

**AUSTRALIA'S IMPLEMENTATION OF ITS NON-
REFOULEMENT OBLIGATIONS UNDER THE CONVENTION
AGAINST TORTURE AND OTHER CRUEL INHUMAN
OR DEGRADING TREATMENT OR PUNISHMENT
AND THE INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS***

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* (a) Portions of this article are derived from a thesis to be submitted by the author for the degree of PhD. Some of the material in this article is substantially the same as material in the author's articles: "Australia's Interpretation of some Elements of Article 1A(2) of the Refugee Convention - Marginalizing the International Law Claims of On-shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives" (1994) 16 *Sydney Law Review* 32 and "The Right to Review in the Australian On-shore Refugee Status Determination Process: Is it an Adequate Procedural Safeguard Against Refoulement?" (1994) 22 *Federal Law Review* (forthcoming).

(b) Many government officials and others interviewed spoke on condition of anonymity. The interviews to which references are made have been tape recorded and copies of the tapes are held at the author's office at the Law Faculty, Monash University. All persons interviewed were well qualified to speak on the matters about which they were interviewed.

(c) The Department of Immigration and Ethnic Affairs has had many names over the years. The most recent name has been used throughout, except in case names where the title of the department has been reproduced as it appears in the case.

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I. INTRODUCTION

Australia has a formal and fairly elaborate administrative system dedicated to identifying those on-shore asylum seekers who are entitled to protection from refoulement under the 1951 Convention relating to the Status of Refugees (Refugee Convention).¹ As well as protecting on-shore asylum seekers who have an entitlement to protection from refoulement under the Refugee Convention, Australia protects on humanitarian grounds some of those on-shore asylum seekers with no Refugee Convention entitlement. The Department of Immigration and Ethnic Affairs (DIEA) has clearly stated that it considers Australia's grants of protection on humanitarian grounds to on-shore asylum seekers to be "in the nature of an 'act of grace'" and implies that this is because "[t]hey do not result from any international treaty obligations".² In other words, in its day-to-day operations DIEA tends to proceed on the assumption that an asylum seeker who does not have an entitlement to protection from refoulement under the Refugee Convention has no treaty-based entitlement to protection from refoulement. Yet DIEA knows this assumption to be incorrect. Australia is a party³ to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴ and to the International Covenant on Civil and Political Rights (ICCPR).⁵ Both of these treaties provide protection from refoulement to at least some of the asylum seekers who fall outside the protection of the Refugee Convention.

Section II of this article provides a brief outline of Australia's non-refoulement obligation under the Refugee Convention. Section III provides an outline of Australia's non-refoulement obligations under article 3 of the Torture Convention and articles 6 and 7 of the ICCPR. It is demonstrated in section III that, while these non-refoulement obligations are in some respects narrower than the non-

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- 1 Australia acceded to the 1951 Convention relating to the Status of Refugees (28 July 1951, 189 UNTS 150) on 21 January 1954 and acceded to the 1967 Protocol relating to the Status of Refugees (31 January 1967, 606 UNTS 267) on 13 December 1973.
 - 2 DIEA, Submission 134, in Joint Standing Committee on Immigration Regulations, *Inquiry into Refugee and Humanitarian Visas and Permits Submissions*, 4 January 1991 at 546.
 - 3 Australia lodged an instrument of ratification of this treaty on 8 August 1989 and became a party 30 days thereafter: Mr Bowen, Deputy Prime Minister, and Senator Evans, Minister for Foreign Affairs and Trade, Joint statement of 13 August 1989, (1989) 60 *Australian Foreign Affairs Record* 471.
 - 4 Reprinted in (1984) 23 *International Legal Materials* 1027 and changes noted in (1985) 24 *International Legal Materials* 535. This treaty entered into force on 26 June 1987: G Stenberg, *Non-Expulsion and Non-Refoulement* (1989) 245 at footnote 1. Hereinafter cited as the Torture Convention.
 - 5 16 December 1966, 999 UNTS 171. This treaty entered into force on 23 March 1976. Australia ratified the treaty with effect from 13 November 1980: 1197 UNTS 411. At the time of ratification Australia made several reservations and declarations. However, most of these reservations and declarations were removed in 1984: Senator Evans, Attorney-General (Cth), News Release, 10 December 1984, reproduced in (1984) *Australian Foreign Affairs Record* 1305. The only reservations still current are reservations to articles 10(2)(a), 10(2)(b), 10(3), 14(6) and 20: Joint Committee on Foreign Affairs Defence and Trade, *Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992) at 23; (1993) *Australian Legal Monthly Digest* [1664].

refoulement obligations contained in the Refugee Convention, they are in some other and important respects wider.

In section IV it is argued that the best way of determining whether Australia attains the international standard of reasonable efficacy in the implementation of its non-refoulement obligations under the Torture Convention and the ICCPR is to examine whether Australia's legal and administrative regime for the implementation of these obligations comply with a few minimum procedural standards. Section V then examines the domestic and international protection mechanisms which can be invoked by persons who are entitled to protection from refoulement under the Torture Convention or the ICCPR and considers whether these mechanisms either individually or in combination meet the minimum procedural standards specified in section IV. It is concluded that they do not.

II. AUSTRALIA'S NON-REFOULEMENT OBLIGATION UNDER THE REFUGEE CONVENTION

A. The Inclusionary Provisions

The prohibition on refoulement is the most important of the obligations imposed on state parties by the Refugee Convention. Article 33(1) of the Refugee Convention provides that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Article 33(2) of the Refugee Convention makes exceptions to the application of article 33(1). These exceptions will be discussed below.

Who is a 'refugee' within the meaning of article 33 of the Refugee Convention? Article 1A(2)⁶ of the Refugee Convention (as modified by article I(2) of the Refugee Protocol) provides that for the purposes of the Convention, the term 'refugee' applies to any person who:

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

6 Article 1A(1) of the Refugee Convention provides that for the purposes of the Convention, the term 'refugee' applies also to any person who:

Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation.

Article 1A(1) of the Refugee Convention is of little significance in the 1990s and will not be considered in this article.

The Refugee Convention goes on to specify that certain persons are excluded from the application of the Convention notwithstanding that they fall within the definition of 'refugee' in article 1A. These exclusions will be discussed below.

B. Analysis of the Inclusionary Provisions

(i) *The Danger against which Protection is Provided*

The danger against which article 33(1) of the Refugee Convention provides protection is the return (refoulement) by a state party of any 'refugee' to a country where his or her "life or freedom would be threatened". Though the matter is not free of doubt, state practice appears to establish that the prohibition against refoulement extends to preventing state parties rejecting asylum seekers at their borders. The reader is referred, by way of example, to the procedures which are in place in Belgium,⁷ the Netherlands,⁸ Switzerland⁹ and the UK¹⁰ to avoid rejection at the border. This state practice is bolstered by reference to supplementary means of interpretation. The representatives at the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (the conference which opened for signature the Refugee Convention) appear to have taken the view that the application of article 33 extended to any refugee who presented him or herself to a state party, even before the refugee had crossed the physical border of that state.¹¹ In any event, they certainly took the view that article 33 applied to any refugee who was physically within the territory of a state when he or she presented him or herself at the border post.¹² Finally, the Executive Committee of the High Commissioner's Program (EXCOM) has stated that the border officials of a state party to the Refugee Convention must observe the principle of non-refoulement in relation to refugee status claimants who present themselves at the border.¹³

7 See Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Summary Description of Asylum Procedures in States in Europe, North America and Australia*, (April 1992), pp 15-6, for description of practice.

8 *Ibid*, pp 50-1 for description of practice.

9 *Ibid*, p 78 for description of practice.

10 See National Population Council, *The National Population Council's Refugee Review*, (1991) p 111 for description of practice.

11 UN Doc E/AC 32/SR 21 at 5-7 cited in G Stenberg, note 4 *supra*, p 175.

12 UN Doc A/CONF 2/SR 16 at 6ff and A/CONF 35 at 21, cited in G Stenberg, *ibid*.

13 Addendum to the Report of UNHCR, UN GAOR: 32nd session, Supp No 12A (1977) at [53(6)(e)], cited in *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1979) at [192]. (Hereinafter cited as UNHCR Handbook). The UNHCR Handbook was reissued in 1988 but no significant changes were made to the text: G Lombard, "An International Perspective on Refugee Determination Activities: Alternative Review and Accountability Models" presented at, Public International Law Conference, University of New South Wales, 10 October 1992, p 3. State parties to the Refugee Convention and Protocol have undertaken to facilitate UNHCR's duty of supervising the application of the provisions of the Refugee Convention and Protocol: Article 35(1) of the Refugee Convention and article II(1) of the Refugee Protocol. The UNHCR Handbook was produced by UNHCR in response to a request made by the Executive Committee of the High Commissioner's Programme (EXCOM) for a handbook "for the guidance of Governments": UNHCR Handbook, p 1. Thus the publication of the UNHCR Handbook, can be regarded as an act of UNHCR in discharge of its duty of supervision and

The Refugee Convention does not deal directly with the question of whether the extradition of persons is capable of amounting to a breach of the non-refoulement obligation. However, EXCOM has concluded unanimously that article 33 applies to prevent extradition.¹⁴ The words of article 33 certainly seem to exclude the ability to extradite a refugee since it prohibits refoulement in "any manner whatsoever".¹⁵ While it is probable that article 33 was not intended by its drafters to affect extradition,¹⁶ most writers now accept that the coverage of article 33 extends to protection from extradition.¹⁷ It may even be the case that the boundaries of the generally recognised 'political offence' exception to extradition is in the process of expanding to complement the Refugee Convention definition of 'refugee'.¹⁸

A person is a Refugee Convention refugee if he or she has a well-founded fear of being *persecuted* for a Refugee Convention reason. Neither the Refugee Convention nor the Refugee Protocol define 'persecution' and there is a great deal of variation in the interpretations applied by the states parties to the treaties.¹⁹ However, there are reasons of principle for arguing that states should interpret the term 'persecution' in the Refugee Convention in the light of human rights treaties to which they are party.²⁰ In other words, as far as Australia is concerned, violations of the rights set down in the Convention on the Prevention and Punishment of Genocide,²¹ the ICCPR, the International Covenant on Economic Social and Cultural Rights (ICESCR)²² and so on should be considered to be persecution.

The problem is that article 33(1) does not in its terms provide that a refugee is not to be returned to the frontiers of territories where he or she would be *persecuted* for a Refugee Convention reason. Rather article 33(1) provides that a refugee is not to be returned to the frontiers of territories where his or her *life or*

states are bound by the Refugee Convention and Protocol to regard the guidelines to interpretation and implementation of those treaties contained in the Handbook as, at the least, highly persuasive.

14 EXCOM Conclusion 17 (XXXI) (1980) cited in G Stenberg, note 4 *supra*, pp 202-3.

15 SP Sinha, *Asylum and International Law*, (1971), p 125.

16 SP Sinha, *ibid*, and G Stenberg, note 4 *supra*, p 175 both citing the travaux préparatoires.

17 WL Fink, "Joseph Doherty and the INS: A Long Way from International Justice" (1992) 41 *De Paul Law Review* 927 at 948-9; GS Goodwin-Gill "Nonrefoulement and the New Asylum Seekers" in DA Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s*, Nijhoff/Sold and Kluwer Academic Publishers (1988) pp 103, 105.

18 DL Shelton, "The Relationship of International Human Rights Law and International Humanitarian Law to the Political Offence Exception to Extradition" in EL Lutz, H Hannum and KJ Burke (eds), *New Directions in Human Rights*, University of Pennsylvania Press (1989) 137 at 140, cites *Ex parte Kolzynski* [1955] 1 QB 540 and *Schtraks v The Government of Israel* [1962] 3 All ER 529 as cases in which the UK courts have "recognised the close relationship between the political offence exception and political asylum".

19 G Stenberg, note 4 *supra*, p 65.

20 For development of this argument see S Taylor, "Australia's Interpretation of Some Elements of Article 1A(2) of the Refugee Convention - Marginalizing the International Law Claims of On-shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives", note 1 *supra* at 53-5.

21 9 December 1948, 78 UNTS 277. Australia ratified this treaty on 8 July 1949: 78 UNTS 277, 278. The treaty entered into force on 12 January 1951: RB Lillich, *International Human Rights Instruments*, William S Hein Company (2nd ed, 1990) pp 130-1.

22 16 December 1966, 993 UNTS 3. Australia ratified the ICESCR on 10 December 1975. The ICESCR entered into force on 3 January 1976.

freedom would be threatened for a Refugee Convention reason. Nevertheless, the use of the words 'life and freedom' do not appear to have been intended to deny protection against refoulement to any person who would have been entitled to the status of 'refugee'.²³ The phrase 'territory where their life or freedom was threatened' was simply chosen as a generous replacement for phrases like 'country of origin', which were used in earlier conventions dealing with the plight of refugees, in order to protect refugees from refoulement to any country where persecution was feared.²⁴

(ii) *Cause of the Danger and Reasons for the Danger*

It is beyond dispute that a person who has a well-founded fear of being persecuted by the government of his or her country of origin or with the acquiescence of the government of his or her country of origin is a refugee and entitled to protection from refoulement. It is also recognised by the US courts that a claimant who is able to show well-founded fear of persecution "by a group which the government is unable to control" can succeed in establishing refugee status.²⁵ The same view is taken by the Supreme Court of Canada²⁶ and the High Court of Australia.²⁷ Bolstering this state practice is the UNHCR Handbook which states that the clause "unable ... to avail himself of the protection of that country" covers the situation of a state unable to protect people from persecution by non-government groups.²⁸ In other words, the Refugee Convention does not require state involvement in the feared persecution in order for the person fearing persecution to be considered a refugee. It is to be assumed that article 33(1) of the Refugee Convention will be interpreted in a consistent manner.

The definition of 'refugee' contained in article 1A(2) of the Refugee Convention excludes from its scope those persons who have a well-founded fear of being persecuted for a reason other than their race, religion, nationality, membership of a particular social group or political opinion. State parties to the Refugee Convention and Protocol, for instance Canada,²⁹ the US³⁰ and Australia³¹ take the view that a

23 A Grahl-Madsen, *The Status of Refugees in International Law*, AW Sijthoff (1966) p 196, explaining the intentions of the Ad Hoc Committee on Statelessness and Related Problems. The Refugee Convention was drafted by the Ad Hoc Committee formed by the United Nations Economic and Social Council (ESC): B Sautman, "The Meaning of 'Well-Founded Fear of Persecution' in US Asylum Law and in International Law" (1986) 9 *Fordham International Law Journal* 483 at 531; TN Cox, "Well-founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status" (1984) 10 *Brooklyn Journal of International Law* 333 at 342.

24 R Plender for UNHCR intervening in *R v Secretary of State for the Home Department; ex parte Sivakumaran* [1988] 1 AC 958 at 984.

25 *Bolanos-Henandez v INS* 767 F 2d 1277 (9th Cir 1984) at 1284.

26 *Re Attorney-General of Canada and Ward; United Nations High Commissioner for Refugees et al; Interveners* (1993) 103 DLR (4th) 1, reversing *Re Attorney-General of Canada and Ward* (1990) 67 DLR (4th) 1.

27 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412 at 449 per McHugh J.

28 UNHCR Handbook, note 13 *supra* at [98].

29 *Marc Georges Severe* (1974) 9 IAC 42, 47 per JP Houle, cited in JC Hathaway, *The Law of Refugee Status*, Butterworths (1991) p 139.

claimant for the status of a Refugee Convention refugee must establish that he or she has a well-founded fear of being persecuted for one of the five reasons listed in the definition, that is, they regard the listing as exhaustive. Article 33(1) protects only persons who are refugees (that is persons who have a well-founded fear of being persecuted for a Refugee Convention reason by their country of origin). Moreover, it protects them only from being returned to a place (whether their country of origin or some other place) where they would face harm on account of their race, religion, nationality, membership of a particular social group or political opinion.

(iii) *The Well-foundedness of Claims*

The phrase “well-founded fear” contains a subjective and an objective element. Apart from accepting this basic proposition, there does not appear to be consensus among states as to the interpretation of the phrase.³² The author has argued elsewhere that the preferred interpretation of the phrase as a matter of international law is that a refugee status claimant must be able to give a plausible account of his or her subjective fear.³³ In Australia, however, the interpretation of the criterion for the purposes of domestic law has been settled by the *Chan* case. In the *Chan* case, Mason CJ,³⁴ Dawson J,³⁵ Toohey J³⁶ and McHugh J³⁷ held that a refugee status claimant’s subjective fear of persecution is “well-founded” if there is a “real chance” that he will be persecuted if he or she returns to the country of his or her nationality.³⁸ This expression conveys the requirement that the chance must not be a remote one³⁹ but imposes no requirement that there must be a greater than 50 per cent chance.⁴⁰ Whichever interpretation is correct, the important thing to note is that a person is a refugee on the basis of his or her subjective fear of persecution provided only that the subjective fear has some objective foundation.

The argument is sometimes made that article 33(1) of the Refugee Convention does not prohibit the return of a ‘refugee’ to another state simply because he or she

30 P Butcher, “Assessing Fear of Persecution in a War Zone” (1991) 5 *Georgetown Immigration Law Journal* 435 at 458.

31 *Morato v Minister for Immigration Local Government and Ethnic Affairs* (1992) 111 ALR 417 at 420, per Black CJ (French J agreeing).

32 TN Cox, note 23 *supra*, p 353.

33 S Taylor, note 1 *supra* at 32, 39-44.

34 (1989) 87 ALR 412 at 418.

35 *Ibid* at 425.

36 *Ibid* at 432.

37 *Ibid* at 448.

38 Justice Gaudron did not adopt the formulation, as she thought that judicial specification of the content of the expression “well-founded fear” would in fact work against the humanitarian purpose of the Refugee Convention. She said that a decision maker should “evaluate the mental and emotional state of the applicant and the objective circumstances so far as they were capable of ascertainment, give proper weight to any credible account of those circumstances given by the applicant and reach an honest and reasonable decision by reference to broad principles which are generally accepted within the international community”: *ibid* at 436.

39 *Ibid* at 418, 425, and 432 per Mason CJ, Dawson J Toohey J respectively.

40 *Ibid* at 418, 425, 432, and 448 per Mason CJ, Dawson J, Toohey J and McHugh J respectively.

has a *well-founded fear* of being persecuted by it but rather that return is only prohibited if his or her "life or freedom *would*"⁴¹ be threatened".⁴² However, a reading of the *travaux préparatoires* would suggest that the subjective element of the article 1 definition was considered to have been incorporated implicitly into article 33(1).⁴³ The issue has not been explored by Australian courts. However, Australia's administrative practice is to assume that the non-refoulement provision applies to all persons recognised by Australia as Refugee Convention refugees.⁴⁴

C. Persons Excluded from the Benefit of the Non-Refoulement Obligation

Articles 1D, 1E and 1F of the Refugee Convention provide for the exclusion from the application of the Convention, of persons who would otherwise fall within the definition in article 1A.

Article 1D of the Refugee Convention provides that the Convention shall not apply to persons who "are at present" (that is at the time that the Refugee Convention came into force)⁴⁵ receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. This effectively means that Palestinian refugees, who receive protection and assistance from the United Nations Relief and Works Agency, are excluded from the Refugee Convention definition.⁴⁶

Article 1E provides that the Refugee Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations of nationals of that country. The history of article 1E suggests that, although it is broadly expressed, it is directed primarily at the situation of ethnic Germans, who have extensive protection under the German Constitution.⁴⁷

Article 1F provides that the Refugee Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;⁴⁸

41 Italics added.

42 M Fullerton, "Restricting the Flow of Asylum Seekers In Belgium, Denmark, the Federal Republic of Germany and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 29 *Virginia Journal of International Law* 33 at 100-101.

43 R Plender for UNHCR intervening in *R v Secretary of State for the Home Department; ex parte Sivakumaran*, note 24 *supra* at 985.

44 Interview with DIEA official A, 13 January 1992.

45 JC Hathaway, note 29 *supra*, p 208.

46 N Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, Institute of Jewish Affairs (1953) p 63; JC Hathaway *ibid.*, p 208.

47 G Stenberg, note 4 *supra*, p 79. In *Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 38 FCR 191, Olney J held that DIEA could not invoke Article 1E simply because a person had been granted refugee status in another country.

48 See *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173 for an example of the application of article 1F(a). Article 6 of the London Charter of the International Military Tribunal annexed to the Agreement for Prosecution and Punishment of the Major War Criminals of the European Axis,

- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;⁴⁹
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.⁵⁰

These exclusion clauses have rarely been invoked by DIEA.⁵¹ Nor were they frequently invoked by the Refugee Status Review Committee (RSRC).⁵² They have not yet been invoked by the RRT.

Even if a person is a refugee within the meaning of article 1A and is not excluded from the application of the Refugee Convention by articles 1D, 1E or 1F, he or she may be excluded from the benefit of article 33(1) by article 33(2). Article 33(2) of the Refugee Convention provides that the benefit of article 33(1) cannot be invoked by a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is,⁵³ or who, having been convicted by a final judgment of a particularly serious crime,⁵⁴ constitutes a danger to the community of that country."

III. AUSTRALIA'S OTHER TREATY-BASED NON-REFOULEMENT OBLIGATIONS

A. Article 3 of the Torture Convention

(i) *The Provision*

The Torture Convention provides that:

8 August 1945, 82 UNTS 279, contains definitions of crimes against peace, war crimes and crimes against humanity: A Grahl-Madsen, note 23 *supra*, pp 273-4. Article 1F(a) would also apply so as to exclude persons guilty of international crime of genocide as set out in the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 or of "grave breaches" of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, p 276.

49 See A Grahl-Madsen, note 23 *supra*, pp 292-4 and JC Hathaway, note 29 *supra*, pp 221-5 for a discussion of article 1F(b).

50 Article 1F(c) might be contravened by senior government officials: Statement of Mr Rochefort of France (during the drafting of the Refugee Convention), UN Doc E/AC 7/SR.166, 22 August 1950, p 6 cited in JC Hathaway, *ibid*, p 229; A Grahl-Madsen, *ibid*, p 286. Most people, however, would not be in a position to threaten international peace and security (United Nations Charter article 1(1)), undermine friendly relations among nations (United Nations Charter article 1(2)) or act contrary to the purposes of the United Nations in any other significant manner.

51 Interview with DIEA official A, 24 February 1993.

52 Interview with a member of the RSRC, 15 January 1992. The RSRC has now been replaced by the Refugee Review Tribunal (RRT).

53 Australia has not as yet attempted to argue that a refugee is unable to claim the benefit of article 33(1) of the Refugee Convention because there are reasonable grounds for regarding him or her as a danger to the security of Australia: Letter from DIEA official A, 15 May 1992.

54 See G Stenberg, note 4 *supra*, pp 226-7 for a discussion of this phrase. Australia has not considered the application of article 33(2) very often: Interview with DIEA official A, 13 January 1992. To the best of my knowledge, *Re Vazquez and Minister of Immigration, Local Government and Ethnic Affairs* (1989) 20 ALD 33 is the only reported case in which DIEA invoked the "particularly serious crime" limb of article 33(2). It is worth noting that UNHCR did not think a "particularly serious crime" was involved in the *Vazquez* case and hence did not think that article 33(2) applied: Interview with H Donzalski, Deputy Regional Representative for Australia, New Zealand and the South Pacific of UNHCR, 14 January 1992.

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁵⁵

'Torture' is defined for the purposes of the Torture Convention as:

...any act⁵⁶ by which severe pain or suffering, whether physical or mental,⁵⁷ is intentionally inflicted on a person for such purposes as⁵⁸ obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁹

(ii) *The Danger Against which Protection is Provided*

Refoulement for the purposes of article 3 of the Torture Convention is a similar concept to that contained in article 33(1) of the Refugee Convention.⁶⁰ Thus

55 Article 3 of the Torture Convention. The Swedish Draft Convention, which formed the basis of working group deliberations, stated that "[n]o state Party may expel or extradite a person to a state where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment": Article 4 of the Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden on 18 January 1978 reproduced in JH Burgers and H Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Nijhoff/Sold and Kluwer Academic Publishers (1988) p 204. The discussions which resulted in the metamorphosis of article 4 of the Swedish draft into article 3 of the Torture Convention, paint a reasonably clear picture of the intended scope of article 3. Reference will be made to these discussions in the analysis which follows.

56 The better view is that "act" includes omission otherwise such conduct as the withholding of food would escape characterisation as 'torture': ME Tardu, "The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (1987) 56 *Nordic Journal of International Law* 303 at 304.

57 As Tardu points out this definition is not sufficient to comprehend "the mind control techniques - psychological, chemical, electronic or otherwise - whereby the will of man is reduced and his autonomy surrendered without any conscious pain or fear": *ibid*.

58 The definition of 'torture' as an act engaged in for a purpose may limit its field of application. The phrase "for such purposes as" makes it clear that the list that follows is not intended to be exhaustive. However, Tardu suggests that an act must be engaged in for a conscious purpose to fall within the definition: *ibid* at 305. This is a plausible limitation given that none of the purposes listed by way of illustration could be described as subconscious ones.

59 Article 1(1) of the Torture Convention. The assertion in article 1 that the infliction of pain or suffering is not torture if "arising only from, inherent or incidental to lawful sanction" introduces some measure of confusion because a range of punishments, which would be perceived in civilised countries as torture, may be lawful sanctions under the domestic law of some states. In 1979, the US delegation to the Commission on Human Rights working group which drafted the Torture Convention proposed that a clear statement be made that "lawful sanctions" did not include "sanctions imposed under colour of law but in flagrant disregard of accepted international standards": JH Burgers and H Danelius, note 55 *supra*, pp 46-7. However, the working group decided, quite deliberately, to refrain from clarifying the ambiguity inherent in using the word 'lawful' in an international treaty: *ibid*, p 47. Australia takes the reference to "lawful sanctions" to be a reference to sanctions which would be lawful under international standards relating to the treatment of prisoners and so on: interview with Attorney-General's Department official B, 15 July 1992.

60 JH Burgers and H Danelius, note 55 *supra*, p 50 citing Commission on Human Rights' 1979 working group. The Swedish draft prohibits, expulsion and extradition, whereas the final version prohibits "return" (refoulement) also. This addition was thought to widen the scope of protection of article 3.

persons who are able to rely on article 3 of the Torture Convention, are protected against rejection at the frontier and all other actions which would fall within the refoulement concept under the Refugee Convention. In addition, extradition, which might arguably fall outside the refoulement concept in article 33 of the Refugee Convention, is explicitly prohibited by article 3.

The history of the Torture Convention makes it very clear that article 3 does not protect persons who face ill treatment falling short of torture upon their return. The Swedish Draft Convention, in fact, prohibited the return of a person to a state in which he or she might be subjected to torture or other cruel, inhuman or degrading treatment or punishment. However, the final version does not mention cruel, inhuman or degrading treatment or punishment. Although the final version of the Torture Convention was drafted in such a manner that most provisions refer to torture alone, article 16(1) then provides that the obligations contained in certain of those provisions shall apply "with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment". Article 16(1) does not extend the operation of article 3 in this manner.⁶¹ In this respect, the scope of protection of article 3 of the Torture Convention is narrower than article 33(1) of the Refugee Convention.

(iii) Cause of the Danger and Reasons for the Danger

'Torture' within the meaning of the Torture Convention is conduct engaged in "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".⁶² Thus article 3 of the Torture Convention does not protect aliens from being returned to a place in which they would be threatened with severe mental or physical suffering upon return if the source of the threat is not a public official (or other person acting in an official capacity) or persons acting with the passive connivance⁶³ of a public official (or other person acting in an official capacity). In this respect, too, the scope of

61 For a time it was proposed that article 16(1) should extend the obligations imposed by article 3 in relation to persons who would be in danger of being subjected to torture, to persons who would be in danger of being subjected to other cruel, inhuman or degrading treatment or punishment: *ibid*, pp 70-1 citing the proposal by the International Commission of Jurists at the Commission on Human Rights working group in 1980. However, it was eventually decided that article 16(1) should not extend the operation of article 3 in this manner: *ibid*, p 74.

62 The definition of torture contained in the Torture Convention is not considered to be "a definition of the intrinsic nature of the act of torture itself" but rather a definition of the acts of torture to which the Convention applies: *ibid*, p 45, discussing deliberations in the Commission on Human Rights working group in 1979. There was in fact debate as to whether the coverage of the Torture Convention should be extended to acts of torture in which public officials had no involvement but it was decided that a state could usually be relied upon to punish such acts through its normal criminal procedures. It is worth noting that article 1(2) of the Torture Convention provides that article 1 is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

63 The term "acquiescence" covers situations in which public officials and other persons acting in an official capacity are clearly *unwilling* to protect a particular victim from the acts of others, for example vigilante groups: ME Tardu, note 56 *supra*, p 306.

protection of article 3 of the Torture Convention is narrower than article 33(1) of the Refugee Convention.

On the other hand, unlike the protection provided by the Refugee Convention, the protection provided by article 3 of the Torture Convention is not limited by reference to the reasons for the danger.

(iv) The Well-foundedness of Claims

Article 3 of the Torture Convention applies only where there are "substantial grounds" for believing that a person "would" be in danger of being subjected to torture.⁶⁴ Article 3(2) of the Torture Convention provides guidelines for determining whether there are substantial grounds for belief. Article 3(2) states that "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violation of human rights". The reference to all relevant considerations, includes a reference to considerations specific to the particular case.⁶⁵ For instance, if a claimant's state of origin has been known to torture persons for holding particular political opinions, or for belonging to particular racial, religious or other social groups and the claimant held such opinions or belonged to such groups, it would have to be taken into account in determining whether there were substantial grounds for believing that the claimant would be in danger of being subjected to torture upon return.⁶⁶ The drafters of article 3(2) contemplated that substantial grounds for belief that the claimant would be in danger could exist even if the state concerned does not consistently and grossly violate human rights on a massive scale.⁶⁷ Conversely, it appears that the fact that another state is guilty of systematic, widespread and serious human rights violations does not preclude the receiving state from returning a person to that state, if it believes that that particular person would not be in danger.⁶⁸ It can be seen that there appears to be no basis on which to make the subjective fear of a claimant under article 3 of the Torture Convention a criterion in assessing whether he or she would be in danger of being subjected to torture. Here again, the protection provided by article 3 of the Torture Convention is narrower in scope than that provided by article 33(1) of the Refugee Convention.

64 This appears to be a deliberate imposition of a higher threshold for protection than that imposed by the wording of the original draft, which spoke of "reasonable grounds" for believing that a person "may" be in danger of being subjected to torture. The Australian interpretation of these phrases is presently a matter of speculation. The Australian Government has not, as yet, been faced with cases, which it felt turned on close attention to the proper interpretation of article 3 of the Torture Convention: Interview with Attorney-General's Department official B, 15 July 1992.

65 JH Burgers and H Danelius, note 55 *supra*, p 127.

66 *Ibid.*

67 *Ibid.*, p 92-3.

68 *Ibid.*, p 128. However, in such a case it is suggested that it would be incumbent on the returning state to produce positive evidence that rebuts the applicant's assertion that he or she would be in danger.

Finally, it should be noted that Article 3 of the Torture Convention is only violated by a state party if that party has “substantial grounds for *believing*”⁶⁹ that the person it proposes to expel would be in danger of being subjected to torture. This concept is explained below in relation to article 7 of the ICCPR.

B. Articles 6 and 7 of the ICCPR

(i) *The Provisions*

Article 6(1) of the ICCPR provides: “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.⁷⁰ Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”. No derogation is permitted from articles 6 and 7, even in “times of public emergency which threatens the life of the nation”.⁷¹

(ii) *Is there a Non-refoulement Obligation Implicit in Articles 6 and 7 of the ICCPR?*

The Human Rights Committee⁷² has stated in its general comments on article 6 that “[t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures”.⁷³ Thus, for instance, in *Herrera Rubio v Colombia*⁷⁴ the Human Rights Committee voiced its suspicion that the Colombian military was complicit in the deaths of Jose Herrera and Emma Rubio de Herrera but, proceeding on the assumption that the killers were unknown, the Committee found that Colombia had violated article 6 because it should have taken “appropriate measures to prevent the disappearance and subsequent killing” of individuals such as Jose Herrera and Emma Rubio de Herrera but it had failed to do so.⁷⁵ In the light of such statements by the Human Rights Committee, it does not appear to be going too far to say that states are at least obliged to refrain from returning aliens

69 Italics added.

70 Articles 6(2) and 6(4) to 6(6) of the ICCPR accept that the death penalty may be imposed by a state party but seek to restrict the circumstances in which it can be imposed.

71 Article 4(2) of the ICCPR.

72 This Committee is set up under Part IV of the ICCPR.

73 General Comment 6(16) on article 6 in Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 93. The Human Rights Committee illustrated the concept of positive measures by saying: “[i]n this connexion, the Committee considers that it would be desirable for state parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”. In other words, the measures contemplated are very far reaching. See also the cases interpreting article 2 of the European Convention which makes similar provision to article 6 of the ICCPR. The European Commission has said that the requirement in article 2 that “[e]veryone’s right to life shall be protected by law” is to be read not only as prohibiting the deliberate taking of life by state parties but also as imposing a positive obligation on state parties “to take appropriate steps to safeguard life”: *Association X v UK* (1979) 14 European Commission of Human Rights Decisions and Reports 31 at 32; *Stewart v UK* (1985) 7 EHRR 453 at 457-8.

74 Report of the Human Rights Committee, UN GAOR: 43rd session, Supp No 40 (1988) 199.

75 *Ibid.*

to any state where there are substantial grounds for believing that the aliens would be exposed to a real risk of being arbitrarily deprived of life. In *VMRB v Canada* the applicant alleged that his right to life was being violated by Canada because "the Canadian government has refused to assure him formally that he would not be deported to El Salvador, where, [he claimed] he would have reasons to fear attempts on his life".⁷⁶ The Human Rights Committee ruled the article 6 claim to be inadmissible because the applicant had not substantiated it. The Committee said:

...the author has merely expressed fear for his life in the hypothetical case that he should be deported to El Salvador. The Committee cannot examine hypothetical violations of Covenant rights which might occur in the future; furthermore the Government of Canada has publicly stated on several occasions that it would not extradite the author to El Salvador and has given him the opportunity to select a safe third country.⁷⁷

It could be argued that the Human Rights Committee may have found a violation of article 6, if the facts presented to the Committee were less hypothetical.

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),⁷⁸ which makes similar provision to article 7 of the ICCPR, has been so interpreted that a state can be in violation of it by extraditing, expelling or otherwise returning⁷⁹ a person to another state, where there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment or punishment in that other state.⁸⁰ For instance, in the *Soering* case, the European Court of Human Rights (European Court) said:

The fact that a specialised treaty [The Torture Convention] should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.⁸¹ It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intent of the Article and in the Court's view this inherent obligation not to extradite also extends to cases where the fugitive would be faced in the receiving state by a real risk of

76 *VMRB v Canada* in Report of the Human Rights Committee, UNGAOR: 43rd session, Supp No 40 (1988) 258 at 259.

77 *Ibid* at 262.

78 4 November 1950, 213 UNTS 221.

79 P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law and Taxation Publishers (2nd ed, 1990), p 236.

80 *Soering v United Kingdom* (1989) 11 EHRR 439 at 467-8; *Cruz Varas v Sweden* (1991) 14 EHRR 1 at 33-4; *Vilvarajah v United Kingdom* (1991) 14 EHRR 248 at 290.

81 In fact, it was the European Commission of Human Rights' (European Commission) interpretation of article 3 of the European Convention on Human Rights which gave the Swedes the idea of proposing the inclusion of the provision, which (in modified form) is now article 3 of the Torture Convention: JH Burgers and H Danelius, note 55 *supra*, p 35.

exposure to inhuman or degrading treatment or punishment proscribed by that Article.⁸²

The Human Rights Committee has, under the Optional Protocol, only had to express concluded views on article 7 of the ICCPR's application in situations where the applicant has alleged that he or she had been subjected to torture or inhuman or degrading treatment or punishment by persons within the jurisdiction of the state party complained of.⁸³ However, in *Mario I Torres v Finland*⁸⁴ Mr Torres claimed that an extradition order was contrary to article 7 of the ICCPR "because the Finnish authorities had been provided with the information, on the basis of which it could be feared that the author would be subjected to torture if he were to return to Spain".⁸⁵ Finland submitted that article 7 did not cover the issue of extradition but that "[e]ven if an extradition were treated as potential complicity to a violation of article 7...Mr Torres did not submit the necessary evidence to indicate that he would, after his extradition, be subjected to treatment in violation of article 7".⁸⁶ The Human Rights Committee found Mr Torres' complaint under article 7 to be admissible.⁸⁷ This must mean that it thought that Mr Torres had been able to show a *prima facie* case.⁸⁸ On the merits, the Committee found, in relation to Mr Torres' allegation "that Finland [was] in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture", that Mr Torres had "not sufficiently substantiated his fears that he would be subjected to torture in Spain".⁸⁹ It could be argued that the Committee would have found a violation of article 7, if Mr Torres had been able to substantiate his fears.

82 *Soering v United Kingdom* (1989) 11 EHRR 439 at 467-8. It has been accepted also by the European Court that a state party's act of expelling an alien may cause that alien such mental trauma as to amount to a breach by that state party of article 3 of the European Convention: *Cruz Varas v Sweden* (1991) 14 EHRR 1 at 37. However, on the facts of *Cruz Varas v Sweden*, the Court concluded that the expulsion could not be characterised as ill-treatment exceeding the minimum severity required for a violation of article 3: *ibid* at 37. The Court found that the applicant had been suffering post-traumatic stress disorder prior to being returned to Chile and that his health had deteriorated after his return to Chile but appeared to take the view that whether or not his expulsion to Chile amounted to ill-treatment exceeding the threshold of severity did not depend on the severity of the trauma inflicted but on whether the applicant had substantial objective grounds for the subjective fears giving rise to the trauma: *ibid* at 37. In other words, this argument appears to be one which cannot succeed before the European Court, if other arguments fail.

83 This comment is made on the basis of the author's perusal of all decisions contained in Human Rights Committee, *Selected Decisions of the Human Rights Committee under the Optional Protocol, 17th to 32nd Sessions* (1990) and all decisions reported in the Reports of the Human Rights Committee, UN GAOR: 43rd session, Supp No 40 (1988) to UN GAOR: 46th session, Supp No 40 (1991). McGoldrick, too, appears not to have found cases in which the Human Rights Committee has dealt with the matters here considered: D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Oxford University Press (1991) p 367.

84 Report of the Human Rights Committee, UN GAOR: 45th session, Supp No 40 (1990) II, 96.

85 *Ibid* at 97.

86 *Ibid* at 97-8.

87 *Ibid* at 99.

88 See Report of the Human Rights Committee, UN GAOR: 46th session, Supp No 40 (1991) 164.

89 Report of the Human Rights Committee, UN GAOR: 45th session, Supp No 40 (1990) II, 96 at 99.

Quite apart from such speculation, it is submitted that there is every reason for interpreting articles 6 and 7 of the ICCPR in a similar fashion to article 3 of the European Convention. Although the state parties to the ICCPR do not have a "common heritage of political traditions [and] ideals", the ICCPR too has an underlying value based on a common heritage. The common heritage is the Charter of the United Nations and the underlying value is that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".⁹⁰ It would be incompatible with this underlying value knowingly to return a person to a country in which he or she would face a real risk of arbitrary deprivation of life or torture or cruel, inhuman or degrading treatment or punishment, that is treatment which would violate his or her "inherent dignity" and "inalienable rights".

(iii) *The Danger Against which Protection is Provided*

If it is accepted that states are obliged by article 6 of the ICCPR to refrain from returning aliens to any state where there are substantial grounds for believing that those aliens would be exposed to a real risk of being arbitrarily deprived of life, the concept of arbitrary deprivation of life needs to be examined. The Human Rights Committee has expressed the view that any taking of life which is *necessary* in self-defence, the defence of others or for the purposes of effecting an arrest or preventing an escape would not fall within the article 6 prohibition.⁹¹ Leaving such situations aside, McGoldrick suggests that the "intentional", "reckless" or "negligent" taking of life would amount to arbitrary deprivation of life.⁹²

The Human Rights Committee's General Comment 6(16) on article 6 is worthy of close consideration. The Human Rights Committee states, *inter alia*, that:

[W]ar and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in the exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life.⁹³

It is argued that a state which returns aliens to a state in the grip of war or other mass violence would not be discharging its "supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life".⁹⁴ It is

90 Preamble to the ICCPR.

91 *Guerrero v Columbia* in Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 137 cited in D McGoldrick, note 83 *supra*, p 341. Article 2 of the European Convention expressly states that the taking of life in such circumstances constitute exceptions to the prohibition in that article.

92 *Ibid.*

93 General Comment 6(16) on article 6 in Report of Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 93.

94 The Human Rights Committee goes on to say immediately thereafter that "Every effort [states] make to avert the danger of war, especially thermo-nuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life". However, it is argued that this is said by way of example only (particularly in view of the fact that war alone is mentioned in

argued, therefore, that states are as obliged by article 6 to refrain from returning aliens to any state where there are substantial grounds for believing that those aliens would be exposed to a real risk of being arbitrarily deprived of life by reason of war or "other acts of mass violence", just as they are obliged to refrain from returning aliens to a state where the risk of arbitrary deprivation of life emanates from some other cause.

If it is accepted that states are obliged by article 7 of the ICCPR to refrain from returning aliens to any state where there are substantial grounds for believing that those aliens would be exposed to a real risk of being subjected to "torture" or other "cruel, inhuman or degrading treatment or punishment", these concepts need to be examined. According to the Human Rights Committee the phrase "cruel, inhuman or degrading treatment or punishment" extends the protection of article 7 beyond protection from "torture" but "[the] distinctions [between the various prohibited forms of treatment and punishment] depend on the kind, purpose and severity of the particular treatment".⁹⁵

The European Court has stated that the difference between "cruel, inhuman and degrading treatment or punishment" on the one hand and "torture" on the other "derives principally from a difference in the intensity of the suffering inflicted".⁹⁶ The Human Rights Committee has avoided close analysis of the distinction between "torture" and other "cruel, inhuman or degrading treatment or punishment" and is, in fact, inconsistent in its application of the term "torture".⁹⁷ Certain treatment may attract the description of "torture" in one case but almost identical treatment in another case may not be so described.⁹⁸ Part of the explanation may well be a sloppy use of terminology on the part of the Committee but part of the explanation may lie in the fact that the line between "torture" and "cruel, inhuman or degrading treatment or punishment" falling short of torture is a fine one. The fineness of the line is illustrated, in the European context, by the fact that in *Ireland v United Kingdom*, although twelve judges of the European Court characterised the combined use of "wall standing", "hooding", exposure to noise, withholding of food and drink and sleep deprivation in the interrogation of suspected terrorists as inhuman and degrading treatment falling short of torture, the members of the European Commission had been unanimous in their conclusion that

this further statement). A requirement that states prevent war causing arbitrary loss of life must extend beyond averting the danger of war to averting arbitrary loss of life in wars which have not been averted.

95 General Comment 7(16) on article 7 in Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 94. This General Comment is being updated by the Human Rights Committee: Report of the Human Rights Committee, UN GAOR: 44th session, Supp No 40 (1989) 137. The updated version was unavailable at the time of writing.

96 *Ireland v United Kingdom* (1978) 2 EHRR 25 at 80 in relation to article 3 of the European Convention. It may also be the case that an act engaged in without a conscious purpose of the sort listed in article 1 of the Torture Convention could not be characterised as torture: ME Tardu, note 56 *supra* at 305.

97 D McGoldrick, note 83 *supra*, p 370.

98 *Ibid.*, pp 369-70.

the treatment amounted to torture and four judges of the European Court were similarly convinced.⁹⁹

The Human Rights Committee has not really enunciated abstract definitions of "cruel treatment or punishment" or "inhuman treatment or punishment", though it has provided a partial explanation of the concept of "degrading punishment" by stating that "for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty".¹⁰⁰ Nor is it possible to distil any definitions of the terms "cruel", "inhuman" and "degrading" by an examination of the practice of the Human Rights Committee. In considering the cases brought before it, under the Optional Protocol, the Human Rights Committee has used many different phrases to describe the treatment or punishment which it has found to have been inflicted on a victim in violation of article 7. These phrases include "severe treatment", "ill-treatment" and "inhuman treatment".¹⁰¹ McGoldrick notes that the Human Rights Committee has used the term "cruel" only three times to describe the treatment or punishment which it has found to have been inflicted on a victim¹⁰² and that rarely has it used the term "degrading" either.¹⁰³ This probably reflects a laxness in the Human Rights Committee's use of terminology rather than any positive conviction on its part that the ill-treatment that has arisen in most of the cases before it could not be described as "cruel" or "degrading".¹⁰⁴ The European Commission has said, in relation to the almost equivalent wording of article 3 of the European Convention,¹⁰⁵ that "the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable"

99 J Kidd, "Torture and International Law: A Note on Recent Developments" (1989) 15 *University of Queensland Law Journal* 228 at 229-30. The remaining judge held that the treatment did not violate article 3 of the European Convention: *ibid* at 230. It is interesting to note that the Human Rights Committee made a finding of torture in relation to a case in which the only ill-treatment of the victim appeared to be that he had been "hooded" and made to stand for a prolonged period of time and had not been provided with prompt treatment when he lost balance, fell and broke his leg: *JL Massera v Uruguay*, in Report of the Human Rights Committee, UN GAOR: 34th session, Supp No 40 (1979) 124 cited in D McGoldrick, note 83 *supra*, p 369. McGoldrick points out that this case arguably sets a lower threshold for a finding of torture than the threshold set by the European Court. The Human Rights Committee may have been influenced by the fact that the lack of prompt treatment rendered permanent the injury sustained in the fall. It is questionable whether it should have been influenced by this factor.

100 *Vuolanne v Finland* in UN GAOR: 44th session, Supp No 40 (1989) 249 at 256.

101 D McGoldrick, note 83 *supra*, p 370.

102 *Ibid*, p 371.

103 *Ibid*, p 370. McGoldrick cites *De Bouton v Uruguay* in UN GAOR: 36th session, Supp No 40 (1981) 143 as an example of a case in which the term "degrading" was used by the Human Rights Committee and points out that similar treatment in other cases had not attracted the label of "degrading" treatment though attracting the label of "inhuman treatment" and so on.

104 The Human Rights Committee's failure to pay close attention to its use of terminology can be justified on the basis that there is no useful function to be served by drawing distinctions between different forms of *prohibited* treatment: *ibid*, p 371. In other words, the only important distinction is between treatment which is prohibited and treatment which is not.

105 Article 3 of the European Convention does not include the adjective "cruel" in its description of prohibited conduct.

and that "treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience".¹⁰⁶

As the foregoing definitions indicate, ill-treatment will not be found to violate article 3 of the European Convention (or, by analogy, article 7 of the ICCPR) unless the suffering it causes exceeds a minimum level of intensity.¹⁰⁷ The point at which ill-treatment will overstep the boundary separating the acceptable from the unacceptable will depend on all the circumstances of the individual case, including the duration and effect of the ill-treatment and even the age and health of the person ill-treated.¹⁰⁸ An example of the sort of treatment that the European Court has described as inhuman and degrading in the circumstances is the combined use of "wall standing", "hooding", exposure to noise, withholding of food and drink and sleep deprivation in the interrogation of suspected terrorists.¹⁰⁹ The sort of punishment that the Human Rights Committee has described as capable of being cruel, inhuman or degrading includes corporal punishment and solitary confinement.¹¹⁰

In a few cases the Human Rights Committee has expressed the view that there has been a violation of article 7 and 10(1) "because [the victim] has not been treated...with humanity and with respect for the inherent dignity of the human person".¹¹¹ Although it may be said that the use of this formulation is readily explained by the fact that article 10(1) of the ICCPR provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", it is not without significance that the Human Rights Committee's choice of words appears to suggest that the treatment in each case amounted to a violation of article 7 for the same reasons that it amounted to a violation of article 10(1). In my view, this formulation probably comes close to the heart of the test which the Human Rights Committee applies in deciding whether or not specified treatment or punishment constitutes a violation of article 7.¹¹²

106 *Report in the Greek Case*, adopted on 5 Nov 1969 quoted in JH Burgers and H Danelius, note 55 *supra*, pp 114-5. It was noted in the *Greek Case* that "inhuman treatment is also degrading".

107 J Kidd, note 99 *supra* at 230 citing *Ireland v United Kingdom* (1978) 2 EHRR 25.

108 *Ibid*; *Vuolanne v Finland* in Report of the Human Rights Committee, UN GAOR: 44th session, Supp No 40 (1989) 249 at 256.

109 J Kidd, note 99 *supra* at 229-30 citing *Ireland v United Kingdom* (1978) 2 EHRR 25.

110 L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development Criteria and Present Status*, Finnish Lawyers Publishing Company, (1988) p 508 citing the Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) at 94-5.

111 Communication No 80/1980 in Human Rights Committee, *Selected Decisions of the Human Rights Committee under the Optional Protocol, 17th to 32nd Sessions* (1990) II, 105 at 108; Communication No 88/1981 in Human Rights Committee, *Selected Decisions of the Human Rights Committee under the Optional Protocol, 17th to 32nd Sessions* (1990) II, 118 at 121; Communication No. 124/1982 in Human Rights Committee, *Selected Decisions of the Human Rights Committee under the Optional Protocol, 17th to 32nd Sessions* (1990) II, 158 at 160.

112 This is supported, too, by the fact that the Human Rights Committee has stated in its general comments on article 7 that "the purpose of [the article] is to protect the integrity and dignity of the individual": General Comment 7(16) on article 7 in Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 94.

(iv) *Cause of the Danger and Reasons for the Danger*

It has been said by the European Commission, in relation to article 3 of the European Convention, that the provision will be violated if a state returns a person to another state in which he or she would be in danger of being subjected to the prohibited treatment by anyone. It is not necessary to establish that the state, to which the person was returned, would itself inflict the ill-treatment or be complicit in any way.¹¹³ It is submitted that the European Commission's view that it is unnecessary to establish that the state to which a claimant is returned would be complicit in the ill-treatment feared by that claimant can be applied to article 7 of the ICCPR¹¹⁴ and, by a more extended analogy, to article 6 of the ICCPR.

Importantly, the protection provided by article 6 and article 7 of the ICCPR is not limited by reference to the reasons for the danger in the manner of article 33(1) of the Refugee Convention.

(v) *The Well-foundedness of Claims*

The objective circumstances, rather than the subjective fears of the claimant, are the primary basis on which determinations under articles 6 and 7 of the ICCPR are to be made.¹¹⁵

Furthermore, article 7 of the ICCPR is only violated by a state party if that party has substantial grounds for *believing*¹¹⁶ that that the person it proposes to expel would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. In *Cruz Varas v Sweden*, the European Court said in relation to article 3 of the European Convention that "[s]ince the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion".¹¹⁷ Consistency requires that article 6 of the ICCPR be interpreted in the same way.

113 P van Dijk and GJH van Hoof, note 79 *supra*, p 236 citing Appl 10040/82, *X v Federal Republic of Germany* (European Commission, unreported).

114 The Human Rights Committee has simply said, in relation to article 7 of the ICCPR, that "it is the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority": General Comment 7(16) para 2 on article 7 in Report of the Human Rights Committee, UN GAOR: 37th session, Supp No 40 (1982) 94. This comment is probably directed to situations in which a state party has shown itself to be *unwilling* to protect the individual concerned. However, the Human Rights Committee's general comments on an article are not intended to be a comprehensive statement of the scope of that article: Report of the Human Rights Committee, UN GAOR: 36th session, Supp No 40 (1981) 107.

115 This interpretation is by analogy with the interpretation of article 3 of the European Convention. See P van Dijk and GJH van Hoof, note 79 *supra*, p 236 re article 3 of the European Convention.

116 This interpretation is by analogy with the interpretation of article 3 of the European Convention set out in the *Cruz Varas* case (1991) 14 EHRR 1 at 33-4 and the *Vilvarajah* case (1991) 14 EHRR 248 at 290.

117 (1991) 14 EHRR 1 at 35-6. The Court added that it could still have regard to information that was not available to the state party before expulsion as "[t]his may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears": *ibid* at 36.

The protection offered by articles 6 and 7 of the ICCPR is, to this extent, narrower in scope than the protection offered by article 33(1) of the Refugee Convention.

C. Persons Excluded from the Benefit of the Non-Refoulement Obligation

The protection of article 3 of the Torture Convention is not in its terms modified by exclusions of the sort contained in articles 1D, 1E, 1F and 33(2) of the Refugee Convention. Although the Committee Against Torture has had occasion to question state parties to the Torture Convention about domestic legislation which provides for exceptions to the principle of non-refoulement, even in relation to persons covered by article 3 of the Torture Convention,¹¹⁸ the very fact that such legislation is queried by the Committee against Torture suggests that state practice of this kind is not so widespread as to effect a modification of the article 3 obligation.

Articles 6 and 7 of the ICCPR are also provisions which do not qualify the protection they provide in the fashion of articles 1D, 1E, 1F and 33(2) of the Refugee Convention. They are, in fact, provisions from which no derogation is permitted.¹¹⁹

It is particularly worth noting that one of the consequences of the differences between the provisions is that article 3(1) of the Torture Convention and articles 6 and 7 of the ICCPR can be invoked even by persons who would be Refugee Convention refugees but for the application of article 1D, 1E or 1F or persons who are Refugee Convention refugees but have disqualified themselves for protection according to the terms of article 33(2) of the Refugee Convention. The only proviso is that they can show that they would be in danger of being subjected to torture (article 3 of the Torture Convention and article 7 of the ICCPR), cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR) or arbitrary deprivation of life (article 6 of the ICCPR) on return.¹²⁰

118 For instance, the representative of Norway was asked by the Committee Against Torture whether, under the *Aliens Act* 1988, "an alien who was considered a threat to national security could be returned to his country even if there was the risk that he would be tortured or killed": Report of the Committee Against Torture, UN GAOR: 44th session, Supp No 46 (1989) 15 (consideration of the initial report of Norway). The representative responded that section 15 of the *Aliens Act* reproduced article 33 of the Refugee Convention, including the exceptions contained in article 33(2): *ibid* at 17. In other words, the answer to the Committee's question was "yes". Questioning by the Committee has revealed also that in Sweden an alien, who has committed a "grave crime" or is a threat to "the security of the realm", may be refused permission to remain, apparently notwithstanding article 3 of the Torture Convention: *ibid* at 12 (response of representative of Sweden to a question asked by the Committee in relation to article 3 in the course of considering the initial report of Sweden).

119 Article 4(2) of the ICCPR.

120 For instance, the German Federal Constitutional Court decided in one case that a Turkish Kurd was not entitled to asylum under article 16(2) of the German Basic Law on grounds approximating the grounds specified in article 33(2) of the Refugee Convention as grounds for denying Refugee Convention refugees protection from refoulement under article 33(1) of the Refugee Convention. Yet the court took the view that article 3 of the European Convention would be violated by the return of the Kurd to Turkey, unless the German government obtained adequate assurances that he would not be subjected to torture or inhuman or degrading treatment or punishment: Judgment of 20 December 1989, Bundesverfassungsgericht (Federal Constitutional Court) cited

IV. MINIMUM PROCEDURAL STANDARDS

A. General Comment

The rest of this article is based on the premise that a state's domestic legal and administrative regime considered as a whole must attain the "international standard of reasonable efficacy"¹²¹ in implementation of its non-refoulement obligations. The presumption is that a state, which does not meet the standard of reasonable efficacy in the implementation of its non-refoulement obligations, will be in violation of those obligations whether its mistakes are made deliberately or honestly. Of course, to the extent that its 'mistakes' are deliberately made, a state would not be acting with the good faith that is required by the principle of *pacta sunt servanda*.¹²²

In most contexts, determination of a system's accuracy would be measured by the percentage of all cases correctly decided. It would not matter whether the correct decisions involved the rejection of invalid claims or the acceptance of valid ones. However, in the context of the treaty obligations which are the subject of this article, a state would not be in breach of those obligations simply by purporting to protect from refoulement persons who had no actual entitlement to such protection. Since a state would only incur a risk of being in breach of its non-refoulement obligations by failing to recognise and protect persons who were, in fact, entitled to such protection, it follows that the correct rejection of invalid claims would be a virtual irrelevancy¹²³ and that the appropriate measure of accuracy is the percentage of valid claims accepted.

This has immediate implications for the nature of a state party's procedures for implementing its non-refoulement obligations. Just as criminal trial procedures are designed to ensure that the innocent are acquitted, even at the expense of letting some of the guilty go free, state parties, though they may legitimately pursue the goal of reasonable accuracy in identifying and expelling persons with invalid claims, must design implementation systems which subordinate that goal to the goal of reasonable accuracy in identifying and protecting persons with valid claims.

Furthermore, since empirical data as to such matters as the percentage of valid protection claims identified and honoured by Australia is, for obvious reasons, impossible to gather, it is inevitable that the efficacy of Australia's implementation of its non-refoulement obligations under the Torture Convention and the ICCPR can only be evaluated by assuming that a protection claim determination system which is procedurally flawed will necessarily fail to deliver on Australia's substantive obligations.

in T Stein, "How Much Humanity do Terrorists Deserve?" in AJM Delissen and GJ Tanja, *Humanitarian Law of Armed Conflict: Challenge Ahead. Essays in Honour of Frits Kalshoven*, M Nijhoff (1991) 567 at 577-8.

121 GS Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, (1983) pp 147-8.

122 See also articles 26 and 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 to which Australia acceded on 13 June 1974 and which came into force on 27 January 1980.

123 Obviously, a state party might have domestic obligations which would be advanced by the correct rejection of invalid claims. What is being suggested is that incorrect acceptances are irrelevant when the issue is whether the state is effectively implementing its non-refoulement obligations.

B. The Analogy with Article 14 of the ICCPR

With some modification, the procedural standards which Australia has undertaken in relation to the determination of criminal charges, under articles 14(1),¹²⁴ and 14(5)¹²⁵ of the ICCPR, can (by analogy) be treated as necessary procedural safeguards in relation to its protection claim determination system as well, if Australia is to achieve reasonable efficacy in the implementation of its non-refoulement obligations. This assertion is made for the following reasons.

It may seem to be the case, at a superficial level, that, while the state is the instigator of criminal proceedings and is seeking to impose a penalty on the accused, the asylum seeker is the instigator of a claim for protection and is seeking to obtain a benefit from the state. However, closer examination shows that there is no substantive difference between the relationship of a prosecuting state and an innocent accused on the one hand and the relationship of a receiving state and a person with a valid protection claim on the other. The innocent accused has a right to liberty which is under threat from the moment that criminal proceedings are commenced to the moment that a non-guilty verdict is returned. The person with a valid protection claim has a right to protection from refoulement which is under threat as long as his or her entitlement has not formally been recognised by the receiving state. In both cases, an incorrect decision will be the precursor to violation by the state of a pre-existing right.

Of course, a given asylum seeker may well be advancing an unmeritorious claim but then so might an accused be guilty.¹²⁶ Yet criminal trials are conducted so as to ensure, as far as possible, the acquittal of all those who are innocent rather than the conviction of all those who are guilty. It is conceded that the consequence for a person with a valid protection claim of having his or her request for protection rejected is the *possibility* of future harm, whereas the consequence for an innocent accused of conviction is the *certainty* of undeserved punishment. On the other hand, criminal sanctions in western countries are humane, whereas the harms against which non-refoulement obligations protect often involve treatment of human beings which would be illegitimate under any circumstances. In moral

¹²⁴ Article 14(1) provides: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...."

The requirement of public hearing should not be imposed in the protection claim determination context because of the risk that, if the authorities in a claimant's country of origin were to hear of the proceeding, the claimant, if he or she is unsuccessful in establishing the claim and is returned to his or her country, may be harmed for having made the claim.

¹²⁵ Article 14(5) of the ICCPR provides that "everyone convicted of a crime shall have a right to his conviction and sentence being reviewed by a higher tribunal according to law".

¹²⁶ A Swart, "The Problems Connected with the Admission of Asylum Seekers to the Territory of Member States" in Council of Europe, *The Law of Asylum and Refugees: Present Tendencies and Future Perspectives: Proceedings of the 16th Colloquy on European Law, Lund, 15 -16 September 1986*, Strasborg: Council of Europe, Publications Section (1987) 65 at 90. See also AE Schacknové, "American Duties to Refugees: Their Scope and Limits" in M Gibney (ed), *Open Borders? Closed Societies?: The Ethical and Political Issues*, Greenwood Press, (1988) 131 at 141.

terms, the possibility of great harm must surely be equivalent to the certainty of much lesser harm.

It follows that, if a state is required to achieve *reasonable* efficacy in the implementation of its non-refoulement obligations, then the measure of 'reasonableness' should be the degree to which the efficacy of a state's protection claim determination system corresponds to the efficacy required of its criminal procedures. This proposition leads to the conclusion that, *prima facie*, a state should apply the same international standards of due process to the determination of a protection claim as it has undertaken to apply in a criminal trial.

It is emphasised that articles 14(1) and (5) of the ICCPR, are discussed in this article, not as provisions of direct applicability to protection claim determinations, but provisions in international instruments under which states have, in relation to various other matters where important individual rights are at stake, bound themselves to apply specified procedural standards because they are perceived as *necessary* to safeguard those rights. The argument is that such safeguards must be as necessary in protection claim determinations because the stakes are every bit as high, if not higher, in protection claim determinations as in the situations covered by articles 14(1) and (5) of the ICCPR.

Article 14(1) of the ICCPR provides that, in the determination of the matters specified, everyone is entitled to a hearing before an independent and impartial tribunal.¹²⁷ By analogy, persons making protection claim determinations ought to be independent and impartial. This requirement is easily explained on first principles. Suppose, for instance, that an interested party is in a position directly or indirectly to control the outcome of a case. There will then be a risk that the decision will be made by reference to factors extraneous to the merits of the case.¹²⁸ In such a case, it would make no difference whether the party, who does not have the power of control, is given the benefit of other procedural safeguards. He or she cannot win in front of that decision maker because the decision will not be made on the basis of relevant considerations but irrelevant ones.¹²⁹

Article 14(1) also requires a hearing to be given. The rationale for this requirement is straightforward. A decision made on the basis of all the information which the claimant can provide in support of his or her case is more likely to be accurate than a decision made without the benefit of the claimant's input.¹³⁰ On this rationale alone, a hearing by way of written submissions would appear to be as effective an opportunity to be heard as an oral hearing. However, there are a

127 The requirement of independence and impartiality can be broken down further as follows: (see MD Bayles, *Procedural Justice: Allocating to Individuals*, Kluwer Academic Publishers (1990) pp 20-21)

1. The decision maker must be free from personal bias stemming from direct financial interest in the outcome of the case, personal prejudices and so on.
2. The decision maker must not himself or herself be part of a body with a stake in the outcome of the case or be otherwise under the control of a person or body with a stake in the outcome of the case.

128 MH Redish and LC Marshall, "Adjudicatory Independence and the Values of Procedural Due Process" (1986) 95 *Yale Law Journal* 455 at 476-7.

129 *Ibid.*

130 *Ibid* at 476.

couple of reasons for suggesting that an oral hearing is preferable. First, there are advantages to the interactive nature of an oral hearing. At an oral hearing, the decision maker is able to tell the claimant what he or she is looking for and to enter into a dialogue with the claimant which only ceases when the decision maker is satisfied that every issue of importance has been adequately canvassed.¹³¹ Second, protection claims involve serious issues of credibility. Credibility cannot adequately be assessed solely on the basis of written submissions, as the decision maker does not, for instance, have the opportunity to observe demeanour.¹³² Since incorrect negative credibility assessments may result in the rejection of valid claims, it follows that credibility assessments should only be made on the basis of an oral hearing.

The crux of article 14(5) is that a decision adverse to the accused should be subject to review by a higher tribunal. If it is accepted that a protection claimant should have the same procedural rights as an accused, the rejection of a protection claim at first instance should be subject to review by a higher tribunal. The requirement of review can also be justified on first principles. It is a fact of life that all decision makers will make errors at least some of the time. One way of minimising the chance that an error has been made in a given case is to get another decision maker to look at the same case afresh. If two decision makers independently come to the same conclusion, confidence in that conclusion is increased. If the second decision maker disagrees with the first, there is no a priori reason to think that the second decision is the correct one but confidence in the correctness of the first decision must necessarily be undermined by the fact that a different decision maker comes to a different decision. Even review falling short of merits review is better than no review at all. The only way of ensuring that a primary decision maker has made a conscientious decision in any given case is to have a mechanism whereby the primary decision making process can be overseen.

Finally, it is argued that a requirement that decision makers at both the primary and review stage be qualified and capable is implicit in the requirement of a fair hearing (article 14(1) of the ICCPR) and should apply by analogy in the protection claim determination context. There is no fairness in having a case decided by a person who is unable to apply his or her mind to it in a meaningful manner.¹³³ In any event, common sense suggests that the goal of reasonable accuracy in identifying valid claims (and hence the standard of reasonable efficacy in the implementation of article 3 of the Torture Convention and articles 6 and 7 of the

131 *Goldberg v Kelly* (1970) 397 US 254 at 269, per Brennan J (delivering the opinion of the Court).

132 Though cultural and other factors can cause demeanour to be misleading to the decision maker, observation of demeanour is still useful if approached with appropriate caution.

133 It might be thought that the requirement in article 14(1) ICCPR, that the tribunal be "competent", is a requirement that its members be qualified and capable. However, this interpretation is precluded by the *travaux préparatoires* in which it is stated that the word "competent" is a reference to the concepts of *ratione materiae*, *ratione personae* and *ratione loci* and not a reference to professional qualifications: Third Committee of the General Assembly, 14th session (1959) cited in MJ Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Nijhoff and Kluwer Academic Publishers (1987) p 287.

ICCPR) cannot be achieved unless those engaged in the act of identifying valid protection claims have a sound knowledge of the relevant treaty provisions and have the ability to apply those provisions to the cases before them.

C. The Application of Article 2(3) ICCPR

In relation to the implementation of articles 6 and 7 of the ICCPR there is the further consideration that, under article 2(3)(a) of the ICCPR, each state party to the ICCPR has undertaken to ensure that "any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". If return of an asylum seeker to a country in which he or she would be in danger of being subjected to arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment, can be characterised as a violation of article 6 or article 7 of the ICCPR by the returning state, it follows that any person claiming that he or she is protected from refoulement under the terms of article 6 or article 7 should have effective remedy against being returned to his or her country of origin in violation of that provision. If an asylum seeker is removed from the territory of a state party to the ICCPR in violation of article 6 or article 7 of the ICCPR, he or she may suffer irreparable damage. It follows that persons claiming protection under article 6 or article 7 must be having the right under article 2(3)(a) to forestall wrongful removal, as this is the only remedy which could be described as *effective*.

Article 13 of the European Convention makes similar provision to Article 2(3)(a) of the ICCPR.¹³⁴ In *Vilvarajah v United Kingdom*,¹³⁵ the European Commission and Court were called upon to consider whether the UK procedures for reviewing the rejection of asylum applications met the requirements of Article 13. The European Commission observed that "[i]n matters as vital as asylum questions it [was] essential to have a fully effective remedy providing the guarantees of certain independence of the parties, a binding decision-making power and a thorough review of the reasonableness of the asylum seeker's fear of persecution". On the facts of the case before it, after considering the four available domestic remedies both individually and in the aggregate,¹³⁶ the European Commission concluded by 13 votes to 1 that the UK had violated Article 13 of the European Convention. In particular, the European Commission stated that the independent merits review by an immigration adjudicator, with the power to make legally binding determinations, which was available under s 13 of the *Immigration Act 1971* (UK), would have been an effective remedy were it not for the fact that the applicants in the case before them were required to seek this remedy from

134 Article 13 of the European Convention provides "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

135 (1991) 14 EHRR 248.

136 *Ibid* at 284.

outside the UK.¹³⁷ The Commission took the view also that judicial review was not an effective remedy because, on review, a decision refusing an asylum application could be challenged only on grounds of “illegality, irrationality or procedural impropriety” and the court did not have the power to consider the merits of the case.¹³⁸ The European Court disagreed with the European Commission and decided¹³⁹ that the availability of judicial review meant that the UK had not violated Article 13 of the European Convention. The Court acknowledged the limitations of judicial review as a remedy but said that it was of the opinion that “these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13”.¹⁴⁰

By article 2(3)(b) of the ICCPR, state parties have further undertaken to ensure that “any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy”. In other words, Article 2(3) imposes specific procedural obligations on states, independently of the substantive secondary obligation to provide effective remedy for the violation of ICCPR rights. Members of the Human Rights Committee clearly regard a whole range of procedural safeguards to be implicit in article 2(3)(b) of the ICCPR. In the course of studying reports made to the Human Rights Committee by state parties under article 40 of the ICCPR and apropos of the implementation of article 2(3), members of the Committee have asked reporting states questions relating to the independence and impartiality of the determining body,¹⁴¹ questions about appeal rights,¹⁴² and questions investigating the independence and impartiality of the appellate body.¹⁴³

Since the sorts of procedural standards implicitly prescribed by article 2(3) of the ICCPR in relation to the implementation of ICCPR provisions are broadly speaking the same as the sorts of procedural standards to be derived by analogy with article 14 of the ICCPR, the implementation of the non-refoulement obligation contained in the Torture Convention can be discussed together with the implementation of the non-refoulement obligations contained in the ICCPR .

137 In other words, after being returned to the country in which they claimed they would be persecuted: *ibid* at 282.

138 *Ibid* at 283.

139 Seven votes to two.

140 Note 133 *supra* at 292.

141 D McGoldrick, note 83 *supra*, p 280 citing by way of example SR 67 at [13] (Tarnopolsky on GDR); SR 84 at [3] (Lallah on Madagascar); SR 109 at [70] (Lallah on USSR).

142 *Ibid*, p 279.

143 *Ibid* citing by way of example SR 187 at [17] (Tomuschat on Poland).

V. IS AUSTRALIA DISCHARGING ITS NON-REFOULEMENT OBLIGATIONS UNDER THE TORTURE CONVENTION AND THE ICCPR?

A. Specific Implementation of Australia's Torture Convention and ICCPR Obligations in Domestic Law and Administrative Practice

Australia has passed the *Crimes (Torture) Act 1988* (Cth) to give effect to some of the provisions of the Torture Convention in domestic law. However, article 3 of the Torture Convention is not among the provisions to which legislative effect is given by the *Crimes (Torture) Act*. The only provision in domestic legislation which has the purpose¹⁴⁴ of giving effect to Australia's obligations under article 3 of the Torture Convention, is s 22(3) of the *Extradition Act 1988* (Cth), which provides that a person may only be extradited to another country, if the Attorney-General is (among other things) satisfied that the person will not be subjected to torture by that country.

Section 22(3) is, of course, no safeguard for on-shore asylum seekers who face removal from Australia by means other than extradition. Furthermore, it is not an ideal safeguard even for those asylum seekers facing extradition. The Attorney-General cannot be characterised as an independent decision maker because the government has a stake in the outcome of extradition proceedings. Making difficulties over extradition can sour relations with the friend or neighbour requesting the extradition. This may have repercussions such as reciprocal difficulties being made in relation to Australian extradition requests. Such considerations may consciously or subconsciously affect the Attorney-General's judgment.

Since the Attorney-General's decision as to whether a person is to be surrendered is a "decision of an administrative character made ... under an enactment" within the meaning of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), it is subject to judicial review under that Act. This is a safeguard against at least the more outrageous decisions that an Attorney-General might be tempted to make.

Outside the context of extradition, the Australian Government has not put in place any specific legislative or administrative mechanisms for the implementation of article 3 of the Torture Convention.

The ICCPR appears as Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The orthodox view appears to be that the schedules to the *Human Rights and Equal Opportunity Commission Act* do not by their own force incorporate into Australian domestic law the international instruments therein contained. Moreover, the orthodox view is that the provisions of the *Human Rights and Equal Opportunity Commission Act* and its schedules do not even constitute a recognition by Parliament that the provisions of the ICCPR and other

144 Australia, *Parliamentary Debates*, House of Representatives, 28 October 1987 (Mr Lionel Bowen, Second Reading speech).

scheduled instruments have become part of customary international law and hence part of Australian common law enforceable by domestic courts.¹⁴⁵

Section 11(1)(f) of the *Human Rights and Equal Opportunity Commission Act* gives the Commission power to “inquire into any act or practice that may be inconsistent or contrary to any human right”.¹⁴⁶ The Commission is able to exercise its powers under s 11(1)(f) when, inter alia, a complaint is made in writing to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.¹⁴⁷ Where, after an inquiry into an act done or practice engaged in by a person,¹⁴⁸ the Commission finds that the act or practice is inconsistent with or contrary to any human right, the Commission must serve a notice on the person setting out its findings and the reasons for those findings.¹⁴⁹ The notice may include recommendations by the Commission for preventing the repetition of the act or a continuance of the practice and recommendations of actions to be taken to remedy any loss or damage suffered by a person as a result of the act or practice.¹⁵⁰ Where the Commission considers it appropriate to do so, it can “endeavour, by conciliation, to effect a settlement of the matters that gave

145 In *Re Jane*, the Human Rights and Equal Opportunity Commission submitted that the provisions of the instruments scheduled to the Act had become part of customary international law: (1988) 85 ALR 409 at 423. It bolstered this submission by arguing that Parliament, by giving the Commission an intervenor function before domestic courts, had recognised that the domestic courts were able under existing principles to give effect to the rights that the Commission was charged with protecting. Chief Justice Nicholson rejected these submissions and stated also that “the better view of the law is that whilst it may be open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about, for example, the existence of a particular right, they are not by their terms incorporated into Australian domestic law”: *ibid* at 425. In *Re Marion* (1990) 14 Fam LR 427 at 449, Nicholson CJ recanted the view that he had expressed in *Re Jane* and made the obiter comment that the *Human Rights and Equal Opportunity Act* 1986 (Cth) and its schedules “constitute a specific recognition by Parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia”; Nicholson CJ said that it seemed to him to be “inconsistent with the whole purpose of the Act to assert that the human rights which the Act requires the [Human Rights and Equal Opportunity Commission] to protect are not rights which are recognised by Australian domestic law”: *ibid* at 449. However, Nicholson CJ was alone in this view. The other two members of the Full Court of the Family Court of Australia expressly approved of the view expressed by Nicholson CJ in the earlier case of *Re Jane*: *ibid* at 474, per McCall J, at 461, per Strauss J. *Re Marion* (renamed *Secretary of the Department of Health and Community Services v JWB and Another*) went to the High Court but the High Court did not express its views on this issue: (1991) 106 ALR 385.

146 The *Human Rights and Equal Opportunity Commission Act* defines “human rights” as “the rights and freedoms recognised by the [ICCPR], declared by the Declarations or recognised or declared by any relevant international instrument”: s 3(1). The terms “Declarations” and “relevant international instrument” are also defined: *ibid*. It should be noted that the Torture Convention is not a “relevant international instrument” within the meaning of the Act (as at 17 November 1993).

147 *Human Rights and Equal Opportunity Commission Act*, s 20(1)(b).

148 Unless the contrary intention appears in an Act, “person” includes a “body politic”: *Acts Interpretation Act* 1901 (Cth), s 22(1)(a). The Commonwealth government is a body politic and, therefore, since no contrary intention appears, a “person” within the meaning of section 29(2)(a) of the *Human Rights and Equal Opportunity Commission Act*: See *Attorney-General (Northern Territory) v Minister for Aboriginal Affairs and Others* (1989) 23 FCR 442 at 444 for identical reasoning (in relation to a different Government and Act).

149 *Human Rights and Equal Opportunity Commission Act*, s 29(2)(a).

150 *Human Rights and Equal Opportunity Commission Act*, s 29(2)(b) and (c).

rise to the inquiry".¹⁵¹ Where the Commission is of the opinion that an act or practice is inconsistent with or contrary to any human right and conciliation is either inappropriate or has been attempted unsuccessfully, the Commission is required also to report to the Commonwealth Attorney-General.¹⁵²

Since the *Human Rights and Equal Opportunity Commission Act* binds the Crown in right of the Commonwealth,¹⁵³ an on-shore asylum seeker would be able to complain to the Human Rights and Equal Opportunity Commission about any act of the Commonwealth which constituted a breach of the non-refoulement obligation contained in either or both of articles 6 and 7 of the ICCPR.

Inquiry by the Human Rights and Equal Opportunity Commission conforms in many respects to the minimum procedural standards outlined above. The Commission's members are persons independent of the Australian Government.¹⁵⁴ The Commission's process of inquiry gives protection claimants the opportunity to be heard by means of written submissions and often also orally at a conciliation meeting.¹⁵⁵ Finally, the Commission is a specialist body so its members can be considered qualified and capable of making findings about whether the Australian Government's actions are inconsistent with Australia's obligations under articles 6 and 7 of the ICCPR. However, the fatal flaw of the Commission's inquiry procedure is that it can only make recommendations. It cannot make binding decisions. The actual decision maker in relation to claims under articles 6 and 7 of the ICCPR would, therefore, still be the Australian Government. The Australian Government, of course, has vested interests such as immigration control objectives which are inimical to the interests of persons with valid protection claims. The Australian Government is not, therefore, an independent and impartial decision maker.

The Australian Government has not put in place any more specific mechanisms for the implementation of the non-refoulement obligations contained in articles 6 or 7 of the ICCPR.

B. The Refugee Status Determination Procedure

In its first report under article 19(1) of the Torture Convention, Australia made the extraordinary statement that it "acts in accordance with [article 3 of the Torture Convention] by providing asylum to persons who are refugees under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees".¹⁵⁶ The

151 *Human Rights and Equal Opportunity Commission Act*, s 11(1)(f).

152 *Human Rights and Equal Opportunity Commission Act*, s 11(1)(f).

153 *Human Rights and Equal Opportunity Commission Act*, s 6(1).

154 See ss 37, 38 and 41 of the *Human Rights and Equal Opportunity Commission Act* which deal with the terms and conditions of appointment, remuneration and termination of appointment.

155 "Guidelines for Handling Complaints under Commonwealth Legislation: Human Rights and Equal Opportunity Commission", *Commonwealth of Australia Gazette*, No GN 8, 28 February 1990, 424 at 431.

156 Commonwealth, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: First Report by Australia* (April 1991), p 21. In fairness to Australia, as well as describing the refugee status determination system, the report made a brief reference to the grant of Domestic Protection (Temporary Entry) Permits (DPTEPs) on humanitarian grounds and to Australia's criminal deportation policy

Committee Against Torture pointed out that persons who were not Refugee Convention refugees might yet be entitled to protection under article 3 of the Torture Convention.¹⁵⁷ In his reply to the Committee Against Torture, Australia's representative implicitly acknowledged that there might be asylum seekers who fell within article 3 of the Torture Convention, although falling outside the Refugee Convention.¹⁵⁸ The representative said that if an application was made for asylum by a person who fell outside the protection of the Refugee Convention but within the protection of article 3 of the Torture Convention, the Minister for Immigration would be made aware of the application and would be able to grant the applicant a temporary entry permit on humanitarian grounds.¹⁵⁹ This response assumes two things. First that persons who had a claim to protection under article 3 of the Torture Convention would apply for recognition as a Refugee Convention refugee. Second, that such a person would, while within the refugee status determination process, be identified as a person protected by article 3 of the Torture Convention.

A person, who does not qualify for protection under article 33 of the Refugee Convention or article 3 of the Torture Convention, may still be protected by article 6 or article 7 of the ICCPR. The assumption appears to be made here also that such persons would apply for recognition as Refugee Convention refugees and, while within that process, would be identified as persons in relation to whom the possible existence of a non-refoulement obligation under article 6 or article 7 of the ICCPR had to be considered. Presumably, the same mechanism would be used to deal with persons entitled to protection under article 6 or 7 of the ICCPR as would be used to deal with persons entitled to protection under article 3 of the Torture Convention.

When the author raised concerns about the ability of refugee status decision makers to identify persons entitled to protection from refoulement under other human rights treaties, she was informed that DIEA officers have been introduced to Australia's international obligations under a range of human rights treaties as part of their on-going training and should, therefore, be able to identify cases which may engage those obligations and to raise the matter with their superiors or with the Attorney-General's Department.¹⁶⁰ However, the view of the Joint Committee on Foreign Affairs Defence and Trade is that, "[g]iven that the accession to the

guidelines: *ibid*, p 22. The report did not, however, explain *how* the mechanisms it described served to fulfil Australia's obligations under article 3 of the Torture Convention.

157 Report of the Committee Against Torture, UN GAOR: 47th session, Supp No 46 (1992) 37. This is not the first time that the Committee Against Torture has expressed the view that article 3 of the Torture Convention is "of a broader nature" than the Refugee Convention such that it is not possible to ensure compliance with article 3 of the Torture Convention simply by implementing legislation designed to comply with the Refugee Convention. See, for instance, Report of Committee Against Torture, UN GAOR: 46th session, Supp No 46 (1991) 50 (consideration of initial report of Algeria).

158 Report of the Committee Against Torture, *ibid* at 40.

159 *Ibid*.

160 Interview with Official B of the Attorney-General's Department, 15 July 1992.

major treaties took place over twenty years ago, the embryonic stage of training in human rights law within the departments is poor and in urgent need of redress".¹⁶¹

On 1 November 1993, the Minister for Immigration, Senator Bolkus, announced a one-off on-shore permanent residence category under which persons who had been granted a visa before 12 March 1992 and who before the date of the announcement had applied for determination of refugee status would be eligible to apply for permanent residence provided that they fulfilled certain other criteria.¹⁶² The further criteria were as follows. The applicant had to be under the age of 45, possess vocational English skills, and have an Australian post-secondary qualification or a current enrolment in an Australian post-secondary course or an overseas post-secondary qualification "recognised as having Australian equivalence" or ownership of an established business employing the equivalent of three full-time staff.¹⁶³ This provision may well catch in its net some persons with an entitlement to protection from refoulement under the Torture Convention or the ICCPR who happened to apply for refugee status before 1 November 1993. However, any such outcome would be fortuitous.

C. The Minister's Discretion

(i) *The Legislative Provisions*

In Australia, an asylum seeker, who qualifies for protection from refoulement according to the terms of article 3 of the Torture Convention, article 6 of the ICCPR or article 7 of the ICCPR, but does not qualify according to the terms of the Refugee Convention, must attempt to persuade the Minister of Immigration to grant a DPTEP to him or her in exercise of the Minister's special power of intervention under ss 115(5),¹⁶⁴ 137,¹⁶⁵ 166BE or 166HL of the *Migration Act*. These sections allow the Minister personally, if he or she thinks that it is in the public interest to do so, to set aside a decision affirmed, varied or made by a Migration Review Officer, the IRT, the RRT or the AAT (on referral from the RRT) and to substitute a decision that is more favourable to the applicant.¹⁶⁶

161 Joint Committee on Foreign Affairs Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, December 1992 at 44.

162 Senator Bolkus, Media Release, 1 November 1993.

163 *Ibid.*

164 The *Migration Reform Act* has repealed present s 115 with effect from 1 September 1994 and put in its place 115G. Section 115G (not yet in force) is substantially the same as s 115(5) (present).

165 The *Migration Reform Act* has repealed present s 137 with effect from 1 September 1994 and put in its place ss 121 and 150L. Section 121 (not yet in force) is substantially the same as s 137 (present). Section 150L (not yet in force) allows the Minister to intervene after Administrative Appeal Tribunal (AAT) review, in circumstances where AAT review has been substituted for Immigration Review Tribunal (IRT) review.

166 *Migration Act*, ss 166BE(1) and 166HL(1). In exercising the power of intervention under ss 115 and 137 the Minister is not bound by ss 24, 34, 51 or 52 of *Migration Act: Migration Act*, s 4(28). In exercising the power of intervention under ss 166BE and 166HL the Minister is not bound by Subdivision AA or AC of Division 2 of Part 2 of the *Migration Act* (not yet in force) or by the regulations but he or she is bound by all the other provisions of the *Migration Act*: ss 166BE(2) and 166HL(2). DIEA used to take the position that the Minister did not have the power to intervene under section 115 if a protection claimant was an illegal entrant or

Each time that the Minister intervenes in this fashion, he or she is required to provide an explanation of his or her actions to both Houses of Parliament.¹⁶⁷ It is not surprising, therefore, that between 19 December 1989¹⁶⁸ and 6 September 1993, the Minister had used his power to substitute a more favourable decision in only 52 cases.¹⁶⁹ Furthermore, the vast majority of these cases did not involve the granting by the Minister of a DPTEP on humanitarian grounds but rather the grant of other entry permits on other grounds.

It should be noted that the Minister does not have a duty to consider whether to exercise his or her power under the sections above mentioned.¹⁷⁰ This stipulation excludes the possibility of judicial review in the event of non-exercise of power. However, if the Minister chooses to consider the exercise of his or her power, the Minister's decision to exercise or refrain from exercising his power is judicially reviewable under the *ADJR Act*.¹⁷¹

This protection mechanism does not meet minimum procedural standards. First, the Minister for Immigration is clearly not an independent decision maker in the sense of being independent of immigration control and other government interests. Second, it is likely that neither the Minister for Immigration nor the DIEA officers who brief him or her, have the knowledge and skills necessary to identify persons entitled to protection from refoulement under the Torture Convention or the ICCPR. Third, the Minister does not have to consider the exercise of his or her power, so that not everyone who wishes to make a claim, gets a hearing. Fourth, even when the Minister chooses to consider the exercise of his or her power, the hearing that the claimant gets is by way of written submission only.¹⁷² Finally, the claimant does not have effective access to judicial review. A Minister who did not wish to exercise his or her power to substitute a favourable decision in a particular case is unlikely to state that he or she considered whether to exercise the power and choose not to exercise it. Rather he or she would formally refuse to consider whether to exercise the power. This precludes the possibility of the claimant seeking judicial review.

prohibited entrant. It was held in *Lek v The Minister for Immigration, Local Government and Ethnic Affairs* that there was no such limitation on the Minister's power: (1993) 43 FCR 100 at 137-8.

167 *Migration Act*, ss 115(7) - (9), 137(3) - (5), 166BE(4) - (6) and 166HL(4) - (6).

168 The date of commencement of the present ss 115 and 137.

169 45 cases under ss 115 and 7 cases under s 137.

170 *Migration Act*, ss 115(10), 137(6), 166BE(7) and 166HL(7).

171 Section 5(1) of the *ADJR Act* provides that a person who is aggrieved by "a decision to which this Act applies" may apply to the Federal Court of Australia for an order of review on any one or more of various grounds. A "decision to which this Act applies" is defined in section 3(1) as a decision of an administrative character made under an enactment (subject to exceptions which are not relevant to the present case).

172 The claimant would already have gone through the refugee status determination process and would probably have received an oral hearing from a DIEA officer in that connection. However, this hearing cannot be counted because it is not primarily directed at ascertaining whether the claimant has a valid claim to protection from refoulement under the Torture Convention or the ICCPR.

(ii) *The Humanitarian Guidelines*

The policy guidelines for the exercise of the Minister's power of intervention under s 115 of the *Migration Act* state that DPTEPs will be granted for the protection of persons "whose particular circumstances and personal characteristics provide them with a sound basis for expecting to face a significant threat to personal security on return as a result of targeted actions by persons in the country of return".¹⁷³ The UNHCR,¹⁷⁴ the Joint Standing Committee on Migration Regulations¹⁷⁵ and even the Attorney-General's Department,¹⁷⁶ to name but a few, are critical of the humanitarian guidelines as they take the view that the guidelines are even stricter than the Refugee Convention definition of refugee. For a start, the criterion that a person seeking humanitarian status face individualised threat to personal security upon return makes it more difficult for some asylum seekers to qualify for humanitarian status than refugee status.¹⁷⁷ The Joint Standing Committee on Migration Regulations suggested also that proving a "sound basis" for expecting a threat to personal security on return was more onerous than showing a "real chance" of persecution for the purposes of the Refugee Convention definition.¹⁷⁸ In fact, the only respects in which the humanitarian guidelines are wider in their scope of protection than the Refugee Convention are as follows. First, the guidelines do not specify that the claimant has to face the threat to security on one of a few limited grounds in order to qualify for humanitarian status. Second, the guidelines do not exclude persons from protection on grounds comparable to those contained in articles 1D, 1E and 1F of the Refugee Convention. Third, the guidelines do not exclude persons from protection on grounds comparable to those contained in article 33(2) of the Refugee Convention. In these respects, the humanitarian guidelines lend themselves to the protection of persons who either are not Refugee Convention refugees or do not have an entitlement to protection under article 33(1) but have a valid protection claim under the Torture Convention or the ICCPR. These limited instances aside, a person with a valid protection claim under the Torture Convention or the ICCPR whose application for Refugee Convention refugee status is rejected could not hope to benefit from the exercise of the Minister's discretion if that discretion is applied strictly in accordance with the policy guidelines.

173 Attachment to G Hand, MPS 15/91 undated.

174 Interview with H Domzalski, 14 January 1992.

175 Joint Standing Committee on Migration Regulations, note 2 *supra*, p 109.

176 Attorney-General's Department, *Evidence*, pp 1544-5 cited in Joint Standing Committee on Migration Regulations, *ibid*, p 109.

177 BL Murray, Submission 17 in Joint Standing Committee on Migration Regulations, *Inquiry into Refugee and Humanitarian Visas and Permits Submissions* (1991) I, p 26; Joint Standing Committee on Migration Regulations, *ibid*, p 108.

178 Joint Standing Committee on Migration Regulations, *ibid*, p 108.

The Minister is not, of course, bound by the policy guidelines.¹⁷⁹ Moreover, the Minister has demonstrated a willingness to make grants of DPTEP to persons whose circumstances fall outside the humanitarian guidelines.¹⁸⁰ This leaves open the possibility that the Minister would use his powers of intervention under ss 115, 166BE and 166HL to grant DPTEPs to persons who were entitled to protection from refoulement under the Torture Convention and/or the ICCPR. However, non-refoulement obligations under the Torture Convention and ICCPR have not as yet been cited as the basis of the Minister intervening to grant a DPTEP on humanitarian grounds. This could mean one of three things. First, no case in which a person was entitled to protection from refoulement under the Torture Convention or the ICCPR had arisen up to 6 September 1993. Second, such cases have arisen but in each case the applicant was also a Refugee Convention refugee and had been recognised as such. Third, such cases had arisen but, if it happened that the applicant was not a Refugee Convention refugee, the possibility that the applicant was entitled to protection under the Torture Convention and/or ICCPR was either overlooked or was considered and wrongly rejected.

D. Territorial Asylum

A person applying for a Territorial Asylum entry permit must fulfil the criteria for a class 800 permanent entry permit. The criteria for this permit are set out in Division 1.2 of Part 1 of Schedule 2 of the *Migration Regulations* (1993). One criterion is that the applicant must have been granted territorial asylum in Australia by an instrument of a Minister. Territorial asylum is granted "as a matter of high policy"¹⁸¹ by the Minister of Foreign Affairs and Trade. Persons who have been granted territorial asylum in the past have tended to be persons who could just as well have been admitted as Refugee Convention refugees or on humanitarian grounds but in respect of whom Australia wished to make high profile political statements.¹⁸² The grant of territorial asylum was really a weapon of the cold war and in these post-cold war days it is difficult to imagine cases in which the Australian Government would wish to make a political statement in this way.¹⁸³ In fact, the Minister has only granted territorial asylum on three occasions in the past 40 years.¹⁸⁴ As far as the author can ascertain, the most recent occasion was in the late 1970s.¹⁸⁵

179 Interview with DIEA Official A, 13 January 1992. In fact, the Guidelines themselves state that the matters canvassed therein are "not exhaustive of all the matters which can be taken into account": Attachment to G Hand, MPS 15/91 undated.

180 Between 19 December 1989 and 6 September 1993, the Minister for Immigration made 16 grants of DPTEPs on humanitarian grounds in exercise of his s 115 power. In several of these cases, the information provided in the s 115 statements indicates that the Minister has been making grants of DPTEPs to persons whose circumstances fall outside the humanitarian guidelines.

181 Procedures Advice Manual, Territorial Asylum (Class 800) (1st ed, July 1990) 1.2.

182 Interview with DFAT official, 24 February 1993.

183 *Ibid.*

184 Note 181 *supra* at 1.2.

185 Interview with DFAT official, 24 February 1993.

Given the circumstances, officers of the Department of Foreign Affairs and Trade (DFAT)¹⁸⁶ and DIEA officers are instructed to assume that a person who requests territorial asylum really intends to make a request for recognition of refugee status and to counsel that person accordingly.¹⁸⁷ Where a person persists with an application for territorial asylum after being counselled (as some do¹⁸⁸), he or she will be interviewed¹⁸⁹ and his or her application will be considered¹⁹⁰ but there is no serious possibility that an applicant will obtain a positive decision in the present day.¹⁹¹ It would appear to be the case that a decision by a Minister to grant or refuse an application for territorial asylum is either a decision of an administrative character made under an enactment or conduct related to the making of such a decision. In other words, it would appear to be a decision reviewable under the *ADJR Act*. However, the availability of judicial review is likely to be of little practical value. The discretion of the Minister to grant or refuse the application is so unconfined as to be almost non-justiciable. In short, the mechanism of territorial asylum is clearly not a realistic avenue of protection for a person with a valid protection claim.

Even if the Minister of Foreign Affairs and Trade was prepared to take into account Australia's non-refoulement obligations under the Torture Convention and the ICCPR in considering territorial asylum applications, the mechanism does not meet the minimum procedural standards necessary for the achievement of reasonable efficacy in the implementation of those non-refoulement obligations. First, the Minister for Foreign Affairs and Trade is not only a decision maker who is not independent of Australian Government interests but is one who, in relation to territorial asylum applications, makes overtly political decisions. Second, it is likely that neither the Minister for Foreign Affairs and Trade nor the DFAT officers who brief him or act as his delegates have the knowledge and skills necessary to identify persons entitled to protection from refoulement under the Torture Convention or the ICCPR.¹⁹²

186 *Ibid.*

187 Procedures Advice Manual, Territorial Asylum (Class 800) (1st ed, July 1990) 1.3.

188 DFAT, *Annual Report 1991-92*, p 89.

189 Telephone conversation with DFAT official, 6 December 1993. Note that at the time of this conversation this person was no longer with DFAT.

190 There is no form to fill in and DFAT has no formal guidelines to which it refers in making a decision on the application. A positive decision can only be made at the Ministerial level. A negative decision can be made by a delegated officer at SES level: Interview with DFAT official, 24 February 1993.

191 Interview with DFAT official, 24 February 1993.

192 DFAT officers' training in human rights law and policy has been recognised by the Department to be inadequate in the context of the sorts of functions they are supposed to be performing. DFAT is in the process of attempting to remedy this state of affairs (Joint Committee on Foreign Affairs Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* at 44).

E. Group Protection

The Australian Government grants temporary protection to some persons on a group basis.¹⁹³ The *Migration Regulations* (1993) provide for the grant of temporary entry permits, valid in respect of a period no later than a specified date, to persons, present in Australia, who are citizens of, and normally resident in, specified countries. Since 19 December 1989, group protection has been granted by regulation to persons from the Peoples' Republic of China (PRC), Lebanon,¹⁹⁴ Sri Lanka, Kuwait and Iraq,¹⁹⁵ and the former Socialist Federal Republic of Yugoslavia. In other words, the specified countries are usually countries experiencing international or internal armed conflict or civil disturbances. Leaving aside the protection of PRC nationals, the group concession mechanism is regarded as an essentially short-term response to unsettled conditions in other parts of the world which may turn out to be reasonably short lived.¹⁹⁶ As each expiry date draws near, conditions in the country concerned are reassessed by DIEA and a further short period of protection is provided, if a continuing need for protection is perceived.¹⁹⁷ The details of the protection provided under the group concession mechanism vary from country to country and from rollover to rollover.

A person who is a citizen, and normally a resident, of Sri Lanka, who has been the holder of an entry permit at any time on or after 31 December 1991, is not already the holder of an entry permit that is valid up to or beyond 31 January 1994 and who is not a subject of a deportation order¹⁹⁸ is eligible for a Sri Lankan Temporary Entry Permit.¹⁹⁹ A person who was, on 19 June 1991, a citizen of the Socialist Federalist Republic of Yugoslavia and is usually resident in a place that, on 19 June 1991, formed part of the Socialist Federal Republic of Yugoslavia, who has been the holder of an entry permit at any time on or after 31 December 1991, who is not already the holder of an entry permit that is valid up to or beyond 31 January 1994, who is not a subject of a deportation order and has not been the holder of an entry permit cancelled under s 35 of the *Migration Act*, is eligible for a Former Socialist Federal Republic of Yugoslavia Temporary Entry Permit.²⁰⁰

On 1 November 1993, the Minister for Immigration, Senator Bolkus, announced a one-off on-shore permanent residence category under which persons who had

193 Persons who are entitled to group protection may still make individual claims for refugee or humanitarian status: Interview with DIEA official A, 13 January 1992.

194 Regulation 119F of the *Migration Regulations* (now repealed). The most recent temporary extension of stay under this regulation expired on 30 November 1991.

195 Regulation 119K of the *Migration Regulations* (now repealed). The most recent temporary extension of stay under this regulation expired on 31 October 1991.

196 Interview with DIEA official A, 13 January 1992.

197 Interview with DIEA official B, 13 January 1992.

198 *Migration Act*, s 48.

199 A class 435 permit presently provided for in Division 2.6 of Part 2 of Schedule 2 of the *Migration Regulations* (1993). At the time of writing, the most recent temporary extension of stay under this regulation expires on 31 January 1994.

200 A class 443 permit presently provided for in Division 2.6 of Part 2 of Schedule 2 of the *Migration Regulations* (1993). At the time of writing, the most recent temporary extension of stay under this regulation expires on 31 January 1994.

been granted a visa before 12 March 1992 and who before the date of the announcement had been granted, or had applied for and apparently met the requirements for, a Sri Lankan Temporary Entry Permit or a Former Socialist Federal Republic of Yugoslavia Temporary Entry Permit, would be eligible to apply for permanent residence provided that they fulfilled certain other criteria.²⁰¹ The further criteria were as follows. The applicant had to be under the age of 45, have vocational English skills, and have an Australian post-secondary qualification or a current enrolment in an Australian post-secondary course or an overseas post-secondary qualification "recognised as having Australian equivalence" or ownership of an established business employing the equivalent of three full-time staff.²⁰²

PRC nationals, who entered Australia on or before 20 June 1989 and were in Australia on 20 June 1989, can apply for a PRC (Temporary) Entry Permit (After Entry),²⁰³ which is valid until 30 June 1994.²⁰⁴ The present Government indicated that the holders of these permits would not be forcibly returned to the People's Republic of China on their expiration,²⁰⁵ except in cases where they had violated Australian law in some serious way.²⁰⁶

On 1 November 1993, the Minister for Immigration, Senator Bolkus, announced that, subject to health and character checks, nationals of the PRC who were in Australia on 20 June 1989 would be granted permanent residence.²⁰⁷ The measure benefits about 19 000 PRC nationals and the 9 500 spouses and dependent children of those PRC nationals.²⁰⁸

As a practical matter, Australia's group concession mechanism and the related one-off permanent residency categories ensure that Australia does provide

201 Senator Bolkus, Media Release, 1 November 1993.

202 *Ibid.*

203 A class 437 permit presently provided for in Division 2.6 of Part 2 of Schedule 2 of the Migration Regulations (1993).

204 DIEA, *Review 1991*, p 18. On 6 June 1989, two days after the Tiananmen Square massacre, PRC nationals in Australia were informed that those lawfully present would be able to get the period of their temporary entry permits extended to 31 July 1989: Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control*, August 1992, p 187. It was also announced that illegals would not be deported for the time being: *ibid.* On 15 June 1989, the availability of a further 12 month extension on temporary entry permits was announced: *ibid.* On 8 December 1989, PRC nationals were informed that all those present in Australia on 20 June 1989 could apply for special entry permits valid until 31 January 1991: *ibid.* The type of temporary entry permit differed depending on whether the person was or was not lawfully present in Australia on 20 June 1989: *ibid.* On 6 June 1990 in the course of an interview on a television program, the Prime Minister, Mr Hawke, indicated that all PRC nationals present in Australia on 20 June 1989 would be allowed to stay: John Hewson, Leader of the opposition, Media Release, 6 June 1990. This extraordinary commitment made to some 20,000 PRC nationals was condemned by Opposition parties as irresponsible and unfair to other ethnic groups: Senator Jenkins, Australian Democrats, Media Release, 7 June 1990; John Hewson, Leader of the Opposition, Media Release, 7 June 1990. After a period of uncertainty, the present arrangements for PRC nationals were announced. The announcement was made on 27 June 1990: *ibid.*, p 188.

205 A Joel, "Why Australia is an Ideal Target for Boat People" (1991) 29 *Law Society Journal* 63 at 64.

206 National Population Council, note 10 *supra*, p 136.

207 Senator Bolkus, Media Release, 23 November 1993.

208 *Ibid.*

temporary or permanent refuge to large numbers of persons who might have a claim to protection from refoulement under article 3 of the Torture Convention, article 6 of the ICCPR or article 7 of the ICCPR. However, at present, these arrangements do not protect persons with a valid protection claim who are nationals of countries other than Sri Lanka, the former Yugoslavia or the PRC. Moreover, a person who has a valid protection claim under the Torture Convention or the ICCPR may be a national of a country for which specific provision has been made and yet fail to meet one or more of the other criteria which have to be satisfied before a person is eligible for a temporary or permanent entry permit under the relevant provision.

F. International Procedures

(i) Torture Convention

Australia has made a declaration under article 22 of the Torture Convention recognising the competence of the Committee against Torture to receive communications from or on behalf of individuals subject to Australia's jurisdiction, who claim to be the victims of a violation by it of the Torture Convention.²⁰⁹ For present purposes it can be said that asylum seekers physically present in Australia, whether lawfully or unlawfully, are subject to Australia's jurisdiction. They can, therefore, submit claims to the Committee Against Torture, that they are victims of Australia's violation of article 3, provided, *inter alia*, that they have exhausted all available domestic remedies.²¹⁰ The fact that a communication takes place after domestic remedies have been exhausted means that the Committee Against Torture can be seen as playing the role of a *de facto* merits review body.

Although it might not appear so at first, it is practicable for persons who face imminent deportation or extradition in alleged violation of article 3 of the Torture Convention, to use the article 22 mechanism. This is because rule 15/22(3) of the Rules of Procedure of the Committee Against Torture provides that "[i]n the course of its consideration, the Committee may inform the state party of its views on the desirability, because of urgency, of taking interim measures to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation".²¹¹ Obviously, the interim measure which must be taken in the present context is for the state to refrain from deporting or extraditing the person until the Committee Against Torture has expressed its views on the merits of the case.

209 Declaration made under articles 21 and 22 on 28 February 1993 with effect from that date: (1993) *Australian Legal Monthly Digest*, [1664].

210 Article 5(b) of the Torture Convention. Other limitations on the admissibility of communications made to the Committee Against Torture are that the Committee is not allowed to consider anonymous communications (article 22(2)), communications which amount to an abuse of process (article 22(2)), communications which are incompatible with the provisions of the Torture Convention (article 22(2)) or a communication which relates to a matter which has been or is being examined under some other international procedure (article 22(5)(a)).

211 Report of the Committee Against Torture, UN GAOR: 43rd session, Supp No 46 (1988) 40.

The Committee Against Torture is composed of persons independent of the Australian government who are eminently qualified for the task of identifying persons entitled to the benefit of the non-refoulement obligation imposed by article 3 of the Torture Convention. On the other hand, the hearing given by the Committee is by way of written correspondence only.²¹² Moreover, where an individual makes a communication to the Committee Against Torture, all that he or she can secure is a statement by the Committee that in its view the individual's rights have been violated by the state party concerned.²¹³ Ultimately, it is up to the state party whether it chooses to take remedial action. In other words, the decision which counts is not made by a decision maker independent of the government of the state. Rather it is made by the government of the state.

(ii) *The First Optional Protocol to the ICCPR*

Australia acceded to the First Optional Protocol to the ICCPR (Optional Protocol)²¹⁴ on 25 September 1991. Article 1 of the Optional Protocol states that state parties recognise the competence of the Human Rights Committee "to receive and consider communications from individuals subject to its jurisdiction who claim to be the victims of violation by that state party of any of the rights set forth in the Covenant".²¹⁵ On-shore asylum seekers can, therefore, submit to the Human Rights Committee claims that they are victims of Australia's violation of article 6 or article 7,²¹⁶ provided, inter alia, that they have exhausted all available domestic remedies.²¹⁷ This means that complaint to the Human Rights Committee is an avenue for a de facto merits review of a domestic decision.

In the past, it was common for years to elapse between the time that a communication was made to the Human Rights Committee and the time that it was considered on its merits, although this situation may have been ameliorated by the recent introduction of more efficient procedures.²¹⁸ The existence of such delays

212 MG Schmidt, "Individual Human Rights Complaints Procedures Based on UN Treaties and the Need for Reform" (1992) 41 *International and Comparative Law Quarterly* 654 at 651-2.

213 Article 22(7) of the Torture Convention. The Committee Against Torture also includes a summary of its activities under the Torture Convention in the annual report that it makes to the United Nations General Assembly: Article 24 of the Torture Convention.

214 999 UNTS 302. The Optional Protocol was adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976: DF Woloshyn, "Canadian Compliance with International Law Respecting the Right of Asylum of Refugees" (unpublished Master of Laws thesis, 1986) p 30.

215 The Commonwealth Attorney-General's Department has established an ICCPR Optional Protocol Unit to handle Australia's responses to communications made to the Human Rights Committee by persons who claim that Australia has violated their rights under ICCPR.

216 See also DF Woloshyn, note 214 *supra*, pp 30-1.

217 Articles 2 and 5(2)(b) of the Optional Protocol. Other limitations on the admissibility of communications made to the Human Rights Committee are that the Committee is not permitted to consider an anonymous communication (article 3), a communication which amounts to an abuse of process (article 3), a communication which is "incompatible with the provisions of [ICCPR]" (article 3) or a communication which relates to a matter being examined under some other international procedure (article 5(2)(a)).

218 H Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *Melbourne University Law Review* 428 at 431.

within the Optional Protocol individual complaint procedure appears at first to make it an inappropriate mechanism for use by persons who face imminent deportation or extradition in alleged violation of article 6 or article 7 of the ICCPR. However, such a person could ask the Human Rights Committee to invoke rule 86 of its Rules of Procedure. Rule 86 enables the Committee to ask the state the subject of the communication to "take interim measures in order avoid irreparable harm to the victim of the alleged violation".²¹⁹ The problem is that a state party receiving such a request is under no obligation to comply with it.²²⁰

In this regard, it is worth noting recent developments in relation to the European Convention. The European Commission also has a rule of procedure allowing the Commission to indicate to the state concerned the interim measures it thinks should be taken.²²¹ These indications are not binding on states²²² but, until the *Cruz Varas* case, the consistent practice of state parties to the European Convention had been to comply with rule 36 indications made by the Commission in expulsion cases.²²³ In the *Cruz Varas* case, Sweden deported the applicant contrary to a rule 36 indication. The European Court decided that on the facts of the case there had been no breach of article 3 of the European Convention but commented that if a breach of article 3 had been found it would "have to be seen as aggravated by the failure to comply with the indication" because of the state party's action in "knowingly [assuming] the risk of being found in breach of article 3 following adjudication of the dispute".²²⁴ It is submitted that the Human Rights Committee should and probably would take the same view of failure to comply with rule 86 requests. Presumably, Australia would not wish to aggravate a breach of article 6 or article 7 of the ICCPR and, if requested to take interim measures in relation to an expulsion or extradition case, would refrain from expelling or extraditing the applicant pending the report of the Human Rights Committee.

The Human Rights Committee is composed of persons independent of the Australian government who are eminently qualified for the task of identifying persons entitled to the benefit of the non-refoulement obligations imposed by articles 6 and 7 of the ICCPR. On the other hand, the Committee does not grant oral hearings but rather proceeds by way of written correspondence.²²⁵ Moreover,

219 *Ibid* at 431, footnote 31.

220 D McGoldrick, note 83 *supra*, p 202.

221 Rule 36 of the Commission's Rules of Procedure provide that "[t]he Commission, or where it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.": quoted in *Cruz Varas v Sweden* (1991) 14 EHRR 1 at 27.

222 In the *Cruz Varas* case, the Commission took the view (12 votes to one) that non-compliance with a rule 36 indication amounted to a breach of the obligation imposed on states by article 25(1) to refrain from frustrating the right of petition: *ibid* at 30. The European Court disagreed and took the view that rule 36 indications could not give rise to any binding obligations: *ibid* at 42.

223 *Ibid* at 29. The Commission's practice is to give a rule 36 indication in expulsion cases if in its view "irreversible harm may be done to the applicant if he is expelled and...there is good reason to believe that his expulsion may give rise to a breach of Article 3 of the Convention": *ibid* at 43 (European Court).

224 *Ibid* at 43.

225 MG Schmidt, note 212 *supra* at 651-2.

where an individual makes a successful application to the Human Rights Committee, all that he or she secures is a statement by the Committee that in its view the individual's rights have been violated by the state party concerned.²²⁶ As with the Torture Convention procedure, it is up to the state party whether it chooses to take remedial action. In consequence, the decision which counts is made by the government of the state rather than a decision maker independent of the government of the state.

G. The Aggregate

An asylum seeker present in Australia who wishes to make a claim to protection from refoulement under the Torture Convention might but will not necessarily be able to do so within a domestic forum. However, the availability of the individual complaint procedure under article 22 of the Torture Convention means that such an asylum seeker is at least able to obtain a hearing (by written submission) by independent qualified and capable persons. Taken together, the availability of the Human Rights and Equal Opportunity Commission's inquiry process and the availability of the individual complaints procedure under the First Optional Protocol to the ICCPR means that every asylum seeker present in Australia who wishes to make a claim to protection from refoulement under the ICCPR is able to get a hearing (often oral) from independent, qualified and capable persons and to get de facto review of an adverse governmental decision by independent, qualified and capable persons. The problem is that no asylum seeker, at any stage, is able to get his or her claim considered via a mechanism which gives the power to make a *binding* decision to persons independent of the Australian Government. It follows that protection mechanisms herein considered do not, even in the aggregate, meet the minimum procedural standards specified in section IV.

VI. CONCLUSION

In section III of this article, it was demonstrated that the Torture Convention and the ICCPR impose non-refoulement obligations which are in important respects wider than the non-refoulement obligation contained in article 33(1) of the Refugee Convention.

In section IV, it was stated as a premise that state parties to the Torture Convention and the ICCPR had to meet a standard of reasonable efficacy in the implementation of the non-refoulement obligations contained therein. Given the impossibility of measuring the efficacy of implementation empirically, it was assumed that a protection claim determination system which was procedurally flawed would necessarily fail to deliver on Australia's substantive obligations. It

²²⁶ Article 5(4) of the Optional Protocol. The Committee also includes a summary of its activities under the Optional Protocol in the annual report it makes to the United Nations General Assembly: Article 6 of the Optional Protocol and article 45 of the ICCPR.

was argued that the minimum procedural standards prescribed by article 14(1) and (5) in relation to criminal proceedings should be applied by analogy to protection claim determinations. It was also argued that article 2(3) of the ICCPR implicitly prescribed minimum procedural standards in relation to the implementation of the non-refoulement obligations contained in the ICCPR. However, it was pointed out that the sorts of procedural standards implicitly prescribed by article 2(3) were broadly speaking the same as the standards to be derived by analogy from article 14(1) and (5).

In section V it was demonstrated that the domestic and international protection mechanisms which can be invoked by persons entitled to protection from refoulement under the Torture Convention and/or the ICCPR do not individually or in the aggregate meet the minimum procedural standards specified in section IV.

Thus far, the Australian Government has been content to ignore the theoretical deficiencies of the protection mechanisms presently available to be invoked by persons who are entitled to protection from refoulement under the Torture Convention and/or the ICCPR. It may be that if the Australian Government, if it happened to realise that a case engaged its obligations under article 3 of the Torture Convention or articles 6 or 7 of the ICCPR, though falling outside the scope of domestic protection mechanisms already in place, it would come up with some ad hoc response that avoided breach of its international obligations. It is suggested, however, that it is far better for Australia to modify its procedures for dealing with on-shore asylum seekers so that persons entitled to protection from refoulement under the Torture Convention and/or the ICCPR do not slip through the net. If Australia does not approach the implementation of its non-refoulement obligations in a systematic and procedurally sound manner, it is unlikely to achieve reasonable accuracy in the identification of valid protection claims and hence is unlikely to meet the international standard of reasonable efficacy in implementation.