Australia's Interpretation of Some Elements of Article 1A(2) of the Refugee Convention

Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives †

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1. *Introduction*

Australia is presently a reluctant host to about 29,000 on-shore asylum seekers whose claims to protection must be determined. Moreover, any substantial adverse change in a country or countries in Australia's region, the Asia-Pacific region, could lead to an enormous increase in the number of asylum seekers arriving in Australia. Sri Lanka is in a state of civil war. Fiji has already experienced several coups. It is predicted that there will be an exodus from Hong Kong when it becomes part of China.[1] Kiribati and Tuvalu may join Atlantis at the bottom of the sea.[2] In short, adverse change in the Asia-Pacific Region is far from a remote possibility. Quite apart from specific events, the mere fact that 60 per cent of the world's population lives in the Asia-Pacific region[3] is sufficient basis for the prediction that Australia will have to deal with large scale irregular migration at some stage. For example, the level of internal migration in China is presently very high and it is not unreasonable to assume that sooner or later the same pressures will cause an international population movement.[4] India, the country with the largest population in the world next to China, has a population growth which outstrips economic growth.[5] It too may

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1 Australian Government, "South-North Migration: An Australian Perspective" unpublished seminar paper presented to *Ninth International Organization for Migration Seminar*, (1990) at 5.

2 Id at 8.

3 Id at 4.

4 'Four Corners', television program broadcast by the Australian Broadcasting Corporation, 23 March 1992.

5 Above n1 at 7.

produce irregular migrants. Whatever the main causes of any future population movements to Australia, many of those who arrive in Australia will claim that they are entitled to Australia's protection under international law. It is likely that Australia will only have an international law obligation of protection in relation to a small proportion of those claimants. However, those few must be identified and protected.

Australia acceded to the 1951 Convention relating to the Status of Refugees[6] on 21 January 1954 and acceded to the 1967 Protocol relating to the Status of Refugees[7] on 13 December 1973.[8] The prohibition on refoulement is the key provision of the Refugee Convention. Article 33(1) 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[9] would[10] be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Article 33(2) 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, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". If it can be said of any particular person that he or she is a "refugee" it can be said also that Australia has expressly undertaken the non-refoulement obligation in Article 33(1) of the Refugee Convention in relation to that person (unless the exception in Article 33(2) applies). This article is concerned with examining whether Australia is violating the non-refoulement obligation in Article 33 of the Refugee Convention by failing to identify persons who are entitled to the benefit of that Article. In particular, this article considers whether Australia is withholding the benefit of Article 33 of the Refugee Convention from refugees who in fact satisfy the Refugee Convention definition by being unduly restrictive in

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6 28 July 1951, 189 UNTS at 150. Hereinafter cited as the Refugee Convention.

7 31 January 1967, 606 UNTS at 267. Hereinafter cited as the Refugee Protocol.

8 Rohn, P H, *World Treaty Index Main Entry Section Part 2 1960-1980* (2nd edn, 1983) III at 1394.

9 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": Grahl-Madsen, A, *The Status of Refugees in International Law* (1966) I at 196 explaining the intentions of the Ad Hoc Committee on Statelessness and Related Problems (see below for an explanation of the role of the Ad Hoc Committee). 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: Plender, R, for UNHCR intervening in *R v Secretary of State for the Home Department; ex parte Sivakumaran* [1988] 1 AC 958 at 984.

10 The argument is sometimes made that Article 33(1) does not prohibit the return of a refugee to another State simply because he or she 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* be threatened: Fullerton, M, "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 J Int'l L* 33 at 100-101 (emphasis added). However a reading of the *travaux preparatoires* would suggest that the subjective element of the Article 1 definition was considered to have been incorporated implicitly in Article 33(1): Above n9 at 985. The issue has not been explored by Australian courts. However, DIEA's practice is to assume that the non-refoulement provision applies to all persons recognised by Australia as Refugee Convention refugees: Interview with DIEA official A, 13 January 1992.

its interpretation and application of the definition of "refugee" contained in Article 1A(2) of the Refugee Convention.

It is argued that Australia has, on the whole, been overly restrictive in its interpretation and application of key elements of the Refugee Convention definition and, insofar as it returns those persons wrongly rejected, has been violating its non-refoulement obligation under Article 33 of the Refugee Convention. It is suggested that a desire on the part of the Department of Immigration and Ethnic Affairs (DIEA),[11] the Department of Foreign Affairs and Trade (DFAT) and, to a much lesser extent, the Attorney-General's Department to favour immigration control and foreign policy objectives over the international law claims of asylum seekers at least partly explains DIEA's and the Refugee Status Review Committee's (RSRC)[12] overly restrictive interpretation and application of the Refugee Convention definition. In support of this view, it is noted that the courts, which are truly independent of such concerns, come closest to interpreting the Refugee Convention definition in line with international standards. It is accordingly concluded that Australia is unlikely to meet its Refugee Convention obligation of non-refoulement until its refugee status determination procedure is placed entirely in the hands of decision-makers who are independent of immigration control and foreign policy concerns.

2. *Methodology*

In this article, each element of the Refugee Convention definition is considered and a preferred interpretation of each element distilled which takes into account State practice, the views of the Office of the United Nations High Commissioner for Refugees (UNHCR), the intention of the drafters and the humanitarian purpose of the Refugee Convention, and the scope of the Refugee Convention definition thereby ascertained. This article then considers whether the interpretation placed on each element of the Refugee Convention definition by each of the bodies responsible for making or reviewing on-shore refugee status determinations in Australia is at least as inclusive as the preferred interpretation. If it is found that the interpretation placed on one or

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11 Primary stage refugee status determinations are made by the officers of the Determination of Refugee Status (DORS) Operations Branch of DIEA.

12 Between July 1991 and June 1993 (inclusive), a refugee status claimant rejected at the primary stage could request review by the Refugee Status Review Committee (RSRC). Each RSRC panel was comprised of a representative of DIEA, a representative of DFAT, a representative of the Attorney-General's Department and a community representative nominated by the Refugee Council of Australia (RCOA). An UNHCR representative was present at meeting of RSRC panels in an advisory capacity. After review, the RSRC made a recommendation on the case reviewed which was forwarded to a delegate of the Minister of Immigration. It should be noted that the RSRC had no legislative existence. In terms of the *Migration Act* what happened at the administrative review stage was that the delegate (to whom the RSRC recommendation was made) conducted an internal review of the decision to refuse a Domestic Protection (Temporary) Entry Permit under the Migration (Review) Regulations (relevant provisions now repealed) and made a decision to grant or refuse that permit. Since 1 July 1993, the RSRC has ceased to function. The Refugee Review Tribunal (RRT) now conducts administrative review of refugee status decisions. However, references will be made throughout to RSRC practice as RRT practice is not as yet sufficiently developed.

more elements of the Refugee Convention definition by one or more of these bodies is not as inclusive as the preferred interpretation, it can be concluded that Australia is failing to recognise as refugees some persons who are in fact refugees and, insofar as it treats rejected refugee status claimants as persons who are not entitled to its protection, that it is in all likelihood breaching the Refugee Convention obligation of non-refoulement.

A. State practice

The focus of this article will be on Australian practice in relation to on-shore asylum seekers. However, reference will be made to the practice of other States from time to time. There are two reasons for doing this. The first is that the Vienna Convention on the Law of Treaties[13] states that for the purpose of interpretation of a treaty there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[14] The *travaux preparatoires* and other such material are supplementary aids to interpretation, subordinate to the means of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties.

The second reason is that the practice of other States in dealing with on-shore asylum seekers can provide useful object lessons for Australia. In this regard, the focus of this article will be on the practice of other western States. This concentration on western nations is justified on two grounds. First, it is unlikely that asylum seekers who leave homes and family in an impoverished country of origin to be homeless and friendless in an equally impoverished neighbouring country, are immigrants wearing "false colours". However, the wearing of false colours is a very real possibility when persons from less developed nations seek asylum in the west. Secondly, most western countries cannot plead poverty and insist that other countries share the burden imposed upon them by on-shore asylum seekers. The "buck" stops with them.[15] In other words, although the vast majority of asylum seekers are to be found in Africa, Latin America and Asia,[16] the manner in which they are dealt with by the receiving States can cast little direct light on many of the issues faced by Australia, because the issues facing western countries in relation to on-shore asylum seekers are different from those faced by other receiving countries.

B. Status of the UNHCR Handbook

UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*.[17] The explanations of the Refugee Convention definition contained in the UNHCR Handbook are based:

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13 23 May 1969, 1155 UNTS at 331. Australia acceded to this treaty on 13 June 1974. It came into force on 27 January 1980.

14 Article 31(3)(b).

15 Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (1992) at 9.

16 Stenberg, G, *Non-expulsion and Non-refoulement* (1989) at 171.

17 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1979). Herein-

> on the knowledge accumulated by the High Commissioner's Office over a period of about 25 years, since the entry into force of the 1951 Convention on 21 April 1954, including the practice of States in regard to the determination of refugee status, exchange of views between the Office and the competent authorities of the Contracting States, and the literature devoted to the subject over the last quarter of a century.[18]

UNHCR's view is that the Handbook is evidence of State practice relating to the interpretation of the Refugee Convention and Protocol and thus a source to be consulted in the interpretation of those treaties.[19] In addition, Article 35(1) of the Refugee Convention provides that:

> [t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of [the Refugee] Convention.

The duty of supervision to which reference is made is imposed upon UNHCR by Paragraph 8(a) of the Statute of the Office of the United Nations High Commissioner for Refugees.[20] Article II(1) of the Refugee Protocol makes similar provision in relation to the 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)[21] for a handbook "for the guidance of Governments".[22] Thus the publication of the UNHCR Handbook can be regarded as an act of UNHCR in discharge of its duty of supervision, and States are bound by the Refugee Convention and Protocol to regard the guidelines to interpretation of those treaties contained in the Handbook as, at the least, highly persuasive. The UNHCR Handbook is often used by governments as an aid to interpretation of the Refugee Convention definition of "refugee".[23] It is also treated as an interpretive guide by the domestic courts of some States,[24] though not treated as binding on them.[25]

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after cited as the UNHCR Handbook. The UNHCR Handbook was reissued in 1988 but no significant changes were made to the text: Lombard, G, "An International Perspective on Refugee Determination Activities: Alternative Review and Accountability Models" (unpublished address, *Public International Law Conference*, UNSW, 10 October 1992) at 3.

18 UNHCR Handbook at 1.

19 See Article 31 of the Vienna Convention on the Law of Treaties: Plender, above n9 at 981.

20 General Assembly Resolution (G A Res) 428(V) Annex, 14 December 1950, reproduced in Goodwin-Gill, G S, *The Refugee in International Law* (1983) at 241.

21 EXCOM was established in 1958: G A Res 1166(XII), 26 November 1957 and E S C Res 672(XXV), 30 April 1958 cited in Goodwin-Gill, G S, id at 132. Australia is a member State of EXCOM. EXCOM functions in relation to UNHCR as an advisory body only: *The National Population Council's Refugee Review* (1991) at 149.

22 Above n18.

23 For instance, the US government: Shiers, E T, "Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers" (1990) 30 *Virginia J Int'l L* 1007 at 1032.

24 For instance, the US courts (id at 1033 footnote 167 citing *M A A26851062 v I N S* 858 F2d 210 (4th Cir 1988) at 214), Canadian courts (Industrial Relations Board (IRB), *Preferred Position Paper: Discrimination as a Basis for a Well-Founded Fear of Persecution* (March 1992) at 11 footnote 6) and UK courts (*R v Secretary of State for the Home Department ex parte Hidir Gunes* [1991] Imm AR 278 at 281-2 per Simon Brown J).

25 See for instance the UK case of *R v Immigration Appeal Tribunal ex parte Mendis* [1989] Imm AR 6 at 21-2 per Balcombe LJ (Staughton LJ agreeing).

DIEA accepts, at least in theory, the interpretive guidance of the UNHCR Handbook.[26] The RSRC interpreted the Refugee Convention and Protocol primarily in the light of the UNHCR Handbook, with recent Australian case law viewed as a secondary source of guidance.[27] On the other hand, the High Court of Australia, while it refers to the UNHCR Handbook, appears to treat the statements contained in the Handbook on par with the suggestions of academic commentators rather than as particularly authoritative guides to interpretation.[28] Mason CJ went so far as to state that, while he did not wish "to deny the usefulness or admissibility of extrinsic materials [such as the UNHCR Handbook] in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties", he regarded the Handbook more as a practical guide for those involved in determining refugee status than as an interpretive guide to the Refugee Convention.[29] It has been demonstrated above that, as a matter of international law, the UNHCR Handbook has to be given more weight than is accorded to it by the High Court.

C. *Intention of the drafters*

The Refugee Convention was drafted by the Ad Hoc Committee on Statelessness and Related Problems (Ad Hoc Committee) formed by the United Nations Economic and Social Council (ESC).[30] From time to time, reference will be made to the intentions of the drafters of the Refugee Convention. The justification for doing this is that customary international law permits the *travaux preparatoires* (that is the preparatory work in the drafting of a treaty, for instance previous drafts of the treaty and official records of the meetings of the drafting committees) to be used as a resource by tribunals attempting to interpret an ambiguous provision of a treaty. In addition, Article 32 of the Vienna Convention on the Law of Treaties provides that:

> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

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26 Thompson, P, "Refugee Procedures in Australia: Current Practices and Reform" (unpublished Masters of Law thesis, 1989) at 23. A copy is located at UNHCR office, Canberra.

27 Interview with a member of RSRC, 15 January 1992. This and other interviews to which reference is made have been tape recorded. The tapes are held in the author's office at the Law Faculty, Monash University. Many government officials and others interviewed spoke on the condition of anonymity. All persons interviewed were, of course, well qualified to speak on the matters about which they were interviewed.

28 See *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412 at 425, 430 and 451 per Dawson J, Toohey J and McHugh J respectively.

29 Id at 420

30 Sautman, B, "The Meaning of 'well-founded fear of persecution' in US Asylum Law and in International Law" (1986) 9 *Fordham Int'l LJ* 483 at 531; Cox, T N, "Well-founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status" (1984) 10 *Brooklyn J Int'l L* 333 at 342.

D. The case for a liberal construction of the Refugee Convention

One of the devices employed by those parties to the Refugee Convention and Protocol, which are reluctant to recognise the refugee status of claimants, is the device of restrictively interpreting the Refugee Convention provisions. This is despite the fact that, given the humanitarian purpose of the Refugee Convention, the rules of treaty interpretation would suggest that its provisions should be construed liberally,[31] in order to give effect to its central purpose of protecting the individual. In fact, Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons expresses the hope that the Convention:

> will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to the persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.[32]

The intent of this statement implies that the "contract" itself should be construed liberally in favour of its beneficiaries.[33]

3. The Refugee Convention Definition of "Refugee"

A person becomes a refugee for the purposes of the Refugee Convention and Protocol the moment he or she satisfies the definition of "refugee" contained in those treaties. Although State parties to the Refugee Convention and Protocol each make their own determinations of refugee status under those treaties, they simply recognise refugee status through their determination procedures, and do not grant it.[34] If Australia fails to recognise as refugees persons who in fact are "refugees" within the meaning of the Refugee Convention and Protocol, it may fail also to meet the obligations which the Refugee Convention imposes upon it in relation to those refugees.

Who is a "refugee" within the meaning of Article 33 of the Refugee Convention? Article 1A(2)[35] of the Refugee Convention provides that for the purposes of the Convention, the term "refugee" applies to any person who:

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31 Plender, above n9 at 977-8 citing in support of a purposive interpretation Article 31 of the Vienna Convention on the Law of Treaties. See also *Reservations to the Convention on the Prevention and Punishment of Genocide* [1951] ICJ Rep 15 at 23.

32 189 UNTS at 137. In *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, the Permanent Court of International Justice (PCIJ) cited an opinion expressed in a resolution of the Conference of Ambassadors in support of the Court's textual interpretation of Article 104(5) of the Treaty of Versailles: PCIJ Series A-B, No 44 (4 February 1932) at 26-7. The Conference of Ambassadors was established after the Treaty of Versailles came into force for the purpose of supervising the drafting of a treaty between Poland and Danzig (a treaty foreshadowed by Article 104 of the Treaty of Versailles): Kimmich, C M, *The Free City: Danzig and German Foreign Policy 1919-1934* (1968) 23. *A fortiori*, it is suggested that the recommendations contained in the Final Act of the very Conference which drafted the Refugee Convention certainly forms part of material which may be consulted as a supplementary means of interpretation of that treaty.

33 Cf Grahl-Madsen, above n9 at 145.

34 Goodwin-Gill, above n20 at 20.

35 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 Octo-

> [a]s a result of events occurring before 1 January 1951[36] and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The temporal limitation was removed by Article I(2) of the Refugee Protocol which provides that for the purposes of the Protocol, the term "refugee" means any person within the meaning of the Refugee Convention as if the words "[a]s a result of events occurring before 1 January 1951" and the words "as a result of such events", in Article 1A(2) were omitted.[37]

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. Articles 1D, 1E and 1F will not be discussed in this article.

4. *"Well-Founded Fear"*

A. *International law*

(i) State practice

There does not appear to be consensus among States as to the interpretation of the "well-founded fear" criterion.[38] At one end of the spectrum, the French refugee status determination authority (OFPRA) requires claimants to show that they have a "reasonable" fear of persecution by giving "a plausible account of fear".[39] At the other end of the spectrum, Germany requires claimants to show a "clear probability" of persecution.[40]

The majority interpretation of the "well-founded fear" standard[41] in the US Supreme Court case of *INS v Cardoza-Fonseca*[42] was that persecution needed to

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ber 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization". Article 1A(1) of the Refugee Convention is of little significance in the 1990s and will not be considered in this article.

36 Article 1B(1) provides that for the purposes of the Refugee Convention, the words "events occurring before 1 January 1951" shall be understood to mean either: (a)"events occurring in Europe before 1 January 1951"; or (b)"events occurring in Europe or elsewhere before 1 January 1951", and each contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention. Article 1B(2) enables parties who initially adopt alternative (a) to adopt alternative (b) at any time by notification.

37 Article I(3) of the Refugee Protocol provides that the Protocol is to be applied by State parties without any geographic limitation, save that existing declarations made by parties to the Refugee Convention in accordance with Article 1B(1)(a) of the Convention, unless extended under Article 1B(2), apply also under the Protocol.

38 Cox, above n30 at 353.

39 Marx, R, "The Criteria for Determining Refugee Status in the Federal Republic of Germany" (1992) 4 *Int'l J Refugee L* 151 at 167.

40 Id at 151.

41 The "well-founded fear" standard, was introduced into domestic law by the *Refugee Act* of 1980 (8 USCS s1101).

42 94 LEd 2d 434 (1987).

be a "reasonable possibility".[43] The US Supreme Court stated that it considered its interpretation to be consistent with the UNHCR analysis of the "well-founded fear" standard.[44] Accordingly, its approach could be taken as State practice supporting the view that the asylum seeker's credible statement or "plausible account" is sufficient evidence of a "reasonable possibility" of persecution.[45]

The UK House of Lords in the *Sivakumaran* case took the view that it had to be established that there was a "reasonable degree of likelihood" that the claimant would be persecuted for a Refugee Convention reason if he or she returned to his or her country.[46] Lord Keith of Kinkel expanded on this interpretation by stating that a fear of persecution was well-founded if there was "a reasonable chance", "substantial grounds for thinking" or "a serious possibility" of persecution occurring.[47] Lord Goff of Chievley added that this interpretation was consistent with the submission by the Home Secretary that there must be "a real and substantial risk of persecution".[48] According to Lord Keith of Kinkel the House of Lords test is consistent with the formulation in the *Cardoza-Fonseca* case.[49] Yet, while the US Supreme Court stated that it considered its interpretation to be consistent with the UNHCR analysis of the "well-founded fear" standard,[50] Lord Goff of Chieveley in the *Sivakumaran* case explicitly acknowledged the divergence of the approaches taken by UNHCR and the House of Lords.[51] In fact, the House of Lord's appears to support a test which is more objective than the one espoused by the US Supreme Court. According to Hathaway, the House of Lords' approach is in line with the generality of State practice in the rest of Europe.[52]

In the Canadian case of *Re Adjei and Minister of Employment and Immigration*,[53] the parties agreed, and the Federal Court of Appeal accepted, that the test was whether there was a "reasonable chance" that persecution would take place if the applicant returned to his or her country of origin. The Court went on to say that the test could also be expressed as the need for a "'reasonable' or even a 'serious possibility', as opposed to a mere possibility".[54] It is

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43 Id at 452 per Stevens J delivering the opinion of the Court. However, the court said that there did not have to be a probability of persecution: id at 453. The BIA has elaborated on the *Cardoza-Fonseca* case by stating that a person has a well-founded fear of persecution if a reasonable person in his or her circumstances would fear persecution if returned to his or her country of origin: *Matter of Mogharrabi* Int Dec 3028 (BIA 1987) cited in Anker, D E, *The Law of Asylum in the United States: A Guide to Administrative Practice and Law* (2nd edn, 1991) at 97.

44 Above n42 at 452 per Stevens J.

45 See below.

46 The *Sivakumaran* case above n9 at 994 per Lord Keith of Kinkel (other Lords agreeing). However, they did not need to be satisfied that it was more likely than not that a claimant to refugee status would be persecuted for a Refugee Convention reason if he or she returned to his or her own country: id at 994-5.

47 The *Sivakumaran* above n9 at 995 citing *R v Governor of Pentonville Prison; ex parte Fernandez* [1971] 1 WLR 987 at 994 per Lord Diplock.

48 The *Sivakumaran* case id at 1000.

49 Id at 994 citing above n42 at 452-3 and footnote 24 per Stevens J.

50 Above n42.

51 The *Sivakumaran* case above n9 at 1001.

52 Hathaway, J C, *The Law of Refugee Status* (1991) at 74.

53 (1989) 57 DLR (4th) 153.

54 Id at 155.

worth noting, however, that the Federal Court of Appeal rejected the phrase "substantial grounds for thinking" and added that even the phrase "serious possibility" might have been considered unacceptable except for the fact that "it clearly remains, as a possibility, short of a probability".[55] Thus, present Canadian practice appears to follow US practice rather than that of the UK[56] and appears in fact to be an endorsement of a "plausible account" test in so far as an applicant's credible statement may be accepted as sufficient evidence of the objective risk of persecution.[57]

A meaning of "well-founded fear" clearly established by State practice would prevail as against any interpretation which may be established by reference to the supplementary means. However, there is no such clearly established meaning. It is, therefore appropriate to turn to supplementary means of interpretation.

(ii) The UNHCR Handbook approach

The UNHCR Handbook acknowledges that the phrase "well-founded fear of being persecuted" contains a subjective and objective element. However, it states that the definition gives primary emphasis to the subjective element of fear in the person applying for recognition as a refugee.[58] Thus, a knowledge of the conditions prevailing in the applicant's country of origin is important only insofar as it aids evaluation of the credibility of the applicant's statements.[59] The UNHCR Handbook further states that, if an applicant's account appears credible, he or she should be given the benefit of the doubt in relation to unproved statements.[60] In fact, it appears to be the case that the UNHCR Handbook advocates a test of "well-founded fear" which is not too far removed from that intended by the drafters of the Refugee Convention, that is a "plausible account" test.[61]

(iii) The intention of the drafters

The Ad Hoc Committee drafted the Refugee Convention definition of "refugee", using a draft proposal submitted by the US as its basic work document.[62] In a draft of its report to ESC, the Ad Hoc Committee's first session stated that "well-founded fear" simply required a claimant of refugee status to give a "plausible account" of his fear.[63] This was the International Refugee Organization (IRO) approach.[64] The final report of the Ad Hoc Committee's

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55 Id at 156.
56 Above n52 at 79.
57 Id at 84 citing Blum, C, "Who is a Refugee? Canada's Interpretation of the Refugee Definition" (1986) 1 *Immigration J* 8 at 9.
58 UNHCR Handbook para 37.
59 Id paras 37 and 42.
60 Id para 196.
61 See below.
62 Plender, above n9 at 979.
63 UN Doc E/AC32/L38 at 1 cited in Sautman, above n30 at 535.
64 The IRO was an agency of the United Nations which operated from July 1947 to January 1952: Grahl-Madsen, above n9 at 18. Its function was to deal with the refugees created by World War II: *Ibid.* The Refugee Convention was intended to take over from the Constitution of the IRO: Sautman, above n30. The IRO Constitution set out defined categories of

first session[65] stated that "well-founded fear" means that "a person has either been actually a victim of persecution or can show good reason why he fears persecution".[66] It seems that this interpretation was not intended as a departure from the IRO approach.[67] The UK representatives on the Ad Hoc Committee expressed the view that the US draft proposal was to be interpreted in the light of IRO practice.[68] The US representative himself expressed a similar view.[69]

(iv) The case for liberal construction

IRO practice was dictated by its inability and disinclination to form its own judgments about the conditions in the applicant's country of origin.[70] It has been suggested that the State parties to the Refugee Convention and Protocol do have the ability to form their own judgments about the conditions in an applicant's country of origin and that, accordingly, the "plausible account" test is not applicable in the context of the Refugee Convention and Protocol.[71] The author takes a different view. The fact that the Refugee Convention and Protocol exist at all is a strong argument for the IRO approach to the "well-founded fear" criterion being applicable in the context of those treaties. This argument can be elaborated as follows.

It is unlikely that a government department responsible for refugee status determinations (or responsible for providing country of origin information to an independent refugee status determination body) would take anything other than the government view in forming a judgment about conditions in a refugee status applicant's country of origin. Foreign policy or immigration control considerations may cause the government's official view of the situation in other States to have no necessary connection with reality. In other words, the government's judgments may be distorted by the knowledge that a decision to recognise refugee status encourages other asylum seekers from the same

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persons who were to be protected by its provisions and stated that no such person with a valid objection should be compelled to return to his or her country of origin. The first of these valid objections was "[p]ersecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations": IRO Constitution Annex 1 Part I Section C(1)(a)(i). See GA Res 62(I) Annex I, 15 December 1946, reproduced in Djonovich, D J (ed), *United Nations Resolutions Series I Resolutions Adopted by the General Assembly* (1973) I at 100. The IRO Manual for Eligibility Officers (published as an aid to construction of the criteria in the IRO Constitution) interpreted "fear based on reasonable grounds" to be fear of persecution for which the applicant must give a plausible account supported where possible by documentation: Cox, above n30 at 339-40 and 349.

65 The final definition of "refugee" contained in the report of the Ad Hoc Committee's first session was not materially different from the definition contained in the report of the Committee's second session or the definition contained in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Sautman, above n30. Thus the interpretation of the phrase "well-founded" by the Ad Hoc Committee's first session is an useful guide to the meaning of that phrase in the Refugee Convention.

66 UN Doc E/AC32/5 at 39 quoted in Sautman, above n30.

67 Cox, above n30 at 349.

68 Plender, above n9 at 981 citing the *travaux preparatoires*.

69 Ibid.

70 Cox, above n30 at 351.

71 For example, the *Chan* case above n28 at 448 per McHugh J.

country to try their luck (thus undermining immigration control) and might be regarded as an implicit statement that the government of the recognising State believed that the State from which the applicant in question had fled was one guilty of persecuting its citizens (thus undermining any foreign policy objective of maintaining friendly relations with the State concerned).

On the other hand, if a State were deliberately to eschew government involvement in the refugee status determination process and were to make it known that decisions by its refugee status determination authority were made solely on the basis of the plausibility of individual applicants' accounts and without reference to the State's or the authority's own judgment of general conditions in the other States in question, it would have less motive and opportunity for attempting to weight the balance between its own and asylum seekers' interests in favour of its own. If a decision to recognise refugee status could not be regarded as an implicit statement that the government or any other institution of the recognising State believed that the State from which the applicant in question had fled was one guilty of persecuting its citizens, the temptation to bring foreign policy considerations to bear in the refugee status determination or review process would be much reduced.[72] The State would still have an immigration control motive for distorting the outcomes of the refugee status determination or review process but its opportunity to do so would be much reduced.

The reason for the existence of the Refugee Convention and Protocol is that they represent the means by which the parties to them (at times when the international community felt great concern for the plight of asylum seekers) chose to ensure that the moral entitlements of certain limited class of asylum seekers would always prevail over whatever immigration and foreign policy interests particular parties happened to have at particular moments in time. It would have been meaningless for those States to bind themselves to treaties which purported to protect a defined class of asylum seekers, if those treaties effectively permitted them to treat persons falling within the defined class exactly as they would have done in the absence of the treaties. It follows that State parties must take the IRO approach to the "well-founded fear" criterion rather than form their own judgments about conditions in refugee status claimants' countries of origin, because only the IRO approach is consistent with the Refugee Convention and Protocol being more than cynical sleights of hand — words that promise much and deliver nothing.

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72 For instance, the deliberations of the US Fourth Circuit Court may have been influenced by the consideration that "to accept the claim of someone to qualify for refugee status is publicly to accuse some other state of engaging in persecution": *MA v INS* 899 F2d 304 (4th Cir 1990) at 313 quoted in Butcher, P, "Assessing Fear of Persecution in a War Zone" (1991) 5 *Georgetown Immigration LJ*, 435 at 441. The intrusion of such concerns into the refugee status determination or review process undermines the effective protection of the individual. According *to* Lord Goff of Chievely the High Commissioner's view regarding the interpretation of the Refugee Convention definition is coloured by exactly this policy consideration: the *Sivakumaran* case above n9 at 998.

(v) Summary

As there is no agreement between the parties to the Refugee Convention or Protocol regarding the interpretation of "well-founded fear", supplementary means of interpretation were consulted. It has been shown that the interpretation of "well-founded fear" advanced by courts in the US and Canada is more consistent with the *travaux preparatoires* and the UNHCR approach than is the UK view.[73] It is concluded that the "plausible account" interpretation is to be preferred. This conclusion is reinforced by the fact that the "plausible account" interpretation is the interpretation which best advances the purpose of the Refugee Convention and Protocol by giving State parties the least motive and opportunity to favour foreign policy objectives and immigration control over the interests of asylum seekers.

B. Australian practice evaluated

(i) The High Court of Australia

In the *Chan* case, Mason CJ,[74] Dawson J,[75] Toohey J[76] and McHugh [77] held that a refugee status claimant's 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.[78] This expression conveys the requirement that the chance must not be a remote one[79] but imposes no requirement that there must be a greater than 50 per cent chance.[80] Two of the High Court judges who favoured this formulation were of the view that it imposed the same standard as that imposed by the House of Lords in the *Sivakumaran* case and the US Supreme Court in the *Cardoza-Fonseca* case, drawing no distinction of substance between those two decisions.[81] However, like Lord Goff of Chieveley in the *Sivakumaran* case, Dawson J explicitly rejected the UNHCR

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73 In Lord Goff's view the UK approach is more consistent with the *travaux preparatoires* and the objects of the Refugee Convention than the UNHCR approach: The *Sivakumaran* case above n9 at 999-1000. However, the previous discussion has already established that, contrary to the Lord's assertion, the *travaux preparatoires* support the view that an applicant need only give a plausible account of his or her fear to establish that he or she has a "well-founded fear" of being persecuted.

74 Above n28 at 418.

75 Id at 425.

76 Id at 432.

77 Id at 448.

78 Gaudron J 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": id at 436.

79 Id at 418, 425, and 432 per Mason CJ, Dawson J and Toohey J respectively.

80 Id at 418, 425, 432, and 448 per Mason CJ, Dawson J, Toohey J and McHugh J respectively.

81 Id at 418 per Mason CJ; id at 431-2 per Toohey J (tentatively); cf id at 424 and 446 per Dawson J and McHugh J respectively.

Handbook's emphasis on the subjective element of the test, though he recognised the policy rationale for such an emphasis. Dawson J said:

> "well-founded" must mean something more than plausible, for an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him, to have no foundation. It is clear enough that the object of the Convention is not to relieve fears which are all in the mind, however understandable, but to facilitate refuge for those who are in need of it.[82]

On the whole, it would appear that the High Court has adopted the more restrictive UK approach to the "well-founded fear" standard.[83]

The Deputy Regional Representative of UNHCR has informed the Australian Joint Standing Committee on Migration Regulations that the "real chance" test set out in the *Chan* case is "the standard that the United Nations is promoting".[84] He said "I make reference to it as a standard consonant with our views and the actual definition of refugee. In no way is it an expansion. It is simply the correct interpretation as we see it".[85] However, he made these comments after making reference to UNHCR's amicus brief to the US Supreme Court in the *Cardoza-Fonseca* case[86] and it appears more likely that he was endeavouring to rebut the suggestion that the *Chan* test is unnecessarily generous than that he was informing the Joint Standing Committee that UNHCR has now chosen to depart from the views stated in the UNHCR Handbook.

(ii) Department of Immigration and Ethnic Affairs (DIEA)

The approach to the "well-founded fear" standard of DIEA officers, who process on-shore applications, is in practice even more restrictive than that of the High Court of Australia. They use the phrase "real chance" without really seeking to give it the content that the judgments in the *Chan* case have given to it. For instance, DIEA decision-makers often appear to take the view that a person cannot have a "well-founded fear" of future persecution unless he or she has been persecuted in the past.[87] In *Thavarajasingham v Minister for Immigration, Local Government and Ethnic Affairs*,[88] a Sri Lankan Tamil applied for judicial review of a DIEA decision to refuse refugee status. The applicant was a member of the People's Liberation Organization of Tamil Eelam (PLOTE), who had fled Sri Lanka in order to avoid anticipated persecution by the Liberation Tigers of Tamil Eelam (LTTE). The Minister's delegate had neither accepted nor rejected the applicant's claim that some of his friends had been killed by the LTTE as a result of their PLOTE activities and

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82 Id at 424.

83 According to the Australian Joint Standing Committee on Migration Regulations the Australian position "is generally taken" to lie between the US and UK positions though "rather closer" to the UK position: Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (1992) at 57.

84 Deputy Regional Representative of UNHCR (Evidence at 1431) quoted in Joint Standing Committee on Migration Regulations, id at 58.

85 Ibid.

86 Ibid.

87 Interview with E. Lester, Co-ordinator of the Refugee Advice and Casework Service (Victoria), 20 January 1992.

88 (1989) 19 ALD 751.

that his cousin had been kidnapped by the LTTE. Rather the delegate had dismissed the claim as being irrelevant to the application, "given the previous lack of interest in [the applicant] by the LTTE".[89] Davies J held that the Minister's delegate could not have approached the evidence in the manner that he did, if he had understood the "real chance" test endorsed by the High Court of Australia.[90]

On the other hand, it appears that the refugee status claims of Somalian applicants are very often successful where similar claims by nationals of countries such as Sri Lanka are not.[91] The fact that there is a discernible pattern to correct and incorrect applications of the "real chance" test suggests that the explanation for misapplication goes beyond a simple lack of comprehension of the test on the part of DIEA decision-makers. A more plausible explanation goes as follows.

Pakistan, Sri Lanka and Iran account for about 33 per cent of Australia's visa overstayers.[92] In other words, persons from these countries represent an immigration control problem. By contrast, Somalians are not included in the overstayer statistics contained in DIEA *Review '91*. This omission suggests that Somalians are not an immigration control problem. Turning now to the statistics on refugee status applications, as at 30 June 1992 the caseload of primary applications for refugee status stood at 21,653 applications with applications from Sri Lankans constituting 807 of these (third after Peoples' Republic of China (PRC) at 15,186 and Fiji at 964).[93] As at 30 June 1992, the caseload of review applications stood at 2,277 with applications from Sri Lankans constituting 127 of these (sixth after PRC, Fiji, Cambodia, Indonesia and India).[94] Somalia is not one of the countries on the Determination of Refugee Status (DORS) top ten countries list for either primary applications or review applications as at 30 June 1992.[95] These figures prompt speculation that most Sri Lankan asylum seekers would be perceived by refugee status decision-makers as persons, numerous enough to be of concern, who are prone to make refugee status applications to get around immigration rules. By contrast, the number of Somalians seeking to remain in Australia by claiming refugee status would be perceived as too small to be of concern whatever their motivations. The acceptance rates at primary stage suggest that primary stage decision-makers are indeed influenced by the statistics.[96] 137 primary applications from Somalians were finalised in the financial years 1989-90 to 1991-92, 121 of these were approved, 8 were refused, 1 lapsed and 7 were

89 Id at 752.

90 Id at 753.

91 Conversation with E Lester, 20 November 1992. See also *Rienzie Patrick Premalal Kekulutotuwage Don v Minister for Immigration, Local Government and Ethnic Affairs* 14 FCR 117, for further example of the misapplication of the "real chance" test by DIEA in relation to a refugee status claim made by a Sri Lankan.

92 "Tide of Migrants Threatens a Flood", *Age*, 7 July 1993 at 8.

93 Determination of Refugee Status (DORS) Policy Section, *Determination of Refugee Status: Statistical Report Financial Year 1991/92* at 6 (table headed "DORS — Overview of the top ten countries financial year 1991/92").

94 Ibid.

95 Ibid.

96 Note, only 5 review applications from Somalians and 9 review applications from Sri Lankans were finalised in this period (id at 28-9) — a number too small for any comment to be made on the pattern of decision.

withdrawn.[97] 258 primary applications from Sri Lankans were finalised in the same period, 18 of these were approved, 202 were refused, 6 lapsed and 32 were withdrawn.[98] In other words, the acceptance rate for Somalian claims was 88 per cent while the acceptance rate for Sri Lankan claims was 9 per cent. This enormous disparity in acceptance rates suggests that Sri Lankan claims are approached with a rejection mentality while Somalian claims are not, leading to an departmental inclination to misapply the "real chance" test in relation to one set of claims but not the other.

(iii) The Refugee Status Review Committee (RSRC)

The RSRC, too, appeared to apply a more restrictive test of the well-foundedness of an applicant's fear of being persecuted than the High Court's "real chance" test in the *Chan* case. For instance, one Cambodian refugee status applicant had been wrongly accused by authorities of spying for Pol Pot and had been summoned for questioning by them, upon which he had gone into hiding.[99] Two of his colleagues had been arrested for failing to comply with similar summons.[100] The RSRC found that the making of the accusation did not provide an objective basis for the applicant's fear of being persecuted for a Refugee Convention reason because the accusation was just an attempt by corrupt officials to secure bribe money.[101] The RSRC was clearly speculating as to the motivation for the false accusation.[102] The authorities making the accusation could in fact have believed that the applicant was a Pol Pot spy.[103] Alternatively, the accusation may have been cynically made but those in authority not party to the corruption may have believed it once it was made.[104] In either case, the applicant's chance of being persecuted for an imputed political opinion would surely not have been a remote one.[105]

Australia's immigration control objectives and foreign policy objectives militate against the easy acceptance of the refugee status claims of Cambodians. The arrival of the recent wave of "boat people"[106] has caused Australia to fear that it is losing control of its northern borders.[107] It fears that generous

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97 Id at 28 (table 10).

98 Id at 29 (table 10).

99 Fact accepted by the Minister's delegate at the primary stage: Primary Assessment and Record of Decision, 6 February 1992 in relation to File 14 (this file number and all the others used in relation to information which has been drawn from Refugee Advice and Casework Service of Victoria (RACS) client files are the author's personal identifiers. The consent of the clients concerned to use the material herein presented was obtained on terms that the numbers allocated to their files by RACS and DIEA and other details which may identify them would not be disclosed.

100 Fact accepted by the Minister's delegate at the primary stage, ibid.

101 Summing up of RSRC deliberations of 23 July 1992 in relation to File 14.

102 Suggestion of a RACS lawyer contained in RACS Submission to the RSRC (drafted by the author) in relation to File 14.

103 Ibid.

104 Ibid.

105 That is the "real chance" test would be met.

106 The wave commenced in November 1989: DIEA *Review '92* at 82.

107 Commonwealth, *Parliamentary Debates*, Senate, 5 May 1992, 2249-50 (Senator Bolkus, then Minister for Administrative Services but presently Minister for Immigration); "Deportations message to Chinese conmen", *Australian*, 9 November 1992 at 3 citing "senior federal government officials"; *Lek Kim Sroun v The Minister for Immigration Local Gov-*

treatment of the boat people arriving in Australia may encourage hordes more to come in boatloads to Australia in hopes of being allowed to remain.[108] Its solution is to be resolutely ungenerous in the treatment of boat people in the hope that others will not be tempted down the same path.[109]

Moreover, there is a widespread perception among the lawyers representing Cambodian asylum seekers that the Australian government believes that granting asylum to Cambodians will undermine the Cambodian peace process, of which Australia is an architect, and that this makes the Australian government particularly desirous of rejecting the refugee status claims of Cambodians. Unguarded comments by Ministerial advisers and the like (on and off the record) give substance to this perception. For instance, the *Bangkok Post* 16 April 1992 contained the following report:

> Australia is refusing asylum to Cambodian refugees because of fears it would undermine the Cambodian peace process, a government official admitted yesterday. Harriet Swift, senior adviser to Immigration Minister Gerry Hand, said the risk was that to accept the boat people as refugees would suggest it was unsafe to return to Cambodia. "If we said it was unsafe for them to return and yet safe for millions of others in Cambodia, it would undermine the whole peace process," she told AFP.[110]

It is argued that the existence of this Governmental agenda probably made the government representatives on the RSRC feel pressured to refuse the refugee status claims of Cambodians.

Indeed, proof is not lacking that departmental officers were in fact subjected to under extraordinary pressure. In the course of a television interview on 6 June 1990 on the Channel 9 program, 'A Current Affair', Bob Hawke (then Prime Minister) asserted that the Cambodian asylum seekers who had arrived in Australia by boat were not genuine refugees.[111] In *Mok v Minister for Immigration and Ethnic Affairs*, Keely J held on the evidence before him that Hawke's comments had been motivated by the immigration control and foreign policy concerns outlined above.[112]

Hawke's comments on the Cambodians were made before any decision on refugee status had been taken by the appropriate decision-makers.[113] In the

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ernment and Ethnic Affairs, unreported judgment of Wilcox J, Federal Court, 22 June 1993 at 40-1 citing records of conversations at a "high level of government", including "the Ministerial level".

108 See, for example, "Hand gets tough on refugee hopefuls", *Weekend Australian*, 14-15 March 1992 at 6 citing Mr Hand, then Minister for Immigration.

109 Grattan, M, "Immigration and the Australian Labor Party" in Jupp J, and Kabala, M (eds), *The Politics of Australian Immigration* (1993) 127 at 136.

110 "Australia Defends Refugee Plan", *Bangkok Post*, 16 April 1992 at 2.

111 Mr Hawke labelled the Cambodians economic refugees and said "we're not here with an open-door policy saying anyone who wants to come to Australia can come. These people are not political refugees": 'Hawke: Why Chinese May Stay, Cambodians Must Go", *Australian*, 7 June 1990 at 3.

112 "Judge slams Hawke, Evans", *Weekend Australian*, 13-14 November 1993 at 1-2. A copy of the unreported judgment was not available to the author at the time of writing.

113 Mr Hawke made this statement when asked why the Australian Government had commenced negotiations with the Cambodian Government for the repatriation of the boat people. Above n111. It is worth pointing out that these negotiations were taking place before any refugee status applications had even been considered, suggesting that the outcome of

television interview, Hawke made the further statement that he would be forceful in ensuring his comments would be followed.[114] In the *Mok* case, Keely J characterised this latter statement as "grossly improper and likely to intimidate and prejudice officers of the department".[115] Accordingly, Keely J allowed Ms Mok's application for review.

(iv) Summary of Australian position

In summary, it appears that the interpretation placed on "well-founded fear" by Australian courts, though not unique in international practice, is less favourable to refugee status claimants than the interpretation this article has suggested should be preferred. Even if it were conceded that the Australian courts are correctly interpreting "well-founded fear", DIEA continues in some cases to apply an even more onerous standard than that applied by the Australian courts and one which has no claim at all to being acceptable at international law. It may well be doing this because it believes that immigration control and foreign policy should be given relatively more weight and the moral entitlements of asylum seekers relatively less weight than the balance implicit in the Refugee Convention. The RSRC, too, applied a more onerous standard than the High Court of Australia, probably for the same reasons as DIEA. In short, Australian administrative practice is proof of the danger of interpreting "well-founded fear" in a way which emphasises the objective rather than subjective element — the danger that governments will succumb to the temptation to be less than objective in their judgments.

5. *"Persecution"*

A. *International Law*

(i) State practice

The harm covered

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.[116] Stenberg suggests that State practice may not support the proposition that violation of civil and political rights is generally to be regarded as persecution, although she states that the possibility cannot be ruled out in the individual case.[117] On the other hand, Canada, which receives enormous numbers of asylum seekers each year and is, therefore, affected to a greater extent than many other signatories by any enlargement of the scope of the Refugee Convention and Protocol, has regard to the "general human rights instruments" and to the "specific pronouncements of United Nations policy in regard to the elimination of discrimination on such grounds as

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the applications was a foregone conclusion.

114 Above 112.

115 Quoted in ibid.

116 Stenberg, above n16 at 65.

117 Id at 69.

race, gender or religion" in interpreting the term "persecution" in the Refugee Convention.[118]

The only point of interpretation on which all States are agreed is that the Refugee Convention does not protect persons who have purely economic reasons for wishing to remain outside their countries of origin.[119] This is not to say that economic deprivation cannot amount to persecution. Authorities in the US,[120] the UK, and Canada[121] have accepted that severe economic deprivation may constitute persecution.[122]

Is there a requirement of individualisation?

It is one of the "heresies"[123] propagated in relation to the Refugee Convention definition that mistreatment does not qualify as persecution unless it has been directed against the mistreated person as an individual. It can now be stated with some confidence that a State which requires claimants to show that they will be singled out for mistreatment is deviating from the interpretation of the refugee definition established by State practice. In Germany the courts have now accepted that, where a claim for refugee status is based on a fear of persecution for reasons of membership of a particular social group, it need only be shown that the group is being persecuted and that the claimant is a member of that group, in order to establish that the claimant himself or herself faces the threat of persecution.[124] In the UK, the High Court has now stated that individualisation need not be demonstrated as long as the claimant has a well-founded fear of being persecuted for a Refugee Convention reason.[125] In the US, too, the requirement that claimants show that they have been personally selected for persecution has been rejected by some US courts[126] and is no

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118 IRB, above n24 at 6.

119 For instance, Germany considers claims to refugee status based solely on economic grounds to be manifestly unfounded: Law of 6 January 1987 cited in Fullerton, above n10 at 179. Canada also distinguishes between refugees and economic migrants: Employment and Immigration Canada, *Immigration Manual* IE 12.03 1) a) (as at March 1992).

120 For example, *Dunat v Hurney* 297 F2d 744 (3rd Cir 1961); *Kovac v INS* 407 F2d 102 (9th Cir 1969); and *Minwalla v INS* 706 F2d 831 (8th Cir 1983). All cited in Sexton, R C, "Political Refugees, Non-refoulement and State Practice: A Comparative Study" (1985) 18 *Vanderbilt J Transn'l L* 731 at 784.

121 Above n 118 at 2.

122 Sexton, above n120.

123 So described in Crawford J and Hyndman, P, "Three Heresies in the Application of the Refugee Convention" (1989) 1 *Int'l J Refugee L* 155.

124 Judgment of *Bundesverfassungsgericht (Federal Constitutional Court), 2 BvR 902/85, 515/89, 1827/89 abstracted in (1992) 4 Int'l J of Refugee L* 99 at 100; see also Fullerton, M, "Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany" (1990) 4 *Georgetown Immigration LJ* 381 at 421 citing Judgment of 1 April 1983, Verwaltungsgericht Köln (Administrative Court, Cologne) No 15 k 15316/80.

125 Matas, D, "Innocent Victims of Civil War as Refugees" in Centre for Refugee Studies, York University, *Obligations and Their Limits: Refugees at Home and Abroad* (collection of unpublished conference papers, 25-28 May 1991) I at 127, 133 citing *Ex Jeyakumaran* (unreported, 1988) and *Ex Coomaraswamy* (unreported, 1985). In *R v Secretary of State for the Home Department ex parte Ayhan Gulbache* [1991] Imm AR 526 at 532, Roch J accepted the view taken in the *Jeyakumaran* case, though, arguably, he retreated slightly from it.

126 Porter, G S "Persecution based on Political Opinion: Interpretation of the Refugee Act of 1980" (1992) 25 *Cornell Int'l LJ* 231 at 242-3 *citing MA A26851062 v INS* 858 F2d 210

longer imposed by US practice.[127] In the Canadian case of *Re Salibian and Minister of Employment and Immigration*[128] the Federal Court of Appeal held that the conclusion of the IRB, that for a plaintiff to be eligible for refugee status he had to be a target of reprehensible acts directed against him in particular, was an error of law.[129] The IRB no longer requires an individual to show that he or she has been singled out for persecution.[130] The IRB now asserts that the imposition of a singling out requirement would "render meaningless the 'particular social group' basis for persecution".[131]

A particularly subtle manifestation of an illegitimate individualisation requirement is illustrated by the approach of the US Fourth Circuit Court to a refugee status claimant from a country experiencing generalised violence. The Fourth Circuit Court is less inclined to characterise that person's fear of harm as a fear of being persecuted for a Refugee Convention reason and more inclined to characterise it as a fear of the random dangers of a violent society.[132] By contrast, Canada's Federal Court of Appeal in the *Salibian* case held that:

> a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition.[133]

This is also the IRB's preferred position.[134] The IRB has further stated that, while the well-foundedness of a refugee status claim cannot be established by showing simply that a regime engages in generalised oppression, "living in a heavily regimented authoritarian system"[135] should not (by analogy with *Re Salibian*) be an obstacle to a claim.[136] The IRB must be correct. If it were not the Refugee Convention would be a hollow instrument indeed. As Graves points out, "[m]ost persecution occurs in the context of general oppression

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(4th Cir 1988). See also *Sanchez-Trujillo v INS* 801 F2d 1571 (9th Cir 1986) at 1574. The courts of other circuits have, however, insisted on individualisation. Porter, id at 242 citing *Gumbol v INS* 815 F2d 406 (6th Cir 1987) at 411.

127 A regulation states "the asylum officer or immigration judge shall not require the applicant to provide evidence that he would be singled out individually for persecution": 8 CFR 209.13(b)(2)(i) (27 July 1990) quoted in Matas, above n125 at 134.

128 Re Salibian and Minister of Employment and Immigration, (1990) 73 DLR (4th) 551.

129 The Court made the following propositions: "(1) the applicant does not have to show that he himself has been persecuted in the past or would himself be persecuted in the future; (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him, but from reprehensible acts committed or likely to be committed against members of a group to which he belonged ...". Above n128 at 558.

130 Above n24 at 15 endnote 21.

131 Ibid.

132 Porter, above n126 at 243. The Fifth and Ninth Circuit Courts treat the fact that a refugee status claimant comes from such a country as a factor tending to support the well-foundedness of his or her claim, ibid. This is no doubt on the reasoning that persecution for Refugee Convention reasons is more likely to take place in societies where the rule of law has broken down.

133 Above n128 at 558.

134 IRB, *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution* (March 1992) 8.

135 Above n118 at 3.

136 Id at 2-3.

and instability or both. It is rare that stable, tolerant, and democratic governments single out a few people for persecution".[137]

Since the meaning of the term "persecution" has not been clearly established by State practice, it is necessary to turn to the supplementary means of interpretation.

(ii) UNHCR Handbook

The harm covered

The UNHCR Handbook, while stating that there is no "universally accepted definition of persecution", cites Article 33 of the Refugee Convention in support of the proposition that a threat to life or freedom is always persecution.[138] The UNHCR Handbook suggests that other serious violations of human rights would also constitute persecution.[139] It should be noted in particular that the UNHCR Handbook states that economic measures, such as the withdrawal of trading rights, which "destroy the economic existence" of a particular group on Refugee Convention grounds, would amount to persecution.[140]

Is there a requirement of individualisation?

The UNHCR Handbook arguably eschews an individualisation requirement when it makes the proposition that what happened to friends, relatives and other members of the same racial or social group may show that the applicant's fear that sooner or later he or she also will be persecuted is well-founded.[141] It could not be the case that the persecution of other members of a racial or social group would establish the well-foundedness of an applicant's fear that he or she as an individual person might be targeted for persecution. It could only establish the well-foundedness of an applicant's fear that he or she *as* a member of that racial or social group might be targeted for persecution.

(iii) The intention of the drafters

The actual wording of the Refugee Convention definition was devised by a working group consisting of the French, Israeli, UK and US representatives on the Ad Hoc Committee.[142] The draft definitions put forward were deliberately broad and intended to extend protection to as many persons as possible.[143] For example, the French delegate assured the representative of the American Federation of Labor that, although there was no specific mention in the Refugee Convention of persons who had left their country for economic and social reasons, in "actual practice he felt sure that [the persons to whom the American Federation of Labor representative referred] would be recognised as refugees".[144]

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137 Graves, M, "From Definition to Exploration: Social Groups and Political Asylum Eligibility" (1989) 26 *San Diego LR* 739 at 810.
138 UNHCR Handbook para 51.
139 Id para 51.
140 Id para 63.
141 Id para 43.
142 Sautman, above n30 at 533.
143 Id at 532-3.
144 UN Doc E/AC.32/SR.17 cited in Hathaway, above n52 at 103 footnote 33.

It should be noted, in particular, that an examination of the *travaux preparatoires* to the Refugee Convention confirms the view that an individualisation requirement is illegitimate. Comments of the Israeli representative indicate that the working group intended the definition of "refugee" to be adequate to cover Spanish Republicans and victims of the German dictatorship, that is persons who often had not experienced individualised persecution.[145]

(iv) The case for liberal interpretation

The harm covered

It is argued that violation of a far more extensive set of rights than simply the right to life and the right to physical freedom should be regarded by States parties to the Refugee Convention as amounting to persecution. It is argued that, as a matter of principle, States should interpret the term "persecution" in the Refugee Convention in the light of human rights treaties to which they are party. "Persecution" is the label used to characterise the infliction of those harms for which human beings have the most repugnance. There can be no better indication that the international community has great repugnance for a particular harm than the fact that a multilateral treaty has been signed in which States have bound themselves to protect persons from that harm. In other words, by utilising this approach, asylum seekers with the most pressing moral claims to protection can be identified and protected and those with the least pressing claims can be identified and returned on a morally and legally defensible basis. This approach is morally and legally defensible because human rights treaties represent the moral judgments of the international community in legal form.

It is noted in passing that it is certainly the view of the United Nations Human Rights Committee[146] that parties to the International Covenant on Civil and Political Rights (ICCPR) should interpret their obligations under the Refugee Convention "in a manner consonant with obligations under the Covenant".[147]

It is contended that in the hierarchy of human rights, the right of national, ethnic, racial and religious groups to be protected from genocide[148] is in the same category as the right to life. This contention is supported by the fact that the International Court of Justice has stated that the principles underlying the

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145 Sautman, above n30 at 533-4.

146 The Committee was established under Article 28 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS at 171.

147 UN Human Rights Committee, examination of Canada under Article 40 of the ICCPR, 22-23 October 1990 cited in Clark, T, "Obligations Concerning the Return of Nationals to an Internationally Recognized Armed Conflict" in Centre for Refugee Studies, York University, *Obligations and Their Limits: Refugees at Home and Abroad* (collection of unpublished conference papers, 25-28 May 1991) I at 165, 178.

148 In the *Convention on the Prevention and Punishment of Genocide*, 9 December 1948, 78 UNTS at 277 (hereinafter the Genocide Convention), "genocide" is defined as meaning "any of the following acts, committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such: a, Killing members of the group; b, Causing serious bodily or mental harm to members of the group; c, Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d, Imposing measures intended to prevent births within the group; e, Forcibly transferring children of the group to another group". See Article 2 of the Genocide Convention.

Genocide Convention[149] are principles of *jus cogens*.[150] Moreover, it is contended that rights relating to the physical and mental integrity of the individual human person, for instance the right not to be subject to torture and other cruel, inhuman and degrading treatment, are in the same category as the right to life.[151] This contention is supported by the fact that, while Article 4(1) of the ICCPR, a treaty to which Australia is party,[152] allows derogation from most of the rights set out therein, Article 4(2) provides that State parties are not permitted to derogate from the right not to be subject to torture and other cruel, inhuman and degrading treatment[153] under any circumstances.[154] Australia is also a party[155] to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[156] in which the right to protection from torture is made non-derogable under any circumstances.[157] It follows that, whatever other rights could be violated without amounting to persecution within the meaning of the Refugee Convention and Protocol, genocide and the violation of such rights as the right not to be subject to torture and other cruel, inhuman and degrading treatment would always amount to persecution.[158]

Next in the hierarchy is the right to physical freedom. Article 4(2) of the ICCPR provides that no derogation is permitted from its prohibition on slavery[159] and the International Court of Justice has stated that the prohibition on slavery is a principle of *jus cogens*,[160] so freedom from slavery at least could be considered to rank equally with the right to protection from genocide and the right to physical and mental integrity. Moreover, as discussed earlier, less extreme deprivations of physical freedom should also be considered to be part of the minimum content of the term "persecution" because of the terms of Article 33 of the Refugee Convention.

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149 Australia is a party to this treaty.

150 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* 1970 ICJ Rep 3 at 32 (Judgment of 5 February 1970).

151 As previously mentioned the violation of the right to life unquestionably amounts to "persecution".

152 This convention entered into force on 23 March 1976. Australia ratified the treaty with effect from 13 November 1980: 1197 UNTS at 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* (1992) at 23; [1993] *Australian Legal Monthly Digest* para 1664.

153 These rights are set out in Articles 6 and 7 of the ICCPR.

154 Above n52 at 109.

155 Australia lodged an instrument of ratification of the convention 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* at 471.

156 Hereinafter cited as the Torture Convention. This convention entered into force on 26 June 1987: Stenberg, above n16 at 245 footnote 1.

157 Article 2(2) of the Torture Convention.

158 Stenberg, above n16 at 68.

159 Article 8 of the ICCPR.

160 Above n150.

The ICCPR provides that, in addition to the rights already discussed, the following rights are also non-derogable rights: the right not to be punished for an act which was not a criminal offence when committed;[161] the right to recognition as a person before the law;[162] and the right to freedom of thought, conscience and religion.[163] The International Court of Justice has stated that the right to protection from racial discrimination is a principle of *jus cogens*.[164] It could be said, therefore, that the international community has decided that these rights also rank equally with the right to physical and mental integrity.[165] Moreover, the other rights set out in the ICCPR can be derogated from only "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" and then only to the extent "strictly required by the exigencies of the situation".[166] Thus failure by a State party to respect these rights in other circumstances is just as much persecution as a failure to respect the strictly non-derogable rights.[167]

Australia ratified the International Covenant on Economic Social and Cultural Rights on 10 December 1975.[168] It is argued, therefore, that Australia should interpret "persecution" as extending to the violation of the rights set out in that Covenant also. It must be stated at the outset, however, that the simple failure by a State to achieve fully the standards set down in the International Covenant on Economic Social and Cultural Rights (ICESCR) is not a violation of economic and social rights. This is because of the understanding expressed in the ICESCR that no more can realistically be expected of States with limited resources than that they "undertake to take steps ... to the maximum of [their] available resources, with a view to achieving progressively the full realisation of [such] rights"[169] and that they ensure that to the extent that such rights can be realised they are guaranteed to all persons "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[170] If rights have not been violated there can be no persecution. It must be emphasised, however, that the deliberate failure of a State to guarantee the social and economic standards set out in the ICESCR to the maximum of its available resources, or failure to do so on a non-discriminatory basis, would amount to persecution.

Is there a requirement of individualisation?

The misconception that mistreatment does not qualify as "persecution" unless it has been directed against the mistreated person as an individual has been refuted through an examination of State practice, the UNHCR Handbook and the *travaux preparatoires*. It goes without saying that a definition of "persecu-

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161 Article 15 of the ICCPR.
162 Article 16 of the ICCPR.
163 Article 18 of the ICCPR.
164 Above n150.
165 Above n52 at 109.
166 Article 4(1) of the ICCPR.
167 Above n52 at 110.
168 International Covenant on Economic Social and Cultural Rights, 16 December 1966, 993 UNTS at 3. Hereinafter cited as the ICESCR. The ICESCR entered into force on 3 January 1976.
169 Article 2(1) of the ICESCR.
170 Article 2(2) of the ICESCR.

tion" which required individualisation would be most illiberal and would hence contravene the spirit of the Refugee Convention.

B. Australian practice evaluated

(i) The Australian Courts

In *Woudneh v Rodney Inder and Minister for Immigration, Local Government and Ethnic Affairs,*[171] Grey J noted that the *Migration Act* 1958 (Cth) (*Migration Act*) made specific reference only to the definition of "refugee" in the Refugee Convention and Protocol.[172] He said that a person making a decision under the *Migration Act* was under no obligation to have regard to provisions in other international treaties which, unlike the Refugee Convention definition, had not been incorporated into the legislation.[173] He concluded that a failure to act in accordance with such unincorporated treaty provisions could not render the decision in question reviewable for error of law.[174] By contrast in the *Premalal* case, Einfeld J said:

> It is ... appropriate, in reviewing refugee status decisions of this kind, to take into account the best available examples of objectivity in this field, namely the various international human rights principles and conventions to which Australia is a party.[175]

Einfeld J pointed out that the High Court had recently and repeatedly[176] accepted the principle that the courts should look to the provisions of treaties ratified by Australia for guidance in interpreting domestic legislation and said:[177]

> Nowhere are considerations of international instruments of human rights more important than in the area of refugees. Australia ratified the [Refugee Convention and Protocol] on the basis of 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. The contents of these rights, although not only or particularly applying to refugees, is comprehensively dealt with in the International Covenant on Civil and Political Rights (ICCPR) which Australia ratified by legislation in 1981 (the *Human Rights Commission Act* 1981).

Not only does Einfeld J's approach better accord with the views of the High Court of Australia, it is the approach which must be taken if Australia is to fulfil its international obligations under the Refugee Convention.

The High Court of Australia has been reluctant to define the limits of the concept of persecution. In the *Chan* case, Mason CJ said that "the denial of

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171 Federal Court of Australia, unreported, 16 Sept 1988, No 86 of 1988.

172 Id at 16.

173 Ibid. It is beyond the scope of this thesis to enter into the controversy which rages in common law jurisdictions as to the domestic legal effect of treaty provisions, which have not been incorporated into domestic legislation. See McGinley, G P J, "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 Adel LR 367.

174 Above n171 at 16.

175 *Premalal* above n91.

176 *Mabo v the State of Queensland* [1992] 175 CLR 1, *Capital Television Pty Ltd v Commonwealth (No 2)* [1992] 108 ALR 577, *National News Pty Ltd v Wills* [1992] 103 ALR 681 and *Dietrich v The Queen* [1992] 109 ALR 385.

177 Above n175 at 49-50.

fundamental rights and freedoms otherwise enjoyed by nationals of the country concerned" may constitute the "harm" to which he referred.[178] In the context of the facts before him, he said:

> [d]iscrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character.[179]

Mason CJ expressly refrained from considering whether "*any* deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution".[180] Dawson J found it unnecessary, for the purposes of the case before him, to express a view as to whether "actions other than a threat to life or freedom would amount to persecution".[181] Similarly, Gaudron J confined herself to the observation that, "[w]hatever else may lie within the meaning of 'persecution', significant deprivation of liberty certainly falls to be so characterised".[182] McHugh J was alone in expressly stating that the "harm threatened need not be that of loss of life or liberty".[183] In his view, other "[m]easures 'in disregard' of human dignity" could amount to persecution in appropriate cases.[184] He gave as examples of such measures, "the denial of access to employment, to the professions and to education or the imposition of restrictions on freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement".[185] It appears that McHugh J interprets "persecution" as the violation of the sorts of rights which are enshrined in the ICCPR and the ICESCR though he makes reference to neither covenant. His approach to the interpretation of persecution is, therefore, consistent with the approach advocated in this article. On the basis of current trends, it appears that it will be McHugh J's analysis of the nature of persecution which will most influence subsequent Australian decisions.[186]

In the *Chan* case, Mason CJ said: "harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of their membership of the group, amounts to persecution if done for a Convention reason".[187] A similar proposition was put forward by McHugh J.[188]

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178 (1989) 87 ALR 412 at 417.
179 Id at 418.
180 Id at 417.
181 Id at 426.
182 Id at 438.
183 Id at 449.
184 Ibid.
185 Ibid.
186 For example, McHugh J's analysis was cited by Davies J in the *Thavarajasingham* case (1989) 19 ALD 751 at 752. See also the *Premalal* case above n175 at 49-52 for an analysis consistent with that of McHugh J.
187 Above n178 at 417.
188 Id at 449.

(ii) Department of Immigration and Ethnic Affairs (DIEA) and the Refugee Status Review Committee (RSRC)

The harm covered

DIEA's *Procedures Advice Manual*[189] provides its officers with guidelines for assessing overseas applications for entry into Australia within the refugee quota. These guidelines are not intended to be used and are not used to assess on-shore refugee status applications.[190] However, it is instructive to compare the *Procedures Advice Manual* guidelines relating to off-shore refugee applications with Australian practice in relation to on-shore refugee status applications.

The assessment guidelines in the first edition of the *Procedures Advice Manual* (PAM I) contained a "list of factors which may be considered persecutory". This list included "threats to life, liberty and security of person; slavery or servitude without compensation; torture and cruel, inhuman or degrading treatment" and arbitrary arrest and detention.[191] This listing was repeated in the second edition of the *Procedures Advice Manual* (PAM II). In other words, in the context of assessing overseas applications for refugee status, DIEA accepts that the violation of rights relating to physical and mental integrity and physical freedom can amount to persecution.

The PAM I list of factors which may be considered persecutory also included "continued or periodic harassment, detention or arrest [for a Refugee Convention reason]" exile (including internal exile) for a Refugee Convention reason; and coercive re-education of former elites for a Refugee Convention reason.[192] This listing was repeated in the PAM II. PAM I also went on to state that, where personally directed for a Refugee Convention reason, the following may also amount to persecution: "arbitrary interference with a person's privacy, family, home or correspondence";[193] "enforced social and civil inactivity; removal of citizenship rights";[194] "passport denial"[195] and "constant surveillance or pressure to become an informer".[196] PAM II here departs from PAM I because it says that an interviewing officer should consider these factors in assessing whether the applicant is subject to "substantial discrimination" as distinct from "persecution".[197] Thus it appears that, in the context of assessing overseas applications for refugee

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189 DIEA publishes the *Procedures Advice Manual* (loose leaf service) for the guidance of its officers and the public.

190 Interview with DIEA official A, 24 February 1993. Off-shore applications for refugee entry are dealt with on a discretionary basis whereas on-shore applications must be dealt with in accordance with the Refugee Convention and Protocol, ibid. While Australia is prepared to provide officers with guidelines for the application of sovereign discretion, it takes the view that it should avoid adding its own glosses to the words of the Refugee Convention and Protocol, ibid.

191 DIEA, *PAM I, Refugee and Humanitarian Visas, Topic 3: Refugees (Class 200)* (2nd edn, March 1990) para 6.3.2; DIEA, *PAM II* (June 1993), ch 21 at 15.

192 DIEA, *PAM I, Refugee and Humanitarian Visas, Topic 3: Refugees (Class 200)* (2nd edn, March 1990) para 6.3.2; DIEA, *PAM II* (June 1993), ch 21 at 15-6.

193 See Article 17 of the ICCPR.

194 See Article 25 of the ICCPR.

195 See Article 12 of the ICCPR.

196 Above n191 para 6.3.3.

197 DIEA, *PAM II* (June 1993), ch 21 at 16-7.

status, DIEA accepts, or at one stage accepted, that violation of a broad range of other civil and political rights can amount to persecution.

Although PAM I stated that "Australia does not accept as refugees, people who have left their country of nationality or usual residence solely for the purpose of seeking enhanced economic opportunities or a better life in a more developed country",[198] the assessment guidelines recognised that economic deprivation, for instance denial of "all means of earning a livelihood"[199] or even "denial of work commensurate with training and qualifications", the "payment of unreasonably low wages"[200] or "relegation to substandard dwellings",[201] may constitute persecution,[202] where such deprivation can be characterised as "personally-directed economic reprisal" rather than the result of "a country's economic system or policies".[203] PAM I also stated that "exclusion from educational institutions" may be persecutory if personally directed for a Refugee Convention reason.[204] Again PAM II departs from PAM I because it says that an interviewing officer should consider these factors in assessing whether the applicant is subject to "substantial discrimination" as distinct from "persecution".[205] In short, DIEA's stated interpretation of "persecution" is, or at one stage was, in conformity with the general consensus of State parties to the Refugee Convention and Protocol insofar as it accepts that severe economic deprivation can amount to persecution.

Although the type of actions characterised as persecution by the various Justices in the Chan case are actions which DIEA itself is or was prepared to describe as persecution in its guidelines for assessing overseas claims, DIEA has expressed concern that the High Court decision in the Chan case gives the term "persecution" too wide a meaning.[206] The Australian Joint Standing Committee on Migration Regulations has also attacked the High Court's observations about the concept of persecution, especially those of McHugh J,[207] as being "unnecessarily and unhelpfully broad".[208] Yet, apart from the judgment of McHugh J, the judgments in the Chan case went no further than necessary for the resolution of that case, which was no further than endorsing the minimum content of "persecution". Moreover, McHugh J's concept of "persecution" appears simply to be correct rather than "unnecessarily" broad. The real reason for the Joint Standing Committee's concern becomes transparent from the following comment:

> In Australia, if the High Court's tests for persecution are followed, there is little scope for refusals on "persecution" grounds.[209] In the Committee's

198 Above n191 para 5.1.2.
199 See Article 6 of the ICESCR.
200 See Article 7 of the ICESCR.
201 See Article 11 of the ICESCR.
202 Above n191 para 6.3.3.
203 Id para 6.3.4.
204 Id para 6.3.3. See Article 13 of the ICESCR.
205 Above n197 at 1.6
206 DIEA, *Review '90: Annual Report 1989-90* at 45.
207 The Joint Standing Committee appears to have taken alarm at some of the phrases used by McHugh J. The phrases "selective harassment" and "threatening with harm" are quoted by the Joint Standing Committee on Migration Regulations above n83 at 62.
208 Ibid.
209 For instance, in the context of commenting on McHugh J's definition of "persecution", Birrell has pointed out that it is a fact of life in China that citizens are assigned to geo-

> view, issues of persecution require political judgment, not a legal solution. The basis for refugee refusals in Australia after *Chan* is likely to be the credibility grounds. This not only limits the capacity of the Government to refuse refugee applications, it also has implications for the form of the determination and adjudication process.[210]

In other words, both sides of politics are united in the view that the function of interpretation is not to ensure that those entitled to protection receive it but to manipulate the Refugee Convention definition so as to give effect to the government's political choices, in particular its wish to deal with on-shore asylum seekers as if they were purely and simply an immigration control problem.

Senator Bolkus, Minister of Immigration, has emphasised the importance of Australia receiving asylum seekers who make applications for entry from *overseas* and has described on-shore asylum seekers as queue jumpers.[211] This is very much an immigration control perspective. As Luke Hardy explains, Australia's generous off-shore refugee resettlement program is part of Australia's strategy for keeping potential floods of on-shore asylum seekers at bay.[212] Australia hopes that by holding out the possibility of orderly entry to asylum seekers it will persuade many to desist from attempting disorderly entry.[213] The persons who benefit from Australia's off-shore refugee programs are selected by Australia. This is consistent with the immigration control objective. The persons who benefit from Australia's Refugee Convention obligation of non-refoulement are self-selected. Once Refugee Convention refugees have established a physical presence in Australia, Australia has, theoretically, no choice but to meet its international obligations towards them. This undermines immigration control.

It is not far fetched to suggest that in deciding on-shore claims to refugee status DIEA's approach to the interpretation of the term "persecution" in the Refugee Convention definition is shaped by the attitude of its political masters.[214]

The UNHCR office in Australia has on a number of occasions disagreed with DIEA officers' interpretations of "persecution"[215] and it has been the experience of lawyers who represent on-shore refugee status claimants that in

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graphic areas and punished if they move elsewhere: Birrell, R, "Problems of Immigration Control in Liberal Democracies: The Australian Experience" in Freeman G P and Jupp J (eds), *Nations of Immigrants: Australia, the United States and International Migration* (1992) 23 at 30. According to Birrell, the fact that a person would only fall within the Refugee Convention definition if there is a Refugee Convention reason does not make the number of persons falling within the definition many fewer because in China "politics is linked to all aspects of life": ibid.

210 Joint Standing Committee on Migration Regulations, above n83 at 63.

211 Commonwealth, *Parliamentary Debates*, Senate, 5 May 1992 at 2253-4 (Senator Bolkus, then Minister for Administrative Services).

212 Hardy, L, "Running the Gamut: Australia's Refugee Policy" in Keal P (ed), *Ethics and Foreign Policy* (1992) 146 at 153-4.

213 Id at 154.

214 DIEA contends that there is "no management instruction" requiring any particular interpretation of "persecution" and that its officers are expected to make decisions on on-shore refugee status claims by applying what they find in the Refugee Convention, the UNHCR Handbook and key judicial decisions to the individual circumstances of the case before them: Interview with DIEA official A, 13 January 1992.

215 Interview with Domzalski, H, Deputy Regional Representative for Australia, New Zealand and the South Pacific of UNHCR, 14 January 1992.

practice DIEA officers rarely accept that there is a risk of "persecution" in situations outside those in which a threat to life or physical freedom is involved.[216] The following is an example illustrating the restrictive approach of DIEA officers to the concept of "persecution".

In a Cambodian case, the Minister's delegate accepted that in the late 1980s the applicant's house had been searched for illegal religious items and that, upon refusal to pay bribe money, the applicant had been taken to do forced labour.[217] However, the delegate did not consider that the search or the subsequent requirement to perform forced labour was persecution for a Refugee Convention reason nor, in fact, did he consider that it was persecution at all.[218] The delegate's position is difficult to understand. The fact that religious items used by ethnic Chinese Buddhists were illegal in Cambodia was in itself a violation of the right of a person to manifest his or her religion in public or private, in teaching, practice, worship and observance.[219] The searching of houses in order to enforce a law that violated that right had also to be a violation of another fundamental right: the right to be free from arbitrary interference with privacy, family, home and correspondence,[220] which right can only be derogated from in strictly limited and extreme circumstances,[221] none of which were applicable.[222] Finally, forced labour is prohibited by Article 8(3)(a) of the ICCPR unless it is for a purpose condoned by Article 8(3)(c) of the ICCPR. Requiring a person to perform forced labour for refusing to pay bribe money to avoid the consequences of a search made in violation of other fundamental rights is certainly not one of the purposes condoned.[223]

In the same case, the applicant claimed that he was unable, in Cambodia, to speak Chinese openly. The Minister's delegate accepted that "the public use of Chinese may have been subject to summary arrest".[224] He stated that the "large body of evidence advanced by the ethnic Chinese Khmer among the boat people indicates that there were restrictions on the extent to which the Chinese language could be spoken publicly and that violations of the restrictions could attract a period of imprisonment or the necessity to pay bribes or fines".[225] However, he maintained his finding that "Chinese Khmer *have not* and will not under current circumstances be subject to measures amounting to persecution for the public expression of their language".[226] Given the Minister's delegate's findings of fact, his assertion that the Chinese Khmer have not been subjected to measures amounting to persecution for the public expres-

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216 RACS, Seminar held in Victoria on 19 November 1991.
217 DIEA, Primary Assessment and Record of Decision, 6 February 1992 in relation to File 14.
218 Ibid.
219 Article 18(1) of the ICCPR. Argument in RACS submission to the RSRC (drafted by the author) in relation to File 14.
220 Article 17(1) of the ICCPR.
221 "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" and then only "to the extent strictly required by the exigencies of the situation" and provided that the measures taken "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin": Article 4(1) of the ICCPR.
222 Above n219.
223 Argument in RACS submission to the RSRC (drafted by the author) in relation to File 14.
224 Above n217.
225 Ibid.
226 Ibid (emphasis added).

sion of their language demonstrates that a too narrow meaning is being given to "persecution".[227] Since the right of ethnic Chinese to speak openly in Chinese, that is their right to freedom of expression,[228] was restricted in circumstances falling outside Article 19(3) of the ICCPR[229] and by reason of their Chinese ethnicity, and they were punished for failure to comply with such restrictions, it can clearly be said that ethnic Chinese have been subjected to persecution on Refugee Convention grounds.[230]

The applicant was no more successful in making out his claim before the RSRC. In another case, a North Vietnamese applicant of Chinese ethnicity claimed that he had been falsely accused of spying for China and had been sentenced to two years imprisonment.[231] He claimed that he was in fact kept imprisoned for nine years during which time he was kept close to starvation and frequently beaten.[232] The extra period of imprisonment was arbitrary detention in contravention of Article 9(1) of the ICCPR and the beatings constituted cruel, inhuman or degrading treatment or punishment in contravention of Article 7 of the ICCPR and also Article 10(1) of the ICCPR. The violation of such rights is clearly persecution. The RSRC rejected this application, expressing the view that the treatment to which the applicant had been subjected whilst "heavy handed" was not "excessive or persecutory".[233] In other words, many members of the RSRC tended to be as restrictive in their interpretation of "persecution" as DIEA.

Is individualisation required?

DIEA appears to require at least some on-shore applicants for refugee status to show that they have been targeted for harassment as individuals. For instance, in one Cambodian case the Minister's delegate said: "I consider that the applicant's claim that racist policies prevailed until his departure is not substantiated by evidence of discrimination *against the applicant or his family*".[234]

Both DIEA and the RSRC have rejected many applicants from countries experiencing civil strife who have only been able to demonstrate a well-founded fear of being persecuted as a member of a group and have not been able to demonstrate a fear of being persecuted in an individual capacity. For instance in one Sri Lankan case, the applicant had encountered trouble because of her part Tamil ethnicity while living in Sri Lanka and her mother[235] and her parental home had been attacked subsequent to her arrival in Australia. The Minister's delegate argued that, while the applicant's fear of persecution was sincere, the incidents on which it was based could "be attributed to the general state of high ethnic tension and strife that has prevailed in

227 Above n223.

228 Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression.

229 Article 19(3) provides that the right to freedom of expression can be restricted only so far as is necessary for "respect of the rights or reputations of others" or for "the protection of national security or of public order (*ordre public*), or of public health and morals".

230 Above n223.

231 "The Long Wait", *Australian Magazine*, 12-13 December 1992 at 38, 41-2.

232 Ibid.

233 Id at 42.

234 DIEA Minute (Record of Decision), 19 September 1991 in relation to File 13 (emphasis added).

235 Her mother was Sinhalese but was married to her Tamil father.

Sri Lanka since 1983 rather than to a systematic persecution of her family".[236] In other words, the delegate's proposition was that a refugee status claimant could not establish a claim to refugee status simply by establishing that persons of Tamil ethnicity in Sri Lanka are subjected to persecution by reason of their ethnicity and that he or she is a person of Tamil ethnicity. It did not even enhance a claimant's case to show that he or she had, as a Tamil person, actually experienced harassment in the past. He or she could only have established a claim to refugee status by establishing that there were persons in Sri Lanka who had notionally written his or her name on a list of persons to be hunted down and persecuted. In short, DIEA appears to have taken the approach which States such as Canada have explicitly and correctly rejected.

Using related reasoning, DIEA and the RSRC are doing something else which the IRB has correctly suggested should not be done. They are taking an approach which ensures that the larger the scale on which atrocities are committed by the government of a refugee status claimant's country of origin, the more difficult it will be for that claimant to succeed. In several Cambodian cases the RSRC has given the following as one reason for recommending against recognition of refugee status:

> the difficulties experienced by the Applicant during the Pol Pot era are consistent with the experiences of millions of other Cambodians and the Committee did not consider the Applicant's experiences during this period to be of an ongoing nature.[237]

What is objectionable about this reason for rejection is the implication that "difficulties" experienced by millions of others could not be "persecution" within the meaning of the Refugee Convention.[238] These claimants, though not targeted as individuals, were certainly targeted as members of a group (albeit a very large group) for Refugee Convention reasons so that their treatment should have been characterised as persecution. DIEA officers, too, have accepted that certain refugee status claimants suffered extreme hardship under the Pol Pot regime but declined to give weight to these past experiences because they were shared by most of the rest of the population.[239]

By contrast to the position of Sri Lankan and Cambodian applicants, a person who is a member of a persecuted Somalian clan has a reasonable chance of being recognised as a refugee on the basis that his or her clan is being persecuted.[240] It appears that the approach taken depends on the source country of the refugee status claimant.[241] As previously stated, there are not many Somalians claiming refugee status in Australia nor are Somalians likely to come here in larger numbers in the future.[242] Cambodians, however, may arrive in

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236 DIEA Minute (Record of decision), 13 July 1992 relating to File 1.

237 Reasons for recommendation of three members of the RSRC, Summing up of RSRC Deliberations, 28 July 1992 in relation to File 3. Though the form of words is taken from one particular file, this reason for rejection is repeated in relation to many Cambodian cases.

238 The reason for rejection quoted suggests also that there has been substantial change of circumstances in Cambodia so that the applicant's fear of future persecution is no longer well-founded despite the applicant's past experience. Though this aspect of the reasoning may be attacked on the facts, it is not objectionable as a statement of principle.

239 Above n87.

240 Ibid.

241 Ibid.

242 Ibid.

boatloads and Sri Lankans in planeloads and the approach to their refugee status claims is restrictive in proportion to the perceived threat to migration control. And, in the case of Cambodians, Australia's motivation to give great weight to foreign policy considerations is also strong.

(iii) Summary of Australian position

In summary, it appears that, in relation to the concept of persecution, the High Court of Australia takes a position which is generally in line with international law. However, some at least of the primary stage decisions made by DIEA officers are affected by serious misconceptions or deliberate misapplications of the Refugee Convention definition. The recommendations of the RSRC were not beyond reproach either. The fact that those misapplications to which this article has drawn attention just happen to have had the effect of causing the outcomes of the refugee status determination process to be more congruent with Australia's immigration control and foreign policy interests than would be the case if the Refugee Convention definition were correctly applied is a matter for considerable disquiet.

6. *"Reasons Of"*

A. *International law*

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. The view that this listing is exhaustive has, in fact, been challenged by some commentators.[243] However, State parties to the Refugee Convention and Protocol, for instance Canada[244] and the US,[245] appear to take the view that a claimant for the status of a Convention refugee must establish that he 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.

B. *Australian practice evaluated*

Australian courts take the view that the listing of grounds of persecution in Article 1A(2) is an exhaustive one.[246] Although this interpretation is consistent with the interpretation established by State practice, it does provide a very tempting "out" for decision-makers who are prepared to sacrifice logic in order to reject refugee status claimants. The author has come across cases in

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243 For example, Mushkat, R, "Balancing Western Legal Concepts, Asian Attitudes and Practical Difficulties — A Hong Kong Perspective" (unpublished conference paper, *International Law and Refugees in the Asia Pacific Region*, University of Melbourne Asian Law Centre, August 1990) 43; Aleinkoff, A T, "The Meaning of Persecution in United States Asylum Law" (1991) 3 *Int'l J Refugee L* 5 at 11.

244 *Marc Georges Severe* (1974) 9 IAC 42 at 47 per Houle J P cited in Hathaway, above n52 at 139.

245 Butcher, above n72 at 458.

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

which DIEA officers have advanced what can only be described as specious reasons for the conclusion that the persecution feared by the claimant in question is not persecution "for reasons of race". For example, one decision-maker said:

> the applicant acknowledges that contacts and influence can benefit those with "prejudicial" backgrounds[247] in Cambodia. I consider this admission weakens the applicant's claim of discrimination for any Convention-related reason, as the lack of influence and connections cannot in my opinion, be held to be Convention-related.[248]

Upon this reasoning one would have to conclude that, if some Jewish women in Hitler's Germany managed to save themselves from the holocaust by sleeping with Nazi officers, the persecution of other Jewish people would not have been for a Refugee Convention-related reason but because of their lack of like connections. The proposition has only to be put into this extreme form to expose its falsity.

DIEA is also too quick to conclude that persecution is not "for reasons of political opinion". For instance, according to UNHCR, there is no objective difference between a situation where a person has a well-founded fear of being persecuted for opinions he or she in fact holds and situations in which a person is persecuted for opinions which he or she does not hold but are attributed to him or her.[249] This view is accepted also by the Australian courts[250] and in theory by DIEA.[251] However, DIEA's application of this theory can be faulted. In *Pancharatnam v Minister for Immigration, Local Government and Ethnic Affairs*, Jenkinson J held that the DIEA decision-maker's conclusion that Sri Lankan authorities would not impute a political motive to the refugee status applicant's importation of heroin into Australia was one that no person in the position of decision-maker, as that position appear[ed] from the evidence before Jenkinson J, could reasonably have made.[252]

The applicant had drawn the decision-maker's attention to an Australian television program on which a Sri Lankan governmental representative had named him and imputed a political motive to his actions. Jenkinson J said:

> It would not be reasonable of the decision-maker to conclude that a Sri Lankan governmental representative would make such a public statement without belief in its truth, unless the decision-maker had some information to justify the conclusion. The absence of any reference either to the conclusion or to any such information justifies, in my opinion, a finding that either the conclusion was not reached by the decision-maker or the information was not in the decision-maker's possession. If the decision-maker had not come to that conclusion, it would not be reasonable of him to think that the governmental representative would not communicate his belief about the applicant to his home government, or to think that the home government would not accept what their representative had told them, unless the decision-

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247 That is ethnic Chinese.

248 Above n234.

249 UNHCR Handbook para 80.

250 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* above n28 at 451 per McHugh J; *Pancharatnam v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 26 ALD 217 (implicit in judgment).

251 This comes out in, for instance, the *Pancharatnam* case.

252 (1991) 26 ALD 217 at 223.

> maker had some information to justify him thinking either of those things. No suggestion appears that any of the decision-makers did have any such information.[253]

DIEA is equally reluctant to make the finding that a person has a well-founded fear of being persecuted for "reasons of religion". DIEA officers seem to take the view, for instance in relation to the treatment of ethnic Chinese Buddhists in Cambodia, that if people are being persecuted for activities they have engaged in by reason of belonging to a certain religion that is not the same thing as being persecuted for reasons of religion. They appear to suggest that, in most instances, persons who say they fear persecution on religious grounds have no legitimate claim to refugee status because they could and should avoid trouble by practising their religion in the privacy of their own home.[254] However, as the UNHCR Handbook points out the ICCPR provides for the right of a person to manifest his or her religion in public or private, in teaching, practice, worship and observance.[255] As a natural corollary, the prohibition of worship in public or private, prohibition of religious instruction and so on must be characterised as persecution for reasons of religion.[256] It appears that this view is accepted by the Federal Court of Australia. In the *Woudneh* case,[257] the applicant was an Ethiopian who had converted to Christianity while in Australia. There was evidence before the court that Christians had been imprisoned without trial in Ethiopia. The Court held that the decision-maker's conclusion that the applicant did not have a well-founded fear of persecution on religious grounds was so unreasonable that no reasonable person could have reached it on the material available to the decision-maker.[258] The decision-maker had implied that the applicant could avoid trouble by concealing his faith. Gray J said:

> [T]he applicant did not supply material dealing with the nature of the religious observances which his faith requires. It is reasonable to assume, however, that some form of public worship would be amongst them. In the absence of evidence that the applicant could conceal his faith consistently with practising it, it was not open to the first respondent to conclude that he would not be persecuted because his faith was unknown to the authorities. The mere fact of the necessity to conceal would amount to support for the conclusion that the applicant had a well-founded fear of persecution on religious grounds.[259]

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253 Ibid.

254 Abpve n87. This attitude exists, too, in Canada: *Orhan Demir*, Immigration Board Decision M82-1274, 6 January 1983 at 4 per Houle J P cited in above n52 at 147.

255 UNHCR Handbook para 71.

256 Id para 72.

257 Above n171.

258 Id at 21 per Gray J.

259 Id at 19.

7. *"Is Unable or, Owing to Such Fear, is Unwilling to Avail Himself of the Protection of that Country"*[260]

A. *International law*

It will often be the case, especially in the context of civil strife, that there will be people who fear persecution by non-government groups, in circumstances where the State is unable rather than unwilling to protect them from such persecution.[261] The US courts do not interpret the Refugee Convention definition as requiring State involvement in persecution. It is recognised by the US courts that a claimant who is able to show persecution "by a group which the government is unable to control" can succeed in establishing refugee status.[262] The same view is taken by the Supreme Court of Canada.[263] 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.[264]

B. *Australian practice evaluated*

In the *Chan* case, McHugh J stated that "[t]he threat need not be a product of any policy of the government of the person's country of nationality" and that "[i]t may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution".[265] In theory, this is the position also of the Australian government.[266] However, it is not particularly easy for a refugee status claimant to convince DIEA that his or her government is unable to provide protection from persecution. For instance, a Cambodian refugee status claimant, who was married to a man who had been involved in a guerilla group, claimed to have been raped by soldiers (or officials).[267] DIEA accepted her story but rejected her claim to be a refugee because, it said, she could have sought redress through the Cambodian courts.[268] The claim of a woman, who alleged sexual harassment by a senior security officer was dismissed for similar reasons.[269] At the time the assessments were made, there was no Cambodian Criminal Code[270] and, according

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260 That is the person's country of nationality. If the person does not have a country of nationality, the definition requires that the person "is unable or, owing to such fear, is unwilling to return to [the country of his or her former habitual residence]".

261 Matas, above n125 at 130.

262 *Bolanos-Henandez v INS* 767 F2d 1277 (9th Cir 1984) at 1284.

263 *Ward v The Attorney-General of Canada* (unreported, 30 June 1993, Supreme Court of Canada) reversing *Re Attorney-General of Canada and Ward* (1990) 67 DLR (4th) 1.

264 UNHCR Handbook para 98.

265 Above n178 at 449.

266 Interview with H Domzalski, 14 January 1992.

267 Above n4. The 'Four Corners' program did not make it clear whether the rapists were soldiers or officials.

268 Ibid.

269 Ibid.

270 Letter from D A Donovan, Director of the Asian Pacific Legal Studies Program, School of Law, University of San Francisco to L Hunt, Legal Aid Commission of NSW, 22 January 1992 (copy on the author's files). A draft Criminal Code existed which was expected

to a written summary of a Seminar on Cambodia presented to DIEA officers by a aid worker who was in Cambodia, "[t]here is almost a total absence of a legal system in Cambodia, with something in the order of 5 trained lawyers in the whole country".[271]

It is unreasonable of DIEA to take a line so strict that it is doubtful that a refugee status claimant could ever show that his or her State is unable to provide protection from persecution — to do so is to de facto impose a requirement of State complicity while eschewing it in theory. Perhaps DIEA takes this line because of its awareness that a liberal construction of the phrase "[i]s unable or, owing to such fear, is unwilling to avail himself of the protection of that country" otherwise has the potential to undermine immigration control.[272]

8. *A Look Forward*

Although primary decisions on refugee status are still made by DIEA officers, the RSRC has been replaced by the Refugee Review Tribunal (RRT). A primary stage decision that a person is not a refugee is an RRT reviewable decision.[273] The RRT is an administrative review tribunal able to make final decisions on the merits.[274] It has the features of an independent tribunal. Each member of the RRT is appointed by the Governor-General[275] and holds office for the period specified in his or her instrument of appointment.[276] Once appointed, RRT members cannot be removed before the expiration of their term, except by the Governor-General upon a ground specified in the *Migration Act*. Thus far the RRT appears to have made good use of its independence. 20 per cent of the decisions which had been made by the RRT as at 4 November 1993 represented successes for the refugee status claimants.[277] These statistics suggest that the RRT is taking a sounder approach to the refugee definition

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to be enacted into law in 1992: ibid. The substantive criminal law was contained in Decree No 2, issued in 1980: ibid. Decree No 2 had twelve articles, three of which dealt with counter-revolutionary crimes: ibid.

271 The summary was obtained by RACS under the *Freedom of Information Act* (Cth). DIEA blacked out the name of the presenter and information about the dates between which the presenter had been in Cambodia. A copy of the summary is on the author's files.

272 The immigration control objection to a liberal construction of the phrase presently under consideration was identified by MacGuigan JA in the *Ward* case at the Court of Appeal level. He said: "No doubt this [liberal] construction will make eligible for admission into Canada claimants from strife-torn countries whose problems arise, not from their normal governments, but from various warring factions, but I cannot think that this is contrary to 'Canada's international legal obligations with respect to refugees and ... its humanitarian tradition with respect to the displaced and persecuted": the *Ward* case (1990) 67 DLR (4th) 1 at 25 per MacGuigan JA in dissent as to this point.

273 S166B(1)(a) of the *Migration Act*.

274 The RRT can exercise all the powers and discretions of the original decision-maker: s166BC(1) of the *Migration Act*. The RRT can affirm a decision, vary a decision, remit a matter to the original decision-maker for reconsideration or substitute its own decision for the original decision: s166BC(2) of the *Migration Act*.

275 S166JB(1) of the *Migration Act*.

276 S166JD(1) of the *Migration Act*. A maximum term of five years is specified in the legislation.

277 Gerkens, M, RRT member, speaking at the Law Institute of Victoria Migration Law Discussion Group on 4 November 1993.

than DIEA does or the RSRC did. However, there is a difference in the acceptance rate between the Sydney office of the RRT (7 per cent)[278] and the Melbourne office of the RRT (30 per cent)[279] which may be a cause for concern if it continues over the longer term.

The *Migration Act* provides for the Principal Member of the RRT to refer to the Administrative Appeals Tribunal (AAT) any RRT-reviewable decision which he or she considers to involve "an important principle, or issue, of general application".[280] Where the referral is accepted, AAT review of the decision is substituted for RRT review.[281] For the purposes of such review, the *Migration Act* provides for the AAT to be constituted two members of the AAT[282] and the Principal Member of the RRT.[283] The purpose of the referral power is "to enable normative principles to be established without the cost and delay involved in appealing a decision to the Federal Court".[284] Thus far no referrals have been made.

It can only be hoped that RRT and AAT decision making will have a positive influence on primary decision making but there is cause to doubt that this will be the case. Government policy is that, where a tribunal disagrees with a government department's interpretation of the law as approved by the relevant Minister, departmental officers should continue to apply the department's previous interpretation of the law unless and until a formal decision is made by the Minister to accept the tribunal's interpretation.[285] To date, government departments have displayed a tendency to ignore AAT decisions which they do not like when making primary stage decisions in other cases.[286] Given that DIEA's refugee status decision-makers have paid no more than lip service to the decisions of the Federal Court and High Court, they are unlikely to pay any greater attention to decisions of the RRT and the AAT.

As far as a given refugee status claimant is concerned, the availability of RRT and judicial review may not be of much use. Not all refugee status claimants would have access to the resources necessary to pursue RRT review of negative determinations and even fewer would have access to the resources necessary to pursue judicial review. In other words, neither administrative nor judicial review can be relied upon to cure completely the defects of primary stage decision making. It follows that the only measure that will ensure that Convention refugees will not be refouled is to put primary stage decision making in the hands of independent decision-makers.

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278 Ibid.

279 Ibid.

280 S166HA(1) of the *Migration Act*. The AAT may accept or decline the referral: s166HB(1) of the *Migration Act*.

281 S166HB(3) of the *Migration Act*.

282 A presidential member of the AAT (who is a Judge) or a Deputy President of the AAT and a non-presidential member of the AAT.

283 S166HD(a) of the *Migration Act*. S166HD(a) of the *Migration Act* also provides for AAT review to be conducted by three members of the AAT in certain circumstances.

284 Commonwealth Parliament, Migration Reform Bill Explanatory Memorandum para 393.

285 Committee for the Review of the System for the Review of Migration Decisions, *Non-adversarial Review of Migration Decisions: The Way Forward* (1992) para 2.7.1.

286 "Judges on the Outer in Laws on Migration", *Canberra Times*, 10 November 1992 cited in Commonwealth, Parliamentary Debates, Senate, 7 December 1992 at 4314 (Senator Charmarette).

9. *Conclusion*

It has been argued in this article that, while the Refugee Convention definition has both a subjective and objective element, primary emphasis should be given to the subjective element. It has been argued that, by following this path, States avoid the temptation of assessing the "objective" situation with too much concern for their own immigration and foreign policy concerns and too little concern for the moral entitlements of asylum seekers. The practice of some States, the UNHCR Handbook and the *travaux preparatoires* support the view that the subjective element of the Refugee Convention definition should be emphasised and, in particular, support the view that a refugee status claimant should be found to have a "well-founded fear of being persecuted" if he or she has given a plausible account of his or her fear of persecution.

Instead of a "plausible account" test, the High Court of Australia has chosen to ask whether there is a "real chance" of persecution. While this is unnecessarily restrictive, it has been conceded that the "real chance" test has some claims to international legitimacy. It has been shown, however, that in the hands of DIEA and the RSRC, the "real chance" test has been transformed in practice into a test more restrictive than that proposed by the High Court. The movement away from a "plausible account" test has simply provided an opportunity (quickly seized) for Australia to give its foreign policy and immigration control objectives priority over the moral entitlements of those asylum seekers that the Refugee Convention was intended to protect.

It has also argued in this article that Australia has an obligation to interpret the concept of "persecution" by reference to human rights treaties to which it is a party, such as the ICCPR. The High Court of Australia has taken a cautious approach to the definition of "persecution" but one that is thus far consistent with the approach which has been advocated in this article. Unfortunately, the Australian government and its Parliamentary opposition take the view that "issues of persecution require political judgment, not a legal solution". With immigration control and foreign policy concerns uppermost in mind, they resent anything which "limits the capacity of Government to refuse refugee applications". It has been suggested in this article that this attitude has been transmitted to departmental decision-makers in DIEA and on the RSRC, resulting in very restrictive interpretations of the concept of persecution.

The coverage of the Refugee Convention definition is limited by an exhaustive list of cognisable grounds of persecution. DIEA officers often advance specious reasons for the conclusion that the persecution feared by the claimant in question is not persecution "for reasons of" race, religion, political opinion or whatever. The approach of the Australian courts to this matter is much more defensible.

The Australian Courts correctly interpret the phrase "is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Unreasonable findings by DIEA decision-makers that a claimant's country of origin is able to provide protection provide further indications that DIEA decision-makers, using DFAT information, deliberately reject interpretations of the Refugee Convention definition that are acceptable at international law in favour of interpretations which will better give effect to its immigration control concerns and DFAT's foreign policy concerns.

In summary, Australia has on the whole been overly restrictive in its interpretation and application of key elements of the Refugee Convention definition and, insofar as it returns to their countries of origin those persons wrongly rejected, has been violating its non-refoulement obligation under Article 33 of the Refugee Convention. To date, the courts, which do not have immigration control and foreign policy concerns and are interested only in "legal solutions", have come closest to interpreting and applying the Refugee Convention definition in line with international standards. DIEA's primary decision-makers, employees of a department with a stated goal of immigration control, mostly interpret and apply the Refugee Convention definition in ways which have very little claim to international legitimacy. The recommendations of the four member RSRC panels were based on interpretations of the Refugee Convention which were almost as restrictive as those of the primary decision-makers. This is not surprising, given that two members of each panel were employees of government departments with immigration control and foreign policy agendas. When the facts are so stated, it becomes evident that Australia is unlikely to meet its Refugee Convention obligation of non-refoulement, until its refugee status determination process is placed entirely in the hands of persons who are independent of immigration control and foreign policy concerns. At the administrative review stage, this has already been accomplished with the introduction of the RRT. It is time that the primary stage also was made independent of immigration control and foreign policy concerns.