Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth

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Abstract

This article is about a complex policy problem for governments everywhere: the phenomenon of children and young people presenting as forced migrants, either alone or in the company of responsible adults. The special vulnerability of children in situations of displacement is apparent and (typically) is readily acknowledged. Rather than responding directly and simply to the needs of the embodied child, however, governments have found serial justifications for denying protection and for adopting policies that harm, rather than help, the children in question. Using as a case study Australia's recent response to children presenting as unauthorised maritime arrivals ('UMA'), the article explores the discourses that have developed to deny children rights that are enshrined in international law. I argue that these have centred around three disabling ideas. The first is that the rights of children are compromised by their standing relative to the rights and interests of adults. The second is that the rights of refugee children and youth are affected by their status as non-citizens or aliens. This is because rights vested under international law will only have meaning if 'enabled' by domestic law. The third challenge to the notion of rights in refugee children and youth revolves around the perceived imperative that countries adopt measures to deter irregular migration. The idea is that policies must be set so as to deter adults from placing refugee children and youth in situations of peril by sending them alone in search of asylum. The protection of the *putative* child is invoked in defence of policies that are acutely harmful to embodied children. In Australia's case, examples of such policies are found in the mandatory detention of undocumented refugee children and youth and the decision to deflect UMA children and youth to regional processing centres on Nauru and Papua New Guinea's Manus Island. Without denying the difficulties governments face in these matters, I argue that Australia's laws and policies have now reached a tipping point. The very concept that refugee children and youth might be rights bearers has been put in question.

I The Challenge

Children presenting as forced migrants — most particularly children seeking asylum without the protection of a responsible adult — pose intractably difficult policy problems. The reasons young people end up in situations of forced displacement are as varied as the

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world's evils, and equally as complex. Children can be part of a mass exodus. They can be the victims of vile criminal activities. They can be pawns in complex strategies devised by adults desirous of achieving immigration outcomes for either or both children and their families. In whatever circumstances they arrive, children are the most vulnerable of migrants. They are unusually susceptible to injury in situations of unrest or disaster (natural or humanitarian).[1] They are particularly ill-equipped to deal with the complexities of legal processes in navigating the protection pathways available under international and domestic law. On the other side, there is evidence that parents and responsible adults will target countries perceived to be generous in their reception of immigrant children.[2] Often placed in situations of great peril, these young migrants are referred to in policy circles as 'anchor' children. Governments everywhere struggle when required to accommodate the needs of children within regimes directed at border control and irregular migration.[3] Australia's experience has led the government in this country to adopt policies and propose law reforms that the government itself acknowledges are detrimental to the interests of the children affected, on the presumption that punitive measures are the only way to deter irregular migration (including irregular migration by children themselves).

The central argument in this article is that there has been a tendency in the Australian case to subscribe to theories about children in forced migration that both deny the complexity of the phenomenon and fail to provide useful frameworks for finding solutions. More specifically, I contend that the approach adopted in this country has led to a regressive tendency to objectify the child migrant — and to deny to children altogether their legal status as rights bearer under international law.

The challenges refugee children and youth face in asserting the rights conferred at law (international and domestic) are threefold. First, in practice, these children are rarely considered as rights bearers in isolation from the adults who dominate the family collective. Here, the rights of the children are perceived to be qualified by the relative rights of the responsible adults who are associated with children by relationship or responsibility. When parents are characterised as irregular migrants, as security risks, or are themselves subjected to deterrent measures such as interdiction and deflection to a third country, children are often the collateral damage to decisions made about adults' status.

Second, the refugee child's status as rights bearer qua child is seen as subservient to the child's status as a non-citizen or alien. Australia's migration laws are quite express[4] in the stipulation that immigration law and policy — particularly as it relates to control and enforcement — has precedence over any other applicable law and policy. Nowhere is this

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1 For a discussion of the disproportionate number of children affected by the Boxing Day tsunami in 2004, see UNICEF, 'UNICEF Launches $144.5 Million Appeal' (Press release, 6 January 2005) <http://www.unicef.org/media/media_24707.html >.

2 This fact is borne out in Australia's experience, with the number of unaccompanied children presenting as irregular maritime arrivals jumping from eight in 2008 to 848 in 2012. See statistics supplied by Department of Immigration and Citizenship ('DIAC'), email to the author from Ms Katie Constantinou dated 26 November 2012, reflecting statistics as at 23 November 2012.

3 See Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press, 2006); Mary Crock and Jacqueline Bhabha, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press, 2007).

5 This is all the more so since the August 2012 amendments to the *Immigration (Guardianship of Children Act) 1946* (Cth), discussed further below.

as apparent as in laws and policies mandating the detention of children and youth presenting as undocumented asylum seekers.

As I have argued elsewhere,[5] Australians clearly understand the notion of obligation under international law, in particular the principle that refugees should not be *refouled* or returned to a place where they face persecution for a Convention reason.[6] However, there is mounting evidence that we do not accept that this obligation might vest a correlative right in persons in respect of whom obligations are owed. This is most particularly the case when the persons asserting rights are minors. Australia's position on these matters is apparent in the policy and laws enacted by its federal Parliament and by the way in which these laws have been interpreted by its highest courts. Subscribing to the dualist approach to international law,[7] both Parliament and the courts have made it plain that it is Australia's domestic laws that will dominate in the event of inconsistency with obligations assumed under international law.[8]

The third problem facing refugee children and youth aspiring to assert rights is what I identify as 'deterrence' theory.[9] This results in the figurative disembodiment of the refugee child by shifting the protective focus from the actual child to the 'putative' child. Deterrence measures play out as harsh and punitive policies that range from interdiction and deflection to a third country, mandatory immigration detention, denial of rights to education and of opportunities for family reunification. Deterrent measures are predicated on the notion that the harsh treatment of the embodied child is necessary so as to prevent harm to and the abuse of future children (the putative children). The imperative to deter is found in the harms befalling children caught up in the processes of irregular migration in general — and of irregular maritime travel in particular. The argument is that generous policies towards children presenting as forced migrants act as a pull factor, encouraging others to send their children in search of protection (or a better life). For example, in 2011, then Minister Chris Bowen used the dangers for children inherent in irregular maritime migration as a primary justification for deflecting unauthorised maritime arrivals ('UMAs') to Malaysia[10] — a country not party to the *Refugee Convention*, which was known to be a place where refugees suffered hardship and abuse of human rights. He said:

> I think the overriding obligation is to stop unaccompanied minors risking their lives on that dangerous boat journey to Australia. The overriding obligation is to say to

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5 See Mary Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia Pacific' (2013) *International and Comparative Law Quarterly* (forthcoming).

6 See *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Art 1A(2) ('*Refugee Convention*') as amended by the *Protocol Relating to the Status of Refugees,* opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

7 See Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 105 [3.4], 142–3 [3.65].

8 See *Al-Kateb v Godwin* (2004) 219 CLR 562; Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

9 Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 *Griffith Law Review* 238.

10 The 'Arrangement' with Malaysia involved sending 800 UMAs to that country in exchange for 4000 refugees from Malaysia: *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, signed 25 July 2011 ('Arrangement'). See the discussion at Part 4 below.

> parents, 'Do not risk the lives of your children to get the prospect of a visa in Australia'.[11]

This article begins, in Part II, with a brief overview of how the United Nations *Convention on the Rights of the Child*[12] and other international instruments that have shaped juridical conceptualisations of the child as legal person. While there has never been a time in human history when the international legal frameworks for the protection of refugee children have been stronger, a gulf has opened between international principle and domestic practice. Australian is presented in Part III as a case study demonstrating how the relativities of rights affect refugee children and youth in two areas of human rights law: the right to family life and the right to personal freedom and integrity of the person (infringed by immigration detention). In each instance it will be seen that the denial of children's fundamental rights is often accompanied by the invocation of deterrence as a policy motivation.

There follows, in Part IV, a study of policies adopted by Australia that plainly conflict with the rights of refugee children and youth to basic protection. With the spike in UMAs that followed the defeat of the so-called 'Malaysian Solution',[13] the government convened an 'Expert Panel' to devise a circuit breaker that would stop the flow of refugee boats to Australia.[14] For UMA children and youth, the change with the most serious ramifications was the decision in August 2012 to re-open 'offshore' processing centres on Nauru and on Papua New Guinea's (PNG's) Manus Island as deterrents. The 'regional processing' regime has the effect of deflecting asylum seekers to these countries, which then assume legal responsibility for all aspects of status determination, care and resettlement. In July 2013, this policy was hardened further by the announcement that all UMAs were to be *resettled* (permanently) in PNG.[15] A new conservative government, elected in September 2013, looks set to continue with the central tenets of this policy. It is a central feature of the scheme that it should cover all irregular maritime migrants, irrespective of their point of contact with Australia[16] and (in principle) irrespective of age and vulnerability. The Minister, acting personally and pursuant to a 'non-compellable, non-reviewable' discretion, is the only actor empowered to exempt individuals from the scheme.[17] The deflection policies reflect, once again, the relativities that plague refugee children and youth as rights bearers. They also embody the theory that irregular migrants can and should be deterred through the adoption of punitive policies.

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11 See Julia Gillard PM and Chris Bowen MP, Minister for Immigration and Citizenship, 'Samantha Stosur, Asylum Seekers, Malaysia Agreement' (Transcript of joint press conference, Canberra, 8 August 2011).

12 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); ratified by Australia 17 December 1990 ('CRC').

13 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Plaintiff M70*'), discussed in Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law Review* 437.

14 Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers,* (Department of Immigration and Citizenship ('DIAC'), August 2012) ('*Houston Report*') <http://expertpanelonasylumseekers.dpmc.gov.au/>.

15 See ABC News, 'Asylum Seekers Arriving in Australia by Boat to be Resettled in Papua New Guinea', *ABC News* (online), 20 July 2013 <http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-be-expanded-under-rudd27s-asy/4830778>.

16 See *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012* (Cth).

17 *Migration Act 1958* (Cth) s 198AE ('*Migration Act*').

I conclude by acknowledging the challenges posed by asylum-seeker children and youth. In so doing, I urge a return to the central tenets of the international legal principles which have done more than anything else to bolster the identity of the migrant child as a legal person both deserving of protection and worthy of respect.

II Legal Frameworks and Refugee Children and Youth

Today, there is little novelty in the idea that children should be regarded as 'rights bearers' in law — not as adults in miniature, but as individuals with separate identities and distinct needs and characteristics.[18] The CRC, done at Geneva in 1989, is the most widely accepted of all UN human rights conventions. It built on earlier human rights conventions[19] and epitomises the evolutionary change that has occurred in attitudes to children and to childhood.[20] The CRC demands that children be seen as 'subject of rights, who (are) able to form and express opinions, to participate in decision-making processes and influence solutions'.[21] Viewing children's rights through the human rights framework has moved children from 'objects' to 'subjects'.[22] The idea of 'children's rights' as 'human rights' promotes an approach to children centred on the *personhood* of children. Children have rights not because of their particular vulnerabilities, but simply because they are human beings who deserve the kind of dignity and respect that the rhetoric of human rights signals. Children are rights holders even in instances where the child may lack capacity to exercise rights autonomously.[23]

For its part, the Committee responsible for the oversight of the CRC has demonstrated a keen awareness of the particular vulnerabilities of children in situations of forced migration, issuing General Comments on the protection of unaccompanied and separated refugee children and youth.[24] The CRC has also been recognised by the United Nations High Commissioner for Refugees ('UNHCR') as the normative framework that should be adopted for the treatment of refugee children and youth.[25]

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[18] Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines' (1999) 11 *International Journal of Refugee Law* 87.

[19] See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except Art 41 which came into force 28 March 1979) ('ICCPR'); *Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT') .

[20] See Philip Alston and John Tobin, *Laying the Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (UNICEF, 2005) 3ff <http://www.unicef-irc.org/publications/pdf/ii_layingthefoundations.pdf>, 3ff.

[21] Maria Santos Pais, 'Child Participation and the Convention on the Rights of the Child' in Rakesh Rajani (ed) *The Political Participation of Children,* (Harvard Center for Population and Development Studies, 2000) 3, 4.

[22] See Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (Columbia University Press, 1994).

[23] David Thronson, 'Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law' (2002) 63 *Ohio State Law Journal* 979, 986–7.

[24] Committee on the Rights of the Child, General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 39th sess, UN Doc CRC/GC/2005/6 (2005).

[25] See UNHCR Policy on Refugee Children, Executive Committee of the High Commissioner's Programme, 44th Sess, Subcommittee of the Whole on International Protection, 23rd meeting, EC/SCP/82, 6 August 1993, [17].

More recent human rights treaties — most notably the *Convention on the Rights of Persons with Disabilities*[26] — accept and reinforce the personhood of children, including those with disabilities. The CRPD echoes the CRC in its core provisions, making no less than 36 mentions of children within its 50 articles. These constitute more references to children than any other human rights treaty apart from the CRC.[27]

The two most critical achievements of the CRC are those that have become known as the 'best interests' principle in art 3, and the notion that children should have the right to participate in all decisions affecting their future (art 12).[28] Article 12(1) of the CRC states that a child who is capable of forming his or her own views has the right to express those views freely 'in all matters affecting' him or her: 'those views of the child being given due weight in accordance with the age and maturity of the child'.[29]

Child-centred approaches involve using techniques to find out children's perspectives, including taking into account these differences and children's relative lack of power in society due to the fact that they communicate differently from adults. This places children as active subjects in the centre of decision-making processes, not as incompetent objects of their parents.[30] This rights-based approach was endorsed by the UNHCR Executive Committee in its Conclusion on Children at Risk. In this document, the Committee articulated a series of principles to underpin any strategies and actions taken by government. These include the primacy of the child's right to protection and assistance; the 'best interests' principle and the importance of adopting a rights-based approach.[31]

For children and young people displaced by conflict or disaster, the CRC provides a protective blueprint that should, in principle, cover almost every eventuality.[32] Article 2 makes it clear that the CRC applies to all children, irrespective of their legal status under domestic law. Article 20 calls for the provision of special protection and assistance for children 'temporarily or permanently deprived of [their] familial environments'. Perhaps most significantly, art 22 makes it clear that the protections available at law to children recognised as refugees should apply in equal measure to asylum-seeker children (that is, those whose status as refugees remains to be determined). The CRC therefore stands out from other instruments in that the phrase 'refugee children' is used to cover both recognised refugees and asylum seekers who are children.[33] The CRC also echoes other

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[26] See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 46 ILM 443 (entered into force 3 May 2008). The text of both instruments is available on the website of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

[27] See Ron McCallum and Hannah Martin, 'Comment: The CRPD and Children with Disabilities' (2013) 20 *Australian International Law Journal* 17 (in this mini symposium).

[28] See CRPD art 7(2): 'in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration'.

[29] CRC art 12(1); see also CRPD art 7(3).

[30] Jo Boyden and Judith Ennew (eds) *Children in Focus: a Manual for Participatory Research with Children*, (Save the Children, 1997).

[31] See UNHCR, *Conclusion on Children at Risk, No 107 (LVIII), 2007* (5 October 2007), UNHCR Refworld <http://www.unhcr.org/refworld/docid/471897232.html>.

[32] See also CRPD art 11.

[33] CRC art 22; see also Mary Crock, 'You Have to be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers' (2002) 10 *Australian Journal of Administrative Law* 33.

instruments condemning and prohibiting human trafficking.[34] Regarding detention, art 37 of the CRC calls on states to detain children only as a last resort and for the shortest possible time, providing also for children in detention to be given access to legal assistance and the right to challenge their detention.

III Relative Rights

In developed countries like Australia, a strong civil society has seen the central tenets of the CRC promoted in many areas of practice,[35] even if state and federal governments have been reluctant to enshrine the Convention in domestic law. The days when children were viewed as the *property* of their parents — where adults were clearly and uniquely the rights holders — may have passed for citizen children.[36] Whether the CRC has had the effect of fully enfranchising *migrant* children as legal actors is another question. At one level, the notion that the welfare of the child should be a primary consideration in all matters concerning all children is well entrenched in both popular and governmental discourses — especially in the areas of family law and child protection.[37] At another, migrant children continue to struggle across a range of indicators. In this part, two aspects of international human rights law that offer key protections for children are considered: the right to family life,[38] and the principle that children should not be subjected to arbitrary or prolonged detention.[39] Australian law, policy and practice have been slow in both areas to recognise rights in migrant children. Where children are most valued is in their relationship with responsible adults. Children presenting as primary applicants do not fare as well. They suffer from both their inferior position in a created hierarchy of rights and in their characterisation as pawns in an adult game where the immigration objectives of the adults are the main concern.

A *The right to family*

In this section, I will illustrate the right of the migrant child to family life in two contexts. The first concerns sponsorship in family reunification cases. The second issue of central concern to migrant children and youth is the separation of family engendered by deportation or removal.

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34 CRC art 34; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations *Convention Against Transnational Organised Crime* (Palermo Protocol) GA Res 55/25, UN GAOR 55th sess, 62nd plen mtg, Annex II, Agenda Item 105, UN Doc A/RES/55/25 (8 January 2001), opened for signature 15 November 2000 (entered into force 25 December 2003); see also the Optional Protocol to the *Convention on the Rights of the Child* on the sale of children, child prostitution and child pornography, UN Doc A/RES/54/263, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

35 See generally Geoff Monahan and Lisa Young, *Children and the Law in Australia* (LexisNexis, 2008).

36 See, eg, Anne Lawrence, *Principles of Child Protection: Management and Practice* (Open University Press, 2004) 41. In Australia, the construction of the 'welfare child' emerged in the late 19th century.

37 See also Nicola Ross, 'Images of Children: Agency, Art 12 and Models for Legal Representation' (2005) 19 *Australian Journal of Family Law* 94.

38 ICCPR arts 17, 23 (1)–(2), 24; CRC arts 8, 9, 10; CRPD art 23; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 10.

39 See ICCPR arts 9, 10; CAT art 16; CRC art 37(b), (d); CRPD arts 14, 17. See also *Refugee Convention* art 31.

Sponsorship Disparities

The reification of children is seen most strongly in the disparity between the rights bestowed on migrant parents to create and maintain family life and those vested in migrant children. No limits are placed on the number of dependent children[40] and orphaned relatives[41] that migrant parents can sponsor upon settlement in Australia.[42] Although the adoption of foreign children can be very difficult,[43] Australia's laws and policies are justified on the basis of protective principles enshrined in the Hague Conventions on Child Abduction.[44]

Where children seek to sponsor parents or family members, however, the situation is dramatically different. Minor children are not permitted to sponsor working age parents from within Australia (the parents must be overseas).[45] Moreover, strict quotas apply to the number of parents who may be granted visas each year. While children who can afford to pay can get priority treatment for some parents,[46] children from disadvantaged backgrounds face impossible odds in the 'non-contributory' stream. Obstacles that have been introduced include a 'balance of family' test, requiring the nominated parents to have more children permanently resident in Australia than in any other country.[47] This is a particular problem for unaccompanied refugee children and youth from the world's most troubled countries: many come from large families and are often the only family member to have been sent abroad in search of protection. The quotas set for 'non-contributory' parent migration mean that the wait for parents can extend well over a decade.[48] As Jacqueline Bhabha has observed, it is an example of 'radical rightlessness' that there is asymmetry between parents whose ability to migrate with their children is virtually unlimited and children who cannot sponsor their parents.[49] When children are denied access to family reunion, she notes, 'they are assumed to be dependent, entities that follow rather than bring in a family'. Bhabha's research shows that Australia is not alone in limiting family reunion in this way or in dismissing child-led migration as illegitimate.

Until August 2012, the situation was brighter for unaccompanied children granted protection in Australia as refugees. A component of the offshore humanitarian program was set aside for 'split family' applications. Over the years, unaccompanied refugee minors were able to sponsor their families to join them in Australia under this scheme. The sharp rise in unaccompanied children presenting as UMAs after 2008,[50] however, raised concerns about the chain migration effect of allowing these children open access to family

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40 See *Migration Act* s 87(1) and (2); Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) ch 8 [8.03].

41 See *Migration Regulations 1994* (Cth) sch 2 subcll 117, 837, Crock and Berg, above n 40, [8.21]ff.

42 See also Crock and Berg, above n 40, ch 8.2; Mary Crock, Mary Anne Kenny and Fiona Allison 'Children and Immigration and Citizenship Law' in Monahan and Young, above n 35, 238.

43 See *Migration Regulations 1994* (Cth) sch 2 subcll 102, discussed in Crock and Berg, above n 40, [8.18] ff.

44 See *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, opened for signature, 29 May 1993 (entered into force 1 May 1995). Australia ratified the Convention in 1998. See Crock and Berg, above n 40, ch 8.2.3.

45 See *Migration Regulations 1994* (Cth) sch 2, subcl 103; Crock and Berg, above n 40, ch 8.3.

46 See *Migration Regulations 1994* (Cth) sch 2 subcl 143; and Crock and Berg, above n 40, ch 8 [8.34].

47 See *Migration Regulations 1994* (Cth) reg 1.05; sch 2 subcll 103.213, 143.213; Crock and Berg, above n 40, ch 8 [8.35].

48 See Crock and Berg, above n 40, ch 8 [8.32].

49 Jacqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Rights?' (2009) 31 *Human Rights Quarterly* 410, 449.

50 Statistics provided by DIAC in November 2012 suggest that the number of arrivals went from eight in 2008 to 848 in 2012. Document provided to the author on 27 November 2012, available on request.

reunification. As well as the risk of overwhelming the humanitarian program, the concern was that the children were being used increasingly as 'anchors' to achieve migration outcomes for their families. The Explanatory Statement to the amending regulations justified the interference to the children's right to family life by reference to both the relativities of the rights vested in children and the need to deter parents from sending their children on dangerous sea voyages. Stressing that arts 17 and 23 of the ICCPR do not confer direct rights to enter a country, it reads:

> As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that changes to family reunification do not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An [UMA] becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 are engaged. Even if Articles 17 and 23 were engaged, the change does not seek to remove the ability of [UMAs] in Australia to achieve family reunification; it simply places [UMAs] on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia. Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing [UMAs] from making the dangerous journey to Australia by boat.[51]

The Memorandum goes on to acknowledge that unaccompanied refugee children and youth can face impossible obstacles in achieving family reunification through the regular family migration stream (due to the balance of family test, costs and delays). However, the restriction is justified as proportionate — again on the basis of protecting the putative child from the perils of ocean voyages.[52]

Interestingly, this is the approach to sponsorship and family reunion that has been favoured by the United States (US) government with the visa program devised for immigrant children if a US family court has found that reunification with at least one parent is not viable due to abuse, neglect or abandonment and it is not in their best interests to return to their country of origin.[53] The Special Immigrant Juvenile Status ('SIJS') operates to grant unaccompanied migrant children a direct path to permanent residence if the application is complete before the child turns 21 and if that child remains unmarried.[54] Although more generous in some respects than the treatment of persons

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51 Explanatory Statement to Migration Amendment Regulation 2012 (No 5), Select Legislative Instrument 2012 No 230 (Cth) 1–2.

52 Ibid 2.

53 *Immigration and Nationality Law Act* 8 USC § 1101(a)(27)(J). The first version of the statute required that the child had no parent available; in 2008, the statutory language was amended to protect children if reunification with one or both parents was not viable. The *Trafficking Victims Protection and Reauthorization Act* of 2008, Public Law 110-457, 122 Stat 5044.

54 See Ombudsman for US Citizenship and Immigration Services, *Recommendation: Special Immigrant Juvenile Status Adjudications: An Opportunity for Adoption of Best Practices*, 15 April 2011, Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf>

granted asylum as *Refugee Convention* refugees, its major drawback is that SIJS children face a lifetime ban on sponsoring family for migration to the US.[55]

Deportation and Removal

Children also face considerable problems in trying to retain a semblance of family life where a parent falls foul of Australia's migration laws. The children of temporary residents are treated at all stages as adjuncts to their parents, even if they are born in Australia.[56] They are subject to removal if a parent is deported.[57] The citizen children of Australian permanent residents are technically immune from removal. However, where a non-citizen parent is convicted of a serious crime, the interests of such children will not guarantee that their parent is given lenient treatment. Where the parent is the only available caregiver, citizen children can face either de facto exile or state care.

The effect of the CRC on this aspect of Australian immigration law was first considered by the High Court in the 1995 case of *Minister for Immigration and Ethnic Affairs v Teoh*.[58] The High Court recognised that Australia's ratification of the CRC gave rise to an entitlement of sorts that the best interests of children will be a primary consideration in relation to decision-making in the immigration context.[59] The case became something of a cause célèbre because it concerned the non-citizen father of seven Australian-citizen children. The man's deportation on messy drug offences placed the children at risk of a lifetime of state care. The High Court majority ruled that Mr Teoh had been denied procedural fairness because he had not been given an adequate hearing on the issue of whether his deportation was in the 'best interests' of his seven children. The Court's use of the principle enshrined in art 3 of the CRC was regarded as radical for two reasons. The first was that the majority had ascribed meaning to human rights principles that had not been expressly incorporated into Australia's domestic laws. Second, just as controversially, the majority was seen to be upholding in the *children* the right to family life.[60]

One reason that the *Teoh* decision raised great controversy lies in the sense of hierarchy that has developed in the discourse on international human rights. Article 2 of the CRC notwithstanding, migrant children are seen as migrants first and children second. As such, any rights vested in them by law must be relative — first to the right of the state to control immigration and thereafter to the rights and status of their parents. The dissonance between the discourse on children's rights in theory and the response generated by attempts to assert rights by or on behalf of a migrant child in practice was more than apparent in the aftermath of the High Court ruling in *Teoh*. The then Attorney General joined with the Minister for Foreign Affairs to issue a statement to the effect that the signature and ratification of an international instrument should not be taken to create any

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55 See Jacqueline Bhabha and Susan Schmidt *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the US* (Themis Press, 2006) 51–4.

56 *Australian Citizenship Act* 2007 (Cth) s 12(1)(a). See Kim Rubenstein, *Australian Citizenship Law in Context* (LawBook, 2002) 90.

57 See *Migration Act*, s 140.

58 (1995) 183 CLR 273 ('*Teoh*').

59 Ibid 291–2 (Mason and Deane JJ). Note, however, that *Teoh* dealt with issues of procedural fairness, and did not *guarantee* any child a right to have their best interests taken into account as a 'primary consideration' in decision-making. The precedential value of the case has also been questioned: See *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

60 See CRC arts 9, 10; ICCPR arts 17, 23.

expectations or entitlements in domestic law, absent enabling legislation. This was followed by legislation to similar effect which was ultimately not pursued[61] — in part because a change in the composition of the High Court saw a retreat by the judiciary from the stance taken in *Teoh*.[62]

In fact, the approach taken by the majority in *Teoh* fell out of fashion not just in respect of its treatment of the CRC. In subsequent cases virtually every attempt to invoke international legal obligations to defend the human rights of refugee children has failed. While these have included attempts to give content to the Immigration Minister's role as guardian of unaccompanied refugee children,[63] it is to the most egregious of these cases that we now turn.

B *The Detention Cases*

The second area where refugee children and youth have suffered serious harm in spite of protections spelled out in international human rights law, is in immigration detention.[64] Ironically, Australia began the practice of detaining children presenting as UMAs in 1989,[65] the very year that the CRC was made. The policy was enacted into laws[66] that survived a constitutional challenge in 1992 on arguments that gave first voice to justifications for the denial of rights that persist to this day. First, the detention of UMAs was framed (somewhat disingenuously) as voluntary in nature on the basis that Australia was merely exercising its sovereign right to prevent undocumented migrants from entering the country. It was said that the asylum seekers (then from Cambodia) were free to leave at any time; they were just not at liberty to enter Australia in the absence of government permission.[67] It followed from this that the detention process did not require the involvement of courts because its function was preventative rather than punitive. The characterisation of immigration detention centres as three-walled prisons, with asylum seekers free to go anywhere but into Australia, featured again in the *Tampa* litigation of 2001.[68] This was so even though the Human Rights Committee had expressly denounced this justification of Australia's laws.[69]

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61 See Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) s 5. The Bill lapsed with the prorogation of Parliament in 1996, was resurrected by the Coalition government in 1999 but ultimately was not put to a vote.

62 See *Re Minister for Immigration and Multicultural Affairs;* Ex *parte Lam* (2003) 214 CLR 1 33–4 [102]. For a commentary on this case, see Wendy Lacey, 'A Prelude to the Demise of *Teoh*: The High Court Decision in *Re MIMA; Ex parte Lam*' (2004) 26 *Sydney Law Review* 131.

63 See Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120; Crock and Kenny, above n 13.

64 See, eg, Zachary Steel, et al 'Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia' (2004) 28(6) *Australian and New Zealand Journal of Public Health* 23.

65 For an account of this period see Mary Crock (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Federation Press, 1993).

66 See *Migration Amendment Act 1992* (Cth); discussion in Crock and Berg, above n 40, ch 16.2.3.

67 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 31–2 ('*Chu Zheng Lim*); Crock and Berg, above n 40, ch 3.3.2.

68 See *Ruddock v Vadarlis* (2001) 110 FCR 491, 548 ('*Vadarlis*').

69 See *A v Australia*, Communication No 560/1993, CCPR/C/59/D/560/1993 (30 April 1997); and *Amuur v France* (1992) 22 EHRR 533. On this point, see Crock, above n 33, 49.

In both *Chu Kheng Lim*[70] and *Vadarlis*,[71] however, the critical findings of the court turned on the relative status of the asylum seekers in question. As constitutional aliens, any rights they might have held under international law were subject to their status under Australia's domestic laws. Without visas, they had no (domestic) right to enter the country and, ipso facto, no right to freedom. This point was made in the opening statement by Heydon J in *Plaintiff M47/2012 v Director General of Security*:

> During oral argument in *Al-Kateb v Godwin*, McHugh J asked counsel for the appellant: 'How can you claim a right of release into the country when you have no legal right to be here?' Most of the plaintiff's arguments in this case were directed to that penetrating question. The plaintiff denied its premise, and denied the answer which the question expected.[72]

Heydon J found himself a dissentient in the Court's findings on the validity of the legislation that condemned the plaintiff to indefinite detention.[73] However, his Honour was not alone in his assumption that the assertion of rights by the non-citizen must always be qualified before the superior power of the sovereign state.

The politics surrounding the first detention cases was so raw that little or no attempt was made to characterise the government's actions as humanitarian in intent; the discourse on deterrence was simply about securing Australia's borders.[74] By 1994, more than 40 babies had been born to the asylum seekers from Cambodia over more than four years spent in detention under a Labor government. During the years of conservative Coalition rule, the number of children in immigration detention peaked at 918 in 2000–01.[75]

The first decade of the new millenium saw a series of cases in which an increasingly conservative High Court reiterated and reinforced the relativities in the human rights of refugee children and youth. All involved attempts to invoke principles of international law to override or modify the statutory regime that had developed mandating the detention of asylum seekers pending the grant of a visa.[76] No concessions were made for asylum-seeker children, notwithstanding earlier changes to the law that could have facilitated release into the community.[77]

The first of these cases involved an attempt by the Family Court of Australia to order the Minister for Immigration to release from detention the Bahktiyari children, whose

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70 (1992) 176 CLR 1; see Mary Crock, 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338.

71 See *Ruddock v Vadarlis* (2001) 110 FCR 491, 548.

72 See *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372, 1422 [228].

73 Ibid 1396–7 [71] (French CJ); 1416 [191]–[192] (Hayne J); 1455 [399] (Crennan J); 1463–4 [447], 1465 [458] (Kiefel J). Compare Heydon J's dissent 1439–42 [315]–[327] . See also 1406–7 [135]–[138] (Gummow J); 1471 [489] (Bell J) who agreed on this point.

74 See Senator Jim Kiernan, 'Defend, Deter, Deny' in Crock, above n 65, ch 4; Australian Broadcasting Commission, 'To Deter and Deny', *Four Corners*, 15 April 2002 (Debbie Whitmont) <http://www.abc.net.au/4corners/archives/2002a_Monday15April2002.htm>.

75 See Human Rights and Equal Opportunity Commission ('HREOC'), *A Last Resort? National Inquiry into Children in Immigration Detention* (HREOC, 2004) 65, 76.

76 For an account of the history and operation of these provisions, see Crock and Berg, above n 40, ch 16.

77 See *Migration Act*, s 72 which introduced the concept of the 'eligible non-citizen', in response to the Human Rights Committee's criticisms of Australia in *A v Australia*. See the discussion in Crock and Berg, above n 40, ch 4.4.

parents were at the centre of a bitter and protracted dispute over their status as refugees.[78] In 2003, a majority of the Full Family Court made history when they asserted that s 67ZC of the *Family Law Act 1987* (Cth) and the injunction powers conferred by s 68B of the same Act empowered that Court to make orders for the welfare of children held in immigration detention.[79] Nicholson CJ and O'Ryan J (Ellis J dissenting) held that if a trial judge found that the continued detention of the children was unlawful, then the Court had the power to order the Minister to release the children.[80]

In the Full Family Court, Nicholson CJ and O'Ryan J ruled that s 67ZC of the *Family Law Act* empowers the Court to make orders relating to the welfare of children, and in doing so prescribes that the Court have regard to the best interests of the child as the paramount consideration. Section 68F then provides guidance as to how a court is to determine the best interests of a child and includes matters such as the need to protect the child from physical or psychological harm. Their Honours found that the injunction power of the Court conferred by s 68B is an aid to the exercise of the Court's jurisdiction in relation to children.[81] Their Honours described these welfare provisions as conferring something akin to the parens patriae jurisdiction of state and territory courts.[82]

The High Court made short work of the Full Family Court's attempts to give primacy to the notion of the children's rights to protection and to treatment respectful of their welfare.[83] The Court made it clear that the welfare jurisdiction of the Family Court within a state is confined to the extent of any explicit reference of legislative power from the states to the federal legislature.[84] It struck down the majority's ruling that the original conferral of welfare jurisdiction on the Family Court in respect of children of marriages was without limitation.[85] Just as importantly, the High Court rejected the lower court's findings that its jurisdiction had been extended to cover asylum-seeker children by Australia's accession to the CRC.[86] The children remained in detention because of their alienage: they were migrants first and children second. Absent express changes to the jurisdiction of the Family Court, the advent of the CRC did not have the effect of extending the powers of that Court to adjudicate on matters involving refugee children.

There followed, in 2004, four cases in which the High Court made it clear that international human rights law must cede before the superior status of domestic

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78 The family was eventually removed from Australia, despite a ruling of the Human Rights Committee condemning Australia's treatment of the family. See *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia*, Communication No 1069/2002: Australia, CCPR/C/79/D/1069/2002 (6 November 2003).

79 See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 173 FLR 360 ('*B v MIMIA*')

80 Following submissions on the deleterious effect detention was having on the children, the Family Court went on to order the release of the Bakhtiyari children.

81 *B v MIMIA* (2003) 173 FLR 360, 387 [132]–[133].

82 Ibid [134].

83 *Minister of Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 ('*MIMIA v B*').

84 In the case of South Australia, the only such reference of power occurred in 1987 and was confined to matters relating to the maintenance of ex-nuptial children.

85 See, eg, *MIMIA v B* (2004) 219 CLR 365, 384 [24]–[52] (Gleeson CJ and McHugh J).

86 Nicholson CJ and O'Ryan J had relied on the *Teoh* decision to hold that the Convention was not merely 'aspirational' in its effect. According to their Honours, the reference to the 'best interests of the child' principle in s 67ZC of the *Family Law Act 1975* (Cth) contained sufficient specificity to require the behaviour of decision-makers to reflect that principle. They ruled (with Ellis J dissenting) that it was strongly arguable that at least part of the intent of the introduction of s 67ZC in 1995 was to extend its protection to all children as required by arts 3(2) and 19 of the CRC and not just children of a marriage. See *B v MIMIA* (2003) 173 FLR 360, 410 [287]. Cf Kirby J *MIMIA v B* (2004) 219 CLR 365, 408–9 (Kirby J).

immigration laws expressed in plain terms of statutory intendment. The first two cases involved failed asylum seekers who remained in detention by reason of the fact that no other country would take them.[87] The third involved asylum seekers detained in very poor conditions who argued that the terms of their incarceration impermissibly converted what was administrative or 'preventative' detention into something punitive.[88]

The last case was brought on behalf of the four Sakhi children[89] and also involved an argument that the mandatory detention provisions in the *Migration Act* were unconstitutional. The assertion was that a scheme mandating the detention of children without consideration of anything other than their immigration status had to be punitive — and therefore a matter within the province of the judicial power of government — requiring the involvement of courts. Unlike adult asylum seekers, the Sahki children could not be said to be 'voluntary' detainees because they had no power to elect to leave the country. Because they were children, counsel also argued that the children could not be said to pose a threat to Australia. Hence, arguments about the validity of preventive detention should fail. While the High Court split in the other cases, it was unanimous in *Re Woolley; Ex parte Applicants 276/2003*.[90] The identity of the applicants as children could not transform (lawful) administrative detention into (unlawful) punishment.[91] The Court ruled that in determining the constitutionality of an enactment, it could have regard only to the purpose of the legislation and not to its effect. Again, the Court made it plain that in spite of Australia's accession to the CRC, migration law will prevail in determining the treatment received by asylum-seeker children. The human rights of the Sakhi children as children were sublimated to their status as irregular migrants. In practice, this meant that they had no rights at all.

In the year that the High Court delivered judgment in the four detention cases, the Human Rights Commission released a 925-page report on children in immigration detention that roundly condemned the Australian government's policies and practices.[92] Having 'won' its battles in the High Court, one year later the government moved to amend the *Migration Act* so as to bring the legislation more in line with the language of the CRC. Section 4AA now provides that, as a matter of principle, children should be detained as a last resort.[93]

The relativity approach to the human rights of asylum seekers has found expression in more recent detention cases, most notably in the High Court's consideration of legislation conferring on Australia's security agency an effective power to veto the grant of a visa to persons recognised at law as 'Convention' refugees. In practice, an adverse security

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87 See *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

88 See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*').

89 See *Re Woolley; Ex parte Applicants M276/2003* [2004] HCATrans 2 (3 February 2004).

90 (2004) 225 CLR 1.

91 Ibid 32 [82] (McHugh J), This argument was used in *Behrooz* to support the contention that in some circumstances it can be 'lawful' for a person to escape from custody. *Behrooz v Secretary DIMIA, SHDB v Godwin, MIMIA v Al Khafaqi* [2003] HCATrans 456, 458 (12–13 November 2003).

92 See HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (HREOC, 2004).

93 The provision nevertheless narrows the concept of detention and makes no mention of the period spent in detention. It reads:

(1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

(2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

clearance has meant that these refugees are condemned to indefinite detention. Children have once again been harmed as collateral damage.[94]

It is not just the children of the refugees found to be security risks who have remained in immigration detention for prolonged periods of time. In spite of a concerted push, after 2008, to reduce the length of time children and families spend in detention,[95] by May 2013 there were 1731 children (aged under 18 years old) in immigration detention facilities and alternative places of detention.[96] As explored in the following part, the reasons for this lie in the toxic mix of ideas surrounding the relativities of rights vested in refugee children and youth and the notion that punitive policies can be effective to deter irregular maritime migration.

IV Deterrence Theory and the Right to Basic Protection

The third area where refugee children and youth have emerged as collateral damage is in the struggle to halt irregular maritime migration through the institution of direct, *physical* deterrent measures in the form of interdiction and deflection. As noted earlier, the centrepiece of recent initiatives in Australia has been the establishment of a 'regional processing' regime, which this time involves the transfer of UMAs to a foreign country for all aspects of the asylum process. The history of Australia's involvement in such schemes is recounted elsewhere.[97] For present purposes it suffices to note that the various schemes have all involved measures that sit uneasily with Australia's obligations under international law.

Nauru and Manus Island were first used for processing the refugee claims of asylum seekers seeking protection in Australia in 2001. On that occasion, a conservative federal government went to some lengths to argue that the regime was compliant with Australia's obligations not to *refoule* or send back refugees to countries where they would face persecution for Convention reasons.[98] The legislative scheme paid lip service to the idea that the 'offshore' country to which asylum seekers were deflected should be party to the *Refugee Convention* and other human rights treaties.[99] Created at the height of the shock effect generated by the terrorist attacks of 11 September 2001, the regime survived the few legal challenges that were made, one of which involved an unaccompanied child.[100] It was a

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94 On 15 October 2012 Australia held in detention seven children on grounds that their parents had recieved adverse security assessments. No minors currently have adverse security assessments against them; there was one, but he has now turned 18: Evidence given to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 15 October 2012, 132 (Martin Bowles, Acting Secretary, DIAC).

95 For a discussion of the scheme establishing Alternative Places of Detention, see Crock and Kenny, above n 13.

96 See DIAC, *Immigration Detention Statistics Summary,* 31 May 2013 <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

97 See Crock, above n 5.

98 See Department of Immigration, Multicultural and Indigenous Affairs ('DIMIA'), *Interpreting the Refugees Convention* (DIMIA, 2002), which contains a lively defence of the lawfulness of the first Pacific Solution. See also Crock and Berg, above n 40, ch 4.3.3.

99 See *Migration Act* s 198A.

100 See *Ruddock v Vadarlis(No 2)* (2001) 115 FCR 229; *P1/2003 v MIMIA* [2003] FCA 1029; *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; and the decisions of McKerracher J in *Sadiqi v Commonwealth* [2008] FCA 1262 (18 August 2008); *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1; and *Sadiqi v Commonwealth (No 3)* [2010] FCA 596 (11 June 2010). See the discussion of these cases in Crock and Kenny, above n 13.

package of measures[101] that did indeed stop UMAs for a period, but at great cost — to the refugees affected and to Australia in both financial[102] and psycho-social terms.[103] Unaccompanied and separated refugee children were particularly susceptible to harm.

Between 2001 and 2003, 55 unaccompanied UMA children were sent to these Nauru and Manus Island. Leaving to one side the very harsh conditions experienced, the greatest concern raised by this first 'Pacific Solution' is that some of the children affected were denied access to basic protections to which they should have been entitled. There is evidence that at least some of the children should not have been sent to Nauru or Manus Island in the first place — the date of their arrival in Australia meant that they should not have been caught by the change of law.[104] Without access to any form of advice or assistance, however, the children were powerless to assert their rights. More worryingly, of the 55 sent to Nauru, 32 were returned (voluntarily) to their countries of origin, their refugee claims having been rejected. Subsequent research suggests that some of the children were subsequently killed and that many left again in search of safety.[105] These statistics stand in sharp contrast to the (compatriot) unaccompanied children whose refugee claims were processed on mainland Australia around the same time. Of 290 unaccompanied children who sought asylum in Australia between 1 July 1999 and 28 February 2003[106] all were ultimately allowed to stay in the country.[107]

The experience of the children caught up in the Pacific Solution underscores the importance of process for the identification and protection of *Refugee Convention* refugees. The available evidence is that children left without assistance invariably fare worse in asylum processes than those who are represented.[108] The first regime established on Nauru and Manus Island was modelled on the processes employed by the UNHCR in its field operations. However, while the UNHCR's operations are driven most often by lack of resources, asylum seekers on Nauru were denied access to any outside assistance as a matter of principle.[109]

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101 The strategy had four elements: the 'excision' from Australia's 'migration zone' of the offshore territories where maritime asylum seekers were making landfall; the interception of UMAs and their deflection to foreign countries; the 'push-back' of boats to Indonesia; and the grant of temporary protection to UMAs recognised as refugees. The legislative scheme was built around the following statutes: *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001* (Cth).

102 For an account of the cost of these strategies, see Crock and Ghezelbash, above n 9, 258–9.

103 The intense focus on UMAs over this period coincided with unprecedented aggression within Australia towards visible minorities. This played out in the targeting of persons thought to be irregular migrants, with more than 240 wrongful arrests, detentions and even deportations. This was also the era of the worst interracial rioting seen in Australia for many years. See Crock and Ghezelbash, above n 9, 276.

104 This allegation was put to the author by one unaccompanied minor brought to Australia from Nauru in 2002 as a 'transitory person'. See Crock, above n 3, 77.

105 Edmund Rice Centre, *Deported to Danger : A Study of Australia's Treatment of 40 Rejected Asylum Seekers* (Research Report, Edmund Rice Centre for Justice & Community Education in cooperation with the School of Education, Australian Catholic University, 2004) <http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=208>.

106 See Crock, above n 3, 39.

107 It should be noted that the children sent to Nauru and Manus Island shared very similar backgrounds and stories to those who made it to mainland Australia. It should be noted here that the children sent to New Zealand in the wake of the *Tampa* Affair were all granted permanent protection within weeks of arrival. See Crock, above n 3, 77

108 See Crock, above n 3, 147–8; Jaya Ramji-Nogales et al, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009).

109 During the early years of the Pacific Solution no one was allowed access to the camps on Nauru and Manus Island. Refugee advocates were denied visas to enter the country. In 2006, these policies were reversed. Migration agent

If public opinion finally turned against the mandatory detention of children in 2005,[110] by 2008 the newly-elected Labor party was ready to acknowledge that the regime established on Nauru was an embarrassment — and plainly in breach of Australia's international legal obligations. Then Shadow Minister Julia Gillard said:

> Labor will end the so-called Pacific solution — the processing and detaining of asylum seekers on Pacific islands — because it is costly, unsustainable and wrong as a matter of principle.[111]

As detailed elsewhere,[112] the politics of irregular maritime migration worked to dissuade the Labor government from making a clean break with the policies of its conservative predecessor. It abolished neither the policy of mandatory detention nor the rubric of offshore processing. The rights of the child were sublimated to the electoral interests of the government, even if the rhetoric adopted on this occasion centred on the imperative of adopting deterrent measures in the interests of 'saving lives at sea'.

Labor's first attempt to establish a regional processing framework, as the new-look deflection process was termed, relied on the same legislation used to support the first Pacific Solution. It was negotiated in May 2011 and promoted as a product of the so-called 'Bali Process'.[113] The *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* was expressed not to be legally binding on either party, a fact that was later to trouble the High Court greatly because of the dissonance it created with the terms of the *Migration Act*.[114] It was to involve the transfer to Malaysia of 800 asylum seekers who arrive in Australia as UMAs. In exchange, Australia agreed to take in 4000 refugees residing in Malaysia under the care of the UNHCR. The scheme was one that the Minister insisted had to include unaccompanied UMA children if it was to have the effect of deterring parents from risking the lives of their children.[115] So it was that Plaintiff 106 was chosen to be among the first UMA asylum seekers to be transferred to Malaysia, a country where refugees, including children,[116] were known to be subjected to

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Marion Le was given access to those who remained on Nauru. With her assistance, the remaining inmates lodged appeals and were all accepted as refugees and resettled in Australia. See Michael Gordon, *Freeing Ali* (University of New South Wales Press, 2005).

110 Pressure from government backbenchers led to softening of the detention policy and changes to the *Migration Act* in June 2005. See Crock and Berg, above n 40, [16.17].

111 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2003, 14006 (Julia Gillard).

112 See Mary Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (2010) 17 *Australian Journal of Administrative Law* 1; Crock and Ghezelbash, above n 9.

113 See *The Bali Process* <http://www.baliprocess.net/>. In recent years, regional consultative processes have been established in most regions of the world. See Alexander Betts, *Global Migration Governance* (Oxford University Press, 2011) 18; Mary Crock and Daniel Ghezelbash, 'Secret Immigration Business: Policy Transfers and the Tyranny of Deterrence Theory', in Savinder Singh (ed), *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate, 2013).

114 *Plaintiff M70/2011v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*M70*').

115 Australian Broadcasting Commission, 'Children Part of Refugee Swap: Bowen', *Lateline*, 2 June 2011 (Tony Jones) <http://www.abc.net.au/lateline/content/2011/s3234302.htm>.

116 Adrian Edwards, *UNHCR Calls for Proper Safeguards for Children Being Returned to Malaysia by Australia* (3 June 2011) United Nations High Commissioner for Refugees <www.unhcr.org/4de8bb8d9.html>.

detention and exploitation.[117] The campaign that followed caused embarrassment of the governments of both Malaysia and Australia.[118]

In the result, the 'Arrangement' with Malaysia did not survive a challenge in the High Court. Absent the shock factor that prevailed in 2001,[119] one decade later the Court was not prepared to accept the assertion that the declaration of a country under s 198A of the *Migration Act* should be regarded as a legislative act and an inappropriate subject for judicial review. The majority ruled that s 198A(3) of the *Migration Act* established a series of jurisdictional facts, the satisfaction of which was required for the lawful declaration of a country as a regional processing country.[120] The declaration was struck down because Malaysia did not meet the objective criteria outlined. It is not a party to the *Refugee Convention* and Protocol and did not in fact have a record sufficient to satisfy an objective observer that it would be able to safeguard the human rights of UMAs sent to it for processing and resettlement as refugees.

The failed Arrangement with Malaysia was interesting in that, at least on its face, the scheme tried to be consistent with human rights standards.[121] It is just that neither country wanted the applicable framework to be legally binding. The situation facing the unaccompanied UMA children was particularly serious, as the guardianship arrangements pertaining in Australia would not have applied in Malaysia.[122] In the *Malaysian Declaration Case*, the High Court did not address the broader question of who should care for children transferred to Malaysia. However, it did rule that the Minister in the instant case had failed to comply with the terms of his own domestic legislation by choosing Plaintiff 106 (the minor plaintiff) for transfer without certifying that the action was in the child's best interests.[123]

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117 Amnesty International *Abused and Abandoned: Refugees Denied Rights in Malaysia,* (Report, Amnesty International, 20 June 2010) <http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16>.

118 See, eg, Australian Broadcasting Commission, 'PM Defends Malaysia's Treatment of Refugees', *News*, 27 October 2011 <http://www.abc.net.au/news/2011-10-27/pm-defends-malaysias-treatment-of-refugees/3604674>; Al Jazeera, 'Australian and Malaysia Sign "Refugee" Deal', 25 July 2011 <http://www.aljazeera.com/news/asia-pacific/2011/07/2011725443955373.html>.

119 For an analysis of the effect of these events, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin, 2008).

120 See *M70* (2011) 244 CLR 144, 194 [109]; 201–202 [135] (Gummow, Hayne, Crennan and Bell JJ); cf 180 [58] (French CJ).

121 For example, the Arrangement provides that the government of Australia would conduct pre-screening assessments 'in accordance with international standards' prior to any transfer from Australia to Malaysia. See the Arrangement, cl 9(3). This would include an assessment of Australia's obligations under the CRC: see DIAC, Submission no 13 to the Senate Legal and Constitutional References Committee, *Inquiry into Australia's Arrangement with Malaysia in Relation to Asylum Seeker,* 11 October 2011 [59]. The Arrangement stipulates (at cl 8) that those transferred from Australia to Malaysia should be 'treated with dignity and respect and in accordance with human rights standards' and that '[s]pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors'. Australia was also to meet the costs relating to ensuring the health and welfare of the transferees: cl 9(1)(c).

122 The previous Minister for Immigration argued that his guardianship of those unaccompanied children transported under the 'Pacific Solution' ceased upon their arrival at the 'declared countries' of Nauru and Papua New Guinea ('PNG'). See Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* [5.60].

123 *Immigration (Guardianship of Children) Act* 1946 (Cth) s 6A(1) ('*IGOC Act*') requires the Minister to consent in writing before a non-citizen child can be removed from Australia. The majority ruled that a declaration, in the form of Memorandum of Understanding comprising an 'Arrangement' with Malaysia, did not constitute the written consent required by the *IGOC Act.* This meant that removal of Plaintiff M106 would be unlawful. See *M70* (2011) 244 CLR 144, 203 [143] (Gummow, Hayne, Crennan and Bell JJ).

The very domestic focus of the High Court's ruling in *M70* underscores the extent to which the legal discourse on refugees in Australia has come to avoid the high road of international legal principle — and indeed the notion that refugees might be rights holders. Instead of responding to the criticisms of its laws and policies in a manner that is respectful of Australia's obligations under international law, the government opted for an even more extreme response. On this occasion, they were supported by the conservative opposition as well as by an electorate ever sensitive to the issue of irregular maritime migration.[124]

In responding to the surge in UMAs following the defeat of the Malaysian Solution policy,[125] the Australian government used the recommendations of its Expert Panel[126] to justify legislation that repealed s 198A of the *Migration Act*.[127] The replacement scheme allows for the establishment of regional processing, ostensibly free from the constraints of judicial oversight by any Australian court. UMA asylum seekers are liable to removal to Nauru and PNG's Manus Island where their status as refugees will be determined by officials in those countries, under Nauruan and PNG laws respectively. It is a central tenet of the Expert Panel's 'no advantage test' that asylum seekers processed under the regional scheme should face the same sort of delays experienced by other refugees in the region. Given the huge variation in the experiences in the region, it is difficult to know just what is envisaged by this so-called principle.[128] Amendments to the *Immigration (Guardianship of Children) Act 1946* (Cth) make explicit the cessation of Ministerial responsibility for unaccompanied non-citizen children who are transferred to a regional processing centre.[129] The *Migration Act* was amended further in 2013 to extend the operation of provisions that prevent UMAs intercepted in offshore territories such as Christmas Island from seeking protection in Australia. The 'excision' of these territories from Australia's migration zone in 2001 has meant that UMAs apprehended at these locations can only claim asylum in Australia if the Minister exercises a personal, 'non-compellable, non-reviewable' discretion to 'lift the bar' on applications. The operation of these so-called 'excision' provisions now apply also to mainland Australia. This means that no UMA is eligible to seek asylum in

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124 On this point, see Mary Crock, 'Alien Fears: Politics and Immigration Control' (2010) 2 *Dialogue* 20-31.

125 Department of Immigration, Answer to Question Taken on Notice, Budget Estimates Hearing, 21-2 May 2012, BE12/0262, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/bud_1213/diac/BE12-0262_Attachment.pdf>. The government has been reticent to release statistics on boat arrivals and clear statistics are hard to find. The Deputy Secretary, Policy and Program Management Group, DIAC, gave evidence to a Parliamentary Committee in December 2012 that the 'ballpark number' of arrivals in the 2012 calendar year was around 8000 irregular maritime arrivals: Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 17 December 2012, 5 (Wendy Southern). The Department's annual statistical publication gives a figure of 7379 UMAs screened in to the RSD process, a figure which certainly does not capture the actual number of boat arrivals (DIAC, Asylum Trends Australia: 2011–12 Annual Publication, DIAC, 2012 <http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-trends-aus-annual-2011-12.pdf> 25.

126 See ABC News, above n 15.

127 See *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2012* (Cth). The government had earlier introduced two Bills into Parliament: the Migration Legislation Amendment (Offshore Processing and Other measures) Bill 2011 (in September 2011); and the Migration Legislation Amendment (The Bali Process) Bill 2012 (rejected by the Senate in June 2012).

128 Letter from Antonio Guterres to Chris Bowen, 5 September 2012, <http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf>.

129 *Immigration (Guardianship of Children) Act 1946* (Cth) especially s 8(3) as amended by *Migration Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 2 items 1–8.

Australia without a special ministerial dispensation. They are liable to be processed in a Regional Processing Country[130]

The Memoranda of Understanding with Nauru and PNG echo the Arrangement with Malaysia by confirming that the scheme is not dependent on the observation of international legal obligations. For its part, Nauru has now enacted the *Refugees Convention Act 2012* (Nauru)[131] and it has amended its *Immigration Regulations 2000* to create a special 'Australian Regional Processing' visa regime which includes a merits review process. In practice, the entire scheme will be run by Australians and for Australia. Nauru does not have the capacity to either design or run either status determination processes or appeals. In December 2012, after the transfers (not including transfers of unaccompanied minors) to Nauru began, the Nauru Parliament passed the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru).[132] As well as regulating the operation of the Regional Processing Centres, the Act makes the Minister for Justice, Customs and Border Patrol (or his/her delegate) the automatic and exclusive guardian of any unaccompanied minors transferred to Nauru.[133] Until this Act was passed, there was no meaningful framework for the legal protection of transferred children.[134] Now, Nauru's protections for children are stronger than Australia's. Whereas the CRC has never been fully implemented and has been given scant recognition in Australian law,[135] s 14 of the recent Nauruan legislation affirms that 'It is the intention of Parliament that, in the treatment of a protected person[136] who is a child, regard must be had to the terms of the Convention of the Rights of the Child'.[137] It will still be a harsh sentence for a child who is sent to Nauru, but it is another of the great ironies of the government's scheme that there now a better framework for recognition of a child's international rights in Nauru than there is in Australia. Of course the problem is that the most critical decision — the decision to transfer — will have been made back in Australia, where the interests of the embodied child are not so protected. It seems that Australia is happy to write human rights into the legislation of other countries, but will not acknowledge these children as rights-bearers on our own territory.

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130 See *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012* (Cth). Presented as an important component of the Expert Panel's 'No Advantage' principle, the amendments will have the effect of creating two classes of asylum seeker in Australia: those who arrive by plane (and who generally present with some form of documentation) and those who arrive by boat without visas. The former group are given access to one of the most sophisticated refugee status determination systems in the world, with access to free assistance where required; oral hearings at both application stage and on appeal; and judicial review of the decisions made. Asylum seekers travelling by plane are generally not detained pending determination of their status as refugees. They are entitled to immediate permanent residence and to an array of assistance measures to settle them into their new country.

131 Nauru became a party to the Refugee Convention and Protocol by accession on 28 June 2011. It was not a party to these instruments when the Conservative Coalition established the first Pacific Solution.

132 Note that PNG does not have legislation to similar effect. PNG's *Child Welfare Act 1961* (PNG) does not readily map onto the circumstances of transferred children, and would at any rate require and order of the Children's Court to take effect (s 41).

133 *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 15.

134 Nauru has a general guardianship Act (*Guardianship of Children Act 1975* (Nauru)) however this would have had no application to children transferred unless a local Nauruan took it upon themselves to apply for guardianship and obtained a Supreme Court order to that effect. Now that Act is relevant in that it sets out the powers that are vested in the Minister by virtue of the December 2012 legislation.

135 See generally John Tobin, 'The Development of Children's Rights' in Monahan and Young, above n 35, 23, 29–31 [2.7].

136 'Protected person' is the term the Act uses to describe people who have been brought to Nauru under the Australian *Migration Act*; see *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 3(1).

137 *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 14.

This is a scheme that sees Australia engaging in the wholesale abdication of its responsibilities as a party to both the *Refugee Convention* and a variety of international human rights instruments. If either Nauru or PNG establish inferior status determination processes, Australia could indeed become complicit in the indirect *refoulement* of refugees that as a matter of international law are squarely its responsibility. The arrangements also do nothing to safeguard the rights Convention refugees have to a whole range of protections beyond *refoulement.*[138] By making a blanket distinction between UMAs and asylum seekers travelling by plane, Australia is plainly in breach of art 31 of the *Refugee Convention*. This prohibits the penalisation of refugees who enter the territory of a state party without authorisation.[139] One might even argue that the whole regime constitutes a breach of the fundamental principle that parties to UN treaties should perform the obligations that they have undertaken in good faith.[140]

For the UMA children and youth selected for transfer to the regional processing countries, the only certainty is that the scheme will involve protracted periods of time living in conditions that will vary from poor to life threatening.[141] On this occasion, Australia has made little attempt to argue that it is acting in compliance with its obligations under international human rights law. The most basic rights of these children are being sacrificed in the name of deterrence. Once again, embodied children are being required to suffer in order to protect the putative children who might otherwise follow in their footsteps.

In Indonesia in October 2012, I met with a 10-year-old boy who was one of very few survivors following the sinking of a boat carrying more than 100 asylum seekers. The oldest child of a widowed mother, he had been sent abroad in search of safe haven with an uncle who perished in the shipwreck. The boy was placed briefly with a family of recognised refugees who left Indonesia to be resettled in New Zealand, moved to a shelter for unaccompanied asylum-seeker children and then taken in by another family. For this child, measures aimed at deterring the responsible adults in his life are light years away from the lived reality of his haunting desolation. The boy stands as a reminder of why the nations of the world came together in 1989 to create *rights* in refugee children — that is, in the child before us, not in the putative child.

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138 See Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) *International Journal of Refugee Law* 23.

139 See Guy Goodwin-Gill, 'Article 31 of the 1951 *Convention relating to the Status of Refugees*: Non Penalisation, Detention and Protection', paper prepared for UNHCR Global Consultations, October 2001 <http://www.unhcr.org/419c778d4.html >.

140 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

141 Manus Island is a very high risk location for malaria and dengue fever: more than 90 per cent of the population of PNG as a whole is at high risk of Malaria. PNG is the highest risk country in the western Pacific region for Malaria, and Manus Island has the highest number of cases of malaria in the country: see World Health Organization, *World Malaria Report 2012* (2012), 161 <http://www.who.int/malaria/publications/country-profiles/profile_png_en.pdf>. Dengue fever presents a similarly high risk: Central Intelligence Agency, 'Field Listing: Major Infectious Diseases' *The World Factbook* (2012) <https://www.cia.gov/library/publications/the-world-factbook/fields/2193.html#>