Australia's 'Safe Third Country' Provisions Their Impact on Australia's Fulfillment of Its Non-Refoulement Obligations

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Early in July 1994, a boat carrying 17 Vietnamese asylum-seekers landed without authorization in Broome, Western Australia.[1] What made these asylum seekers different from previous unauthorized arrivals was that they had already been found not to be refugees in a screening process conducted under the Comprehensive Plan of Action (CPA).[2] The screening had been conducted by the Indonesian Government at the Galang Processing Centre in Indonesia.[3]

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Note on terminology: The government department now titled the Department of Immigration and Multicultural Affairs (DIMA) has had many names. The most recent title has been used throughout this article except in author and case citations where the title of the time has been used.

1 'UN lawyer to check boat people', *Age* (9 July 1994) p 10.

2 Senator Bolkus, Media Release B44/94 (15 July 1994); 'Boat people arrive from Indonesia', *Weekend Australian* (10-11 September 1994) p 2. In 1979 a multilateral agreement was reached under which regional countries agreed to give first asylum to the asylum seekers flowing out of Vietnam, and western countries agreed to provide them with permanent resettlement: Lawyers Committee for Human Rights Refugee Project, *Hong Kong's Refugee Status Review Board: Problems in Status Determinations for Vietnamese Boat People* (1992) p 2. The agreement started to break down in the late 1980s, as far more asylum seekers were arriving in first asylum countries than there were resettlement places. On 14 June 1989 a second multilateral agreement called the Comprehensive Plan of Action (CPA) was reached. The CPA is an agreement between the countries of origin of the asylum seekers covered by it (Vietnam and Laos), the countries of first asylum (Indonesia, Malaysia, the Philippines, Thailand and Hong Kong), countries offering resettlement and the Office of the United Nations High Commissioner for Refugees (UNHCR). The CPA provides for refugee status determinations to be made by the countries of first asylum. Those asylum seekers found to be refugees are to be pro-

The 17 arrivals from Galang were allowed to apply for protection in Australia and three of them were successful in obtaining that protection.[4] However, the then Australian Government subsequently procured an amendment to the *Migration Act* 1958 (Cth) which rendered invalid protection visa applications made by non-citizens covered by the CPA.[5] At the same time it passed an amendment which rendered invalid protection visa applications made by non-citizens covered by 'an agreement relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen'.[6] In this article these amendments are referred to collectively as the 'safe third country' provisions.

This article examines the safe third country provisions now contained in the *Migration Act* in light of the relevant principles of international law. The article demonstrates that these safe third country provisions are not a legitimate application of the customary international law principle of 'safe third country' because they place Australia in danger of breaching one or more of the non-refoulement obligations it has

vided with resettlement in western countries, while those found not to be refugees are to be returned to their countries of origin. Forced repatriation of those found not to be refugees now takes place: Lawyers Committee for Human Rights Refugee Project. The definition of 'refugee' which the CPA uses is the definition contained in the 1951 Refugee Convention and the 1967 Protocol to that Convention. The CPA requires refugee status determinations to be made in accordance with the procedures recommended in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* and by the Executive Committee of UNHCR (EXCOM).

3 Senator Bolkus, Media Release B44/94 (15 July 1994); 'Boat people arrive from Indonesia', *Weekend Australian* (10-11 September 1994) p 2.

4 The then Minister for Immigration issued conclusive certificates in respect of the 14 refugee-status claimants who were unsuccessful. Each certificate stated that it would be contrary to the public interest to change the primary stage decision because any change in the decision would prejudice Australia's international relations. The issue of conclusive certificates meant that the rejected asylum seekers could not get their rejections reviewed by the Refugee Review Tribunal (RRT). The Minister explained his action by saying that it was necessary to maintain the integrity of the Comprehensive Plan of Action: 'Boat people arrive from Indonesia', *Weekend Australian* (10-11 September 1994) p 2.

5 Section 91C(1) and s 91E of the *Migration Act*.

6 Section 91C(1) and s 91E of the *Migration Act*. The amending Act commenced on 15 November 1994. However, the amending Act provides that a non-citizen who is covered by the CPA or in relation to whom there is a safe third country and who made an application for a protection visa between 1 September 1994 and the commencement of the Act but had not been granted a protection visa before the commencement of the Act is to be treated as if he or she made an application for a protection visa after the commencement of the Act: Item 3 of the Schedule to the *Migration Legislation Amendment Act (No 4)* 1994.

undertaken pursuant to three treaties to which it is a party. The article also suggests ways in which the safe third country provisions can be amended so that Australia's fulfillment of its non-refoulement obligations is no longer jeopardized.

The Relevant Principles of International Law

The Non-Refoulement Obligations Imposed by the Refugee Convention, Torture Convention and ICCPR

Australia is a party to the 1951 Convention relating to the Status of Refugees (the 'Refugee Convention').[7] The prohibition on refoulement is the key provision of the Refugee Convention. Article 33(1) provides that no State party 'shall expel or return ("refouler") a refugee[8] in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened[9] on account of his race, religion, nationality, membership of a particular social group or political opinion.'[10]

7 28 July 1951, 189 UNTS 150. Australia acceded to the Refugee Convention on 21 January 1954. Australia is also a party to the 1967 Protocol relating to the Status of Refugees (31 January 1967, 606 UNTS 267), referred to as the 'Refugee Protocol'. Australia acceded to the Refugee Protocol on 13 December 1973.

8 Article 1A(2) of the Refugee Convention, as modified by article I(2) of the Refugee Protocol, provides that for the purposes of the Convention, the term 'refugee' applies to any person who: 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

Articles 1D, 1E and 1F of the Refugee Convention provide for the exclusion from the application of the convention persons who would otherwise fall within the definition in article 1A. 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: GS Goodwin-Gill, *The Refugee in International Law* (Clarendon, 1983) 20. It follows that the making of a refugee status determination by a State or any other authority is declaratory and not constitutive.

9 Despite its apparently restrictive wording, article 33(1) does not allow a refugee to be sent to a place where he or she is exposed to persecution other than deprivation of life or freedom or to a place where he or she has a 'well-founded fear of being persecuted' simply because the chance of persecution falls short of certainty. In short, article 33(1) must be read in the light of the definition of 'refugee' (see note 8 above for that definition).

10 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.'

Two points about the scope of article 33 should particularly be noted. First, it prohibits the sending of a refugee to *any* country where he or she has a well-founded fear of being persecuted on Refugee Convention grounds, not just his or her country of origin (ie, country of nationality or former habitual residence).[11] Secondly, it is accepted in current theory and State practice that the phrase 'in any manner whatsoever' has the effect of prohibiting indirect, as well as direct, expulsion or return of a refugee to a persecuting country.[12] A State party to the Refugee Convention is, therefore, under an obligation to refrain from removing an asylum seeker to a third country in which he or she will face a real risk of being expelled or returned to a persecuting country.[13]

Australia is also a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Torture Convention').[14] Article 3 of the Torture Convention provides that no State party 'shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' It should be noted that the Committee Against Torture takes the view that article 3 encompasses an obligation to refrain from removing a person to a third country in which he or she will face a real risk of being expelled or returned to a country where there are substantial grounds for believing that he or she would be subjected to torture.[15]

Finally, Australia is a party to the International Covenant on Civil and Political Rights (ICCPR).[16] Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'. No derogation is permitted from article

11 R Plender for UNHCR intervening in *R v Secretary of State for the Home Department; ex parte Sivakumaran* [1988] 1 AC 958, 984-5.

12 See, for example, United Kingdom Delegation, Geneva, 'Sending Asylum Seekers to Safe Third Countries' (1995) 7 *Int J of Refugee Law* 119 at 121 and A Achermann and M Gattiker, 'Safe Third Countries: European Developments' (1995) 7 *Int J of Refugee Law* 19 at 26.

13 Ibid (United Kingdom Delegation, Geneva).

14 Reprinted in (1984) 23 *ILM* 1027 and changes noted in (1985) 24 *ILM* 535. This treaty entered into force on 26 June 1987. Australia lodged an instrument of ratification of this treaty on 8 August 1989 and became a party 30 days thereafter: (1989) 60 *Foreign Affairs Record* 471.

15 *Mutombo v Switzerland*, Comm No 13/1993 (1994), summarised in R Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke J of Comp and Int Law* 1 at note 97.

16 16 December 1966, 999 UNTS 171. This treaty entered into force on 23 March 1976. Australia ratified the treaty with effect from 13 November 1980.

7.[17] What is important to note in the present context is that a State party to the ICCPR will be in violation of article 7 if it removes a person to another State where there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment in that other State.[18] In other words, a non-refoulement obligation is implicit in article 7. Moreover, it is argued that this obligation extends to an obligation to refrain from removing an asylum seeker to a third country in which he or she will face a real risk of being expelled or returned to a country where there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. According to Achermann and Gattiker,[19] a similar proposition holds true in the case of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention')[20] and there appears to be no good reason why article 7 of the ICCPR, which is almost identical to article 3 of the European Convention, should be interpreted in a manner at odds with the interpretation of article 3 of the European Convention.

Asylum at International Law

For various economic and other reasons, most States (including Australia) are less than enthusiastic about granting permanent asylum (in the sense of a permanent right of residence within its territory) to refugees or other persons facing danger if returned to their country of origin. It is, therefore, not surprising that the very clear position at international law is that States are under no obligation to grant permanent asylum to such persons. However, if a State is bound by a non-refoulement obligation with respect to a given individual, and there is no place to which that individual can be removed without the obligation being breached, the State in question has no choice but to tolerate that individual's presence within its territory. In these cir-

17 Article 4(2) of the ICCPR.

18 Argument in support of this assertion is to be found in S Taylor, 'Australia's Implementation of its Non-Refoulement Obligations Under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17 *UNSWLJ* 432 at 444-7. See also United Nations Human Rights Committee, General Comment 20/44 of 3 April 1992 quoted in R Boed, note 15 above at 21.

19 Achermann and Gattiker, note 12 above, at 26.

20 4 November 1950, 213 UNTS 221.

cumstances, fulfillment of the non-refoulement obligation through time is functionally equivalent to a grant of asylum.

The 'Safe Third Country' Principle at International Law

Nothing in the three treaties here considered precludes a State avoiding a de facto grant of asylum to an on-shore asylum seeker to whom it owes a non-refoulement obligation by 'passing the buck' to a third country. Many States do, in fact, try to pass the buck, arguing that the third country in question has a greater responsibility to consider a particular asylum seeker's case and then provide protection if need be, or that the third country has already demonstrated its preparedness to protect the particular asylum seeker. Some States argue that an asylum seeker's passage through the third country *en route* to the State in which he or she presents his claim is sufficient basis for the latter to expect the former to assume responsibility for protecting the asylum seeker if such protection is needed.[21] The rationale they give is that travel by the asylum seeker beyond the first safe country he or she reaches after fleeing his or her country of origin is to be regarded as migratory movement rather than movement necessary for the purpose of obtaining protection.[22] It is, therefore, reasonable (they argue) for all subsequently reached countries to subject the asylum seeker to normal immigration controls, such as returning him or her to the place of embarkation.[23]

Other States take the view that there must be a more substantial connection between the third country and the asylum seeker than a mere transit stop in that country.[24] This more substantial connection may, for example, be a stay of several weeks in the third country, or possession of a valid document to enter that country.[25] The rationale for seeking this more substantial connection is that it is contrary to the 'basic principles of international solidarity and burden sharing' to place most of the burden of providing protection on those countries

21 GS Goodwin-Gill, *The Refugee in International Law* (2nd ed, Clarendon, 1996) p 340.

22 See, for example, United Kingdom Delegation, Geneva, note 12 above.

23 Ibid.

24 Goodwin-Gill, *The Refugee in International Law*, p 340; UNHCR, 'The Concept of "Protection Elsewhere"' (1995) 7 *Int J of Refugee Law* 123 at 125.

25 See, for example, practice of Belgium (H Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (M Nyhoff, 1995) p 48), Switzerland (id, p 66) and the United States (R Marx, 'Non-Refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' (1995) 7 *Int J of Refugee Law* 383 at 398).

which just happen to be adjacent to the countries of origin of asylum seekers.[26]

In Europe, under the Dublin Convention[27] and the Schengen Agreement[28] the primary responsibility for determining a refugee status claim and providing protection if need be lies (as between States parties) with the State party which authorized the claimant to enter its territory, regardless of which of the States parties' territories the claimant first entered or where the claimant chooses to lodge his or her claim.[29] However, the State responsible for making a determination as between the States parties to the Dublin Convention or Schengen Agreement, as the case may be, is entitled to send an asylum seeker to a non-party State without determining his or her claim, so long as such a course of action is consistent with its obligations un-

26 UNHCR, 'The Concept of "Protection Elsewhere"', note 24 above, at 125-6.

27 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990. This convention is not yet in force, but its mere existence has already had a strong influence on the domestic law and practice of some EU States: Achermann and Gattiker, note 12 above, at 28 and 30; S Choudhury, 'Third Country Asylum' (1991) 141 *New Law Journal* 1564.

28 Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders. This convention was implemented on 26 March 1995. The asylum chapter of the Schengen Agreement will be replaced by the Dublin Convention when that convention enters into force: 'Background Note on the Schengen Agreement', *The Reuters European Community Report* (24 March 1995).

29 M Kjaerum, 'The Concept of Country of First Asylum' (1992) 4 *Int J of Refugee Law* 514 at 526. If a State party has granted residence to a Refugee Convention refugee it becomes responsible for examining any claims which may thereafter be presented by a member of his or her family: Schengen Agreement, art 35; Dublin Convention, art 4. Apart from this, where an applicant for asylum and/or recognition of refugee status actually posesses a valid residence permit or visa issued by a State party, the issuing State is primarily responsible for examining the application: Schengen Agreement, art 30(1)(a); Dublin Convention, arts 5(1) and (2). If two or more State parties have issued residence permits or visas to the applicant, the treaties lay down the criteria to be applied in determining which of the issuing States is responsible for examining the claim: Schengen Agreement, art 30(1)(b); Dublin Convention, art 5(3). In certain circumstances, an issuing State remains responsible even after the visa or residence permit has expired: Schengen Agreement, art 30(1)(c); Dublin Convention, art 5(4).

If the applicant has entered the territory of the States parties from the territory of a non-party by irregularly crossing a border, the party whose border was crossed is responsible for examining the application (unless a criterion previously outlined applies): Schengen Agreement, art 30(1)(e); Dublin Convention, art 6. If none of the above criteria applies, the State party with whom the application was lodged is responsible for examining it: Schengen Agreement, art 30(3); Dublin Convention, art 8.

der the Refugee Convention[30] (and, in the case of the Schengen Agreement, its 'international commitments' more generally[31]). Not only this, but the EU Ministers responsible for immigration have agreed in their Resolution on a Harmonized Approach to Questions Concerning Host Third Countries, 1 December 1992 (the 'EU Resolution') to incorporate the following principles into their national legislation by the time the Dublin Convention comes into force:

- If an application for asylum is received, the receiving State must identify whether there is a 'host third country' in relation to the asylum seeker before undertaking a substantive examination of the application for asylum and irrespective of whether the applicant may be regarded as a refugee. (A 'host third country' is, in this context, a non-Member of the EU which meets certain criteria discussed below.)
- If there is a host third country in relation to the asylum seeker, he or she may be removed to that country without examination of his or her application for asylum. However, the receiving State 'retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country'.
- It is only if the receiving State is of the view that the asylum seeker 'cannot in practice be sent to a host third country' that the provisions of the Dublin Convention can be applied to determine which of the State parties to that Convention has the responsibility of considering the application for asylum.
- The responsible State retains 'the right, pursuant to its national laws, to send an applicant for asylum to the host third country'. In other words, it is not bound by the receiving State's views on the matter.

The purpose of this Resolution is of course to ensure that in most cases, asylum seekers are expelled from the EU, even if they have genuine protection needs.

It can be seen that there is no consensus among States as to the criteria to be used in allocating responsibility for considering a given asylum seeker's case and providing protection if need be. However, there is consensus on one point: the fact that a third country has primary or, at least, a greater responsibility for providing protection to a particular asylum seeker does not relieve the State within whose territory

30 Schengen Agreement, art 29(2); Dublin Convention, art 3(5).

31 Article 29(2) of the Schengen Agreement.

the asylum seeker happens to be of its own non-refoulement obligation towards that asylum seeker.[32]

What follows from this? Reasoning from first principles, the third country must not be one in which the asylum seeker has a well-founded fear of facing persecution on a Refugee Convention ground, and/or in which there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment, as sending the asylum seeker to such a place would quite clearly amount to a breach of the buck-passing State's non-refoulement obligations.[33] Moreover, since indirect refoulement is also encompassed by the prohibition against refoulement in all three treaties here considered,[34] the third country must be one which can be relied upon to grant asylum or, at the very least, to accept responsibility for fulfillment of the non-refoulement obligations.

It is clearly the position at customary international law that the third country must be 'safe' in the senses mentioned above.[35] Evidence of the *opinio juris* of specially affected States can be found in EXCOM Conclusion No 58 (XL)(1989)[36] (the 'EXCOM Conclusion') and the EU Resolution adopted by the EU Ministers responsible for immigration on 1 December 1992.[37] The EXCOM Conclusion provides that refugees and asylum seekers may be returned to a country 'where they have already found protection', if '(i) they are protected there against refoulement and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human rights standards until a durable solution is found for them'. In a broadly similar

32 UNHCR, 'The Concept of "Protection Elsewhere"', note 24 above, at 124-5.

33 See above under heading 'The Non-Refoulement Obligations imposed by the Refugee Convention, Torture Convention and ICCPR'.

34 Ibid.

35 R Marx, note 35 above, at 393.

36 EXCOM has a membership of more than 40 States, including Australia and other States specially affected by asylum seekers: National Population Council, *The National Population Council's Refugee Review* (July 1991) p 149. It functions in relation to UNHCR as an advisory body. Its conclusions are not legally binding on the High Commissioner or any State; however, probably because of its composition, the Australian Attorney-General's Department regards its conclusions as 'highly persuasive' and 'entitled to great respect': DIMA, Submission No 97 (1 September 1993) in Joint Standing Committee on Migration, *Inquiry into Detention Practices Submissions* (1993) IV, S1007.

37 The member States of the EU are certainly specially affected States: in comparison to the numbers of asylum seekers arriving in the EU each year, the numbers arriving in Australia pale into insignificance.

vein, the EU Resolution states that the following criteria must be met in order for a country to be regarded as a host third country:

- Return to the third country must not pose a threat to the life or freedom of the asylum seeker within the meaning of article 33 of the Refugee Convention.
- The asylum seeker must not be 'exposed to torture or to inhuman or degrading treatment' in the third country.[38]
- The asylum seeker must already have been granted protection in the third country or have had the opportunity to seek the protection of that country before approaching the State in which he or she is now applying for asylum, or there must be 'clear evidence' that he or she will be admitted to the third country.[39]
- The asylum seeker 'must be afforded effective protection in the host third country against refoulement' within the meaning of the Refugee Convention.

The 'safety' criteria contained in the EXCOM Conclusion are a little more rigorous than the criteria contained in the EU Resolution. The EXCOM Conclusion specifies that the asylum seeker must be protected in the third country against refoulement. The EU Resolution specifies only that the asylum seeker must be protected against refoulement *within the meaning of the Refugee Convention.*

On the other hand, given that removal of the asylum seeker by the third country to another country where there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment would be a violation *by the third country* of the asylum seeker's right not to be subjected to torture or inhuman or degrading treatment,[40] the requirement in the EU Resolution that the asylum seeker must not be exposed to torture or to inhuman or degrading treatment in the third country could be argued to incorporate a requirement that the asylum seeker must be safe in the third country from refoulement within the meaning of the European Convention (and, therefore, also the ICCPR and Torture Convention). The EXCOM Conclusion specifies that the third country must be one in which the asylum seeker will be treated in accordance with recognized basic human rights standards, while the EU Resolution specifies more precisely that the third country

38 This criterion takes account of the non-refoulement obligations contained in the European Convention, art 3; the ICCPR, art 7; and the Torture Convention, art 3.

39 A visa would be an example of such evidence: Achermann and Gattiker, note 12 above, at 23.

40 See above under heading 'The Non-Refoulement Obligations imposed by the Refugee Convention, Torture Convention and ICCPR'.

must not be one in which the life or freedom of the asylum seeker would be threatened within the meaning of article 33 of the Refugee Convention[41] or one in which he or she is exposed to torture or to inhuman or degrading treatment. A requirement that an asylum seeker be treated in accordance with recognized basic human rights standards seems to extend beyond a requirement that the asylum seeker not be persecuted on Refugee Convention grounds, be tortured, or be treated in an inhuman or degrading way, since it appears to require for example that the asylum seeker be accorded social and economic rights, such as the right to work.[42]

The other significant difference between the EXCOM Conclusion and the EU Resolution is that the EXCOM Conclusion specifies that the asylum seeker must already have found protection in the country to which it is proposed to remove him or her, while the EU Resolution allows removal to a third country not only where the asylum seeker has already found protection in that country, but also where the asylum seeker has simply had a previous opportunity to seek protection in that country or there is evidence that the asylum seeker will be admitted into that country.

The position taken in the EU Resolution is reflected in the actual practice of most States, particularly European States,[43] so that the EU Resolution (if not the more rigorous EXCOM Conclusion) can be taken to represent the customary international law position.[44]

To what lengths must a buck-passing State go to satisfy itself that a third country is safe for a particular asylum seeker? Ideally, an asylum seeker should not be sent to a third country unless that country agrees beforehand to accept responsibility for considering the asylum

41 It must, of course, be remembered that the reference to a threat to 'life or freedom' in article 33 is to be interpreted in light of the definition of 'refugee' contained in article 1A(2) of the Refugee Convention as being simply an infelicitous way of referring to 'persecution' more generally: see note 9 above.

42 M Kjaerum, note 29 above, at 519.

43 Goodwin-Gill, *The Refugee in International Law*, p 334.

44 This author has stressed evidence of *opinio juris* and has not relied on examples of conforming State practice. This is because the author agrees with FL Kirgis ('Custom on a Sliding Scale' (1987) 81 *Am J of Int Law* 146) that the more strongly States have asserted the existence of a rule of customary international law, the less need there is to show that they have acted consistently with the asserted rule. The exact substitution rate of *opinio juris* for State practice acceptable for a given rule depends on its content: id at 149. Where, as here, the rule relates to human rights, international decision makers very readily accept statements of *opinio juris* as a substitute for actual practice, to the extent, in fact, of discounting non-conforming practice: id at 147-8.

seeker's case and providing protection if need be.[45] However, an absolute requirement that such a guarantee be obtained does not appear to be part of the safe third country principle at present.[46]

The requirements that it is argued *are* part of the safe third country principle are as follows. First, in determining whether a third country is 'safe,' the focus must be on its actual practice and not simply on the obligations which it has formally undertaken.[47] Thus, for example, if the third country in question has violated a non-refoulement obligation in the past in dealing with certain categories of person, it cannot be regarded as 'safe' in relation to those categories of person.[48] As another example, if the third country's interpretation of the 'refugee' definition is overly restrictive or its refugee status determination process does not meet minimum procedural standards, some persons who are in fact refugees will not be identified as such[49] and are likely to be returned to their country of origin in violation of the non-refoulement obligation in article 33 of the Refugee Convention.[50] Such a country cannot be regarded as 'safe'.[51]

Secondly, a buck-passing State cannot place complete reliance on a generalized assessment of the safety of the third country.[52] An asylum seeker must be given the opportunity to establish that the third country is not safe in his or her particular case.[53] The opportunity must be accompanied by 'appropriate procedural safeguards',[54] including the right to appeal an unfavourable decision.[55]

45 UNHCR, 'The Concept of "Protection Elsewhere"', note 24 above, at 126-7.

46 United Kingdom Delegation, Geneva, note 12 above, at 122.

47 UNHCR, 'The Concept of "Protection Elsewhere"', note 24 above, at 126.

48 Achermann and Gattiker, note 12 above, at 26.

49 As mentioned in note 8 above, a State's determination of refugee status is declaratory not constitutive.

50 See S Taylor, *The Impact of Australia's Refugee Status Determination System on its Implementation of its Refugee Convention Obligation of Non-Refoulement* (PhD thesis, University of Melbourne, 1994) for a detailed discussion of this proposition.

51 *Note on International Protection*: UN doc A/AC.96/815 (31 August 1993) para 22; Amnesty International, Submission No 11 in Submissions to Senate Standing Committee on Legal and Constitutional Affairs, Migration Legislation Amendment Bill (No 4) 1994 (1994) I, 226; Goodwin-Gill, *The Refugee in International Law*, p 343.

52 *Note on International Protection*: UN doc A/AC.96/815 (31 August 1993) para 21.

53 Ibid.

54 Ibid.

55 UNHCR, 'The Concept of "Protection Elsewhere"', note 24 above, at 126.

That these procedural requirements are part of the safe third country principle is the view taken by UNHCR[56] and some States[57] but not others.[58] It is quite obvious, however, that a State which does not have regard to the actual practice of third countries and/or does not make individualized assessments of safety necessarily runs a serious risk of refoulement. It is argued that this is a sufficient reason for discounting their views and practice.

It might of course be argued on the other side that if the number of States parties whose procedures result in the violation of their non-refoulement obligations under the Refugee Convention, Torture Convention and/or ICCPR is large enough, those obligations cease to exist. Certainly, the International Court of Justice has accepted that it is possible for treaty modification to be effected by the coming into existence of contrary customary law.[59] However, such modification is not to be lightly inferred.[60] The position taken by this author is that, in the case of human rights and humanitarian treaties such as the three treaties here considered, nothing less will suffice for the formation of contrary customary law than an *express* avowal by a very large proportion of States parties of their intention to modify their treaty obligations by their practice. Any other approach would render human rights and humanitarian treaties worthless paper in a world where few States 'walk their talk' in relation to the subject matter of such treaties. As far as this author is aware, no express avowal of an

56 Article 35(1) of the Refugee Convention provides that 'The 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 referred to is imposed by art 8(a) of the Statute of the Office of the UNHCR: GA Res 428(V) Annex, 14 December 1950.) Thus UNHCR views which touch upon the implementation of the Refugee Convention should, at the least, be treated as highly persuasive by States parties to the Refugee Convention.

57 Eg the UK: United Kingdom Delegation, Geneva, note 12 above, at 121.

58 The following are examples: Austria and Switzerland take the fact that a third country is party to the Refugee Convention and the European Convention to be sufficient evidence of safety: Achermann and Gattiker, note 12 above, at 35. If an asylum seeker enters Germany from a country which is on a list of safe countries, he or she can be returned there without any individualized assessment of safety being made: ibid; R Marx, note 25 above, at 402.

59 GM Danilenko, *Law-Making in the International Community* (M Nijhoff, 1993) pp 166-9, citing *Case concerning the Temple of Preah Vihear* [1962] ICJ Rep 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* [1971] ICJ Rep 16; and *Case Concerning the Continental Shelf* [1982] ICJ Rep 18.

60 Id at p 170.

intent to modify treaty obligations has accompanied the implementation of the safe third country procedures just discussed.

Australian Practice Evaluated

The Protection Visa Regime

The means by which a non-citizen in Australia formally invokes Australia's non-refoulement obligation under article 33 of the Refugee Convention is by applying for a class of permanent visa known as a 'protection visa'. A criterion for the grant of a protection visa is that the applicant is 'a non-citizen in Australia to whom Australia has protection obligations under the [Refugee Convention] as amended by the [Refugee Protocol].'[61] When a valid application for a protection visa is lodged with DIMA, an officer of that Department (acting as a delegate of the Minister for Immigration) determines whether the applicant is a refugee. If the applicant is determined to be a refugee and meets certain additional criteria,[62] a protection visa will be granted. If the applicant is refused a protection visa, he or she may seek merits review of the decision by the Refugee Review Tribunal (RRT).[63] The RRT has the power to affirm or vary the primary stage decision or set it aside and substitute a new decision.[64] An applicant who is unsuccessful before the RRT may apply for Federal Court review of the tribunal decision on certain restricted grounds.[65] A protection visa applicant also has the option of seeking from the High Court of Australia an injunction or a writ of mandamus or prohibition against any of the decision makers previously specified.[66]

A person who is not a refugee, but wishes to invoke Australia's non-refoulement obligation under article 3 of the Torture Convention or article 7 of the ICCPR, must first make a protection visa application

61 Section 36 of the *Migration Act*.

62 The applicant must undergo a medical examination (Clause 866.223 of Schedule 2 of the Migration Regulations) and a chest x-ray examination (Clause 866.224 of Schedule 2 of the Migration Regulations) and satisfy public interest criteria 4001 to 4003 (Clause 866.225 of Schedule 2 of the Migration Regulations) and the Minister must be satisfied that the grant of the visa is in the national interest (Clause 866.226 of Schedule 2 of the Migration Regulations).

63 Sections 411 and 412 of the *Migration Act*.

64 Section 415 of the *Migration Act*. The RRT also has the power to refer an application for review to a specially constituted Administrative Appeals Tribunal (AAT) to be dealt with by that tribunal: *Migration Act*, s 443. This has never been done. For this reason, provisions relating to AAT review are ignored in this article.

65 Section 476 of the *Migration Act*.

66 Section 75(v) of the Australian Constitution.

claiming to be a refugee, go through the refugee status determination process and then, after his or her protection visa application has been rejected by the Minister for Immigration's delegate and the RRT, persuade the Minister for Immigration to grant a protection visa to him or her in exercise of the Minister's special power of intervention under s 417 of the *Migration Act*. This section allows the Minister for Immigration personally, if he or she thinks that it is in the public interest to do so, to set aside a decision affirmed, varied or made by the RRT and to substitute a decision that is more favourable to the applicant.[67] In exercising the power of intervention under s 417, the Minister for Immigration is not bound by Subdivision AA or AC of Division 3 of Part 2 of the *Migration Act* or by the regulations.[68] What this means in the present context is that the Minister for Immigration in exercising his or her power under s 417 is able to grant a protection visa even if the applicant is not a refugee (or does not in some other respect meet the criteria for the grant of a protection visa). Although the non-refoulement obligations under the Torture Convention and/or the ICCPR have not as yet been cited as the basis of the Minister for Immigration granting a protection visa under s 417, it is presumed that the Minister would, in principle, be prepared to intervene to grant a protection visa on that basis.[69]

The CPA Provisions

The *Migration Act* now prevents persons rejected under the CPA screening process from being processed again in Australia,[70] subject to two exceptions dealt with below under the headings 'Access by

67 Subsection 417(1) of the *Migration Act*.

68 Subsection 417(2) of the *Migration Act*.

69 See further S Taylor, 'Australia's Implementation of its Non-refoulement Obligations Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17 *UNSWLJ* 432 at 463-6 and S Taylor, *The Impact of Australia's Refugee Status Determination System on its Implementation of its Refugee Convention Obligation of Non-Refoulement*, note 50 above, at pp 306-9.

70 It also theoretically prevents Vietnamese and Laotian asylum seekers who arrived in CPA countries of first asylum on or before 14 February 1994 but left before being screened from being processed in Australia. However, it seems unlikely that there would be any persons in this category arriving in Australia now. (Vietnamese and Laotian asylum seekers arriving in CPA countries of first asylum after 14 February 1994 are not eligible for screening under the CPA: Department of Immigration and Ethnic Affairs, *Annual Report 1993-94*, p 33. Since they cannot be described as persons 'covered by the CPA', persons transitting in CPA countries of first asylum after 14 February 1994 are not excluded from being processed in Australia by the CPA provisions of the *Migration Act*.)

Regulation' and 'Ministerial Discretion'. The asylum seekers excluded from applying for a protection visa by the CPA provisions are returned to the CPA country of first asylum from whence they came to be dealt with there. In other words, Australia is relying on the CPA countries of first asylum (or UNHCR officials based in those countries) to protect any returned asylum seekers in relation to whom one of Australia's non-refoulement obligations has been engaged.

Is this determination that the CPA countries of first asylum are 'safe' justified, having regard to actual practice in those countries and not just the obligations which they have formally undertaken?[71] Hong Kong[72] and the Philippines[73] are presently carrying out forced repatriations of screened-out asylum seekers. Indonesia[74] and Thailand[75] regard forced repatriation as an option open to them.[76] Given that CPA screening has now officially come to an end in all the CPA countries of first asylum[77] and that these countries are anxious to put the CPA behind them, the only sensible assumption that Australia can make is that all the CPA countries of first asylum will exercise the forced-repatriation option. This means that the only asylum seeker safe from being returned to his or her country of origin from a CPA country of first asylum is a screened-in asylum seeker.

As mentioned earlier, the asylum seekers fitting the description 'covered by the CPA' most likely to arrive in Australia in the future are those who have already been screened out. They will not be re-screened if returned to the CPA country of first asylum from whence they came.[78] At the same time, reliance by a CPA country of first asylum on its previous rejection of an asylum seeker is problematic where the screening procedure that was in place in that country at the

71 See above under heading 'The "Safe Third Country" Principle at International Law'.

72 'Camp protest as Vietnamese forced home', Agence France Presse (14 May 1996).

73 'Broke Philippines decides to expel 2500 boat people', *Australian* (29 February 1996) p 17.

74 Yen Tran, 'The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on [sic] International Refugees and Human Rights Laws' (1995) 17 *Houston J of Int Law* 463 at 480 at note 140, and 488 at note 214.

75 Ibid.

76 The last Malaysian camp was closed on 25 June 1996: 'Boat people camp closes', *Australian* (26 June 1996) p 17. The closing of the camps was achieved through the forced repatriation of some asylum seekers: 'Malaysia repatriates second group of Vietnamese', Agence France Presse (4 May 1996).

77 'The Comprehensive Plan of Action', *UNHCR Information Bulletin* (Aug 1995) p 3.

78 Author's telephone interview with an UNHCR official (Canberra Office) on 28 November 1995.

time of rejection can be characterized as having been unreliable or where the asylum seeker now has new claims and/or supporting evidence to present.

In relation to the first of these points, the argument of the Australian Attorney-General's Department is that the screening procedures that were in place in the CPA countries of first asylum can be taken to have been reliable because of the detailed, UNHCR-approved procedural standards imposed by the CPA.[79] However, several NGOs and academic commentators have marshalled evidence to show that the manner of implementation of the CPA was less than impressive. If this evidence is to be believed, the screening procedures in place in Hong Kong[80] and Indonesia[81] (for example) were procedurally inadequate; decision makers in Hong Kong[82] and the Philippines[83] (for example) applied the refugee definition incorrectly in some instances; some decision makers in Indonesia[84] and the Philippines[85] (for example) acted corruptly; and on and on. Regardless of whether credence is given to these allegations (and it must be said that UNHCR does not give credence to them), it is undeniable that the percentage of asylum seekers

79 Attorney-General's Department, Submission No 4 in Submissions to Senate Standing Committee on Legal and Constitutional Affairs, Migration Legislation Amendment Bill (No 4) 1994 (1994) I, 19.

80 D PoKempner, 'Indefinite Detention and Mandatory Repatriation: The Incarceration of Vietnamese in Hong Kong' (1992) 10 *UCLA Pacific Basin LJ* 329; Lawyers Committee for Human Rights Refugee Project, note 2 above; AC Helton, 'Refugee Determination under the Comprehensive Plan of Action' (1993) 5 *Int J of Refugee Law* 544 at 557.

81 Australia, *Parliamentary Debates*, Senate, Standing Committee on Legal and Constitutional Affairs (hereinafter SCLCA), Migration Legislation Amendment Bill (No 4) 1994, 5 October 1994, SLC 208 (Mr Jeans, legal consultant employed by UNHCR in Galang from January 1992 to June 1992); Id, SLC 222 (Mr Thien Phan, Member, Vietnamese Elderly Friendship Association); Id, 30 September 1994, SLC 186 (Mr Trung Viet Doan, Vietnamese Refugees Supporting Committee); Helton, note 80 above.

82 PoKempner, note 80 above, at 338-9; SCLCA, 30 September 1994, SLC 185 (Mr Green, worker, Jesuit Refugee Service); Helton, note 80 above, at 557.

83 Ibid (SCLCA).

84 SCLCA, 5 October 1994 (Mr Jeans, legal consultant employed by UNHCR in Galang from January 1992 to June 1992); NSW Refugee Fund Committee, *Report on Corruption in the Screening Process under the Comprehensive Plan of Action in Galang Camp, Indonesia* (20 August 1994).

85 See 'UNHCR Report on Alleged Corruption in the [sic] Refugee Status Determination in the Philippines' in UNHCR, *Information Package on the Comprehensive Plan of Action on Indo-Chinese Refugees* (October 1995) for discussion of these allegations and repudiation by UNHCR of any suggestion that corruption was pervasive or led to wrongful denials of refugee status.

screened in varied greatly between CPA first-asylum countries, as the following table shows:

	Acceptance rate (%)	
Country	**First instance**	**Cases reviewed**
Hong Kong[86]	11	6
Indonesia[87]	27	37
Malaysia[88]	28	18
Philippines[89]	43	13
Thailand[90]	21	3

Senator Chamarette has argued that this disparity in acceptance rates between countries suggests a worrying lack of uniformity in the implementation of the CPA.[91] UNHCR's view appears to be that to the

86 Annex I to 'Statement by Mrs Sadako Ogata, the United Nations High Commissioner for Refugees, to the United States Congressional Hearing on the CPA' in UNHCR, *Information Package on the the Comprehensive Plan of Action* (October 1995). The overall acceptance rate is stated as being 16.2% of cases: ibid. A much lower figure of 8% is cited by Senator Chamarette (Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, p 1915) but the author accepts the UNHCR figure because the provenance of Senator Chamarette's figure is not known to her.

87 Ibid (Annex I to 'Statement by Mrs Sadako Ogata'). It is not, of course, possible to obtain an overall acceptance rate simply by adding the two acceptance rates. However, on the basis of certain assumptions about the raw data, the author calculated an overall acceptance rate of 40%. A figure of 40% has also been cited by Senator Ellison (SCLCA, 30 September 1994, SLC 191).

88 Ibid (Annex I to 'Statement by Mrs Sadako Ogata'). The first-instance figures provided in Annex I were as of June 1995, while the review figures were as of end 1994. It was not, therefore, possible for the author to calculate an overall acceptance rate. It should also be noted that the Malaysian figures cannot directly be compared with those of the other countries because the figures for the other countries are given in terms of cases, not persons; a case may cover more than one person.

89 'UNHCR Report on Alleged Corruption in the [sic] Refugee Status Determination in the Philippines' in UNHCR, *Information Package on the Comprehensive Plan of Action on Indo-Chinese Refugees* (October 1995). On the basis of certain assumptions about the raw data, the author calculated an overall acceptance rate of 51%. This is very close to a figure of 47% cited by Senator Chamarette (Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, p 1915).

90 Annex I to 'Statement by Mrs Sadako Ogata', see note 86 above. On the basis of certain assumptions about the raw data, the author calculated an overall acceptance rate of 23%. This is very close to a figure of 20% cited by Senator Chamarette (Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, p1915).

91 Ibid (*Parliamentary Debates*). This is despite the fact that a steering committee meets every so often to monitor the implementation of the CPA and to deal with

extent that the disparities suggest this, the lack of uniformity was benign. In other words, the high acceptance rates of the Philippines and Indonesia are explained by incorrect acceptances by those countries,[92] rather than the lower acceptances rates of the other countries being explained by incorrect rejections. Additionally, UNHCR explains the particularly low acceptance rate in Hong Kong by the fact that almost two-thirds of asylum seekers screened in Hong Kong came from the north of Vietnam, while most of the asylum seekers screened in the other CPA countries of first asylum were from the south of Vietnam.[93] According to UNHCR, asylum seekers from North Vietnam 'usually had less valid claims for refugee status given the historical and political differences'.[94]

Given the enormous respectability of UNHCR, not to mention its role in supervising the implementation of the provisions of the Refugee Convention, it might appear at first to be reasonable to accept the UNHCR version of the CPA story. The author's view, however, is that UNHCR probably has too much 'face' invested in the success of the CPA for it to be entirely objective in its assessments. Even more to the point, though, is the fact that misplaced trust in the NGO version of the CPA story cannot result in refoulement. Misplaced trust in the UNHCR version can. It should particularly be kept in mind that if the NGO version is correct, even a guarantee by a CPA country of first asylum to reconsider the case of an asylum seeker returned to its territory would be of little value. If its procedures have not improved in reliability, it is no more likely to get its determination of refugee status right the second time than it is the first.

If, for the sake of argument, it is conceded that the UNHCR version of the CPA story is correct, this does not address the question of whether it is safe to return to a CPA country of first asylum an asylum seeker who has claims and/or supporting evidence not available at the time that he or she was screened out. A person with new claims might have become a refugee since his or her screening out, while a person with new evidence may, if given the opportunity, be able to make out a better case for refugee status than he or she could manage the first

any problems which might be identified: SCLCA, 30 September 1994, SLC 147 (Mr Fontaine, UNHCR).

92 'Introduction' and 'Statement by Mrs Sadako Ogata, the United Nations High Commissioner for Refugees, to the United States Congressional Hearing on the CPA' in UNHCR, *Information Package on the the Comprehensive Plan of Action* (October 1995).

93 Annex I to 'Statement by Mrs Sadako Ogata', see note 86 above.

94 Ibid.

time around. No matter how reliable the procedure under which such a person was originally screened out, he or she needs to be given a second chance.

Turning now to considering the appropriateness of relying on UNHCR to protect any returned asylum seekers in relation to whom one of Australia's non-refoulement obligations has been engaged, it is the case that UNHCR has given assurances that it will re-examine the case of any person who alleges that he or she was affected by corruption in the screening process or is able to bring forward new information relevant to his or her claim to refugee status, and will exercise its mandate if the person is found to be a refugee.[95] There is no reason to suppose that UNHCR's re-examination of cases would be anything other than genuine and competent. Is it not entirely appropriate then for Australia to rely on UNHCR? The answer is that it certainly would be, if (contrary to fact) Australia's only non-refoulement obligation was the obligation under article 33 of the Refugee Convention. The UNHCR (in the CPA context) is only concerned with identifying and protecting refugees—thus re-examination of cases by the UNHCR will be no safeguard against non-refugees, who are nevertheless entitled to protection from refoulement under the Torture Convention and/or the ICCPR, being returned to their country of origin.

Even if it could be known as a fact that asylum seekers removed to CPA countries of first asylum under the CPA provisions of the *Migration Act* would never be forcibly repatriated, removal of asylum seekers to these countries could still place Australia in breach of one or more of its non-refoulement obligations. Australia would be in breach of the article 33 obligation of non-refoulement if an asylum seeker removed to a CPA country of first asylum was a refugee and faced a real chance of being persecuted *in the CPA country of first asylum* for a Refugee Convention reason. Australia would be in breach of article 3 of the Torture Convention if there were substantial grounds for believing that the asylum seeker would be subjected to torture *in the CPA country of first asylum*. Finally, Australia would be in breach of article 7 of the ICCPR if there were substantial grounds for believing that the asylum seeker would be exposed to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment *in the CPA country of first asylum*.

95 Author's telephone interview with an UNHCR official (Canberra Office) on 28 November 1995; Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, p 1919 (Senator McMullan).

What conditions do asylum seekers covered by the CPA experience in CPA countries of first asylum? The conditions in the Hong Kong camps are particularly bad.[96] The camps are overcrowded to the point of being unsanitary and are infested with rats.[97] Not surprisingly, outbreaks of communicable diseases are common.[98] Moreover, according to the 1995 Annual Report of the US Committee on Refugees, asylum seekers in the Hong Kong camps 'were subjected to unprecedented levels of violence by Hong Kong authorities in 1994'[99] and from all accounts this violence continues.

Conditions in the overcrowded[100] Galang Camp in Indonesia are not much better. There have been reports of 'abuse, rape, intimidation and beatings' of the asylum seekers by the camp's security officials.[101] Conditions in the camps in the Philippines[102] and Thailand are not as appalling. However, testimony presented to the US House of Representatives Hearing on the Comprehensive Plan of Action for Southeast Asian Refugees suggests that all countries of first asylum are reducing the food, water, shelter and other services supplied to the camps in order to encourage screened-out asylum seekers to return home.[103] The individual presenting this testimony went on to say:[104]

> with camp services deteriorating, conditions are ripe for the kind of reports we have all received—violence in the camps, violence by host country authorities against the refugees, violence between refugee groups, and self-violence, mutilation and even suicide.

96 Testimony by Elisa C Massimino, Legal Director, Washington Office, Lawyers Committee for Human Rights, before the US House of Representatives Committee on International Relations, Subcommittee on Asia and the Pacific, Subcommittee on International Operations and Human Rights, 27 July 1995, on Lexis-Nexis.

97 Yen Tran, note 74 above, at 497-8.

98 Ibid.

99 D Kirschten, 'Clock's Ticking for Vietnam Refugees' (1995) 27(23) *The National Journal* 1420.

100 Yen Tran, note 74 above, at 486.

101 Ibid, citing 'Terrorised in the Camp of Shame', *South China Morning Post* (6 June 1993) p 4.

102 Ibid, 492-3.

103 Testimony by Le Xuan Khoa, President, Southeast Asian Resource Action Center before the US House of Representatives Committee on International Relations, Subcommittee on Asia and the Pacific, Subcommittee on International Operations and Human Rights, 25 July 1995, on Lexis-Nexis.

104 Ibid.

Camp conditions can only get worse after 30 June 1996, the date on which UNHCR will cease its funding of the care and maintenance programs within the camps.[105]

Australia interprets 'cruel, inhuman or degrading treatment or punishment' as including 'intimidation or humiliation, prolonged solitary confinement or denial of exercise, insulting language, overcrowded detention quarters, lack of proper facilities, heavy-handed methods of interrogation and separation of families.'[106] Clearly, the CPA countries of first asylum are countries in which there are substantial grounds for believing that returned asylum seekers would be exposed to a real risk of being subjected to 'cruel, inhuman or degrading treatment or punishment' within Australia's own interpretation of that phrase. Thus Australia will be in breach of article 7 of the ICCPR every time it returns an asylum seeker covered by the CPA to a CPA country of first asylum. In light of this conclusion, there is little point in exploring whether these facts about the conditions experienced by asylum seekers in countries of first asylum mean that Australia would also breach article 33 of the Refugee Convention and/or article 3 of the Torture Convention by returning any particular subset of asylum seekers to a country of first asylum.

The final point to be made about the CPA countries of first asylum is that they do not meet the criteria for designation as safe third countries contained in either the EXCOM Conclusion or the EU Resolution (referred to above). The preceding discussion has shown that screened-out asylum seekers will not be protected from refoulement if returned to CPA countries of first asylum. For this reason alone the CPA countries of first asylum do not meet either set of criteria for designation as safe third countries. Additionally, however, returned asylum seekers will experience conditions which fall below recognized basic human rights standards (making CPA countries of first asylum unsafe in terms of the EXCOM Conclusion) and amount, in fact, to inhuman or degrading treatment (making CPA countries of first asylum unsafe in terms of the EU Resolution).

The More General 'Safe Third Country' Provisions

Subject to two exceptions dealt with below under the headings 'Access by Regulation' and 'Ministerial Discretion', a protection visa

105 'Boat people returned from Malaysia', Agence France Presse (20 April 1996).

106 Department of Foreign Affairs and Trade, Submission No 89 in *Joint Standing Committee on Migration Inquiry into Detention Practices Submissions* (1993) III, S820.

application is invalid if made by a non-citizen who is covered by 'an agreement relating to persons seeking asylum between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen'.[107] Section 91D(1) of the *Migration Act* provides as follows:

> A country is a 'safe third country' in relation to a non-citizen if:
>
> (a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to the class of persons of which the non-citizen is a member;[108] and
>
> (b) the non-citizen has a prescribed connection with the country.

Considering first the requirement that the non-citizen has a prescribed connection with the third country, this requirement is partially elaborated in s 91D(2) as follows:

> Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:
>
> (a) the person is or was present in the country at a particular time or at any time during a particular period; or
>
> (b) the person has a right to enter and reside in the country (however that right arose or is expressed).

Connections will be prescribed on a country-by-country basis, depending on the terms of the agreement reached with an individual country or group of countries.[109] Subsection (2)(a) allows (inter alia) for the possibility that transitting through a particular third country on the way to Australia might be prescribed as a connection, if that country has entered into an agreement accepting responsibility for

107 Section 91C(1) and s 91E of the *Migration Act*.

108 Section 91G of the *Migration Act* provides that, where the Minister announces by notice in the Gazette that he or she intends to make a regulation prescribing a safe third country, the regulation thus foreshadowed can backdate the prescription to the date of the announcement or after (being a date not more than six months prior to the coming into effect of the regulation). The explanatory memorandum in fact states that s 91G provides 'that the cut-off day must not be before the day on which the Minister announces his or her intention in the Gazette to make an STC regulation. Alternatively, the cut-off day cannot be more than six months before the STC regulation takes effect.' In this author's opinion, however, the grammatical structure of the section makes the two requirements cumulative rather than alternative. Be that as it may, the essence of s 91G is that an application for a protection visa which was valid at the time it was made may later be rendered invalid by the backdated operation of a safe third country prescription. It should be noted, however, that Section 91G(3) of the *Migration Act* provides that s 91G does not render invalid the protection visa application of a person who has actually been granted a substantive visa pursuant to the application before the regulation comes into force.

109 SCLCA, 30 September 1994, SLC 158-9 (Mr Metcalfe, DIMA).

determining the refugee status claims of persons who have spent such a limited time in its territory. Subsection (2)(b) allows (inter alia) for the possibility that having a visa for entry into and residence in a particular third country might be prescribed as a connection, even if the visa holder has never previously been to that country. Again, this assumes that the country in question has entered into an agreement accepting responsibility for determining refugee status claims in such cases. The reference to a 'right to reside' is meant to indicate a right to do more than simply transit or visit, but encompasses rights falling short of a right of permanent residence.[110] The wording of s 91D(2) makes it clear, however, that the regulations can prescribe any link at all between a person and a country as a 'connection'. The only real limits are what third countries are prepared to agree to[111] and what Parliament is prepared to countenance when given an opportunity to disallow the regulations.[112]

Considering now the requirement that a country has been prescribed as a safe third country in relation to the non-citizen or in relation to the class of persons of which the non-citizen is a member, s 91D(3) provides as follows:

> The Minister must, within 2 sitting days after a regulation under paragraph (1)(a) is laid before a House of Parliament, cause to be laid before that House a statement, covering the country, or each of the countries, prescribed as a safe third country by regulation, about:
>
> (a) the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and
>
> (b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and
>
> (c) the willingness of the country, or each of the countries, to allow any person in relation to whom the country is prescribed as a safe third country:
>
> (i) to go to the country; and
>
> (ii) to remain in the country during the period in which any claim by the person for asylum is determined; and

110 Id at SLC 158.

111 If a connection is prescribed without being included in the agreement with the country in question, it is contended that a non-citizen having the prescribed connection with the country could yet not be said to be 'covered' by the agreement as required by s 91E of the *Migration Act*.

112 SCLCA, 30 September 1994, SLC 153 (Mr Metcalfe, DIMA; Mr Richardson, DIMA).

> (iii) if the person is determined to be a refugee while in the country—to remain in the country until a durable solution relating to the permanent settlement of the person is found.

Section 91D(3) may be an attempt to pick up on the safety criteria contained in EXCOM Conclusion. However, there are several problems with it. First, it does not require the Minister to state that he or she is satisfied that the country complies with the relevant international law concerning the protection of persons seeking asylum, that the country meets the relevant human rights standards, and that the country is willing to allow any person in relation to whom the country is prescribed as a safe third country to go to the country and remain in the country while any claim is being determined and, if found to be a refugee, until a durable solution is found.[113] Secondly, it gives no indication of what the 'relevant international law concerning the protection of persons seeking asylum' is.[114] Thirdly, it gives no indication of what the 'relevant human rights standards' may be or whether it is contemplated that the same human rights standards might be 'relevant' to some countries and not to others.[115] Of course, if Parliament were not satisfied that a third country met the criteria set out above, Parliament could disallow the regulation prescribing that country as a safe third country. However, Parliament is under no obligation to do so (and indeed, given Parliamentary sovereignty, could not by legislation be placed under any irrevocable obligation to do so).

Section 94D(4) provides that a regulation made for the purposes of paragraph (1)(a) ceases to be in force at the end of two years after the regulation commences. This subsection prescribes a maximum, not a minimum. It is always open to the Government to repeal a regulation before the end of the two-year period, if circumstances in the third country change to such an extent that it is no longer safe. Indeed, the previous Government gave an undertaking that it would repeal any regulation prescribing a country as a safe third country the moment that country ceased to be safe in fact.[116] From comments made by a coalition spokesperson in response to this undertaking, it appears that

113 Refugee Advice and Casework Service (NSW), Submission No 12 in *Submissions to the Senate Standing Committee on Legal and Constitutional Affairs*, Migration Legislation Amendment Bill (No 4) 1994 (1994) I, 250.

114 Amnesty International, Submission No 11 in *Submissions to Senate Standing Committee*, note 113 above, 226.

115 Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, pp 1916-7 (Senator Chamerette).

116 Id at p 1924 (Senator McMullan).

the present Government has the same policy.[117] However, the nature of bureaucracy is such that it seems unlikely in the extreme that DIMA would get around to reviewing a given regulation until the sunset clause was just about to take effect.

Stronger than all other objections is the objection that any implementation of the safe third country principle which allows the Government or Parliament to prescribe safe third countries will jeopardize either Australia's international relations or the safety of those to whom it owes a non-refoulement obligation. There are countries, such as Indonesia and the United States, which are not safe for at least some groups of asylum seekers, but which may be offended if they are not prescribed as safe without qualification.[118] In some of these cases, Australia may not be able to afford to give offence because its defence, trade or other important interests would be put at risk.[119] Such considerations may lead to countries being prescribed as safe in circumstances in which they are not.[120] Likewise, it may lead Parliament to refrain from disallowing or even discussing regulations made under s 91D(1)(a).[121]

Acting under the authority of s 91D of the *Migration Act*, the previous Government inserted regulation 2.12A into the Migration Regulations.[122] This regulation provides:

> (1) For the purposes of paragraphs 91D(1)(a) and (b) of the [*Migration Act*]:
>
> (a) PRC is a safe third country in relation to a person who is, or has been, a Vietnamese refugee settled in PRC, or a person who is a close relative of, or is dependent on, a person who is, or has been, a Vietnamese refugee settled in PRC, as covered by the Memorandum of Understanding between Australia and PRC the English text of which is set out in Schedule 11;[123] and

117 Id at p 1925 (Senator Short).

118 SCLCA, 5 October 1994, SLC 199-200 (Dr Crock); Australia, *Parliamentary Debates*, Senate, 18 October 1994, vol S 167, p 1909 (Senator Spindler).

119 Id (*Parliamentary Debates*).

120 Ibid; SCLCA, 30 September 1994, SLC 151 (Mr Rose).

121 In the course of the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Migration Legislation Amendment Bill (No 4) 1994, Senator Ellison suggested that it 'could really affect our international relations' to have a debate in Parliament on the question of whether a particular country was safe: id (SCLCA) at SLC 170. Senator Bolkus agreed: ibid.

122 Section 4 of the *Migration Legislation Amendment Act (No 2)* 1995 specifically provides for the backdating of regulation 2.12A of the Migration Regulations.

123 See appendix for the full text of the Memorandum of Understanding.

(b) a person referred to in paragraph (a) has a prescribed connection with PRC for the purposes of paragraph 91D(1)(b) of the Act, if the person, or a parent of the person, resided in PRC at any time before the person entered Australia.

(2) The use in subregulation (1) of the word 'Vietnamese' is as a reference to the nationality or country of origin and not as an ethnic description.

Regulation 2.12A was a response to the unauthorized arrival in Australia of boatloads of Vietnamese nationals who had fled Vietnam and resettled in PRC many years ago, but who claimed upon arrival in Australia that they were being persecuted by PRC authorities. As at 14 May 1996, 760 persons,[124] including PRC nationals,[125] had been returned to the PRC under the safe third country provisions.

The previous Government appeared to accept that the Sino-Vietnamese[126] had a well-founded fear of being persecuted on Refugee Convention grounds if returned to Vietnam. In other words, it appeared to accept that the Sino-Vietnamese were refugees, not merely asylum seekers who may or may not be refugees. If this was in fact the case, the previous Government must have accepted also that the Sino-Vietnamese were all entitled to the benefit of the non-refoulement obligation in article 33 of the Refugee Convention.[127] If, contrary to the author's interpretation of the situation, the previous Government did not accept *as given* that all the Sino-Vietnamese were refugees, it is still the case that some or all of them may, in fact, be refugees and hence entitled to the benefit of the non-refoulement obligation in article 33 of the Refugee Convention,[128] or, if not refugees, still persons entitled to the benefit of the non-refoulement obligation in the Torture Convention and/or the ICCPR.

In these circumstances, the best complexion that can be put on regulation 2.12A is that its enactment followed a prima facie group determination by the previous Government that claims by Sino-

124 DIMA, Media Release DPS 3/96 (14 May 1996).

125 Interview with Richard Sandiland, refugee lawyer (13 June 1995); interview with Richard Egan, Western Australian Representative, Indo-China Refugee Association (10 June 1995). These interviews were tape recorded and the tapes are held at the author's office in the School of Law and Legal Studies at La Trobe University.

126 This term is used throughout this article as DIMA uses it, ie as a shorthand designation of Vietnamese nationals who at some point resettled in the PRC. Most of these persons are also Sino-Vietnamese in the more conventional sense of being Vietnamese nationals of Chinese ethnicity.

127 Unless excluded under article 33(2)

128 Unless excluded under article 33(2)

Vietnamese arriving in Australia to the effect that they faced persecution in the PRC were not well-founded.[129] If this determination proves incorrect in the case of a given individual, Australia may well breach one or more of its non-refoulement obligations by returning the individual to the PRC. The non-refoulement obligation in article 33 of the Refugee Convention is not simply an obligation to refrain from returning refugees to their country of nationality (in this context, Vietnam), but an obligation to refrain from sending them to *any* country in which their 'life or freedom would be threatened' for a Refugee Convention reason. Likewise, the non-refoulement obligations in the ICCPR and the Torture Convention are obligations to refrain from sending any person to *any* country in which there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture (ICCPR and Torture Convention) or being subjected to inhuman or degrading treatment or punishment (ICCPR).

In making its prima facie group determination about the Sino-Vietnamese, the previous Government relied on assurances from UNHCR and Australian officials based in the PRC to the effect that Sino-Vietnamese were not being persecuted by the PRC authorities,[130] as well as the impressions to a similar effect gained by immigration officials who visited the resettlement region in southern China immediately prior to the signing of the safe third country agreement.[131] The Government was probably particularly influenced by assurances that Sino-Vietnamese who had gone from the PRC to Hong Kong and Japan and been returned to the PRC under safe third country agreements had not been persecuted on their return.[132]

129 In his statement under 91D(3), tabled on 2 February 1995, the then Minister for Immigration said: 'In respect of human rights accorded to the Vietnamese refugees in China, Australia is satisfied the refugees are treated essentially as Chinese nationals, and that their living standards are in the main similar to those of local Chinese nationals. We understand that they have the same rights and obligations as Chinese nationals, which includes the obligations under the household registration system, and that they enjoy the same civil rights as Chinese nationals, with the exception of the right to participate in elections.'

130 Senator Bolkus, 'Refugee Bills reinforce human rights commitment', *Australian* (2 March 1995) p 11.

131 Australia, *Parliamentary Debates*, House of Representatives, 9 February 1995, vol H of R 199, pp 883-4 (Mr Ferguson).

132 Australia, *Parliamentary Debates*, Senate, Legal and Constitutional Legislation Committee (hereinafter LCLC), Migration Legislation Amendment Bill (No 2) 1995/Migration Legislation Amendment Bill (No 3) 1995, 3 February 1995, L&C 82 (Mr Richardson, DIMA); L&C 129-30 (Mr Fontaine, UNHCR).

Richard Egan has pointed out that the problem with the legislation[133] is that it does not distinguish between three different categories of Sino-Vietnamese. First there are those who were officially resettled in the PRC and have never been persecuted by the PRC authorities.[134] Others were also officially resettled in the PRC, but have since experienced some kind of persecution on grounds of political opinion or for some other reason.[135] As Richard Egan argues, there is no reason to suppose that Sino-Vietnamese are 'not going to experience the same kinds of persecution and in roughly the same proportion as [other] Chinese residents.'[136] Finally, there are those who were never officially resettled in China. Members of this third category do not have household registration and are for that reason discriminated against to an extent amounting to persecution.[137]

The previous Government effectively made a prima facie determination that the Sino-Vietnamese arriving in Australia fall into the first category. Based on the evidence of UNHCR and so on, it may indeed be fair to assume that the vast majority of Sino-Vietnamese still in the PRC fall into the first category. However, it is not fair to assume that the Sino-Vietnamese who arrive in Australia fall into the three categories in the same proportions as those that remain in the PRC. The Sino-Vietnamese who arrive here have felt impelled by their circumstances to commit themselves to a long voyage over treacherous seas in overcrowded and barely seaworthy vessels—those that remain behind have not. If assumptions are to be made, a more reasonable assumption is that there are proportionately more persons belonging to the second and third category amongst those that arrive here than among those that remain behind. Seven Sino-Vietnamese who arrived here on the boat code-named 'Dalmation', 46 of the 53 on the 'Pluto', six on the 'Toto' and all 51 who arrived on the 'Unicorn'

133 Mr Egan was actually commenting on s 4 of the *Migration Legislation Amendment Act (No 2)* 1995 which provides for the backdating of regulation 2.12A of the Migration Regulations, but his comments are applicable to regulation 2.12A itself.

134 LCLC, 3 February 1995, L&C 91 (Mr Egan, Western Australian Representative, Indo-China Refugee Association).

135 Ibid; LCLC, 3 February 1995, L&C 91 (Mrs Le, President, Indo-China Refugee Association).

136 LCLC, 3 February 1995, L&C 91 (Mr Egan, WA Representative, Indo-China Refugee Association)

137 Id at L&C 92; LCLC, 3 February 1995, L&C 91 (Mrs Le, President, Indo-China Refugee Association). For a description of the treatment of Sino-Vietnamese without household registration see LCLC, 3 February 1995, L&C 85-87 (Ms Martin, Coalition for Asylum Seekers) and Australia, *Parliamentary Debates*, Senate, 8 February 1995, vol S 169, pp 702-3 (Senator Spindler).

prior to regulation 2.12A being conceived were determined to be refugees[138] *and in need of Australia's protection*,[139] supporting this assumption.

The previous Government's position was that there are sufficient safeguards in place to ensure that Sino-Vietnamese who do not fall into the first category are not returned to the PRC. This is also the present Government's view. In the first place, those Sino-Vietnamese who cannot be verified as having registration in PRC (ie fall into the third category) are not covered by the safe third country agreement and cannot be returned to the PRC under its terms.[140] Those persons will be given the same opportunity to access Australia's protection as other asylum seekers.[141] It is accepted by the author that the terms of the safe third country agreement are indeed a sufficient safeguard for Sino-Vietnamese in the third category.

Sino-Vietnamese in the second category are said to be able to rely on safeguards such as the Minister's noncompellable discretion to allow protection visa applications by persons who would otherwise be prevented from making applications under the safe third country provisions. The adequacy of safeguards such as the Minister's noncompellable discretion will be discussed shortly.

An aspect of regulation 2.12A which has not been touched upon thus far is its provision that 'PRC is a safe third country in relation to ... a person who is a close relative of, or is dependent on, a person who is, or has been, a Vietnamese refugee settled in PRC.' The regulation allows a PRC national who is the spouse (for example) of a Vietnamese refugee settled in the PRC to be returned to the PRC.[142] It is, of course, going far beyond the parameters of the safe third country principle to designate the country of nationality of an asylum seeker as a safe third country in relation to him or her!

There is a trend in Europe towards designating safe countries of origin (being countries in which there is 'in general terms no serious risk

138 Id (*Parliamentary Debates*) at p 703 (Senator Spindler).

139 LCLC, 3 February 1995, L&C 92 (Mr Egan, WA Representative, Indo-China Refugee Association); LCLC, 3 February 1995, L&C 91 (Mrs Le, President, Indo-China Refugee Association).

140 LCLC, 3 February 1995, L&C 115-6 (Mr Richardson, DIMA)

141 Id at L&C 116.

142 Australia, *Parliamentary Debates*, Senate, 9 February 1995, vol S 169, p 798 (Senator Harradine).

of persecution').[143] It is considered to be justifiable in most cases to give a person from a designated safe country of origin access only to an accelerated version of the receiving country's asylum procedure.[144] However, there is a very clear recognition of two points. First, it is necessary to give a person from a designated safe country of origin access to full procedure, where there are 'any specific indications presented by the applicant which might outweigh the general presumption'.[145] Secondly, it is still necessary to make individual determinations in relation to *all* applicants from designated safe countries of origin.[146] The question in relation to any given asylum seeker from a safe country of origin is simply whether the individual determination of his or her application is to be made under the accelerated procedure rather than the full procedure. UNHCR is not very enthusiastic about the designation of safe countries of origin, but is prepared to accept the practice as long as the designation is for procedural purposes only and is presumptive, with every asylum seeker from a designated safe country of origin being given the opportunity to rebut the presumption.[147]

A PRC national who is a close relative of, or dependent on, a Vietnamese refugee settled in China, but claims to face persecution in the PRC, would be able to invoke the Minister's noncompellable discretion.[148] However, it is argued below that the possibility of invoking the Minister's discretion does not amount to a sufficient opportunity for an individual PRC national to rebut the designation of the PRC as a safe country of origin. That aside, the effective designation of the PRC as a safe country of origin for a PRC national who is a close relative of, or dependent on, a Vietnamese refugee settled in China does not simply mean (as it does in Europe) that some individuals are given access to an accelerated procedure for considering protection visa applications. Instead, those individuals are excluded from the system altogether. Finally, the PRC's past record in relation to the observance of human rights standards provides no objective justification for designating it as a safe country of origin.

143 The language is that of the EU Ministers responsible for immigration in their Resolution on Manifestly Unfounded Applications for Asylum (1 December 1992).

144 Ibid.

145 Ibid.

146 Ibid.

147 SCLCA, 30 September 1994, SLC 148 (Mr Fontaine, UNHCR)

148 Australia, *Parliamentary Debates*, Senate, 9 February 1995, vol S 169, pp 818-9 (Senator Bolkus)

Review Rights

The CPA provisions and the more general safe third country provisions make protection visa applications from certain persons invalid by operation of law. Since there is not a 'decision' to refuse a visa, nor even a 'decision' not to consider an application for a visa, there is no scope for judicial review.[149]

Access by Regulation

Section 91C(1)(c) enables the Government to make regulations which will enable named or defined non-citizens to make valid protection visa applications even though they are covered by the CPA, or by an agreement relating to persons seeking asylum between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen. According to the Explanatory Memorandum accompanying the Migration Legislation Amendment Bill (No 4) 1994, this provision was included to deal with situations 'where the circumstances of a large group of people make it appropriate for them to make a valid protection visa application.' As at the date of writing, no such regulations have been made.

Ministerial Discretion

Section 91F of the *Migration Act* specifies another exception to the provision which renders invalid protection visa applications by persons covered by the CPA or in relation to whom there is a safe third country. The exception is a power, exercisable by the Minister for Immigration personally, to allow a particular non-citizen to make an application for a protection visa, if the Minister thinks that it is in the public interest to allow this. The Minister does not, however, have a duty to consider whether to exercise his or her power to allow an application to be made.[150]

It can be seen that in any given case one of three alternative decisions is necessarily made pursuant to s 91F: a decision to allow an application to be made, a decision to refuse to allow an application to be made, or a decision that the Minister will not consider whether to allow an application to be made.[151] It is probably the case that the rules

149 SCLCA, 30 September 1994, SLC 159 (Mr Metcalfe, DIMA).

150 Section 91F(6) of the *Migration Act*.

151 The decision that the Minister will not consider allowing an application can probably be delegated by the Minister to another, though the ability to make the other two decisions cannot: see interpretation of s 417 of the *Migration Act*

of procedural fairness and so on must be complied with in making any decision under s 91F.[152] However, an asylum seeker has very limited recourse if there is no such compliance.

Section 475(2)(e) of the *Migration Act* provides that a decision of the Minister not to exercise or not to consider the exercise of his or her power under s 91F is not a 'judicially-reviewable decision' and so not reviewable by the Federal Court under the *Migration Act*. Section 485 of the *Migration Act* further provides that decisions covered by s 475(2) cannot be reviewed by the Federal Court under any other law.[153] It may nevertheless be the case that *conduct* for the purpose of making a decision under s 91F is reviewable by the Federal Court under s 6 of the *Administrative Decisions (Judicial Review) Act* 1975 (Cth).[154] However, the relief which the court can grant if a ground of review is made out is limited.[155] The Court cannot quash or set aside the decision itself nor refer the case back to the decision-maker for further consideration.

Turning from the Federal Court to the High Court, a decision of the Minister not to exercise or not to consider the exercise of his or her power under s 91F would be reviewable by the High Court under s 75(v) of the Australian Constitution in circumstances where an injunction or a writ of mandamus or prohibition could properly be sought by way of relief.[156] However, the fact that seeking a prerogative writ from the High Court is a legally difficult (and therefore expensive) endeavour makes the s 75 option no option at all for most asylum seekers.[157]

(analogously worded to s 91F) in *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (unrep, Fed Ct of Australia, Merkel J, 13 May 1996).

152 Ibid.

153 Except under s 44 of the *Judiciary Act* 1903 (Cth) which provides for matters to be remitted by the High Court to the Federal Court.

154 See *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*, note 151 above.

155 Section 16(2) of the *Administrative Decisions (Judicial Review) Act* sets out the relief available.

156 The appropriateness of these remedies cannot be assumed. For example, since the Minister has no duty to consider the exercise of his or her power under s 91F, the High Court would not be able to grant mandamus to compel the Minister to consider the exercise of the power.

157 Section 486 of the *Migration Act* provides that, with the exception of the High Court's jurisdiction under s 75 of the Australian Constitution, the Federal Court has exclusive jurisdiction with respect to 'judicially reviewable decisions'. However, since a decision of the Minister not to exercise his or her power under s 91F is defined as not being a 'judicially reviewable decision' and likewise a decision of the Minister not to consider the exercise of his or her power under s 91F is defined

Given the Minister's almost complete lack of accountability for a decision to refuse to allow an application to be made or a decision not to consider whether to allow a decision to be made,[158] it appears far from satisfactory, even in theory, that the Minister's discretion under s 91F should be the only safeguard against refoulement for persons caught by the safe third country provisions.

The practice relating to the exercise of the Minister's discretion, so far as the author is aware,[159] provides further grounds for pessimism. In 1994/1995, DIMA outlined the practice as follows. DIMA told the Senate Standing Committee on Legal and Constitutional Affairs that statements made in compliance interviews by the asylum seekers from Galang had been forwarded to Canberra to be scrutinized by senior DIMA officials against certain guidelines relating to the invocation of the Minister's discretion, and that a similar process was envisaged in relation to the Sino-Vietnamese asylum seekers.[160] According to DIMA, if the circumstances revealed at the interview suggested that the case was an appropriate one for the Minister's intervention, DIMA would make a recommendation to the Minister that he should consider exercising his discretion.[161]

What cases would be appropriate ones for the exercise of the Minister's discretion? According to DIMA, an event which occurs after a

as not being a 'judicially reviewable decision', s 486 does not limit the ability of the High Court or any other court to review such decisions. There does not appear to be any basis apart from s 75(v) of the Australian Constitution on which a court other than the Federal Court could claim jurisdiction.

158 The *Migration Act* makes the Minister accountable to Parliament for each decision to *allow* an application to be made: ss 91F(3)-(5) of the *Migration Act*. However, forcing the Minister to justify all favourable decisions is hardly an additional safeguard against refoulement for persons caught by the safe third country provisions.

159 In November 1995, the author asked DIMA to provide her with a copy of any written guidelines relating to the exercise of the Minister's discretion under s 91F and put to DIMA detailed questions about the procedure by which DIMA officials identified and drew to the attention of the Minister appropriate cases for the exercise of the Minister's s 91F discretion. Six months and several letters and telephone calls later, DIMA was still 'working on' the author's request. DIMA's *Onshore Refugee Procedures Manual* (21 March 1996), a manual designed to provide decision support to DIMA's staff, has nothing to say about s 91F, although it sets out in pain-staking detail procedures for identifying and drawing to the Minister's attention appropriate cases for the exercise of the Minister's s 417 discretion and 48B discretion together with guidelines for the exercise of those discretions. All of this leads the author to suspect that there are no clearly formulated procedures for identifying and drawing to the Minister's attention appropriate cases for the exercise of the Minister's s 91F discretion and certainly no written guidelines for the exercise of the discretion.

160 LCLC, 3 February 1995, L&C 139-40 (Mr Sullivan, DIMA).

161 SCLCA, 30 September 1994, SLC 160 (Mr Metcalfe, DIMA).

person arrives in Australia and possibly renders that person a refugee *sur place*[162] would be a circumstance which might make it 'in the public interest' for the Minister to exercise his s 91F discretion in favour of the asylum seeker.[163] Moreover, DIMA has promised that an asylum seeker who claimed to face persecution in the 'safe' third country would be allowed to make an application for a protection visa through the exercise of the Minister's discretion.[164] DIMA has also informed the Senate Standing Committee that it would be in the public interest for the Minister to exercise his or her discretion in favour of an asylum seeker where there were 'compelling humanitarian reasons' for allowing the asylum seeker to apply for a protection visa.[165] These grounds for exercise of the Minister's discretion appear at first to go a long way towards meeting the concerns raised above under the headings 'The CPA Provisions' and 'The More General "Safe Third Country" Provisions', especially if DIMA's reference to 'compelling humanitarian reasons' is taken as an acknowledgment that it would be appropriate for the Minister to exercise his discretion where Australia's non-refoulement obligations under the Torture Convention and the ICCPR are engaged. However, when practice is examined a bit further, it becomes clear that the safety net is illusory.

It is unsatisfactory that the only opportunity an asylum seeker has to convince DIMA to place his or her claims before the Minister is in a relatively brief interview with a compliance officer, the focus of which is on other matters.[166] What is even more unsatisfactory is that the so-called 'opportunity' is hardly an opportunity at all. At the compliance interview, persons found to fall into a class of person excluded from the on-shore refugee status determination process are simply asked whether there are any special circumstances which they would

162 A person who had no claim to refugee status at the time he or she left his or her country of origin may become a refugee while outside his or her country because of changes in that country during his or her absence or even as a result of his or her own actions while outside the country of origin. Such persons are called refugees *sur place*.

163 SCLCA, 30 September 1994, SLC 153-4 (Mr Metcalfe, DIMA).

164 'Let me be quite clear: if a Sino-Vietnamese or anyone else arrived and said, "I am here because I was in Tienanmen Square, etc" then they would be passed on through the full process. The Minister's non-compellable discretion could be engaged at that point.': LCLC, 3 February 1995, L&C 139 (Mr Richardson, DIMA)

165 SCLCA, 30 September 1994, SLC 154 (Mr Metcalfe, DIMA).

166 Refugee Advice and Casework Service (Vic), Submission No 5 in *Submissions to the Senate Standing Committee on Legal and Constitutional Affairs*, Migration Legislation Amendment Bill (No 4) 1994 (1994) I, 33; Refugee Advice and Casework Service (NSW), Submission No 12 in *Submissions to the Senate Standing Committee on Legal and Constitutional Affairs* (1994) I, 245.

like the authorities to take into account.[167] Such a question gives the person no clue as to what kind of information precisely is being sought, or why. Nor is the interviewee usually in receipt of legal or other independent advice[168] which might enlighten him or her about the significance of the question. It might be thought that a person who truly was fleeing persecution in the PRC, for example, would volunteer that information without the need for any greater prompting. This overlooks the fact that such persons are likely to have learned to mistrust those in positions of authority, and need to be given an opportunity to satisfy themselves that the Australian authorities can be trusted before they can be expected to volunteer sensitive information.[169] A compliance interview occurs too soon after an unlawful non-citizen has been taken into custody and is too brief and too intimidating for trust to develop.[170] The inclination of those with genuine claims to protection, if they fear that sensitive information might get back to the authorities they are fleeing and put them in further jeopardy should they be returned, is to present themselves as wanting to remain in Australia for vaguely specified reasons, for example because they want a 'better life'.

There is a further problem with the practice. It appears that formal guidelines relating to the exercise of the Minister's s 91F discretion have never been issued.[171] This suggests a lack of serious commitment to the goal of ensuring that the Minister's discretion is exercised in all appropriate cases. Further evidence of this lack of commitment is the fact that the Minister's s 91F discretion has not been exercised even once.[172] The discussion of the concerns raised above has hopefully established to the reader's satisfaction the great implausibility of any assertion that amongst the many hundreds of persons prevented from making a valid protection visa application by the prospective or retrospective operation of the safe third country provisions, there has not been one whose circumstances warranted the exercise of the Minister's discretion.

167 'Boat people given no chance, says lawyer', *Age* (25 November 1994) p 4, citing an Immigration Department spokesperson; LCLC, 3 February 1995, L&C 139-40 (Mr Sullivan, DIMA).

168 Australia, *Parliamentary Debates*, Senate, 9 February 1995, vol S 169, p 821 (Senator Bolkus).

169 S Taylor, 'Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions' (1994) 13 *University of Tasmania Law Review* 43, 64-5.

170 Id at 65.

171 See note 159 above.

172 No statement under s 91F had been tabled in Parliament up to 28 June 1996.

Recommendations

In light of the foregoing discussion, the following recommendations are made.

Australia should not return persons covered by the CPA to CPA countries of first asylum because it is likely to be violating article 7 of the ICCPR every time it does so.

Section 91D should be amended so that a country can only be prescribed as a safe third country if the Minister is satisfied that it complies with the relevant international law concerning the protection of persons seeking asylum, meets relevant human rights standards for the persons in relation to whom it is prescribed as a safe third country, and is willing to allow any person in relation to whom it is prescribed as a safe third country to go to the country, to remain there while any claim for protection is determined and, if determined to be in need of protection, to remain there until a durable solution is found.[173] Moreover, it should be specified that 'relevant international law concerning the protection of persons seeking asylum' includes the obligations of non-refoulement contained in the Refugee Convention, the Torture Convention and the ICCPR. It should also be specified that 'relevant human rights standards' are, at a minimum, the prohibition of torture and inhuman or degrading treatment or punishment.[174] Finally it should be specified that the mere fact that the country in question is a party to the Refugee Convention, the Torture Convention, the ICCPR or any other agreement (including an agreement to accept responsibility for considering the claims of an asylum seeker, or class of asylum seekers, and providing protection if need be) is not to be taken as sufficient evidence of conformity with the obligations contained in those conventions, but rather that the Minister must be satisfied that actual practice is in conformity with those obligations.[175]

Subsection 91D(4) should be amended to state that a regulation made for the purposes of paragraph 1(a) ceases to be in force at the end of

173 Refugee Advice and Casework Service (NSW), Submission No 12 in *Submissions to the Senate Standing Committee on Legal and Constitutional Affairs*, Migration Legislation Amendment Bill (No 4) 1994 (1994) I, 250.

174 Unless these standards are regarded as 'relevant human rights standards', the non-refoulement obligations contained in the Torture Convention and the ICCPR may be breached.

175 See above under the heading 'The "Safe Third Country" Principle at International Law'.

six months after the regulation commences.[176] The shortness of the period will force DIMA to monitor the situation of each country prescribed as safe on a more or less continuous basis. DIMA can hardly claim that the period is so short as to be unworkable, given that it felt able for many years to deal with the six-monthly review and renewal of regulations providing temporary protection to persons from Sri Lanka and the former Yugoslavia.[177]

Either because the assumptions of fact on which a regulation is based are faulty (as in the case of regulation 2.12A) or because of the peculiar circumstances of an individual asylum seeker, the possibility cannot be discounted that a country prescribed as safe for a particular category of asylum seeker may not be safe for an individual belonging to that category. Since the consequences of sending an asylum seeker to an unsafe country are extremely serious for the asylum seeker[178] and Australia[179] alike, each individual must be given a formal opportunity, quite separate from the compliance interview and accompanied by the same kinds of procedural safeguards as are considered necessary in determining an application for a protection visa,[180] to rebut the presumption that the country to which it is proposed to remove him or her is truly 'safe'.[181] If the asylum seeker successfully rebuts the presumption, he or she should, of course, be allowed to apply for a protection visa.

Implementation of these recommendations will enable Australia to achieve its goal of avoiding the grant of asylum wherever possible,[182] while at the same time ensuring that its fulfillment of its non-refoulement obligations is not jeopardized.

176 Refugee Advice and Casework Service (NSW), note 166 above, at 251.

177 Ibid. Present indications are that, due to improvement in the conditions in both Sri Lanka and former Yugoslavia, these regulations will not be renewed beyond 31 July 1997: Philip Ruddock, Media Release MPS 26/96 (1 July 1996). However, this fact does not undermine the point being made.

178 His or her very life may be the price paid for Australia's error.

179 Exposure to the risk of violating one or more of its non-refoulement obligations.

180 See above under the heading 'The Protection Visa Regime' and, for a more detailed discussion of necessary procedural safeguards, see S Taylor, note 50 above.

181 See above under the heading 'The "Safe Third Country" Principle at International Law'.

182 See above under the headings 'Asylum at International Law' and 'The "Safe Third Country" Principle at International Law'.

Appendix: Schedule 11 of the Migration Regulations

Memorandum of Understanding

Representatives of the Ministry of Civil Affairs of the People's Republic of China and the Department of Immigration and Ethnic Affairs of Australia met in Beijing from January 20 to 25, 1995 on the issue of recent unauthorised arrivals in Australia of Vietnamese refugees settled in China. The discussion was held in a friendly cooperative atmosphere.

Being concluding parties to the '1951 Convention Relating to the Status of Refugees' and the '1967 Protocol Relating to the Status of Refugees', both parties observed that since 1979 the Chinese Government has provided effective protection to over 280,000 Vietnamese refugees settled in China, including significant humanitarian assistance such as land, housing, medical care, education and employment. Both parties also noted that the United Nations High Commissioner for Refugees has been closely involved in all matters relating to refugees, with the active cooperation of the Chinese authorities, both centrally and locally.

Both parties agreed that for the recent and possible future unauthorised arrivals in Australia of Vietnamese refugees settled in China they will, in the spirit of international cooperation and burden sharing maintaining and further developing friendly relations between China and Australia, and fulfilling international obligations consistent with international practice, engage in friendly consultations and seek proper settlement of the issue through agreed procedures. To this end, Vietnamese refugees settled in China returned under agreed verification arrangements will continue to receive the protection of the Government of China.

On this basis both parties reached the following understandings on special arrangements for dealing with current unauthorised arrivals in Australia of Vietnamese refugees settled in China.

1. The Ministry of Civil Affairs agrees to accept those refugees settled in China, subject to verification procedures as agreed between the two parties, and will be responsible for their resettlement. However, this will not constitute a precedent for China in its handling of similar cases with other countries and regions.

2. The Department of Immigration and Ethnic Affairs will provide the Ministry of Civil Affairs with Vietnamese refugee registration forms as agreed between the two parties to facilitate the verification by the Chinese side. The Department of Immigration and Ethnic

Affairs will be responsible for the return of the verified Vietnamese refugees to China by air and will meet all associated costs. The refugees will be returned in groups as soon as possible as verification procedures are completed.

3. Both parties agree to keep the UNHCR informed of the outcome of the negotiations and progress in relation to returns, and seek its assistance if necessary.

Done in duplicate in Beijing on January 25, 1995 in Chinese and English, both texts being equally authentic.