journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

The Principle of Deterrence in the Detention of Asylum Seekers in the Pursuit of State Interest: A Legal Appraisal.

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Abstract

There has been an unprecedented increase in the detention of asylum seekers by some States over the years. Detention of immigrants has been adopted concurrently with other restrictive migration policies by States. This calls for a serious cause for concern from the human rights law perspective, as vulnerable persons who ordinarily should be protected by States are subjected to inhumane and degrading immigration policies. Detention which ordinarily should be applied as an exceptional response to irregular migration has now become a routine practice. This research aims to analyse the principle of deterrence postulated by States as a justification for irregular migration. The international laws governing detention of asylum-seekers as well as the Courts scepticism towards the deterrent justification by States such as the United Kingdom, United States, Australia and Israel were also examined. It was found that there is no empirical evidence to support the general justification by States on deterrence as a basis for detention of immigrants. The research adopted both the doctrinal and the 'law-in-context' method, with research materials sourced from international laws/instruments, case laws, books and journal articles. The research recommended for States to key into the alternatives to detention provided by the United Nations High Commissioner for Refugees and also for the frequent monitoring of immigration detention facilities to ensure compliance with international human rights standard.

Keywords: Asylum-Seekers, Detention, Human Rights and Refugee Law.

1.1 Introduction

Over the years there has been an unprecedented increase in the detention of asylum seekers by a good number of States. Detention of immigrants has been adopted concurrently with other "restrictive migration policies by States, such as increased border controls and a stringent return policy, the propagation of anti-migrant rhetoric in the public sphere, and the criminalisation of migrants in irregular situations".[1] This calls for a serious cause for concern from the human rights law perspective, as vulnerable persons who ordinarily should be protected by States are subjected to inhumane and degrading immigration policies.

Detention which ordinarily should be applied as an exceptional response to irregular migration has now become a routine practice. States have justified the detention of asylum seekers as a necessary deterrent towards irregular migration.[2] Interestingly there has been no empirical evidence that support this notion that detention discourages people from seeking asylum.[3] It is

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[1]Ioanna Kotsioni, 'Detention of Migrants and Asylum-Seekers: The Challenge for Humanitarian Actors' (2016)35 Refugee Survey Quarterly 41, 45.

[2] UNHCR, 'Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014-2019 UNHCR' (2015)27 Int'l J Refugee L 375.

[3] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, Francois, A/HRC/20/24. (2 April 2012) Para 8.

saddening to note that the detention policies in most States often run short of international best practices. The negative effects of detention on the health and lives of refugees and asylum-seekers are widely documented.[4]

Governments have used detention to limit irregular migration flows, such as facilitating the return of rejected asylum-seekers and irregular migrants.[5] Public health scholars have described "the practice of immigration detention as a threat to key human rights principles, including the right to seek asylum, the right to be free from arbitrary arrest, the right to freedom of movement, and the right to be free from torture, cruel, inhuman or degrading treatment".[6]

This research aims to examine the notion of detention of asylum-seekers in a bid to analyse the principle of deterrence postulated by States as a justification to irregular migration. The international laws governing detention of asylum-seekers as well as the Courts skepticism towards the deterrent justification by States such as the United Kingdom (UK), United States (US), Australia and Israel are also examined. Alternatives to detention were equally discussed as a way forward in this thorny subject matter.

2.1 Analysing the Position of International Law in Relation to the Detention of Asylum-Seekers

This part of the essay focuses on the different international legal instruments on detention as well as the guidelines of the UNHCR which provides guidance as to the nature of detention. Scholarly arguments relating to the complexities on detention under international law equally forms part of the analysis in this section.

The Convention Relating to the Status of Refugees (Refugee Convention) recognizes the right to freedom of movement to be accorded to refugees lawfully in the territory of State Parties.[7] There have been arguments as to whether this provision is applicable to asylum-seekers, given that the Article refers to lawful refugees.[8] Hathaway asserts that the above provision of Article 26 is applicable to persons whose asylum claims have been presented.[9] Nevertheless, for several European States the right to freedom of movement to asylum-seekers is still under contention.[10]Wilsher asserts that the Convention has failed in providing the appropriate protection to asylum-seekers globally, for him, the question of when detention under the Convention is necessary has raised a lot of controversies as some States are of the view that it is

[4] Alice Edwards, 'From Routine to Exceptional: Introduction to UNHCR's Global Strategy - Beyond Detention 2014-2019 Supporting Governments to End the Detention of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 128.

[5]IoannaKotsioni, (n 2) 41.

[6] Zachary Steel, et al "Global Protection and the Health Impact of Migration Interception", (2011)8(6) PLoS Medicine Series on Migration and Health, 2–3.

[7]Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 26.

[8]Cathryn Costello and Minos Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 47, 50.

[9] James C Hathaway, The rights of Refugees under International Law (Cambridge University Press 2005) 154.

[10]Reinhard Marx, 'Article 26 (Freedom of Movement/ Liberte de Circulation)' in Andreas Zimmermann (ed) Commentary on the 1951 Convention Relating to the Status of Refugees. (Oxford University Press, 2011) 1161-1164.

until a person has been granted his asylum claim, it may be expedient to detain such person to prevent an unlawful entry into a State.[11]

Article 31 of the Refugee Convention provides that contracting States to the Convention shall not impose penalties on refugees on the basis of the latter's unlawful entry into the States provided the said refugees show cause for such illegal entry when presenting themselves to the authorities.[12] Again regarding a controversial issue, as to whether 'detention' falls within the meaning of 'penalties' as envisaged under Article 31(1). Some scholars have expressed a contrary opinion that 'penalties' as used in the said provision refers to criminal sanctions, whereas 'detention' is purely an administrative measure and does not fall within the category of criminal sanctions.[13] For some academics, certain forms of detention could fall under the definition of 'penalties' under Article 31(1) of the Convention, and as such should be precluded in line with the provision.[14] It is submitted that this latter view is reasonable given the attitude of various States in using varying extreme detention policies as a deterrent to asylum seeking and immigration.

It is noteworthy that the "right to personal liberty is not absolute and administrative detention is not per se unlawful under the international law".[15] The United Nations High Commissioner for Refugees (UNHCR) through its Guidelines "has been able to set the limits for detention of asylum-seekers to be a measure of last resort, with liberty as the default position".[16] Detention under Article 31(2) according to the UNHCR is only expedient when its aim is in conformity with international law, particularly national security, public health and public order.[17]

For Cornelisse, Article 31(2) of the Convention requires a proportionality test while taking into consideration the individual circumstances of each asylum-seeker in making a decision limiting detention.[18]

The UNHCR's detention Guidelines for asylum seekers provides that "minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks."[19] Where essential facts are needed from the asylum-seeker as to why the asylum claim is being made, a

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[11] Daniel Wilsher, Immigration Detention: Law, History, Politics. (1st edn, Cambridge University Press 2011) 138-139

[12] Refugee Convention, art 31(1).

[13] Galina Cornelisse, Immigration Detention and Human Rights: Rethinking Territorial Sovereignty (MartinusNijhoff Publishers, 2010) 262.

[14] Cathryn Costello and Minos Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 47, 51.

[15] Eleonora Del Gaudio and Stephen Phillips, 'Detention of Child Asylum Seekers in the Pursuit of State Interests: A Comparison of the Australian and EU Approaches' (2018) 36(1) Nordic Journal of Human Rights 1, 15.

[16] UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR 2012 http://www.unhcr.org/505bioee9.html accessed 19 March 2021.

[17] Ibid.

[18] Galina Cornelisse, (n 14) 262.

[19] UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR 2012. Para 24 http://www.unhcr.org/505bioee9.html accessed 19 March 2021.

brief period of detention is equally permissible.[20] Further grounds for allowing detention include cases where the individual is unlikely to cooperate or may abscond or in narrow circumstances involving accelerated proceedings.[21] The UNHCR however advises "that such brief periods of detention cannot be used to justify detention for the entire [refugee] status determination [process]."[22] Detention of asylum-seekers is permissible above the fact gathering stage only on grounds of exceptional and grave circumstances such as war; detention is allowed in such cases for reasons of national security until the asylum-seeker has qualified to become a refugee.[23]

Under the International Covenant on Civil and Political Rights (ICCPR), everyone is guaranteed a right to personal liberty and security and no one shall be subjected to detention or arbitrary arrest except on grounds provided under the law.[24]While Article 9 of the Covenant does not provide an absolute right, it however fails to stipulate the various circumstances under which detention may be permitted but merely restates that it must be in accordance with the law. At first glance, it would seem States have wide powers at detaining persons under this Covenant. However, through the "prohibition on arbitrary detention, the drafters intended to ban detention authorized by unjust national laws".[25]Wilsher asserts that the prohibition on arbitrariness extends beyond mere unlawfulness but includes unreasonableness, disproportionality, capriciousness and unpredictability.[26]

Consequently the Human Rights Committee (HRC), the body which oversees ICCPR's implementation by State parties and adjudicates complaints filed under the Covenant, has stated that save for the purposes of an investigation, lack of cooperation or to prevent an asylum seeker from absconding, detention is arbitrary under Article 9.[27] The HRC has therefore struck down a good number of cases involving the detention of asylum-seekers over long periods and held that in the absence of particular evidence that an applicant is likely to abscond, supervised release should be granted.[28]

The ICCPR, notwithstanding its human rights provision against arbitrary detention, has been of little significance to international and national courts in the area of detention of asylum seekers, the HRC however has been a strong adjudicatory tool for the Covenant.[29] It is submitted that courts failure of applying the provisions of the ICCPR in immigration detention cases is likely as a result of the fact that the ICCPR is not a treaty specifically made to regulate refugee and immigration law but is merely a human rights treaty.

[20] UNHCR Detention Guidelines, Para 28.
[21] UNHCR Detention Guidelines, Para 22.
[22] UNHCR Detention Guidelines, Para21-30.
[23] Refugee Convention, art 9.
[24] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9(1).
[25]Galina Cornelisse, (n 14) 252.
[26] Daniel Wilsher, Immigration Detention: Law, History, Politics. (1stedn, Cambridge University Press 2011)160
[27] Ibid, 159-166.
[28] Stephen Meili, 'Do Human Rights Treaties Matter: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom' (2015) 48 NYU J Int'l L & Pol 209,228.
[29] Ibid, 227.

The position of the law on detention as it relates to the European Union[30] is seen under the European Convention on Human Rights (ECHR). Article 5 of the ECHR guarantees the right to liberty; it however stipulates the various circumstances under which this right could be limited through detention. Article 5(1) (f) which is of particular concern to this essay, provides that

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> F. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.[31]

In *Saadi v UK*,[32] the UK Court of Appeal and the House of Lords overturning the decision of the High Court held that the detention of the applicant, an Iraqi asylum-seeker was right, given that the UK was experiencing a mass influx of asylum-seekers and detention was deemed necessary to process claims quickly. The European Court of Human Rights (ECtHR) equally held that the applicant's detention was permissible under Article 5(1)(f), according to the Court:

> Until a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to 'prevent his effecting an unauthorised entry.[33]

Immigration detention in the UK is indeterminate; as there are no statutory limitations on the period of time an individual can be detained.[34] UK failed to adopt the EU Returns Directive[35], which places 18 months as the maximum limit for immigration detention.[36] Consequently detention in the UK is "uncertain and unpredictable and may last a few hours or a few days, or weeks, months, and even years".[37] The implication of this is that immigrants are left uncertain about the duration of their application process. Furthermore, the UK government could easily

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[30] It is pertinent to note that the EU position under the ECHR is applicable to member States of the EU who ratified the Convention. This distinction is necessary as the EU being an 'umbrella body' for States lacks the requisite personality for the applicability of the ECHR.

[31] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR) art 5(1)(f)

[32] *Saadi v UK* [2008] 47 EHRR 17.

[33] *Saadi v UK* [2008] 47 EHRR 17, para 65.

[34] Mary Bosworth 'Can immigration detention be legitimate? Understanding confinement in a global world' In: Katja Franko Aas and Mary Bosworth (eds) Extraordinary Punishment: Comparative Studies in Detention, Incarceration and Solitary Confinement, 50–67. (Oxford University Press 2013) 149–165.

[35] Council Directive 2008/115/EC of 16 December on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L. 348/98-348/107, art 15.1

[36] Justine Stefanelli, 'Whose rule of law? An analysis of the UK's Decision not to opt into the EU Asylum Procedures and Reception Conditions Directives. (2011) International and Comparative Law Quarterly 60: 1055–1064.

[37] Sarah Turnbull, 'Stuck in the middle': Waiting and Uncertainty in Immigration Detention' (2016)25(1) Time and Society 61, 62.

employ this uncertainty on length of time as a tool for deterrence by subjecting asylum seekers to an indeterminate period of detention.

Concerning the case of vulnerable persons, where ordinarily there should be strong reasons to discourage detention. Neither case laws nor international conventions are conclusive on prohibiting detention of such asylum-seekers.[38]

Major concerns have been raised with respect to immigration detainees who are susceptible to contracting Covid-19 and the attendant health challenges. Governments have been called upon to protect these vulnerable class of persons, however little effort have been put towards properly managing immigration detention facilities to avert outbreak of this pandemic.[39] The case of *R (Samson Bello) v Secretary of State for the Home Department*[40] is instructive on this issue. In this case the UK High Court refused to grant the release from an immigration detention of a person at high risk of corona virus complications. The Court however ordered for an accelerated hearing to determine whether persons at high risk of covid-19 complications could be recognized under the Adults at Risk Policy as Level 3 risk.[41] The implication of this according to Schymcyk is that once a detainee is proved to have level 3 risk under the said policy, such a person will only be detained on grounds of public safety and when his removal is imminent.[42] It is hoped that the Court in *Samson Bello* eventually finds reason to hold in favour of the applicant as this would set a good precedent in immigration detention on the protection of detained vulnerable persons at health risk.

3.1 The Courts' Skepticism towards the Detention of Asylum Seekers under the Principle of Deterrence

This section gives an overview of the Court's reluctance to uphold the deterrence justification for irregular migration as practiced by different States. The scope of this analysis will be limited to few selected countries which have witnessed a massive influx of asylum-seekers over the years.

Thousands of persons across the globe are subjected to immigration detention annually. This has invariably resulted in a high level of litigation in this area. It is the duty of the "courts to serve as guardians of liberty, and they have asserted this position in a good number of cases revolving around the detention of immigrants".[43]

In countries such as the US, UK, Israel, Australia and Canada which have witnessed a large influx of asylum-seekers over the years their various governments have been seen to implement unfair policies towards detaining a great number of these asylum-seekers. However, national courts as would be seen in this work, have resisted and are skeptical towards these detention

[38] Phillipe De Bruycker and EvangeliaTsourdi, 'The Challenge of Asylum Detention to Refugee Protection' (2016) 35 Refugee Survey Quarterly 1, 3.

[39] Legal Sector Workers United, 'Protect Migrants, Protect Workers: Close Detention Centers now' (LSWU, 11 May 2020) https://newsocialist.org.uk/protect-migrants-protect-workers/ accessed 12 May 2021.

[40] *R (Samson Bello) v Secretary of State for the Home Department* [2020] EWHC 950 (Admin).

[41] Ibid.

[42] Alexander Schymyck, 'High Court to Rule on Release of Immigration Detainees at High Risk from Covid-19' (Free Movement, 23 April 2020) https://www.freemovement.org.ac.uk/high-court-to-rule-on-release-of-immigration-detainees-at-high-risk-from-covid-19/ accessed 11 May 2021.

[43] Sadat Sayeed and David Neale, 'Immigration and Asylum Case Law since 201 – A Complex Picture: Part 2' (2017) 22(4) Judicial Review 349, 353.

policies, even when justified by the States to be in their interest as a deterrent to irregular immigration.

The US District Court of Columbia in *R.I.L-R v Johnson*[44]granted an injunction against the United States government's "No Release Policy" which was geared towards deterring future immigration to the State. This injunction was in favour of some Central American women and children who sought asylum from gang-related violence in Honduras, Guatemala and El Salvador.[45]

In 2015 a High Court in the UK struck down the 'Detained Fast Track' Policy of its government, which was designed to quickly resolve claims of certain classes of asylum-seekers that the government deemed to be non-meritorious.[46] The said policy was initiated in 2000 in response to the large influx of asylum-seekers to the United Kingdom from countries experiencing varying degrees of civil war and unrest.[47]

The 'Detained Fast-Track' policy of the UK government was deemed to be procedurally unfair to asylum-seekers because they imposed very short time limits on detained asylum-seekers, thereby negatively affecting the judicious hearing of their claims as they had little time to present their evidence and case.[48] According to Phelps, the Fast Track Rules that have been found to be unlawful were actually "drafted with apparent reluctance, by a judicial body under considerable pressure, following a direct intervention from the Home Secretary".[49] This invariably exposes the politicisation of detention policies in a bid to deter irregular migration.

Furthermore, the Australian government policy on mandatory detention has been continuously criticized by the HRC.[50] In *A v Australia*[51]the Australian government detained an asylum-seeker for four years during which period his asylum claim was processed. The HRC found a breach of Article 9 of the ICCPR and stated that detention should not prolong over a period for which a State cannot provide the requisite justification. In the present case there was no justification by the Australian government for the continued detention of the asylum-seeker.[52]

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[44]*R.I.L-R v Johnson* [2015] 80 F Supp 3d 164

[45] Ibid, para 172-173; Wil Hyton, 'The Shame of America's Family: Detention Camps' *New York Times* (New York, 4 February 2015) http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?-r=o accessed on 2 March 2021.

[46]*Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin).

[47] Stephen Meilli, 'Do Human Rights Treaties Matter: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom' (2015) 48 NYU J Int'l L & Pol 209, 210.

[48]Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015)68 Current Legal Problems, 143, 161; European Council on Refugees and Exiles, 'UK Detained Fast-Track System denied Asylum Seekers Justice for 10 Years' (ECRE, 27 January 2017) https://www.ecre.org/uk-detained-fast-track-system-denied-asylum-seekers-justice-for-10-years/ accessed 2 May 2021.

[49]Jerome Phelps, 'Ending the Detained Fast Track?' (University of Oxford: Faculty of Law, 15 February 2016) https://www.law.ox.ac.uk/research-subject-groups/center-criminolog/centerborder-criminologies/blog/2016/02/ending-detained accessed 2 May 2021.

[50]Eleonora Del Gaudio and Stephen Phillips, 'Detention of Child Asylum Seekers in the Pursuit of State Interests: A Comparison of the Australian and EU Approaches' (2018) 36(1) Nordic Journal of Human Rights 1, 10.

[51]*A v Australia*Comm no 560/1993

[52]*A v Australia*Comm no 560/1993 (HRC 3 April 1997) UN Doc CCPR/C/59/D/560/1995.

The HRC in stating the circumstances in which detention of immigrants is permissible stated that, detention in the course of an asylum claim "is not arbitrary per se but it must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time".[53] It would be arbitrary to continue with the detention of immigrants in the absence of any specific reason relating to the individual while their asylum claims are being determined.[54] The Australian government nevertheless rejected these views of the HRC, stating that it was not obliged to provide the appellant with any remedy neither would it review its immigration legislation.[55]

The clear rejection of deterrence as a justification for detention in immigration articulates a major problem with deterrence as it is linked with criminal law. Deterrence in this context simply means imposing hardship on one person in a bid to influence another individual, a term common with criminal law. Consequently, asylum-seeker 'X' is detained in a bid to discourage asylum-seeker 'Z' from trying to come to a country. Kagan asserts that this is a common rationale for imposing sanctions on crimes.[56]

Israel between 2008 and 2013 experienced a large surge of asylum-seekers, majorly from Eritrea and Sudan, fleeing from human rights violations. The Israeli government was unwelcoming towards granting them refugee protection. According to the Prime Minister, Benyami Netanyahu, "if we do not stop the problem, 60,000 infiltrators are liable to become 600,000 and cause the negation of the State of Israel as a Jewish and democratic State…"[57] The Minister for Interior also stated that Israel did not need to import more problems from Africa and because majority of the asylum-seekers were Muslims, they would eventually think that the country belonged to them. Subsequently by early 2014, only 2 out of 36,000 Eritreans were granted asylum. Israel in a bid to deter asylum seekers made use of mass detention for a period of 3 years at a facility in its southern desert.[58]

The Israeli High court in a unanimous decision in *Adam v Knesset*[59]while holding that the detention in the case was not proportionate, expressed major reservations on the principle of deterrence postulated as a justification for detention of asylum-seekers by the Israeli government.[60] The court noted that detention of asylum seekers was specifically problematic, as it was not a punishment for a crime and it could only be valid in extreme situations.[61]

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[53]*MGC v Australia* Comm no 1875/2009 (HRC 26 March 2015)

[54] Supra.

[55] Response of the Australian Government to the Views of the HRC in Comm no 1875/2009 (MGC v Australia) 2 October 2015, para 13 https://www.humanrights.gov.au/sites/default/files/document/publication/Children_Detention2014_Discussion_paperFINAL.pdf accessed 20 April 2021

[56] Michael Kagan, 'Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States' (2016) 51 Tex Int'l L J 191,204.

[57]TailaNesher, Netanyahu: Israel Could be overrun by African Infiltrators. HAARETZ (21 May 2012) http://www,haaretz.com/news/diplomacy-defense/netanyahu-israel-could-be-overrun-by-african-infiltrators-1.431589 accessed 3 March 2021

[58]Michael Kagan, 'Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States' (2016) 51 Tex Int'l L J 191,206.

[59]*Adam v Knesset* [2013] HCJ 7146/12.

[60] Ibid, para 57.

[61] Ibid, paras 61, 65.

Following the decision in *Adam,* the Israeli parliament (Knesset) re-enacted a similar detention policy, though having a maximum of one year period in detention as against the previous 3 years.[62] Nevertheless, the High Court still frowned at this when deciding another case as detention in the said case failed on the proportionality test relying on *Adam*.[63]

Kagan argues that "for any advocate of refugee protection, 'Israel's reaction to the arrival of asylum-seekers, its reluctance to grant bonafide asylum, its systematic use of detention and its leaders' bombastic, racially-tinged, anti-immigrant rhetoric- has been appalling".[64]

It is submitted that the courts are making considerable progress towards changing the detention narrative by upholding the rights of asylum-seekers who have been unjustifiably detained by States in a bid to protect the latter's' interest towards preventing irregular migration.

4.1 UNHCR's Global Strategy to Support Governments to End Detention of Asylum-Seekers

The United Nations High Commissioner for Refugees (UNHCR) in 2014 launched a 5 year initiative to support States in ending the detention of all asylum-seekers where necessary. The UNHCR's Global Strategy has three goals, which include: to put an end to the detention of child asylum-seekers, to ensure the availability of alternatives to detention in law and its implementation and finally to ensure that in situations where detention is necessary and unavoidable, that the conditions of detention meet international standard. [65]

Through the Global Strategy, the UNHCR offices, in conjunction with national governments and other stakeholders, are working assiduously towards addressing the key challenges of detention. Some of such challenges include; the use of detention by States as a deterrent to irregular immigration even though it is prohibited by international law, the substandard conditions inherent in detention facilities especially as it concerns vulnerable persons, the increasing and automatic use of detention by countries among other challenges.[66]

4.2 Alternatives to Detention

The Alternatives to Detention which is the second goal of the UNHCR's Global Strategy is important as it reaffirms the position of International law on detention being a measure of last resort. It is equally helpful for the following reasons: short and long term psychological and physical harm is avoided, cost effectiveness for governments as they are way cheaper than detention, the costs related to the legal challenges are reduced among others.[67] The Option Paper 2 on Alternatives to Detention provides that;

[62] *Eitan-Israeli Immigration Policy Ctr. v Israeli Gov't* 1, 5-6(2014) HCJ 7385/13 (Isr.).
[63] Supra, para 38.
[64] Michael Kagan, (n 59) 206.
[65] Alice Edwards, 'From Routine to Exceptional: Introduction to UNHCR's Global Strategy - Beyond Detention 2014-2019 Supporting Governments to End the Detention of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 128, 130.
[66] Ibid, 131.
[67] UNHCR, Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention. 2015

- During screening, first line officers are advised to base their decisions either to detain or release on an individualised and detailed assessment in conformity with international law, special circumstances and needs of particular asylum-seekers should be considered.[68]
- Timely detention reviews are encouraged under the Option Paper. That is the right to be promptly brought before a judicial or an independent authority to have a detention decision reviewed. The right to attend the reviews is equally available to the asylum seeker and his representative.[69]
- Maximum periods of detention under the relevant national laws cannot be circumvented by re-detaining persons soon after an order for their release had been granted on the same grounds. Access to legal representation and legal aid is emphasized.[70]
- Asylum-seekers should live in communities with work and/or social rights during the processing of their claims. A range of accommodation options should be made available to help meet the particular needs of an individual asylum-seeker and their families.[71]
- Bail applications should be made automatic and its financial burden should be reduced by giving asylum-seekers the option of providing sureties and guarantors who have passed through legal checks.[72]

States are therefore employed to always consider these alternatives, whenever detention is expedient as these would greatly aid towards curbing the challenges encountered with the different detention policies of States.

5.1 Conclusion and Recommendations

Most governments view detention as a means to discourage irregular migration to their territories. In as much as irregular entry poses some challenges to States, detention can never be the solution. Studies have shown that even stringent detention policies have failed to deter asylum seekers, "and further that there are workable alternatives to detention that can achieve governmental objectives of security, public order and the efficient processing of asylum applications".[73] Notably on this issue is the fact that it is not unlawful for an individual to seek asylum, it therefore goes contrary to international law when persons are detained on the ground of entering a State without authorisation.[74] Individuals have the right to seek asylum and equally a right to be treated in a humane manner while making their applications.

Detention policies of States have been found to serve symbolic and political purposes beyond their official administrative purposes,[75] and detainees are left to experience their detention as a

[68] Ibid, 2.
[69] UNHCR, Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention. (2015),3.
[70] Ibid, 4.
[71] Ibid, 6.
[72]Ibid, 3.
[73] UNHCR, 'Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014-2019 UNHCR' (2015)27 Int'l J Refugee L 375.
[74] Ibid.
[75] Alice Bloomfield, 'Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?' (2016)35(1) Refugee Survey Quarterly 33-35.

form of punishment.[76]It is quite encouraging that the Courts in some of the countries discussed in this work are skeptical towards justifying the detention of asylum-seeks on the basis of deterrence to irregular immigration.

Fortunately, the UNHCR being aware of the complexities and challenges with detention policies across the globe has come up with a global strategy to end detention as already discussed briefly in this work. States are therefore encouraged to key into the goals and recommendations of this great initiative. Much effort should be geared towards implementing the alternatives to detention as well as improving the living conditions in the various detention facilities to put them at par with international best practices. States must understand that immigration detention should be discouraged and should be a last resort in necessary and deserving cases.

Furthermore, frequent monitoring of immigration detention centers is urgently required to ensure compliance with international human rights standards.[77] Asylum-seekers should stay in a good environment in order to maintain their mental and physical health during the period their asylum claims are processed. States are equally encouraged to take into consideration the special circumstance of vulnerable asylum seekers in a bid to afford the latter the rights and protection which they deserve.

[76]SoorejPuthoopparambil, B M Ahlberg and Magdalena Bjerneld, 'A Prison with Extra Flavours: Experiences of Immigrants in Swedish Immigration Detention Centres', (2015)11(2) International Journal of Migration, Health and Social Care 73–85.

[77]Eleonora Del Gaudio and Stephen Phillips (n 16) 16.