(c)(d)
[814] [1987] 1 MLJ 134
[815] Ibid., at pp.134-135

employment pass validly issued for a stipulated period, and he clearly had a legitimate expectation to be entitled to remain in this country at least until the expiry of the prescribed duration, and any action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances."[816]

9.4. Detention

The conditions in Malaysia's immigration detention centres have been described by governmental, intergovernmental and non-governmental sources to be overcrowded due in part to delays in removal.[817] Unlike other jurisdictions examined thus far, the Malaysian domestic regulatory framework imposes extensive criminal sanctions for breaches of many of the provisions pertaining to admission, inspection and stay. Although this research is concerned with the parameters of executive authority to detain unauthorised entrants the liberal inclusion of criminal offences in the Immigration Act which results in the incarceration of a greater number of non-citizens directly impacts on the conditions of immigration detention and by extension raises concern as to whether detainees are treated with dignity and humanity.[818]

[816] Ibid., at p. 137

[817] United States of America, Department of State, "2008 Country Reports on Human Rights Practices - Malaysia," http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119046.htm; SUHAKAM Human Rights Commission of Malaysia, "Annual Report 2007," at p. 70 http://www.suhakam.org.my/214

[818] The following is sample of criminal offences for the most common immigration control breaches. It has been argued that the liberal inclusion of criminal offences in the Immigration Act, *supra* n. 764, has resulted in overcrowding in immigration detention centres. For example, section 6(3) provides that entering or attempting to enter Malaysia without the prescribed documentation constitutes an offence. Section 5(2) provides entering or departing Malaysia other than from the abovementioned-approved places constitutes an offence under the Act unless "compelled by accident or other reasonable cause." Section 24(2) provides that the failure to present oneself for inspection before an immigration officer or leaving a place of examination without authorisation and refusing or neglecting to return after being informed that they are prohibited from entering Malaysia constitutes an offense under the Act.

As a means to prevent overcrowding, SUHAKAM, the Malaysian Human Rights Commission recommends that undocumented migrants should be repatriated rather than be detained for immigration offences.[819] A number of sources have referred to the poor sanitary conditions in detention centres and insufficient provision of food, water and medical care leading to the death of detainees.[820] Officers are alleged to have been involved in the rape of detainees, including children[821] and subject those persons to physical abuse including corporeal punishment as authorised by legislation for persons who are in breach of immigration laws.[822]

Immigration officers are authorised without warrant to arrest and detain persons reasonably believed to be liable for removal for a period of up to 30 days pending a decision to remove.[823] The Director General is authorised to detain a person identified as a prohibited immigrant following inquiries made on arrival and return that person to the place of embarkation or country of birth or citizenship.[824] Persons subject to a removal order may be detained "for such period as may be necessary for the purpose of making arrangements for his removal."[825] Places of detention include prisons, police stations and

[819] SUHAKAM Human Rights Commission of Malaysia, "Annual Report 2008," at p. 33 http://www.suhakam.org.my/214

[820] International Federation for Human Rights, "Malaysia: Death of 2 Burmese indicative of state of detention places in Malaysia," 26 May 2009, http://www.unhcr.org/refworld/docid/4a2cd0d2b.html; SUHAKAM Report 2008, ibid., at p. 45, http://www.suhakam.org.my/214

[821] Maruja M.B. Asis, "Borders, Globalisation and Irregular Migration in Southeast Asia," at p.200 in Aris Ananta and Evi Nurvidya Arifin (eds.), *International Migration in Southeast Asia*, (Singapore: Institute of Southeast Asian Studies, 2004)

[822] *See*, "Inside Malaysia's 'Hell Holes' An Outcry over Treatment of Migrant Workers," Asiaweek, Vol. 21, issue: 33(August 25, 1995) 31; *See also*, Amnesty International, "Photographic evidence shows the cruelty of caning In Malaysia", 25 August 2009, http://www.unhcr.org/refworld/docid/4a978361c.html; *See also*, SUHAKAM Report 2008, *supra* n. 819, at pp. 45-46 where the Commission noted that the detainees alleged that mistreatment led to a riot at the Lenggeng Immigration Detention Centre

[823] Immigration Act, *supra* n. 764, section 35

[824] Ibid., section 31

[825] Ibid., section 34(1)

immigration depots.[826] At the discretion of the Director General detained persons who are eligible to lodge an appeal under section 33 may be released pending the determination of the appeal.[827]

Statutory provisions authorising detention for offences against the Immigration Act must be read in conjunction with the Constitution which states "no person shall be deprived of... personal liberty save in accordance with law."[828] Persons complaining that they are unlawfully detained may apply to a court for a writ of *habeas corpus* to determine whether they should be released.

> "Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before a court and release him."[829]

The grant of a writ of *habeas corpus* is a right not a discretion of the court.[830] However, the inclusion of an ouster clause in the Immigration Act expressly provides that there shall be no judicial review including consideration of petitions for writs of *habeas corpus* of a decision made by the Minister or the Director-General.[831] As is the case in many jurisdictions, the judiciary where possible will accommodate a legislative provision, which appears to the incompatible with the Constitution. However, the principle of constitutional supremacy demands that where no such accommodation can be achieved, the courts either will, strike down a provision or be inclined to favour an

[826] Ibid., section 34(3)
[827] Ibid., section (2)
[828] Federal Constitution of Malaysia, *supra* n. 753, Art. 5
[829] Ibid, Art.5(2)
[830] Jain, M.P. *Administrative Law of Malaysia and Singapore* , 2nd ed., (Singapore: Malayan Law Journal, 1989) at p.440
[831] Immigration Act, *supra* n. 764, section 59A(2)(c)

interpretation, which is compatible with the Constitution even if the true intention of parliament is in fact apparent.[832]

In *Andrew S/O Thamboosamy* v. *Superintendent of Pudu Prisons*[833] the appellant who had renounced his citizenship unlawfully re-entered Malaysia on a Malaysian passport without a valid Pass as required by section 6 (1) (c) of the Act. The Court rejected the appellant's assertion that there was an implied right to a hearing before an order of detention was issued and that the order of detention was required as a matter of law to be served on the appellant.[834] The prolonged duration of detention resulting from the appellant's refusal to sign an application for travel documents to facilitate deportation was raised as the primary ground of appeal. The Court acknowledged that Article 5 of the Constitution protects unlawful deprivation of personal liberty and therefore any power to detain "must be construed strictly and in cases of doubt or ambiguity the Court should lean in favour of the subject."[835] However, the Court viewed that the problem in dealing with "illegal immigrants" is essentially a "matter of public policy to be decided by Parliament and by the Executive."[836] Although detention under section 34(1) is authorised "for such period as may be necessary for the purpose of making arrangements for... removal" the prolonged duration of detention due to another country not receiving the unlawful entrant does not necessarily render detention unlawful.[837]

[832] *See*, Crane, Cheryl et al. "Parliamentary Supremacy in Canada, Malaysia and Singapore" in *Asia-Pacific Legal Development* (Vancouver: UBC Press, 1998); *See also*, Kennedy J in *Zadvydas*, *supra* n. 492, where his Honour asserted that the majority in the US Supreme Court favoured an interpretation of a statutory provision, which avoided a constitutional question.
[833] [1976] 2 MLJ 156
[834] Ibid., at p. 157
[835] Ibid., at p. 158
[836] Ibid., at p. 158
[837] Ibid., at p. 158

In a contrasting case, *Lui Ah Yong* v. *Superintendent of Prisons*[838] the applicant sought an order of *habeas corpus* to secure his release from detention after a period of almost 9 years due to his unlawful entry into the Federation. The applicant asserted that section 34 (1) was not intended to authorise authorities to detain persons indefinitely and due to the inordinate length of detention it had subsequently become unlawful.[839] Arulanandom J noted that detention under section 34(1) was for the express purpose of arranging for removal rather than for "administrative expediency."[840] The Order of Removal made by the Controller of Immigration under section 56(2) stated: "detention is considered necessary until arrangements can be made for your return to your place of embarkation or country of citizenship."[841] Arulanandom J concluded that "powers of detention under section 34(1) are clearly and unambiguously limited... for the purposes of removal to one of two places, i.e. the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated continued detention *a fortiori* becomes unlawful."[842]

In *Re Meenal*, family life considerations were raised in *habeas corpus* proceedings.[843] The applicant an Indian national who was the wife of a Malaysian citizen surrendered her red identity card, which granted a right to permanent residence, returned to India and elected not to obtain a re-entry permit. The applicant returned to Malaysia on

[838] [1977] 2 MLJ 226
[839] Ibid., at p. 227
[840] Ibid., at p. 227
[841] Ibid., at p. 227
[842] Ibid., at p. 228
[843] [1980] 2 MLJ 299

a social visit pass, which was extended periodically. The immigration authority then issued a special pass, which was also extended periodically for arranging to leave Malaysia. Following the expiration of the special pass, an order of detention was made under section 34 pending removal of the applicant due to her unlawful presence in Malaysia under section 33(1). The applicant sought an order of *habeas corpus* from the Court requiring the respondents to show reason why the applicant should not be released.

The applicant argued that Article 15 of the Malaysian Constitution governing registration of citizenship for wives of Malaysian citizens conferred a right on the non-citizen wife to be issued with the necessary documentation permitting entry and stay so that she could comply with the two year residence requirement prior to the application of registration for citizenship.[844] The Court rejected the argument by noting that under Article 15(1) of the Constitution the applicant was required to establish that she intended to reside in Malaysia permanently and that she is a person of good character. The right under Article 15(1) accrues once all elements are established. The Court also recognised that although the Constitution is the supreme law of Malaysia, provisions governing citizenship should be adjudicated with reference to laws and policy governing immigration. The Court rejected the applicant's assertion that as a wife of a citizen who has previously held permanent residency that she would be excluded from the reach of section 15(1) of the Immigration Act as she is "otherwise entitled or authorised to remain in Malaysia under the Act." The argument was rejected, as there was no provision in the

[844] Federal Constitution of Malaysia, *supra* n. 753, Art.15(1) provides: "Subject to Article 18, any married woman whose husband is a citizen is entitled, upon making application to the Federal Government, to be registered as a citizen if the marriage was subsisting and the husband a citizen at the beginning of October 1962, or if she satisfies the Federal Government –
(a) that she has resided in the Federation throughout the two years preceding the date of the application and intends to do so permanently; and
(b) that she is of good character."

Immigration Act, which would "entitle" or "authorise" the applicant to remain in Malaysia.[845]

The judiciary in Malaysia has generally deferred to the executive and the legislature on matters of public policy including the detention of unauthorised entrants. While the courts contend that such matters are reserved for the political branches of government power, widespread criticism by human rights groups, concerning the conditions in Malaysian immigration detention centres warrants greater intervention by the judiciary to determine compliance with domestic constitutional guarantees and international norms protecting personal liberty and security of person.

9.5. Removal

The practice of returning non-citizens to countries in the region experiencing political turmoil or countries governed by oppressive regimes, as is the case in the separatist regions of Indonesia and Myanmar respectively, has been condemned by human rights organisations where the life and freedom of those persons are threatened. The geographical proximity of Malaysia to these countries coupled with its porous borders resulting in high levels of unauthorised migration is distinguishable from the migratory movements experienced by most of the other countries examined in this research. The government's immigration control response to the phenomenon of irregular migration is therefore heavily influenced by geopolitical considerations.

The Immigration Act authorises the Director General to remove "illegal immigrants"[846] being those persons convicted of an offence relating to entry,[847] entering

[845] *Re Meenal*, *supra* n. 843, at p. 302
[846] Immigration Act, *supra* n. 764, section 32

Malaysia without a valid entry permit or pass,[848] entry as a prohibited immigrant,[849] and persons in contravention of an order made by the Director General in which a pass or permit is cancelled.[850] The Director General is authorised to order the removal of non-citizens who unlawfully enter, attempt to enter or unlawfully remain in Malaysia regardless as to whether any proceedings are being taken against that person.[851]

The Immigration Act authorises the Director General to remove persons whose presence in Malaysia is unlawful due to a contravention of section 9 (prohibition of entry and cancellation of pass or permit) and section 15 (unlawful entry or presence in Malaysia).[852] In limited cases, the order for removal may be appealed to the Minister.[853] An order of removal may not be appealed where the presence of a person in Malaysia is unlawful due to a contravention of section 9 authorising the Director General to issue an order to cancel a pass or permit or to prohibit the entry of any person or class of persons.[854] A person whose presence in Malaysia is unlawful due to the expiration of pass as referred to in section 15 (1)(c) and section 60 are also prohibited from lodging an appeal to the Minister.[855] Persons who have unlawfully re-entered Malaysia shall be removed again.[856]

Non-citizens who are unable to remain in Malaysia without being a charge upon the public or charitable institution or to cover the cost of return travel to country of birth or citizenship may apply to the Malaysian Government to cover the cost of

[847] Ibid., section 5
[848] Ibid., section 6
[849] Ibid., section 8
[850] Ibid., section 9
[851] Ibid., section 56(2); *Andrew S/O Thamboosamy*, *supra* n. 833
[852] Ibid., section 33(1)
[853] Ibid., section 33(2)
[854] Ibid., section 33(2)
[855] Ibid., section 33(2)
[856] Ibid., section 36

repatriation.[857] Persons falling into this category are recognised by the Act to be a prohibited person.[858] The return to Malaysia of repatriated persons is conditional on those persons obtaining the sanction of the Director General including the repayment of expenses associated with the cost of repatriation.[859]

9.5.1. Appeal

Persons who have had their permit or certificate cancelled by the Director General under subsections 14(2) and (3) of the Act, or whose presence is declared by the Director General to be unlawful under section 14 (4) shall be informed of the grounds on which the cancellation or declaration is based.[860] The person affected by the cancellation or declaration may appeal to the Minister whose decision is final.[861]

Section 59 of the Immigration Act excludes the right to be heard where an order has been made against a person or any class of person:

> "No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under the this Act."[862]

As a general principle of public law, Parliament may exclude rules of natural justice where there has been express legislative intent.[863] The abovementioned provision excludes the *audi alteram partem* (fairness) pillar of natural justice.[864] Acts of Parliament are presumed to be constitutional with the burden on those attempting to prove otherwise.

[857] Ibid., section 46
[858] Ibid., section 8(3)(a), 8(3)(g)
[859] Ibid., section 46(3)
[860] Ibid., section 14(5)
[861] Ibid., section 14(5)
[862] Ibid., section 59
[863] *Sugurmar Balakrishnan*, *supra* n. 802, at p. 311
[864] Ibid., at p. 312

If reasons for a decision are later disclosed, notwithstanding that there was no obligation on the administrative authority to make such a disclosure, and those reasons do not conform to the considerations referred to in the legislation authorising administrative action then those decisions may be examined before a court of law.[865] The cancellation of the appellant's entry permit due to his "private morals" was not a consideration prescribed by section 9(1)(c) and therefore the decision to cancel was not in accordance with law.[866]

The Federal Court on appeal recognised that there is a trend to provide reasons in administrative decision-making due to "an increased openness in matters of government and administration" however, this does not alter the established position under the common law that there is no duty to provide reasons.[867] The State Authority issued the Director of Immigration with directions to cancel the respondent's entry permit. According to the Federal Court it was not "reasonably expected" that the State Authority would give reasons to the Director and the Director therefore cannot be expected to provide reasons to the respondent.[868] The Federal Court held that reasons provided by the State Authority during court proceedings could not be subject to examination as the "intention of the legislature in giving the power to the state authority to direct the cancellation of the entry permit would be rendered nugatory."[869]

9.6. Judicial Review

[865] Ibid., at p. 319
[866] Ibid., at p. 320
[867] *Pihak Berkuasa Negeri Sabah*, *supra* n. 780, at p. 98 citing *R* v. *Royal Borough of Kensington and Chelsea; ex p Grillo* (1996) 28 HLR 94
[868] Ibid., at p. 98
[869] Ibid., at p. 99

The Immigration Act expressly excludes judicial review of administrative acts and decisions. Section 59A of the Immigration Act provides:

> "(1) There shall be no judicial review any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysia State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
> (2) In this section, 'judicial review' includes proceedings instituted by way of-
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
> (b) an application for a declaration or an injunction;
> (c) any writ of habeas corpus; or
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysia State, the State Authority, by any provisions of this Act."

Privative clauses are enacted to prevent administrative acts and decisions being subject to "curial review."[870] Privative clauses will shield administrative action from judicial oversight where the decision-maker acts "in accordance with law... and is consonant with, the constitutional right of a person to approach the judicial arm of Government to seek redress for alleged wrongs."[871] Otherwise, administrative acts or decisions authorised by a normal statutory provision in conflict with the supreme law of the Federation is subject to judicial scrutiny.

In *Sugurmar Balakrishnan* v. *Pengarah Imigresen Negeri Sabah & Anor*, the Court of Appeal acknowledged that it was arguable that ouster clauses are incompatible with the constitutional guarantee protecting personal liberty, which would allow an aggrieved individual to access and seek relief from an independent judiciary.[872] As the Constitution is "the supreme law of the Federation", legislation that is inconsistent with

[870] *Sugumar Balakrishnan*, *supra* n. 802, at p. 304
[871] Ibid., at p. 304
[872] Ibid., at p. 308; Federal Constitution of Malaysia, *supra* n. 753, Art.5(1)

the Constitution shall be void "to the extent of the inconsistency."[873] However, where possible the inconsistency between the protection of constitutional rights and the authority of the legislature to exclude judicial oversight should be resolved by complying with the "rule of harmonious construction". This principle of statutory interpretation allows an "impugned provision to operate in harmony with the Constitution" rather than striking down the statutory provision altogether.[874]

The judiciary will generally not intervene in cases involving matters of national security or national interests. The courts have deemed that such matters are "best left to the Executive arm of the Government to deal with according to the exigencies of the particular case and based upon information that is exclusively available to it."[875] Privative clauses will not protect administrative decisions involving errors of law from judicial oversight, as the decision-maker would have exceeded his or her jurisdiction.[876]

Arbitrariness in administrative decision-making is incompatible Article 8(1) of the Constitution, which provides; "All persons are equal before the law and entitled to the equal protection of the law." Judicial review is not limited to matters of process otherwise referred to as "procedural impropriety" but extends to matters of substance enabling a court to review decisions on grounds such as "illegality" and "irrationality" otherwise referred to as "Wednesbury unreasonableness."[877] The Court of Appeals concluded that in the exercise of administrative functions the relevant decision-making authority must comply with its duty to act fairly which encompasses both procedural fairness and

[873] Ibid., Federal Constitution of Malaysia, Art. 4(1)
[874] *Sugumar Balakrishnan*, *supra* n. 802, at p. 308 citing *Tasmania* v. *The Commonwealth* (1904) 1 CLR 329, 357; *See also*, ibid., Article 4(1) of the Constitution which states: "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."
[875] *Sugumar Balakrishnan*, ibid., at p. 309
[876] Ibid., at p. 308
[877] Ibid., at p. 321; *R Rama Chandran* v. *The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145

substantive fairness.[878] However, the Federal Court on appeal has ruled that the amendment of section 59A which limited the powers of judicial review to matters of procedure and expressly excluded proceedings instituted by way of an application, writ or any other suit of action referred to in section 59A(2) was conclusive as to the intention of Parliament:

> "In our view, Parliament having excluded judicial review under the Act, it is not possible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised."[879]

[878] Ibid., at p. 323
[879] *Pihak Berkuasa Negeri Sabah*, supra n. 780, at p. 92

10. Singapore

10.1. Constitutional Authority

Singapore gained its sovereignty when it seceded from the Federation of Malaya on 9 August 1965.[880] Due to its colonial background under British rule, both countries have adopted a common law legal system and share an almost identical Constitution. The Constitution of the Republic of Singapore is modelled on the Westminster parliamentary system of government adhering to the doctrine of separation of powers. Legislative powers were transferred to the Head of State and Legislature of Singapore after it seceded from Malaysia in 1965.[881] The judicial power is vested in the Supreme Court and as the Constitution is the supreme law of the Republic any other enacted law inconsistent with the Constitution is void to the extent of the inconsistency.[882]

The "fundamental liberties" outlined in Part IV of the Constitution should not be regarded as "stick and carrot privileges" but rather as the supreme law, constitutional rights are "inalienable".[883] The right to equality before the law and equal protection of the law is enshrined in the Constitution.[884] Individual rights conferred by the Constitution must be reconciled with the "sovereignty, integrity and unity of Singapore" which is regarded as "the paramount mandate of the Constitution."[885] As an exercise of sovereign

[880] Section 3, Republic of Singapore Independence Act, Act 9 of 1965, provides, "The Yamg di-Pertuan Agong of Malaysia shall with effect from Singapore Day cease to be the Supreme Head of Singapore and his Sovereignty and jurisdiction and power and authority, executive or otherwise, in respect of Singapore shall be relinquished and shall vest in the Head of State."
[881] Ibid., section 5
[882] Constitution of the Republic of Singapore, 1965, Arts. 4, 93
[883] *Taw Cheng Kong* v. *Public Prosecutor* 1 SLR 943, at p. 965
[884] Constitution of the Republic of Singapore, *supra* n. 882, Art. 12(1)
[885] *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR 662, at p. 684

power, the state is therefore authorised "to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery".[886]

The courts have recognised that constitutional interpretation is not limited by "normal rules and maxims" as employed in the interpretation of ordinary legislation but "as *sui generis*, calling for principles of interpretation of its own, suitable to its character."[887] The Constitution, as a legal instrument protecting fundamental liberties, respect must be accorded to the language adopted and to the "traditions and usages which have given meaning to that language."[888] The courts therefore should adopt "a generous interpretation of avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the (fundamental liberties) referred to."[889]

Although the courts have been willing to call for a "generous" interpretation of fundamental liberties, they have been reluctant to have recourse to external influences especially foreign case law and international law in constitutional interpretation. For instance, in *J.B. Jeyaretnam* v. *Lee Kuan Yew*,[890] the Court of Appeal in determining the ambit of protection of free speech under the Constitution refused to be influenced by European and US case law in which it was held that comments made concerning public or elected officials was an exception to the law of defamation.[891]

[886] Ibid., at p. 684 citing *Commissioner, HRE* v. *LT Swamiar* 1954 2 SC 282
[887] *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 MLJ 64, at p. 70 citing *Minister of Home Affairs* v. *Fisher* [1980] AC 319
[888] *Taw Cheng Kong*, supra n. 883, at p. 954 citing *Minister of Home Affairs v Fisher* [1980] AC 319, Lord Wilberforce who delivered the opinion of the Privy Council
[889] Ibid., at p. 955 citing *Minister of Home Affairs* v. *Fisher* [1980] AC 319; *Ong Ah Chuan*, *supra* n. 887, at p.70
[890] [1992] 2 SLR 310
[891] Ibid., at pp. 332-333

Following the abolishment of the right of appeal to the Privy Council in April 1994, the Singapore Court of Appeal is not bound by the doctrine of *stare decisis*.[892] Moreover, following the enactment of the Application of English Law Act, limitations were imposed on the application of the English common law:

> "(1) The common law of England (including the principles and rules of equity), so far as it is part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require."[893]

Consistent with the position adopted in the United Kingdom, Singapore follows the dualist theory concerning the reception of international law in domestic law as the Constitution is silent on this issue.[894] In the absence of an express requirement to apply international and foreign case law, the courts have generally followed the same approach as in Malaysia in which the Constitution is primarily interpreted within its "four walls".[895]

> "Standards set down in one country cannot be blindly or slavishly adopted and/or applied without a proper appreciation of the context in another. It is of no assistance or relevance to point to practices or precedents in any one particular country and to advocate that they must be invoked or applied by the court in another. The margins of appreciation for public conduct vary from country to country as do their respective cultural, historical and political evolutions as well as circumstances. Standards of public order and conduct do reflect differing and at times greatly varying value judgements as to what may be tolerable or acceptable in different and diverse societies."[896]

[892] Practice Statement on Judicial Precedent [1994] 2 SLR 689 cited in Eugene Kheng-Boon Tan, "Law of Values in Governance: The Singapore Way," 30 *Hong Kong Law Journal* 91 (2000) at p. 96
[893] Section 3, Application of English Law Act, Cap 7A, Act 35, 1993
[894] C.L. Lim, "The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v. Public Prosecutor," *Singapore Journal of Legal Studies* 218 (2005), at pp. 228-229
[895] *Chan Hiang Leng Colin*, *supra* n. 885, at p. 681 citing *Government of the State of Kelantan*, *supra* n. 760
[896] *Chee Siok Chin* v. *Minister for Home Affairs* [2006] 1 SLR 582

In addition to the general reluctance of the judiciary to have recourse to external sources, which would allow a more liberal interpretation on the scope of fundamental liberties, there is also a "strong" presumption that an enacted provision is constitutionally valid posing an additional barrier for an individual challenging an impugned provision.[897] Thio observes that a "robust reading of rights" has not been consistently realised where the "courts have embraced high positivism and adopted a deferential attitude toward state organs on the issue of the scope of permissible restrictions on rights."[898]

Judicial deference to the political branches of government is consistent with the position of cultural relativists who favour curtailing fundamental liberties where "Asian" communitarian values deemed necessary for economic prosperity and stability are undermined, as is the case where public order or morality is threatened.[899] The objective in promoting economic and social rights is closely associated with the utilitarian purpose of developing a secure, stable and prosperous society rather than emphasising respect for civil and political rights, which is primarily concerned with the interests of the individual.[900]

> "In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore ... The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual."[901]

[897] *Taw Cheng Kong*, *supra* n. 883, at p. 954
[898] Li-ann Thio, "Reading Rights Rightly: The UDHR and It's Creeping Influence on the Development of Singapore Public Law," *Singapore Journal of Legal Studies* 264 (2008), at p. 266
[899] *See*, Tai-Heng Cheng, "Central Case Approach to Human Rights: Its Universal Application and the Singapore Example," 13 *Pacific Rim Law & Policy Journal* 257 (2004) in which the author rejected the assertion that limiting political rights is necessary for economic development.
[900] Kheng-Boon Tan, *supra* n. 892, at p. 100
[901] Prime Minister Lee Kuan Yew, speech at the Opening of the Singapore Law Academy, 31 August 1990, reproduced in 2 *Singapore Academy of Law Journal* 155 (1990) at p. 156 cited in Thio, *supra* n. 898, at pp. 274-275

10.2. General Requirements for Admission and Inspection

The Minister of Home Affairs is authorised to declare "immigration control posts, landing places, airports, train checkpoints or points of entry" considered necessary for the entry of persons into Singapore under the Immigration Act.[902] Persons entering or seeking to enter Singapore are required to present themselves for inspection at one of the abovementioned locations "unless compelled by accident or other reasonable cause."[903]

Non-citizens wishing to enter Singapore are required to hold a valid entry or re-entry permit, to have his or her name endorsed on the entry or re-entry permit or be in possession of a valid pass unless exempted by the Minister under section 56 of the Act.[904] There is a presumption that where a person has failed to produce documentation authorising entry and stay when requested by a police or immigration officer then that person has entered, re-entered or remained in Singapore unlawfully.[905] Similarly, there is a presumption that persons located within the "waters of the port" are attempting to enter Singapore in contravention of section 6 (1)(c) where that person is unable or unwilling to produce travel documentation, there is no "visible means of subsistence", and there is an attempt to conceal that person's identity.[906]

Persons arriving in Singapore by sea, air and train are required to appear before an immigration officer at a time and place directed by the officer.[907] Persons arriving by land or at a location other than an authorised landing place or airport are required to proceed to the nearest immigration control post or immigration officer for examination.[908] Persons

[902] Immigration Act Cap 133, 1963, section 5(1)
[903] Ibid., section 5(2)
[904] Ibid., section 6(1)
[905] Ibid., section 57(5)
[906] Ibid., section 6(4)
[907] Ibid., sections 24(1), 25(1) and 25A(1)
[908] Ibid., section 26(1)(2)

entering or leaving Singapore are required to "fully and truthfully" answer all questions and inquiries put forward by an immigration officer or police officer for the purpose of establishing among other factors that person's identity, nationality and occupation and to disclose and produce relevant documents in that person's possession concerning such matters.[909] The answers and documents are admissible as evidence in any proceedings against that person.[910]

In cases where an immigration officer has found a person to be prohibited from entering Singapore under the Act then that person shall be informed of the finding and confined to ensure that the person departs the Republic.[911] Immigration officers are authorised to take the necessary steps "including the use of force" to ensure that persons subject to examination or who are prohibited from entering Singapore comply with instructions.[912]

Offences associated with irregular admission include, making false reports, false statements or false representations in relation to obligations imposed by the Act or Regulations[913] and actively or passively restricting or obstructing immigration officers in carrying out their duties.[914] Other offences include using entry, re-entry, passes or certificates not lawfully issued to that person,[915] making false statements to obtain entry or re-entry permits, passes or certificates,[916] and the use or possession of forged or unlawfully altered entry or re-entry permits, passes or certificates.[917]

[909] Ibid., section 28(1)
[910] Ibid., section 28(2)
[911] Ibid., sections 24(2); 25(2); 25A(2); 26(3)
[912] Ibid., sections 24(5), 25(5), 25A(5)
[913] Ibid., section 57(1)(f)
[914] Ibid., section 57(1)(g)
[915] Ibid., section 57 (1)(j)
[916] Ibid., section 57(1)(k)
[917] Ibid., section 57(1)(l)

10.3. Categories of Non-Citizens in an Irregular Situation

10.3.1. Member of a Prohibited Class

Prohibited immigrants are non-citizens who are defined in section 8(3) of the Act or a person who in the opinion of the Controller of Immigration is a member of a prohibited class.[918] This section closely resembles the counterpart provision in the Malaysian Immigration Act.[919] Section 8(3) of the Immigration Act identifies members of prohibited classes to include persons who are likely to become a public charge,[920] persons who suffer from a mental health condition or a contagious or infectious disease rendering his or her presence "dangerous to the community", or persons who refuse to submit to a medical examination.[921] The Immigration Act expressly refers to persons who suffer from HIV/AIDS as being a member of a prohibited class.[922] The conviction of a person for a criminal offence in any country,[923] unlawful entry into Singapore,[924] persons involved or profiting from prostitution or other "immoral" activity,[925] vagrancy and begging,[926] engagement in political violence, seditious activity or destruction of property will also render those persons a member of a prohibited class.[927]

The Minister also possesses broad powers to classify a person as a prohibited immigrant "in consequence of information received from any source or from any

[918] Ibid., section 8(1)
[919] Immigration Act 1959/63 (revised 1975) Act 155 , *supra* n. 764, section 8(3)
[920] Ibid., section 8(3)(a)
[921] Ibid., section 8(3)(b)(c)
[922] Ibid., section 8(3)(ba)
[923] Ibid., section 8(3)(d)
[924] Ibid., section 8(3)(h)
[925] Ibid., section 8(3)(e)(f)
[926] Ibid., section 8(3)(g)
[927] Ibid., section 8(3)(i)(j)

government through official or diplomatic channels."[928] Persons previously removed from another country[929] or persons not in possession of valid travel documents or in possession of forged or altered documents may be classified as a prohibited immigrant.[930] Family members and dependents of a prohibited immigrant may be classified as a member of a prohibited class.[931] Where the Minister has issued an order prohibiting persons from entering Singapore either permanently or for a specified period, or limiting persons of a particular class from entering and remaining in the Republic this may also result in those persons being classified as a member of a prohibited class.[932]

The burden of proof that a non-citizen is not a prohibited immigrant lies with that person.[933] A permit or certificate, which has been issued, may be cancelled where the Controller is satisfied that the holder is a prohibited immigrant.[934] The person affected shall be informed of the grounds justifying the cancellation.[935] An appeal may be made to the Minister and his or her decision shall be final.[936]

10.3.2. Additional Authority of Public Officials to Determine Irregular Status

The Minister is authorised where he or she considers it "expedient to do so in the interests of public security or by reason of any economic, industrial, social, educational or other conditions" to prohibit the entry or re-entry into Singapore of any person or class of

[928] Ibid., section 8(3)(k)
[929] Ibid., section 8(3)(l)
[930] Ibid., section 8(3)(m)
[931] Ibid., section 8(3)(n)
[932] Ibid., section 8(3)(o)
[933] Ibid., section 8(4)
[934] Ibid., section 14(3)
[935] Ibid., section 14(5)
[936] Ibid., section 14(6)

person, other than a citizen of Singapore, either for a specified period or permanently.[937] The Minister may restrict the number of persons of any class entering Singapore during the period of the order[938] and restrict the period which any person or class of person who enters or re-enters Singapore is allowed to remain.[939] The Controller may cancel a permit or certificate where inquiries authorised by section 24, 25, 25A, 26 or "from other information" reveal that the documentation was issued because of false representation or concealment of a material fact.[940]

10.4. Detention

The "fundamental liberties" outlined in Part IV of the Constitution, include the prohibition on deprivation of liberty unless it is "in accordance with law."[941] Persons claiming to be unlawfully detained may seek an order from the High Court to be produced before the Court and released if the detention is deemed unlawful.[942] The right to personal liberty will not invalidate laws in force prior to the commencement of the Constitution authorising arrest and detention where it is in the "interests of public safety, peace and good order."[943]

As is the case in Malaysia, the Singaporean legislative framework details an extensive list of immigration offences, which often leads to the imposition of custodial sentences. As mentioned in the preceding chapter although this research is concerned with the parameters of executive authority to detain unauthorised entrants, the inclusion

[937] Ibid., sections 9(1)(a)(i); 9(2)
[938] Ibid., section 9(1)(a)(ii)
[939] Ibid., section 9(1)(a)(iii)
[940] Ibid., section 14(2)
[941] Constitution of the Republic of Singapore, *supra* n. 882, Art. 9(1)
[942] Ibid., Art. 9(2)
[943] Ibid., Art. 9(6)(a)

of criminal offences in the domestic regulatory framework results in the incarceration of a greater number of non-citizens. This influences the conditions of immigration detention and by extension raises concern as to whether detainees are treated with humanity and dignity.

In *Abu Syeed Chowdhury* v. *Public Prosecutor*, the High Court acknowledged that there had been a disparity in sentences for cases involving false representation which warranted "a clear re-statement of the sentencing regime" applicable to those cases.[944] The High Court noted that the intention of the legislature by increasing sentences under section 57 (1)(vi) was to take "a tougher stand against such offenders, presumably to stem the tide of illegal immigrants awash on our shores in the wake of the regional economic downturn. It therefore behoves the judiciary to adopt a similar mindset when enforcing the law in immigration cases."[945] The High Court concluded that a "strong message of deterrence" should be sent to persons who have committed an offence against the Immigration Act, therefore "a custodial sentence should be the applicable norm."[946]

The Public Prosecutor in *Kang Seong Yong*[947] successfully appealed a non-custodial sentence on the ground that it was "manifestly inadequate in view of the district judge's erroneous finding that there were exceptional circumstances on the facts to justify imposition of a fine."[948] Similar to the facts in *Abu Syeed Chowdhury* the respondent made false representations that he was a university graduate in his application to obtain an employment pass and his subsequent renewal of that pass. Notwithstanding that the respondent was regarded by his employers to be an asset, it was "insufficient to surmount

[944] *Abu Syeed Chowdhury* v. *Public Prosecutor* [2002] 1 SLR 301, at p. 307
[945] Ibid., at p. 307
[946] Ibid., at p. 307
[947] *Public Prosecutor* v. *Kang Seong Yong* [2005] 2 SLR 169
[948] Ibid., at p. 174

the high threshold of showing exceptional circumstances" to avoid a custodial sentence being imposed.[949]

In cases where there is doubt as to whether a person has a right to enter Singapore, immigration officers are authorised to detain those persons at an immigration depot for a period not exceeding seven days.[950] Except by written order of the Minister, no person shall be detained longer than this period.[951] The Controller of Immigration in his or her discretion may release a person from detention on terms he or she thinks fit.[952] Persons reasonably believed to be liable to removal from Singapore but prior to a decision being made, may be arrested without warrant and detained in any prison, police station or immigration depot for a period of fourteen days.[953]

Persons identified as a prohibited immigrant following an examination on arrival may be prohibited from disembarking or detained at an immigration depot or "other place designated by the Controller."[954] The Immigration Act authorises the Controller of Immigration to detain persons who have been ordered to be removed from Singapore "for such period as may be necessary for the purpose of making arrangements for his removal."[955] The Controller may in his or her discretion and on such conditions as he or she thinks fit release a person from detention pending an appeal to the Minister under section 33(2) challenging the order of removal.[956] The Act authorises police officers and immigration officers to detain persons "on board a suitable vessel, aircraft or train"

[949] Ibid., at p.178
[950] Immigration Act, *supra* n. 902, section 27(1)
[951] Ibid., section 27(2)
[952] Ibid., section 27(2)
[953] Ibid., section 35
[954] Ibid., section 31(1)
[955] Ibid., section 34(1); *John Muhia Kangu* v. *Director of Prisons* [1996] 2 SLR 747
[956] Ibid., section 34(2)

pending the outcome of any appeal under section 33.[957] The Controller has authority to detain persons ordered to be removed in prisons, police stations, immigration depots or in any other place designated by the Controller.[958]

In *Lau Seng Poh* v. *Controller of Immigration,* the applicant had been detained pending an order of removal being enforced.[959] The applicant was adopted at three months of age and there was no conclusive evidence to establish that he was born in Singapore. The applicant sought a writ of *habeas corpus* to secure his release from detention and to ensure that the order of removal would not be enforced. Thean J rejected the contention of the respondents that the court was prevented from examining whether the Controller of Immigration was justified in issuing the orders of removal and detention given that the orders were validly made.[960] Although there were discrepancies on the evidence produced in support of the applicant, Thean J opined that could be explained due to the passage of time and method of examination immigration officials employed over a number of years. Thean J concluded that on the balance of probabilities, the applicant was born in Singapore and he was therefore not an unlawful entrant for the purposes of the Act. The orders of detention and removal were therefore ruled invalid.[961]

Although enacted as a means to ensure domestic security and prevent subversion, **t**he Internal Security Act may be used as an additional source of authority to detain non-citizens in an irregular situation. The Act authorises the detention of persons "acting in

[957] Ibid., section 34(3)
[958] Ibid., section 34(4)
[959] [1985] 2 MLJ 350
[960] Ibid., at p. 353 where Thean J declared, if "judicial review of the decision of the executive in exercising such a draconian power of removal and detention under the Act would be precluded practically in all cases. Such drastic deprivation of rights of those subject to the Act to have recourse to courts for judicial review cannot have been intended by the legislature, and indeed there is nothing in the Act to vouch for such a conclusion."
[961] Ibid., at p. 358

any manner prejudicial to the security of Singapore ... or to the maintenance of public order."[962] The curtailment fundamental liberties is authorised by the Constitution provided that it falls within one of the broad grounds referred to in section 149 including actions deemed "prejudicial to the security of Singapore."[963] Judicial review including an Order for Review of Detention is expressly prohibited except as it relates to compliance with a procedural requirement.[964]

10.5. Removal

Persons identified as a prohibited immigrant following examination on arrival are liable to be returned to the place of embarkation, country of birth, citizenship or "any other port or place designated by the Controller."[965] "Illegal immigrants" being persons convicted of offences outlined sections 5, 6, 8 and 9 are liable to be removed.[966] The relevant offences include entering or attempting to enter Singapore other than from an authorised immigration point[967] and entering or attempting to enter Singapore without a valid entry or re-entry permit or pass or for a person accompanying the holder of a permit not having his or her name endorsed on that document.[968] Moreover, other non-citizens, which may be removed, include prohibited immigrants entering Singapore without valid pass,[969] or persons in contravention of an order made by the Minister in which "in the interests of public security or by reason of any economic, industrial, social, educational or other conditions in Singapore" the Minister considers it expedient to:

[962] Section 8(1), Internal Security Act, Cap. 143, 1985 rev. ed.
[963] Constitution of the Republic of Singapore, *supra* n. 882, Art.149(1)(e)
[964] Internal Security Act, *supra* n. 962, sections 8A(c) and 8B
[965] Immigration Act, *supra* n. 902, section 31(2)
[966] Ibid., section 32
[967] Ibid., section 5
[968] Ibid., sections 6(1) and 6(3)(a)
[969] Ibid., section 8

> "(i) prohibit, either for a stated period or permanently, the entry or re-entry into Singapore of any person or class of persons;
> (ii) limit the number of persons of any class who may enter Singapore within any period specified in the order;
> (iii) limit the period during which any person or class of persons entering or re-entering Singapore may remain therein."[970]

The Controller is authorised to remove any person unlawfully remaining in Singapore by reason of sections 15 and 62 regardless as to whether proceedings are taken against that person concerning an offence against the Act.[971] Section 62 provides that persons whose presence in Singapore is unlawful due to an infringement of a previous written law, regulation or order shall be unlawful for the purposes of the Immigration Act. Section 15 of the Act states:

> "a person shall not remain in Singapore after the cancellation of any permit or certificate, or after the making of a declaration under section 14 (4) or after the expiration or notification to him, in such manner as may be prescribed, of the cancellation of any pass relating to or issued to him unless he is otherwise entitled or authorised to remain in Singapore under the provisions of this Act or the regulations."

A declaration referred to in section 15 may be made by the Controller where a person issued with a permit or certificate has been obtained through a false or misleading statement,[972] that a person is a prohibited immigrant[973] or that there has been contravention of a condition of the permit or certificate.[974]

An applicant may appeal to the Minister challenging the order of removal except in cases where a pass has expired.[975] The appeal against an order of removal shall not

[970] Ibid., sections 9(1)(a); 8(3)(o) and 8(2)(a)
[971] Ibid., section 33(1)
[972] Ibid., section 14(4)(a)
[973] Ibid., section 14(4)(b)
[974] Ibid., section 14(4)(c)
[975] Ibid., section 33(2)(3)

operate as a stay of execution.[976] The Minister, Controller of Immigration or any public officer are not obliged "to disclose any fact, produce any document or assign any reason for the making of any removal order under this Part which he considers it to be against the public interest to do so."[977]

In *Ma Teresa Bebango Bedico* v. *Public Prosecutor*, the petitioner entered Singapore in breach of section 36 and was sentenced to 18 months imprisonment having previously been in breach and removed from Singapore under the same provision.[978] The High Court rejected the petitioner's argument that the authorities were estopped from claiming that she had committed an offence under section 36 as they made a mistake in issuing a visitors pass, which she argued amounted to written permission on the part of the Controller to enter Singapore for the purposes of the Act.[979] The High Court noted that the petitioner took "positive steps" to conceal her ban from entering Singapore due to a previous violation of section 36 by obtaining a new passport. Moreover, "permission in writing" in section 36 meant "prior written permission" as the intention of the legislature would have been defeated if the person who had been previously removed would be allowed to enter and then wait for the decision of the Controller while in Singapore.[980]

10.6. Judicial Review

The Immigration Act expressly excludes judicial review for acts performed by and decisions made by the Minister and the Controller of Immigration:

[976] Ibid., section 33(4)
[977] Ibid., section 33(6)
[978] [2002] 1 SLR 192
[979] Ibid., at p. 196
[980] Ibid., at p. 197; *Sun Hongyu* v. *Public Prosecutor* [2005] 2 SLR 750, at p. 758

> "There shall be no judicial review in any court of any act done or decision made by the Minister or Controller under any provision of this Act except in regard to any question relating to compliance with any procedural requirement of this Act or regulations governing that act or decision."[981]

Judicial review for the purposes of section 39A includes "proceedings instituted by way of:

> (a) an application for a Mandatory Order, a Prohibiting Order or a Quashing Order;
> (b) an application for a declaration or an injunction;
> (c) an Order for Review of Detention; and
> (d) any other suit or action relating to or arising out of any decision made or act done in pursuance of any power conferred upon the Minister or the Controller by any provision of this Act."[982]

As is the case in Malaysia, the legislature in Singapore has enacted a privative clause scheme to prevent administrative acts and decisions being subject to judicial review. The Constitution is recognised as the supreme law of the Republic. Legislation, which is inconsistent with the Constitution, shall be void to the extent of inconsistency.[983] As evidenced in other jurisdictions in this research, the judiciary is generally reluctant to strike down a privative clause scheme even in cases where it appears that a conflict cannot be averted.[984] Instead, where such conflict arises, as evidenced in Malaysia, the authority of the legislature to exclude judicial oversight should be resolved by adopting the "rule of harmonious construction".[985] As the domestic regulatory frameworks in both Singapore and Malaysia are almost identical, coupled with the proclivity of the judiciary to defer to the political branches, it is difficult to envisage cases where the ouster clause would conflict with the Constitution.

[981] Immigration Act, *supra* n. 902, section 39A(1)
[982] Ibid., section 39A(2)
[983] Constitution of the Republic of Singapore, *supra* n. 882, Art. 4
[984] For example, *see S157*, *supra* n. 414, where the High Court of Australia upheld the constitutionality of the statutory scheme by confining the scope of its operation
[985] *Sugumar Balakrishnan*, *supra* n. 802, at p. 308

Prior to the enactment of the Immigration (Amendment) Act (No. 38 of 1993) which excluded judicial review over matters of immigration, the courts were reticent to intervene in the affairs of the executive branch. In *Re Siah Mooi Guat,*[986] the applicant sought an order of *certiorari* to remove into the High Court and to quash a decision of the Minister of Home Affairs under section 8(3)(k) of Act that the applicant is a member of a prohibited class due to information received indicating that she is an "undesirable immigrant." The applicant challenged the declaration issued by the Controller of Immigration under section 14(4) that her presence in Singapore was unlawful and the cancellation of the re-entry permit under Section 14(3) of the Act and the employment pass under a regulation 16 of the Immigration Regulations. The Minister dismissed an appeal by the applicant under section 14(5) against the declaration and the cancellation of the re-entry permit and employment pass by the Controller of Immigration.

The applicant claimed that as national security was not a factor influencing the decision of the Minister he was bound to "comply with the rules of natural justice in toto."[987] Prior to making a finding under section 8(3)(k) the applicant asserted that the principle of legitimate expectation required the Minister to afford her the opportunity to make representations either orally or in writing and to provide reasons why he considered the applicant to be an undesirable immigrant.[988] If the decisions made by the Minister were invalid then the declaration and cancellations made by the Controller would also be invalid.[989] The High Court referred to authority recognising that the right to legitimate expectation in public law evolved on a case-by-case basis. However, in the present case

[986] *Re Siah Mooi Guat* [1988] 3 MLJ 448
[987] Ibid., at p. 452
[988] Ibid., at p. 452
[989] Ibid., at p. 452

"no promise whatsoever was made to the applicant that the stay in Singapore was to be conditioned by any considerations other than those provided in the Immigration Act and the regulations thereunder."[990]

Counsel for the applicant referred to the judgment of Lord Denning in Schmidt's case where in obiter he stated that an alien should be permitted to make representations if the grant of leave to stay is revoked prior to its expiration.[991] On the facts of the case, the applicant held a re-entry permit valid until 6 March 1987, which had been cancelled 5 September the previous year. The High Court noted that Parliament demonstrated its intention to respect the rules of natural justice (guaranteeing the right to be heard) by allowing aggrieved persons to appeal to the Minister under section 14 (5) notwithstanding that the Act did not require the Minister to disclose reasons for his decision.[992]

Section 8 (3)(k) expressly authorises the Minister to receive information "from any source or from any government through official or diplomatic channels" and form an opinion without having to disclose the source of the information as to whether an alien should be categorised as an undesirable immigrant. The High Court confirmed that confidential information may be relied upon by the Minister as "Parliament has burdened him with the responsibility to decide on the reliability of the information... and not the court, to decide whether it is in the public interest that the information should be disclosed."[993]

The High Court rejected the applicant's claim that the decisions of the Minister are subject to judicial review as they were irrational or "Wednesbury unreasonable". The

[990] Ibid., at p. 454
[991] Ibid., at p. 454; *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149
[992] Ibid., at p. 455
[993] Ibid., at p. 455

applicant contended that in the time she had been a permanent resident of Singapore, a period of more than five years, she had an "unblemished record" in respecting the laws and conducting herself in a manner compatible with the interests of the Republic. Although those claims were not refuted, the applicant failed to meet the burden of establishing that the Minister acted on information, which he perceived to be unreliable, and that he did not give "due and careful consideration" prior to rejecting the appeal.[994]

In *Re Mohamed Saleem Ismail,*[995] the applicant a citizen of Singapore married an Indian national who resided in Singapore for approximately one year following their marriage having her pass renewed every month under regulation 14(3) of the Immigration Regulations. The applicant's wife was informed in writing that there would be no further extension of stay, which prompted her solicitors to appeal to the Minister of Home Affairs to request an extension of stay based on compassionate grounds as she was in an advanced stage of pregnancy. The request was granted on condition that no further stay would be permitted. The applicant sought an order of *mandamus* from the High Court requiring the Controller of Immigration to review his discretionary decision not to allow the applicant's wife to remain in Singapore until she was eligible for permanent residence. Alternatively, the applicant sought a declaration that his wife be permitted to reside in Singapore for two years so that she may apply for permanent residence under section 123 (2) of the Constitution being the wife of a citizen of Singapore.

The first ground of appeal cited by applicant was that the Controller of Immigration had "totally failed to consider or had insufficiently considered the special circumstances." The High Court noted:

[994] Ibid., at p. 456
[995] [1987] 1 SLR 369

> "In the exercise of... supervisory jurisdiction over inferior tribunals including administrative officers exercising judicial or quasi-judicial functions under a statute or subsidiary legislation the High Court is supervising and not reviewing; the High Court in its supervisory capacity cannot substitute its own views for those of the tribunal or officer which or who have been statutorily entrusted to make the decision."[996]

As judicial review concerns supervision of the decision-making process as opposed to a review of the decision itself, the High Court rejected the first ground of appeal as there was evidence that the Controller of Immigration considered all relevant facts prior to making a decision.[997]

The second ground of appeal was that the Controller of Immigration "failed to exercise his discretion judicially" given that the applicant's wife was not a member of a prohibited class or an undesirable person for the purposes of the immigration legislative framework. In dismissing the second ground of appeal, the High Court referred to an affidavit prepared by the Assistant Controller of Immigration, which noted that the right to entry and residence is not an automatic right but is "based on prevailing immigration policy bearing in mind the need to safeguard the rights and interests of the vast majority of Singaporeans."[998]

The third ground of appeal raised by the applicant was that his wife would be denied the opportunity of being able to apply for citizenship under section 123(2) of the Constitution if she were not permitted to reside in Singapore for at least two years prior to the application. The High Court noted that there is no right in the Constitution, which would permit a spouse to remain in Singapore for the prescribed period to apply for citizenship. Indeed such matters are subject to public policy considerations referred to in

[996] Ibid., at p. 372
[997] Ibid., at p. 372
[998] Ibid., at pp. 372-373

section 4 of the Act.[999] Conferral of citizenship under article 123(3) is discretionary even if the requisite conditions are satisfied.

As a fourth ground of appeal, the applicant contended that his right to equal protection of the law had been violated as the Controller of Immigration failed to establish criteria, which would allow wives of Singapore citizens to be granted permanent residence. The High Court rejected the argument referring to Government policy, which had generally been strict in granting permanent residence status in Singapore due to limited resources and available land.[1000]

[999] Immigration Act, *supra* n. 902, section 4(1) provides: "The Minister may from time to time give the Controller directions of a general character, and not inconsistent with the provisions of this Act, as to the exercise of the powers and directions conferred on the Controller by, and the duties required to be discharged by the Controller under, this Act or any regulations or orders made thereunder, in relation to all matters which appear to him to affect the immigration policy of Singapore."
[1000] *Re Mohamed Saleem Ismail* , *supra* n. 995, at p. 374

11. Final Comparative Analysis

11.1. Analysis of Southeast Asian Jurisdictions

The proliferation of human rights instruments, which have been developed under the auspices of the UN, has coincided with the protracted debate as to whether human rights norms are culturally relative or whether they have universal application. The creation of the UN following the Second World War is heavily influenced by Western liberal principles espoused by the United States. This is evident with the UN Charter inspired or influenced by the US Constitution, the Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen. Following the period of the decolonisation and the end of the Cold War states were generally free from undue influence and enjoyed sovereignty in the true sense. Independence generated a greater level of scepticism concerning the nature of human rights obligations leading to a rejection of universalism in favour of norms being culturally relative.

The "Asian values" approach to human rights is a regional specific response vigorously advocated by the former leaders of Singapore and Malaysia, Lee Kwan Yew and Mahathir Mohammed.

> "In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore ... The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual ..."[1001]

Relativism based on Asian values was later endorsed in the Chinese White Paper on Human Rights and in the Bangkok Declaration adopted prior to the Vienna World Conference on Human Rights in 1993. The Vienna Declaration and Programme of Action

[1001] Thio, *supra* n. 898, at pp. 274-275

were adopted by consensus at the World Conference. Although the Declaration acknowledged that "human rights are universal, indivisible ... interdependent and interrelated ... the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind..."[1002]

In acknowledging the existence of varying levels of relativism and universalism, Donnelly identifies a radical interpretation of these doctrines to "mark the end points of a continuum."[1003] Radical cultural relativism dictates that culture is the "sole source of ... validity of moral right or rule"[1004] whereas radical universalism requires "absolute priority" to be given to the "demands of the cosmopolitan moral community."[1005] At different points on the continuum lie strong and weak forms of universalism and cultural relativism.

An extreme interpretation of Asian values has been criticised on the basis that it is "nonsensical" to group diverse cultures, languages and religions in Asia to highlight communitarian traditions as a means to justify the failure of authoritarian regimes to respect human rights.[1006] Radical universalism has also been subject to criticism on the basis that it is disrespectful to local traditions and customs. The imposition of a standard derived from Western liberal principles which advance and prioritise civil and political rights over economic and social rights may be regarded as a form of "cultural imperialism". A radical form of universalism is therefore incompatible with traditional

[1002] Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Part I), at pp.20-46 (1993) at para.5
[1003] Jack Donnelly, "Cultural Relativism and Universal Human Rights", 6 (4) *Human Rights Quarterly* 400 (Nov., 1984) at p. 401
[1004] Ibid., at p.401
[1005] Ibid., at p.402
[1006] Aryeh Neier, "Asia's Unacceptable Standard," *Foreign Policy*, No. 92 (Autumn, 1993) 42; Scott Goodroad, "The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order", 9 *Ind. Int'l & Comp. L. Rev.* 259 at 266

Asian cultures, which promote the welfare of the collective, the community/state. Tatsou asserts that the Asian value approach is favoured by Asian nations due to its "anti-West-centric stance. The underlying message is this: Liberal democracy is a specifically Western value system alien to Asian culture and therefore the Western attempt to impose it on Asian countries must be denounced as cultural imperialism."[1007]

Leaving aside the repugnancy of imposing western ideals with *no* respect for cultural variation, radical universalism may be dismissed on the ground that the international human rights system vests primary responsibility with the state to respect and to ensure rights within their borders. States are afforded a "margin of appreciation" to fulfil their international obligations and hence cultural factors will inevitably come into calculation regarding how the state chooses to meet its obligations. Moreover, although international human rights regimes have made significant advances regarding state accountability, respect for the reserved domain of domestic jurisdiction remains a fundamental principle of the UN.[1008]

In the author's view human rights norms associated with liberty and security of person, which the courts in common law jurisdictions generally recognise a presumption favouring personal liberty, should be viewed from a strong universalism/weak cultural relativism perspective. It is inevitable that there will be variation among jurisdictions regarding the interpretation of the scope of applicable norms without it necessarily constituting a violation of that norm.

As noted throughout the course of this research to comprehend how general international law regulates this field it is necessary to undertake a comparative

[1007] Inoue Tatsuo, "Liberal Democracy and Asian Orientalism," in Joanne Bauer and Daniel Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press (1999) at 30
[1008] UN Charter, *supra* n. 16, Art. 2(7)

examination of sets of jurisdictions to identify areas of uniformity and inconsistency in state practice. If a departure from generally accepted practice is particularly severe this would indicate a violation of a norm rather than a process of accommodation based on cultural variation, which provides for a more accurate indication of the parameters of a particular norm. As stated throughout the course this research, the ambit of human rights norms are primarily determined by the actions of states rather than international institutional arrangements. Even though monitoring bodies are established under various regimes, which are vested with general oversight responsibility concerning compliance, the development of international law is a process in which the state is intimately and inextricably tied to. In other words, the law is what it is and not something which it should be.

The measures adopted by states in Southeast Asia identified in the preceding chapters may be viewed as evidence of how human rights norms are to varying degrees culturally relative. Arguably, this is based on a perceived heightened need to protect public goods such as ensuring public order, security and morals, which is compatible with communitarian values rather than an absolute rejection of universalism due to historical tensions with Western powers.

11.1.1. Prohibition of Arbitrary Detention

The common law presumption in favour of personal liberty has enabled the courts to interpret legislation of seemingly expansive scope to be subject to implied limitations. In the seminal *Hardial Singh* case, Woolf J acknowledged that although there was no

express limitation of time concerning the authority to detain, his Honour was satisfied that it was subject to implied limitations.

> "First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation which it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."[1009]

In *Tan Te Lam*, the Privy Council identified three principles derived from the *Hardial Singh* decision. Firstly, the "power of detention is to be... limited to a period which is reasonably necessary to achieve the purpose for which the power was granted." Secondly, detention is limited to cases "in which the purpose for which the power was granted can be achieved within a reasonable time." Thirdly, "all reasonable steps" are required to be taken "to ensure that the purpose for which the detention was authorised is achieved within a reasonable time."[1010]

Hong Kong case law is generally compatible with European human rights and HRC jurisprudence by acknowledging that it is insufficient for domestic law to prescribe grounds and procedure to satisfy the element of lawfulness.[1011] Rather, the "quality of law" is fundamental to ensure that detention does not become arbitrary. The regulatory provisions authorising deprivation of liberty must therefore be "sufficiently accessible

[1009] *Hardial Singh*, *supra* n. 341, at p. 985
[1010] *Tan Te Lam*, *supra* n. 699, at p. 873E
[1011] For example, in *Van Alphen* v *The Netherlands*, *supra* n. 193, the HRC concluded that arbitrariness may result in cases where there is a "lack of predictability" (para.5.8); Similarly, in the seminal *Sunday Times v United Kingdom* decision, *supra* n. 176, the ECHR acknowledged that the "quality of law" necessary to avoid arbitrariness requires that it is "adequately accessible" so that persons have knowledge of legal rules governing a particular field (para.49).

and precise in order to avoid all risk of arbitrariness."[1012] The fact that the provision authorising detention was silent as to the circumstances where detention would be employed and in the absence of a clear and accessible policy establishing the grounds for detention accessible to the applicant resulted in a breach of Article 5(1) of the HKBOR.

Although the prohibition against arbitrary detention is expressly referred to in the HKBOR,[1013] a policy of automatic detention of nationals of a particular state has been held not to violate that prohibition.[1014] Some parallels may be observed between the mandatory detention in Australia in which the HRC concluded that the Australian government failed to establish that there were not "less invasive means" to protect the integrity of the domestic regulatory framework and the regime of automatic detention established for Vietnamese nationals.[1015] The *Chieng A Lac* decision not only raises issues concerning scope of norms associated the liberty and security of person but it also concerns whether a state has a justifiable claim to impose a different regulatory regime for a particular category of unauthorised entrant while still respecting the principle of non-discrimination. Arguably, the mass influx of persons from a particular country justifies a heightened level of concern to protect public goods, which may justify such a response.

In Singapore and Malaysia, the application of "four walls" doctrine in constitutional interpretation favours an interpretation of fundamental liberties based on a literal interpretation of the text of the instrument as applied to local conditions rather than

[1012] *A (Torture Claimant)*, *supra* n. 682, at pp.764-765, para.34
[1013] HKBOR, *supra* n. 677, Art. 5(1)
[1014] *Chieng A Lac*, *supra* n. 694
[1015] *C* v. *Australia*, *supra* n. 196, para.8.2

to draw analogies from other jurisdictions.[1016] Moreover, there is a strong presumption that domestic legislation complies with the Constitution.[1017] This mode of interpretation clearly reflects a relativist position, which undermines the establishment of uniform standard of treatment given the reduced influence of judicial precedent from other jurisdictions.

In Malaysia, the courts have acknowledged that legislation authorising deprivation of liberty must be strictly construed. There is however a noticeable tendency to defer to the political branches of government power to deal with the phenomenon of irregular migration to justify an impugned measure.[1018] As with other jurisdictions examined thus far, detention should be employed for an immigration control purpose rather than for "administrative expediency".[1019] However, the domestic regulatory framework appears to endorse prolonged potentially indefinite detention, as persons subject to a removal order may be detained "for such period as may be necessary for the purpose of making arrangements for ... removal."[1020] The geographical locations of the Southeast Asian jurisdictions examined in this research are situated in the most populous region on the planet. Arguably, judicial deference to the political branches is justifiable given that elected politicians are primarily responsible for ensuring that public goods are protected.

While there is a division concerning the legality of prolonged potentially indefinite duration of detention in Australia and the US, though in the former jurisdiction

[1016] *Chan Hiang Leng Colin*, *supra* n. 885, at p. 681 citing *Government of the State of Kelantan*, *supra* n. 760
[1017] *Taw Cheng Kong*, *supra* n. 883, at p. 954
[1018] For example, *see Andrew S/O Thamboosamy v. Superintendent of Pudu Prisons*, *supra* n. 833
[1019] *See*, *Lui Ah Yong*, *supra* n. 838; *See also*, *Saadi*, *supra* n. 615; *Hardial Singh*, *supra* n. 341
[1020] Immigration Act, *supra* n. 764, section 34(1)

only by a narrow majority, it cannot be said that state practice reveals uniformity in this area. However, detention of this nature coupled with poor conditions not meeting a minimum standard may be regarded as unreasonable and arbitrary in nature. This argument was raised in the Hong Kong case *Chieng A Lac*, however in this case the conditions of detention were assessed not according to some minimum standard but with reference to "local conditions".[1021] As to whether the harsh, abusive and unsanitary conditions of detention publicised by the national human rights commission in Malaysia coupled with prolonged indefinite duration of detention will amount to detention being arbitrary in nature even taking into consideration cultural variation remains to be answered.[1022] Arguably, internal rather than external assessments from NGOs or Western liberal democracies will carry more weight in the domestic judicial decision-making process.[1023]

11.1.2. Obligation to Treat Detainees with Dignity and Humanity

In Hong Kong, the rejection of the existence of absolute international standards and the decision to view the Standard Minimum Rules for the Treatment of Prisoners as an aspirational objective required to be applied "in the light of local conditions",[1024] reveals a tendency of the judiciary to view norms as culturally relative. It must be acknowledged that the Standard Minimum Rules for the Treatment of Prisoners are non-binding except where they reiterate fundamental human rights such as the prohibition

[1021] *Chieng A Lac*, *supra* n. 694, at p. 278
[1022] *See*, SUHAKAM reports, *supra* n. 817 and 819
[1023] For a discussion on the clash between internal and external judgments in the context of practices which are culturally relative *see* Jack Donnelly, *Universal Human Rights in Theory & Practice*, 2nd ed., (Ithaca and London: Cornell University Press, 2003) at pp.92-93
[1024] *Chieng A Lac*, *supra* n. 694, at p. 278

against inhuman or degrading treatment or punishment. Arguably, this represents a weak level of cultural relativism / strong universalism but may potentially be elevated to a moderate to strong form of cultural relativism / moderate to weak universalism where fundamental human rights are involved. The fact that the Standard Minimum Rules is essentially a non-binding instrument coupled with the fact that states are afforded a "margin of appreciation" in meeting their international commitments or furthering desired international goals, then arriving at a decision with reference to "local conditions" cannot amount to rejection of universalism. Moreover, as Gleeson CJ of the Australian High Court recognised, establishing criteria to measure severity to render detention unlawful would prove a difficult assignment.[1025] Arguably, only in straightforward cases where the authorities are accused of violating *jus cogens* norms will the judiciary intervene to determine whether such measures are compatible with domestic law.

11.1.3. Removal

In Malaysia, the Director-General is conferred with broad powers to cancel a pass authorising entry and stay. Irregular status may be acquired when it is in the Director-General's "absolute discretion."[1026] It could be argued that this legislative provision is likely in many instances to be incompatible with legitimate expectations that public authorities would not cancel a pass granting the right to stay and work in Malaysia without compelling reasons. However, legitimate expectations are not completely abandoned by the judiciary in Malaysia as evidenced with the *J.P Berthelsen* decision. In this case, the Court held that if an employment pass is cancelled, there is a legitimate

[1025] *Re Woolley*, *supra* n. 364, para.29
[1026] Immigration Act, *supra* n. 764, section 9(1)(b)

expectation that the non-citizen would be able to remain in Malaysia until it expired and the rules of natural justice required that the applicant be afforded an opportunity to make the necessary representations before a public authority.[1027]

The Hong Kong regulatory framework permits removal of unauthorised recent arrivals i.e. persons who entered unlawfully for a period of less than two months by an immigration official.[1028] After this period, authority to remove is vested with the Director of Immigration.[1029] The rationale for placing the decision-making responsibility with a higher ranked official is that it enables that person to consider reasons why longer-term unauthorised residents should remain and be granted a favourable exercise of discretion. For short-term unauthorised residents, placing competence to remove with lower ranked officials bear similarities to the expedited removal process in the United States.

The issue of legitimate expectations to warrant a favourable exercise of executive discretion has also figured prominently in Hong Kong case law. The High Court has opted not to apply Article 10 of the ICESCR, which recognises the family as the "natural and fundamental group unit of society" as it has been held that there is no legitimate expectation for a wife and mother of Hong Kong permanent residents to remain in spite of her unauthorised status.[1030] This decision was justified on the ground that the ICESCR is merely "promotional" in character and that the rights referred to in the Covenant are aspirations, which may be achieved progressively. "Local conditions" particular to Hong

[1027] *J.P. Berthelsen*, *supra* n. 814
[1028] Immigration Ordinance, *supra* n. 652, section 18(2)
[1029] Ibid., section 19(1)(b)(i)
[1030] *Chan To Foon*, *supra* n. 744

Kong were cited to justify immigration control policy, which at that particular time if left unchecked could threaten the "social fabric" of the Territory.[1031]

Notwithstanding that the Court cited a human rights instrument to support its decision; I would argue that interpreting the Covenant in such a manner undermines its importance as a binding international legal instrument. It is acknowledged that the ICESCR allows state parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of ... rights."[1032] However, mainly concerns the economic and technical capacity of the state to ensure that these rights are realised. It does not justify a curtailment rights based on sovereign policy considerations in the absence of an express and clearly framed reservation, which a state party is required to submit to comply with international law.[1033] Arguably, such an interpretation of a binding instrument to justify the rejection of legitimate expectations under domestic public law represents a moderate form of relativism in judicial decision-making.

11.1.4. General Observations

A general observation from undertaking a comparative examination of domestic case law in Southeast Asian jurisdictions is that the judiciary in Hong Kong is more willing to have recourse to foreign case law in the judicial decision-making process. This does not necessarily indicate that there is a departure from a relativist orientation as such

[1031] Ibid., at p. 132
[1032] ICESCR, *supra* n. 97, Art. 2(1)
[1033] See, VCLT, *supra* n. 272, section 2

cases are generally interpreted "in the light of local conditions."[1034] However, it does reveal a commitment on the part of the judiciary to engage in the decision-making process of cases from other jurisdictions.

In contrast to Hong Kong, the enactment of legislation in Singapore stipulating that the common law of England shall continue to form part of the law of Singapore but only law established prior to the abolishment of the right of appeal to the Privy Council in 1994 reveals more of a self-directed if not isolationist orientation. The common law remains in force "so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require."[1035] It is argued that this reveals a moderate to strong form of cultural relativism given that it imposes an obligation on the judiciary to specifically consider "local conditions" in a determination as to whether the common law of England is applicable in Singapore.

11.2. Concluding Observations Based on Research Conducted

The purpose of this research is to define the parameters of norms associated with administrative detention and removal of irregular migrants. As stated throughout the course of this research, undertaking this inquiry is justified given that international institutional arrangements are only able to provide a base level interpretation of the scope of norms due to the manner in which international law is created and evolves. A more accurate and substantive elucidation of the ambit of applicable norms can only be achieved through a process of comparative analysis of state practice. As recognised by international monitoring bodies, states are primarily responsible for determining the

[1034] *Chieng A Lac*, *supra* n. 694, at p. 278
[1035] Application of English Law Act 1993, *supra* n. 893, section 3

nature of their international commitments as they are afforded a "margin of appreciation" to meet their customary and/or conventional law obligations.

State participation in conventional law regimes may contribute to the crystallisation of customary law norms - a process requiring "general and consistent" practice but not necessarily universal.[1036] States not party to multilateral conventions may nevertheless be obliged to afford irregular migrants a minimum level of treatment in its immigration control response if it can be established that the crystallisation of customary law norms is sufficiently evolved and not frustrated by conflicting practice. State practice may also be dictated exclusively or partially through sovereign policy choices. Whether the impetus for engaging in such practice is traced to a perceived international commitment, an exercise sovereign authority or a combination of both, identifying uniformity and variation in state practice is essential to aid our understanding as to how rules in this field are established under general international law.

Tunkin describes the situation where certain states are bound by conventional law norms and others states bound by customary law norms as "mixed norms" or "treaty-customary norms".[1037] The immigration control response for the jurisdictions examined in this research is regulated in international law by a combination of conventional and customary law norms. This has occurred not only on an inter-regional plane but also on a regional level where Hong Kong one of the three jurisdictions in Southeast Asia sharing a common colonial heritage is bound by numerous multilateral human rights conventions while Singapore and Malaysia are not.

[1036] VCLT, *supra* n. 272, Art. 38 provides: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."; *See also*, Restatement, *supra* n. 15, § 102 Comment b

[1037] Grigory Tunkin, "Is General International Law Customary Law Only?," 4 *European Journal of International Law* 534 (1993), at p. 539

As noted above, the doctrine of cultural relativism has figured prominently in academic literature as a means to explain how states in Southeast Asia view their human rights obligations under international law. The doctrine rejects individual-centred rights protection espoused by Western nations as a form of "cultural imperialism" instead the primary focus is on promoting the welfare of the community and state through the protection of public goods.[1038] The doctrine of incorporation challenges cultural relativism through a recognition that rules of international custom will form part of the common law except to the extent of its inconsistency with domestic law.[1039] Taking into account the evolving nature of international custom, the courts have been willing to recognise the existence of a new rule of international custom in domestic law even though this may be incompatible with an old rule previously relied upon in judicial adjudication.[1040]

International norms associated with liberty and security of person includes the prohibition of arbitrary detention, the right to challenge the lawfulness of detention and

[1038] Li-ann Thio, "'Pragmatism and Realism Do Not Mean Abdication': A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law," 8 *Singapore Year Book of International Law* 41 (2004), at p. 43

[1039] *Chung Chi Cheung* v. *The King* [1939] AC 160, at pp. 167-168 per Lord Atkin where his Honour declared: "It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations except amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

[1040] In *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] Q.B. 529 the majority comprising of the judgements of Lord Denning M.R. and Shaw L.J. favoured the doctrine of incorporation recognising that a new customary rule may replace an older rule, which had previously been received into the common law. "Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court - as to what was a ruling of international law 50 or 60 years ago - is not binding on this court today. International law knows no rule of *stare decisis.* If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it." p. 554 H per Lord Denning and p. 579 F-G per Shaw LJ

an obligation to ensure that detainees are treated with humanity. The obligation to treat persons in detention with humanity includes the requirement that the domestic immigration control response does not infringe international norms prohibiting torture, cruel, inhuman or degrading treatment or punishment and the protection of the right to life. Notwithstanding that procedural guarantees are to be afforded to migrants in a regular situation, the entry into force of the CMW as well as independent state practice arguably reveals a development in international law that the removal of migrants in an irregular situation should also be made pursuant to a decision made by a competent authority in accordance with law.[1041]

The abovementioned norms are included in the major general multilateral conventions as well as non-binding instruments. As evinced through state practice, the measures employed in Australia and the United States to comply with conventional law obligations provides greater specificity and substance concerning how these states perceive the nature of their obligations. It may be argued that these measures are dictated either exclusively or partially by sovereign policy considerations rather than out of a sense of legal obligation to follow the practice (*opinio juris*). The author regards such suggestions as being overly distrustful given the goodwill these states have historically demonstrated by allowing UN human rights monitoring mechanisms to subject domestic practice to international scrutiny. Rather, the process, which takes place, is that customary and codified norms are internalised within the domestic legal framework.[1042] State measures fall generally within the "margin of appreciation" rather than an exercise of authority with scant regard for international obligations and disrespect for relations

[1041] Cf. ICCPR, *supra* n.97, Art. 13 and CMW, *supra* n. 53, Art. 22(2)
[1042] See generally, Harold Hongju Koh, "Why Do Nations Obey International Law?," 106 *Yale Law Journal* 2599 (1997)

among states. Such a process challenges the view advanced by classical realist thinking that states only pay lip service to international obligations especially where sovereignty is threatened. The measures undertaken by these states may also reveal a direction in international practice. Measures adopted by Australia and the United States may influence and be replicated by other states which is performed out of a sense of legal obligation.

At the time of writing Australia and United States are party to the ICCPR and CAT, however both of these countries have not ratified the CMW. Australia has ratified the CRC while the United States has only signed the Convention.[1043] Australia is a party to the 1951 CSR and the amending 1967 Protocol while the United States is party to the 1967 Protocol. In contrast to the Western jurisdictions, Malaysia and Singapore have acceded to the CRC but at the time of writing are not party to the ICCPR, CMW, CAT, the CSR and the amending 1967 Protocol. Upon resuming sovereignty over Hong Kong from the United Kingdom, China expressed its intention that the ICCPR, CRC and CAT would bind the Special Administrative Region. Although China is party to the CSR and the 1967 amending Protocol it like the United Kingdom beforehand has not extended those obligations to Hong Kong SAR.

The principle of equality and non-discrimination is the foundation for determining the extent to which human rights norms associated with administrative detention and removal have evolved into the corpus of rules under general international law. Ramcharan describes the principle as the "dominant single theme" of the ICCPR and the HRC refers to it as "a basic and general principle relating to the protection of human

[1043] Although the United States has only signed and not ratified the CRC, it is obliged not to defeat the object and purpose of the Convention prior to entering into force for the United States. VCLT, *supra* n. 270, Art.18

rights."[1044] The principle is widely accepted as forming part of international custom and some jurists assert that it constitutes a peremptory norm of international law from which no derogation is permitted. In spite of the pivotal role which the principle plays in the application and enjoyment of substantive rights, Weissbrodt notes that there is "a disjuncture between the rights that international human rights law guarantees to non-citizens and the realities non-citizens must face."[1045]

General multilateral conventions, international and domestic case law and international law jurists recognise that it is permissible to employ varying degrees of differential treatment without it constituting an act of discrimination. The state seeking to employ an impugned measure however is required to establish that it pursues a legitimate aim for which there is an objective and reasonable justification. Additionally, reasonable proportionality must exist between the means employed and the aims pursued. Rights of a "basic" or "fundamental" character, which includes the right to life and the prohibition against torture, do not permit distinctions between citizens and non-citizens as well as among non-citizens.

The doctrine of territorial sovereignty, the prevailing norm in international law authorising states to admit and exclude non-citizens on broad public goods grounds is often cited to justify a conventional immigration control response of administrative detention and removal of irregular migrants. As evidenced through a comparative examination of domestic jurisprudence the competence of a state to control the demographic composition of its population is an uncontroversial expression of its sovereignty. The admission of non-citizens should therefore be regarded as a privilege

[1044] Ramcharan, *supra* n. 99, at p. 249; HRC GC 18(37), *supra* n. 86, para.1
[1045] Weissbrodt, *supra* n. 7, para.2

not a right.[1046] However, once a migrant enters the territorial jurisdiction of the host state whether legally or illegally he or she will generally be afforded greater protection due to compliance with human rights norms and guarantees provided for by national constitutions.[1047] The "entry fiction" doctrine in the United States and the legislative amendment to the Migration Act 1958 (Cth) establishing offshore excise places, which bar unauthorised arrivals from lodging visa applications in Australia, is evidence of measures taken to preserve the territorial integrity of the host state.[1048]

Notwithstanding the codification of substantive rights, the international human rights law regime itself seeks to preserve the sovereign authority of states especially in cases where public goods (public order, security, health, economic interests, morals, protection of rights and freedoms of others etc.) are threatened. For instance, even a comprehensive and progressive human rights instrument like the CMW authorises state parties "when there are migrant workers and members of their families within their territory in an irregular situation, (to) take appropriate measures to ensure that such a situation does not persist."[1049] Furthermore, those persons are under an "obligation to comply with the laws and regulation" of receiving and transit states, including the law applicable to entry, stay and employment.[1050] Although states are required to take into account circumstances of entry, duration of stay and other relevant factors, including family life considerations when considering possibility of regularising the position of unauthorised migrants there is no obligation to consider regularisation.[1051]

[1046] *United States ex rel. Knauff* v. *Shaughnessy* , *supra* n. 465; *Musgrove*, *supra* n. 31; *Cain*, *supra* n. 35
[1047] *Zadvydas*, *supra* n. 492
[1048] Migration Amendment (Excision from Migration Zone) Act 2001 No. 127, 2001
[1049] CMW, *supra* n. 53, Art. 69(1)
[1050] Ibid., Art. 34
[1051] Ibid. Arts. 35 and 69(2)

Immigration control measures, which are *prima facie* incompatible with international norms associated with detention and removal cannot be justified under international law if the host state cannot establish that such measures are reasonable and necessary to protect a public good. Arguably, it is less credible for a host state to assert that it is seeking to protect a public good and thus deprive unauthorised migrants of a minimum standard of treatment where it tacitly accepts and benefits from unauthorised migration in times when it is politically expedient and remove those persons when it is not. It is seldom acknowledged in domestic policy proclamations the significant contribution in economic and social spheres unauthorised migrants provide for the host state by performing work, which the domestic workforce is unable or unwilling to undertake due to an ageing population, increased educational and professional opportunities and recourse to social welfare protection. Moreover, local businesses as employers of the domestic workforce are able to maintain competitiveness in global markets by minimising operations costs by utilising the services provided by unauthorised migrant workers. The mass removal of irregular migrants in times of economic downturn as was the case during the 1997 Asian economic crisis is a notable example of the contradictory approach adopted by some states in the region.

The right to liberty and security of person codified in the ICCPR may be derogated from in times of public emergency threatening the life of a nation.[1052] Although it has been asserted that the non-derogable status of a codified right is evidence of its "fundamental" or "basic" character, I would argue that this status is not determined by its position on a hierarchical ladder which could justify a more liberal use of limitations and

[1052] ICCPR, *supra* n. 97, Art.4(1)

restrictions for certain rights.[1053] Although state parties are required to ensure that persons deprived of their liberty are treated with humanity under Article 10 of the ICCPR it does not mean that because this right is placed on a lower rung to non-derogable rights that it loses its "fundamental" character. I would argue that the imposition of harsh immigration control measures as seen during the 1997 Asian economic crisis could not be justified notwithstanding the need to protect public goods. A significant onus exists for the host state to establish that measures, which are incompatible with being treated with humanity, are reasonable and justifiable and are employed to pursue a legitimate aim even in times of public emergency. Rights which may be derogated from in times of public emergency, should not lead to the conclusion that they are less likely to form part of international custom. The domestic authorities through practice acknowledge that strong justification is required to employ measures, which are incompatible with these rights.

11.2.1. Detention

Detention for the purpose of immigration control may be imposed as a criminal sanction for a breach of the domestic regulatory framework or as an administrative measure both prior to and following a decision to remove. The focus of this research has been to determine the parameters of executive authority as opposed examining the criminal law dimension of unlawful entry and presence in the host state.

Prolonged arbitrary detention is generally recognised as being prohibited by international custom.[1054] The detention of unauthorised migrants must be reasonable and

[1053] Ibid., Art. 4, ICCPR; *See*, Tiburcio, *supra* n. 100, Ch. 4 Fundamental Rights. I argue below that prolonged detention of an arbitrary character without recourse to review will also constitute a violation of a fundamental right notwithstanding the derogations may be made under the ICCPR.
[1054] Restatement, *supra* n. 15, § 702 (e)

proportionate and a balance is required to be struck between the conflicting interests of the state and the individual.[1055] Moreover, "arbitrariness" is not to be equated with being against the law rather it should be interpreted broadly to include elements of "inappropriateness and injustice."[1056] The onus is on the state to provide "appropriate justification" for continued detention.

Although persons seeking asylum fall outside the category of person I have identified as having irregular status, the United Nations High Commissioner for Refugees and the UNHCR Executive Committee have been instrumental in defining criteria to govern the permissible use of administrative detention. Article 31(1) of the CSR requires state parties not to impose penalties on refugees, including persons seeking asylum, "on account of their illegal entry or presence".[1057] The UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers provides "detention should only be resorted to in cases of necessity. The detention of asylum-seekers who come 'directly' in an irregular manner should, therefore, not be automatic, or unduly prolonged."[1058] The automatic or mandatory detention of persons claiming asylum because of their illegal entry may be regarded as a form of penalisation especially if the duration of detention is prolonged and/or harsh conditions are imposed.

As is the case under the UNHCR legal framework, state practice reveals that administrative detention should not be employed as a form of punishment. The practice of mandatory detention has been subject to judicial scrutiny as the legislative scheme

[1055] Report of the Working Group on Arbitrary Detention, Visit to Australia, *supra* n. 214, para.12; *A* v. *Australia*, supra n. 193, paras.9.2 - 9.4
[1056] *A* v. *Australia*, ibid., para.9.2
[1057] CSR, *supra* n. 118, Art.31 (1); *See also*, UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, *supra* n. 202, at para.3 where Art.31 (1) "applies not only to recognised refugees but also to asylum-seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one."
[1058] Ibid., para.3

requiring administrative detention of unlawful non-citizens irrespective of individual circumstances is claimed to be penal in character. Such authority is reserved for the judicial branch of government. The High Court of Australia upheld the constitutionality of the legislative scheme by concluding that the provisions were enacted for an immigration control purpose, which constituted an incident of executive power under the Constitution.[1059] The High Court has reaffirmed the validity of the mandatory detention scheme on a number of occasions[1060] and it has received bipartisan support as evidenced through the continuation of the policy by successive governments in spite of international criticism including by respected bodies such as the UN Working Group on Arbitrary Detention.[1061]

A comparative examination of state practice reveals administrative detention employed for initial screening, including undertaking identity checks and to ensure that persons suspected of unauthorised entry do not abscond, is not considered to contravene the international norms associated with protection of liberty and security of person.[1062] The HRC has declared that it is not arbitrary *per se* to detain persons seeking asylum and that there is no customary rule prohibiting the detention of those persons.[1063] This initial measure is commonly justified on the basis that it seeks to protect public goods and therefore a reasonable and justifiable response to protect the sovereign authority and territorial integrity of the host state.

[1059] *Chu Kheng Lim*, *supra* n. 33
[1060] *Al-Kateb*, *supra* n. 334; *Al Khafaji*, *supra* n. 352
[1061] As noted in the course of my research, at administrative level Key Immigration Detention Values, *supra* n. 383, were drafted in recognition of the harsh consequences which may result from an indiscriminate and mandatory regime however the scheme itself has not been subject to legislative amendment.
[1062] *Saadi*, *supra* n. 615
[1063] *A* v. *Australia*, supra n. 193, para.9.3

It is more difficult to assert that prolonged indefinite detention often caused by the failure of the host state to remove unauthorised non-citizens will not contravene the prohibition against arbitrary detention.[1064] The authority to detain has been held to be subject to an implied limitation for a period considered "reasonably necessary" to effect removal in the United Kingdom and in Malaysia and Singapore under the "four walls" doctrine until a time where the purpose of detention i.e. removal is frustrated and cannot be fulfilled.[1065] In the latter case, the period of detention of the irregular migrant was approximately nine years, which exceeded any acceptable standard of treatment and forced the judiciary to intervene. In Hong Kong, in determining reasonableness of the duration of detention, the Court took into account the applicant's refusal to accept voluntary repatriation in holding that it did not infringe the right to liberty and security of person under the Hong Kong Bill of Rights Ordinance.[1066] The United States Supreme Court concluded that legislation authorising detention following a 90-day removal period is subject to an implied limitation that removals should occur within a six-month period to avoid constitutional invalidation.[1067]

In Australia, a legislative scheme in which detention is prescribed until one of three events occur, either the unlawful non-citizen is removed, deported or granted a visa has been held not to contravene Chapter III of the Federal Constitution as its purpose is not punitive in character.[1068] Although there is a requirement that removal on request of the unlawful non-citizen is to occur "as soon as reasonably practicable", so long as the authorities had done everything in their power to effect removal its purpose is not

[1064] *Zadvydas*, *supra* n. 492; *Lin v. Ashcroft*, *supra* n. 514
[1065] *R* v. *Governor of Durham Prison, ex p. Singh (Hardial) supra* n. 341; *Lui Ah Young*, *supra* n. 838
[1066] *Chieng A Lac, supra* n. 694
[1067] *Zadvydas*, *supra* n. 492
[1068] *Al-Kateb*, *supra* n. 334; *Al Khafaji*, *supra* n. 352

unlawful.[1069] The legislative scheme cannot be construed to impose an implied limitation. It also cannot be inferred that because the authorities in another state thwarted repatriation that the host state would be prevented from removing the detainee at the earliest possible opportunity in the future.[1070] Although the legislative scheme may result in prolonged indefinite detention, if the authorities were acting in accordance with its constitutional power to effect removal then such a measure is not unlawful.

According to the HRC, the Australian government failed to establish that detention was not arbitrary in the case of a Cambodian national who was detained for over a four year period and an Iranian national who suffered psychiatric illness resulting from a period of detention lasting over two years.[1071] In the latter case, the HRC elaborated on the scope of this obligation, requiring the Australian government to demonstrate that there was not "less invasive means" to secure the same ends.[1072] Taking into account the particular circumstances of the applicant, the HRC concluded that compliance with immigration policies could be achieved in ways other than immigration detention including the imposition of sureties and reporting obligations. In cases of indefinite detention, a conventional practice is to arrange for an alternative to detention such as granting temporary admission. Although those persons remain liable to detention, it does not mean that the inability to remove those persons in the foreseeable future compels the authorities to grant exceptional leave to enter.

Although the use of indefinite detention is widely condemned, state practice is not consistent or evolved to declare that detention widely considered unjust is prohibited by

[1069] Ibid., *Al-Kateb*; ibid., *Al Khafaji*
[1070] *Al-Kateb*, ibid., *Al Khafaji*, ibid.
[1071] *A* v. *Australia*, *supra* n. 193, para.9.4; *C* v. *Australia*, *supra* n. 196, para.8.2
[1072] *C* v. *Australia*, ibid., para.8.2

international custom. However, there is more merit to such claims where the detention involves certain categories of irregular non-citizens who are especially vulnerable such as unaccompanied children who are usually afforded an alternative migration control measure. I would argue that standard to determine whether detention is arbitrary based on conventional criteria of duration, recourse to review etc. is not always an accurate indicator to determine whether detention is in fact arbitrary. Rather the cumulative factors involving not only the length, conditions and recourse to review but also the vulnerability of the detainee, which may include being a minor, or a sufferer of mental or physical impairment needs to be factored into consideration before determining whether detention is arbitrary. Although it is possible to establish a minimum standard it is also necessary acknowledge that there are exceptions where the general standard applicable for one person is not necessarily the same for another.

In the report of the Working Group on Arbitrary Detention concerning its visit to Australia the Working Group concluded:

> "Australian public opinion must also know that, to the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world."[1073]

A mandatory indiscriminate regime requiring unauthorised arrivals to be detained often for a prolonged indefinite period without recourse to substantive review coupled with a failure to treat detainees with humanity will more likely bind states, which are not party to general multilateral conventional law regimes such as the ICCPR. This has significant implications for countries such as Singapore and Malaysia, which have not

[1073] UN Working Group on Arbitrary Detention, *Report on Visit to Australia*, *supra* n. 214, para.62 (b)

ratified the ICCPR, advocated that customary law norms are culturally relative and included a privative clause in domestic legislation to oust the jurisdiction of the courts.

The members of the Working Group in their report on their visit to Australia emphasised that to their knowledge no other country employed a similar immigration control response. Australia is specially affected by irregular migration, which in part is because none of the major transit countries in the region recognises the CSR and the 1967 amending Protocol. The immigration control response employed by the Australian government therefore has the potential to frustrate the development customary rules in this field. However, if one accepts the conclusion of the Working Group there should be sufficient general and consistent practice to the contrary, in spite of Australia being specially affected by this phenomenon, which would prohibit states from adopting a regime, which is likely to lead to detention of an arbitrary nature. The immigration control response of the Australian government should therefore not be viewed as an indication of the recognition of a new customary rule but as a breach of an existing rule.[1074] The Australian government could challenge this claim by asserting that it has been a "persistent objector" to this rule during the crystallisation process. However, the mandatory detention regime was only introduced in 1992, which I argue does not meet the time requirement established by the ICJ in the seminal Fisheries case.[1075]

11.2.2. Removal

The discretionary authority of the host state to remove non-citizens is acquired by virtue of its sovereignty. States maintain competence to undertake and determine the

[1074] *Nicaragua* v. *United States*, *supra* n. 256, para.186
[1075] *Fisheries case* (*United Kingdom* v. *Norway*), *supra* n. 247

procedure for status determination.[1076] A broad "margin of appreciation" is afforded to states to determine which persons are entitled to remain and the applicable procedure employed for this process.[1077] The discretionary authority of states with regard to removal is however not without its limitations, which imposes an obligation on states to ensure that the exercise of authority is not "arbitrary" or "abused".

The regulation of this discretionary authority recognised through their domestic practice includes respect for the rule of *non-refoulement*.[1078] The rule prohibits the return of persons where they are likely to be subject to execution,[1079] enforced disappearance,[1080] torture,[1081] or in cases where the "life or freedom" of a person is "threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."[1082] *Non-refoulement* forms part of this research only to the extent, which it is factored into the administrative decision-making process. For example, this process may reveal that the administrative official has based his or her decision outside jurisdiction or that compliance with the rules of procedural fairness/natural justice has not been met. The substantive scope of the rule has not been subject to examination.

[1076] *C* v. *Director of Immigration* [2008] HKEC 281, para.171
[1077] For example, as an exception to the rule of *non-refoulement*, the INA, *supra* n. 462, permits the return of aliens where their life or freedom may be threatened on the ground that they "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion."§241(b)(3)(B)(i); The compatibility of this provision with Article 33 (2) of the CSR, *supra* n. 118, authorising an exception to the principle of *non-refoulement* where there are "reasonable grounds" for believing that the non-citizen is "a danger to the security of the country" or "a danger to the community of that country" is ultimately an assessment for the host state to make.
[1078] CSR, *supra* n. 118, Art. 33(1); CAT, *supra* n. 216, Art. 3(1)
[1079] ECtHR, Application No. 13284/04, *Badar and Kanbor* v. *Sweden*, para.46
[1080] International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005) , Art.16(1)
[1081] *Chahal*, *supra* n. 48, para.80; Notably, Article 3(1) of CAT, *supra* n. 216, extends *non-refoulement* obligations only to persons who are in danger of being subject to torture and not to cruel, inhuman or degrading treatment or punishment.
[1082] CSR, *supra* n. 118, Art.33(1)

The principle of *non-refoulement* is codified in international conventions and at least in certain jurisdictions is recognised as forming part of international custom. Some jurists assert that the principle may have "acquired the status of *jus cogens* ... a peremptory norm of international law from which no derogation is permitted."[1083] However, in domestic case law the elevated normative status of the rule is generally not accepted.[1084]

Although Singapore and Malaysia are not party to the CSR and the 1967 Protocol, the High Court in Singapore has noted that the Singapore government is obliged to comply with its customary law obligations without expressly addressing whether *non-refoulement* formed part of international custom.[1085] In Malaysia, the Court of Criminal Appeal implied that if a rule of international custom could be established it would form part of the common law save to the extent of any inconsistency.[1086] However, the applicant is required to meet the onerous task of establishing that the broader

[1083] Jean Allain, "The Jus Cogens Nature of Non-Refoulement", 13(4) *International Journal of Refugee Law* 533 (2001)

[1084] In Hong Kong, it is has been recognised that the rule of *non-refoulement* forms part of international custom however there is insufficient evidence to conclude that it has acquired the elevated status of *jus cogens* which prohibits any form of derogation. However, there is sufficient evidence to conclude that Hong Kong both during its time as a British colony and following resumption of sovereignty by China has rejected the rule at least to the extent that it concerns persons seeking asylum based on CSR grounds as evidenced through domestic policy pronouncements and the intent of the legislature. It therefore cannot be concluded that the principle has been incorporated into the common law as consequence of this inconsistency. *See*, *C* v. *Director of Immigration*, *supra* n. 1076

[1085] In *Public Prosecutor* v. *Nguyen Tuong Van* [2004] 2 Sing. L.R. 359, para.36 the High Court accepted that Singapore is obliged to comply with its customary law obligations codified in section 36 (1) of the Vienna Convention on Consular Relations, *supra* n. 75, to inform Australian consular officials of the arrest and detention of one of its nationals for drug trafficking. The Central Narcotics Bureau followed internal directives to inform the consular officials approximately 20 hours after the defendant had initially been detained even though Singapore had not ratified the Convention. Kan Ting Chiu J concluded: "Singapore holds herself out as responsible member of the international community and conforms with the prevailing norms of the conduct between states. Specifically, the directive suggests the acceptance of the obligations set out in Art 36(1)."

[1086] *Public Prosecutor* v. *Narongne Sookpavit & Ors* [1987] 2 MLJ 100

international community along with the forum state has accepted that rule.[1087] The mere acquiescence of the state to a particular rule according to this rationale would not suffice. Such an interpretation is incompatible with decisions of the I.C.J. and the opinions of international law jurists who assert that a state will be relieved of obligations if it has persistently objected to the rule during its formation.[1088]

Consistent with decisions and conclusions reached by international monitoring bodies, domestic case law has interpreted the principle to require host states to undertake inquiries concerning whether the applicant may subsequently be returned to a country where he or she may suffer harm. The administrative decision must therefore be based on relevant information to avoid jurisdictional error.[1089] Such inquiries are not limited to establish whether agents of the state would be responsible for the harm suffered but also whether non-state actors may threaten life and liberty and whether the state would tolerate or condone such treatment.[1090]

The United States and Australia recognise that non-citizens have the right to claim asylum.[1091] Whether protection is granted is a matter determined by their respective domestic regulatory regimes. While international law may prescribe, the right to "seek" asylum there is no rule of international custom requiring states to allow those persons to

[1087] C.L. Lim, "Public International Law before the Singapore and Malaysia Courts," 8 *Singapore Year Book of International Law* 243 (2004), at p. 252. *Narongne Sookpavit*, ibid., at p. 105, according to Shankar J before custom could be considered to form part of the domestic law sufficient evidence through domestic and foreign case law was required to be produced to confirm its existence. The high evidential standard was not established and therefore Article 76 (1) of the Constitution required conventional law to be implemented in the domestic sphere through legislation.
[1088] *Fisheries case* (*United Kingdom* v. *Norway*), *supra* n. 247
[1089] For example, see *SFGB v. Minister of Immigration and Multicultural and Indigenous Affairs, supra* n. 433, where a decision was made in the absence of information
[1090] ECt.HR 22 April 1997, Case No. 11/1996/630/813, *H.L.R.* v. *France*
[1091] INA, *supra* n. 462, § 208 (a)(1); Migration Act, *supra* n. 285, section 36

enter.[1092] In Australia, the applicant is required to avail him or herself to the protection of another country before protection obligations arise under the CSR and the 1967 Protocol.[1093] However, it is not expected that that person will avail him or herself to the protection of another country where he or she will subsequently be returned to another country where that fear of harm is likely to be realised.[1094]

There has been protracted criticism concerning the scope of administrative review and the exercise of administrative discretion to ensure such obligations are respected.[1095] The Migration Act authorises the Minister where he or she deems it to be in the "public interest" to allow a further application for a protection visa where it has previously been refused[1096] and to substitute a more favourable decision than the decision made by the RRT.[1097] The relevant provisions are however non-reviewable, non-compellable and non-delegable which is of relevance in comprehending the extent to which the Australian government perceives the nature of its obligations in this field.

The protection of non-citizens in an irregular situation is one area where the administrative decision-making process must comply with established standards to guard against jurisdictional error in the broad sense.[1098] These standards are equally applicable in removal decisions outside the protection/humanitarian realm for other categories of non-citizens identified in the introductory chapter. For instance, irregular non-citizens

[1092] Mirko Bagaric et al., *Migration and Refugee Law in Australia* (Cambridge, New York: Cambridge University Press, 2007) at p. 246, para.137
[1093] Migration Act, *supra* n. 285, section 36(3)
[1094] Ibid., section 36(5)
[1095] Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958*, (Canberra: Senate Printing Unit, Department of the Senate, March 2006), pp. 133-140, http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/report/report.pdf
[1096] Migration Act, *supra* n. 285, section 48
[1097] Ibid., section 417
[1098] *See*, Beaton-Wells, *supra* n. 416, at p. 138

who have had long-term residence in the host state may develop familial ties, establish businesses and employ local workers or seek to benefit from government endorsed amnesties to regularise their status. In all cases, administrative decisions concerning removal must be fair, rational and lawful.[1099]

11.2.3. Privative Clauses

The use of privative clauses to oust the jurisdiction of the courts has been employed in many of the jurisdictions examined in this research. The enactment of the Migration Legislation Amendment (Judicial Review) Act 2001 (Cth) in Australia is a notable example of the legislative attempt to preserve executive authority. A "privative clause decision" under this regime is defined as being "final and conclusive" which cannot be "challenged, appealed against, reviewed, quashed or called into question in any court" and not subject "to prohibition, mandamus, injunction, declaration or certiorari".[1100]

In Australia, the privative clause scheme is comprehensive. For instance, non-citizens who are able to rely on the protection of a third country are unable to make a valid application for a visa unless the Minister in a personal exercise of authority deems that it is in the "public interest" for the non-citizen to be allowed to apply for a visa.[1101] Other discretionary decisions beyond the reach of the courts include substituting a decision of the RRT which is more favourable to the applicant[1102] and granting a person

[1099] Administrative Review Council, "The Scope of Judicial Review Discussion Paper," 2003, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_The_Scope_of_Judicial_Review (last accessed, 10 December 2009), at p.47
[1100] Migration Act, *supra* n. 285, section 474(1)
[1101] Ibid., section 91Q
[1102] Ibid., section 417

in immigration detention a visa so that that person is no longer subject to the mandatory detention regime.[1103]

The High Court of Australia has interpreted privative clause decisions narrowly to comply with the rules of statutory construction. An interpretation should be adopted which is consistent with the Constitution and "that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies."[1104] Administrative decisions tainted by jurisdictional error are deemed not to be a decision and therefore such decisions do not oust jurisdiction of the courts.[1105]

Cases, which were unsuccessful in ousting the jurisdiction of the courts, have involved the administrative review body reaching findings of fact in the absence of probative evidence to justify a decision to remove in spite of the applicant's claim that officials were involved in her trafficking.[1106] The involvement of officialdom was relevant with respect to whether the applicant's state of nationality could provide adequate protection following repatriation. By requiring the applicant to establish that officials were *directly* involved in her trafficking, the RRT overlooked or disregarded sources, which indicated that the involvement of officialdom in human trafficking was systemic in Thailand. Similarly, a decision made to remove the applicant on the basis that reports could not be obtained regarding whether the Taliban was active in a province of

[1103] Ibid., section 195A
[1104] *Plaintiff S157/2002*, *supra* n. 414, at p. 505
[1105] Ibid., at p. 506
[1106] *VXAJ*, *supra* n. 443

Afghanistan constituted a jurisdictional error, as it was impossible to determine whether the person claiming asylum is likely to suffer mistreatment.[1107]

In the United States, the intent of Congress to oust the jurisdiction of the courts on a broad range of immigration control matters is evident with the enactment of the Antiterrorism and Effective Death Penalty Act, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the REAL ID Act of 2005, which made significant amendments to the INA. The legislative amendments had the effect of preventing the courts from undertaking judicial review with respect to discretionary decisions made under Title II of the INA by the Attorney General or the Secretary of Homeland Security with the exception of applications for asylum.[1108] For example, the discretionary authority of the Attorney General concerning the detention or release from detention of aliens is not subject to review.[1109] The courts are not authorised to review decisions where there has been a refusal to grant asylum due to the availability of a safe third country, a previous application for asylum was refused and the application was not filed within the permissible one-year period.[1110] The courts may review final orders of removal.[1111] An "order of deportation" becomes final either following the determination of the BIA, which has affirmed the order or following an expiration of the period in which the applicant is authorised to seek review of the order of the BIA.[1112] The enactment of the REAL ID Act sought to eliminate *habeas corpus* review. *Habeas corpus* proceedings are still available for persons subject to expedited removal but are limited in

[1107] *SFGB*, *supra* n. 433
[1108] INA, *supra* n. 462, § 242(a)(2)(B)(ii)
[1109] Ibid., § 236(e)
[1110] Ibid., § 208(a)(3)
[1111] Ibid., § 242(d)
[1112] Ibid., §101(a)(47)

the determination of specific issues.[1113] Review is not prohibited where constitutional claims or issues concerning statutory construction arise.[1114]

In the United States, the jurisdiction of the courts are ousted in specific circumstances yet maintained where constitutional issues arise. In Australia, the courts have maintained the constitutionality of a broad privative clause scheme yet significantly curtailed the scope of its operation through judicial interpretation. The legislatures in Singapore and Malaysia have sought to oust the jurisdiction of the courts in a comprehensive and absolute manner. In contrast to Australia and the United States, the courts have demonstrated that it will defer to the political branches of government power deeming unauthorised migration to threaten public goods and therefore a matter best reserved for elected officials. Judicial deference supports the position of public officials in these jurisdictions in advocating human rights norms are culturally relative. The degree to which they depart from a "universal" or "quasi-universal" standard is determined by the nature of state practice.

With the exception of cases involving jurisdictional error, the extensive legislative amendments in the United States and Australia curtailing judicial review in broad matters of immigration is evidence of sufficient practice to rebut assertions that the ousting of the jurisdiction of the courts is contrary to rules of general international law. The liberal use of privative clauses in the Southeast Asian jurisdictions examined in this research further supports this position.[1115] However, if there is a denial of the rules of natural justice or the decision of the administrative decision-making authority is tainted by jurisdictional error, it is unlikely in the author's view that it would preclude judicial scrutiny. As such while

[1113] Ibid., § 242(e)
[1114] Ibid., § 242(a)(2)(D); *Zadvydas*, *supra* n. 492
[1115] Immigration Act, *supra* n. 764, section 59A; Immigration Act, *supra* n. 902, section 39A

state practice reveals that privative clauses are not incompatible with rules established under general international law, where administrative decision-making does not meet the requirements of fairness, lawfulness and rationality the ousting of the jurisdiction of the courts is unlikely to be permissible under general international law.

12. Conclusion

The primary objective of this research has been to define the parameters of human rights norms associated with administrative detention and removal of irregular migrants through a comparative examination of state practice from two distinct sets of jurisdictions. The criminal law dimension, which is applicable in certain states, is excluded from the scope of this research. The Western set of jurisdictions comprise of Western liberal democracies which have traditionally supported universal human rights whereas the Southeast Asian set of jurisdictions are influenced by the broad concept of "Asian values" comprising of elements associated with communitarianism and Confucianism.

The Southeast Asian states examined in this research, particularly Singapore and Malaysia under the leadership of Lee Kuan Yew and Mahathir bin Mohamad respectively have been vocal in their rejection of universalism (at least in its radical form) in favour of norms being culturally relative. The influence of cultural relativism on state practice justifies the imposition of restrictions and limitations on norms where it is considered that public goods are undermined. Such measures are deemed necessary to preserve the economic welfare and social fabric of the state. Acceptance of cultural relativism however does not necessarily reveal a departure from the international regulatory framework as monitoring mechanisms have long recognised that the state is best placed to meet its international commitments taking into consideration "local conditions", which in the case of Southeast Asian states include a heightened need to protect public goods.

The author has imposed an artificial limitation on the category of persons identified as having irregular status. Four major categories of irregular migrants have

been identified for the purpose of this research: 1/ persons who arrive on the territory of the host state by bypassing immigration control, 2/ persons who stay beyond the time authorised, 3/ persons who violate their condition of stay e.g. undertaking remunerative activity, 4/ persons who enter the territorial jurisdiction of the host state by deception or false pretences. The common feature associated with these forms of irregular migration is that the non-citizen has already entered the territorial jurisdiction of the host state. It is acknowledged that the concept of irregularity may be subject to a more restrictive or liberal interpretation depending on the category of person which the research wishes to address.

Reasons why states behave in a particular way to irregular migration e.g. geopolitical considerations, deterrence, economic reasons etc. is also not directly relevant to this inquiry as it is the raw material of state practice which counts in the formation and development of international law. Admittedly however, such considerations are relevant in assessing whether public goods are undermined which may justify the curtailment of recognised rights and freedoms.

Throughout the course of this research, the author has asserted that international monitoring mechanisms lack the competence and the authority to accurately define the parameters of norms in this field due to the pivotal role of the state in the creation and development of norms under public international law. International monitoring bodies acknowledge this by delivering its findings in “general comments”, “concluding observations” and “recommendations”. Moreover, international judicial bodies such as the ECtHR acknowledge that states are afforded a “margin of appreciation” to carry out their international commitments. States may internalise the findings and

recommendations of these bodies and in Europe, membership in the European Union compel states to accept the decisions of the ECtHR. However, it is the actions of states, which are instrumental in providing a detailed and substantive interpretation of the scope of applicable norms, rather than international institutional arrangements, which provide broad guidance concerning nature of international commitments.

The parameters of these norms as recognised under rules of general international law may be defined through a comparative examination of domestic legislation, case law and policy pronouncements, evidence of measures adopted by the respective branches of government power. Although such measures may be seen as a relinquishment of sovereignty in order to adhere to conventional and customary law norms, this practice is also evidence of the need to maintain authority to protect public goods – public order, economic interests, security, public morals etc.

In a legal system in which the sovereign equality of states constitutes the prevailing norm of international law, the author does not attach greater weight or importance to the practice of certain states over others. The exception to this rule is that where states are "specially affected" by a certain phenomenon, in the case of this research irregular migration, the ICJ in the *North Seas Continental Shelf Cases* has recognised that the practice of these states is especially influential in assessing how rules of general international law are established and evolve. The dynamics of irregular migration influenced by push-pull factors vary from region to region with some states being affected by intra-regional irregular migration whereas other states are affected by inter-regional movement of persons or a combination of both. Regardless of the dynamic which applies to a particular state, all of the states examined in this research are specially

affected by irregular migration and hence its practice is especially influential in defining the scope of norms in this field compared to states not so affected.

Comparing and contrasting state practice through an examination of seminal case law with respect to core issues of administrative detention and removal, and legislative measures commonly aimed at preserving the authority of the executive and excluding judicial oversight reveals the perceived nature of international commitments and/or measures undertaken pursuant to sovereign policy considerations. Whether a domestic measure is undertaken out of an expressly advocated sense of legal obligation to follow the practice or exercised partially or exclusively as a result of sovereign policy considerations is not necessarily conflicting. As the author asserts in the preceding chapter it is overly cynical to suggest that human rights norms are relegated to insignificance when states are faced with competing priorities. Such suggestions may be countered by acknowledging the goodwill historically demonstrated by these states either through cooperation with human rights monitoring mechanisms. States generally seek to work within the human rights framework albeit on occasions justifying the curtailment of norms under the rubric of cultural relativism. The author supports this position by noting that states maintain membership in the United Nations, adhere to the principles outlined in the UN Charter, which includes respect for human rights and fundamental freedoms and accept landmark instruments such as the Vienna Declaration and Programme of Action concluded at the World Conference on Human Rights.

While it is argued that undertaking a comparative analysis of two distinct sets of jurisdictions generates a more accurate understanding of the scope of norms in this field, it must be acknowledged that the findings of this research may be challenged if the

practice of other states specially affected by irregular migration is incompatible with the findings of this research. Furthermore, it is acknowledged that the inclusion of a greater number of states in the comparative examination process would strengthen the conclusions of this research, especially for those who favour a traditional interpretation concerning the manner in which international custom is formed and evolves. However, in the absence of more time and greater resources it would only be possible to engage in a superficial examination of the immigration control response of additional states.

The research, which I have completed should not necessarily be viewed as an absolute standard, rather it should be seen as a reliable indicator of the present state of international law in this field as regulated by the actions of states. The states included in this research are highly influential in regulating the present state of international law and coupled with the decision to undertake a comparative examination of two distinct and seemingly diametrically opposed sets of jurisdictions concerning the perceived nature of human rights commitments promotes greater objectivity. The task of locating equally influential practice to challenge areas of relative uniformity identified in this research would prove a difficult although not impossible assignment.

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