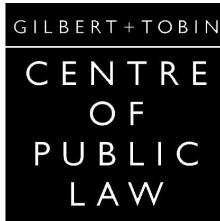

THE UNIVERSITY OF NEW SOUTH WALES

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Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

28 September 2009

Dear Senate Committee,

Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

Thank you for affording me the opportunity to comment on the Migration Amendment (Complementary Protection) Bill 2009.

Complementary protection has been one of my principal research areas for the past eight years. I am the author of the book, *Complementary Protection in International Refugee Law*, published by Oxford University Press in 2007, which is the leading work on the topic. I am also the Associate Rapporteur of the Convention Refugee Status and Subsidiary Protection Working Party of the International Association of Refugee Law Judges.

I am based at the University of Oxford as a Visiting Fellow until December 2009, and am therefore unable to appear in person to give evidence to the Committee. However, I would be very happy to provide telephone evidence if this is possible.

Yours sincerely,

Jane McAdam

A INTRODUCTION AND BACKGROUND

1. The Migration Amendment (Complementary Protection) Bill 2009 introduces welcome changes to the Migration Act 1958 (Cth). It attempts to bring domestic law into line with Australia's *non-refoulement* obligations under international human rights law,[1] thereby also aligning Australian legislation with comparable provisions in the European Union ('EU'), Canada, the United States, and draft provisions in New Zealand.[2] It follows a series of recommendations in parliamentary reports that Australia adopt a system of 'complementary protection'—protection that is complementary to Australia's obligations under the Refugee Convention,[3] based on its expanded *non-refoulement* obligations under human rights law.[4]

2. The absence of a codified system of complementary protection in Australia has meant that for many years, Australia has been unable to guarantee that people who do not meet the refugee definition in the Refugee Convention, but who nonetheless face serious human rights abuses if returned to their country of origin or habitual residence, are granted protection. There has been no mechanism for having claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment assessed,

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[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 ('ICCPR'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT'); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; see also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No 5 ('ECHR'), which gives rise to significant comparative jurisprudence.

[2] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, arts 2(e), 15 (known as the 'Qualification Directive'); Immigration and Refugee Protection Act 2001 (Canada), c 27, s 97; 8 CFR §§208.16, 208.17 (US); Immigration Bill 2007 (No 132-2), available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm (accessed 25 September 2009) codifying in part New Zealand's international law obligations conceded by the government in *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC).

[3] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read together with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[4] See eg Senate Legal and Constitutional Affairs Committee, *Administration and Operation of the* Migration Act 1958 (Cth of Australia, Canberra, 2006) Recommendation 33, para 4.50ff; Senate Select Committee on Ministerial Discretion in Migration Matters, *Report* (Cth of Australia, Canberra, 2004) esp ch 8; Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (Cth of Australia, Canberra, 2000). See further J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) 3, 131–34; UNHCR Regional Office (Australia, New Zealand, Papua New Guinea and the South Pacific), 'Discussion Paper: Complementary Protection' (No 2, 2005) <http://www.unhcr.org.au/pdfs/Discussion22005.pdf> (accessed 20 June 2007); Refugee Council of Australia and others, 'Complementary Protection: The Way Ahead' (April 2004) <http://www.refugeecouncil.org.au/docs/current/comp-protection-model.pdf > (accessed 21 June 2007); National Council of Churches in Australia, 'Fact Sheet: Introducing the Complementary Protection Model' (2007) <http://www.ncca.org.au/__data/page/993/Complementary_Protection_Fact_Sheet_2007.pdf> (accessed 20 June 2007); Migration Legislation Amendment (Complementary Protection Visas) Bill 2006 (introduced by Senator Andrew Bartlett of the Australian Democrats).

except via the 'public interest' power of the Minister for Immigration and Citizenship under section 417 of the Migration Act 1958 (Cth). The section 417 process is lengthy and inefficient, accessible only once an unsuccessful appeal has been made to the Refugee Review Tribunal. Furthermore, whether or not a claim is considered, and whether or not a visa to remain in Australia is granted, is wholly discretionary and non-reviewable. The section 417 mechanism is appropriate for purely humanitarian and compassionate cases, but not for those engaging Australia's *non-refoulement* obligations under international law. The changes proposed by the Bill are therefore very important because they align domestic law with Australia's international obligations. They ensure that every protection applicant who does not meet the refugee definition automatically has his or her claim assessed against Australia's *non-refoulement* obligations under international human rights law.

3. The test for complementary protection in the Bill operates as follows. A protection visa must be granted to non-citizens with respect to whom 'the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in subsection (2A)'. Matters listed in section 36(2A)—the complementary protection grounds—are that:

   (a) the non-citizen will be arbitrarily deprived of his or her life; or
   (b) the non-citizen will have the death penalty imposed on him or her and it will be carried out; or
   (c) the non-citizen will be subjected to torture; or
   (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
   (e) the non-citizen will be subjected to degrading treatment or punishment.

   The Bill defines the terms 'torture', 'cruel or inhuman treatment or punishment', and 'degrading treatment or punishment'.

   Section 36(2B) provides that there is no 'real risk' of irreparable harm if:

   (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in that subsection; or
   (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen would be irreparably harmed because of a matter mentioned in that subsection; or
   (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

   According to section 36(2C), an individual is ineligible for a visa on complementary protection grounds if:

   (a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
(ii) the non-citizen committed a serious non-political crime before entering Australia; or
(iii) the non-citizen has been found guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or
(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

4. The Bill provides for five grounds of complementary protection. At first glance, this may seem more extensive than complementary protection regimes in other jurisdictions, but this is not the case. The Bill expands out a number of grounds that are bundled together in the international human rights instrument on which they are based (the International Covenant on Civil and Political Rights ('ICCPR')), as well as in comparable legislation in the EU, Canada and (in draft form) New Zealand.

5. In my view, the Bill makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalizing an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonization is being sought.[5] It invites decision-makers to 'reinvent the wheel', rather than encouraging them to draw on the wealth of jurisprudence that has been developed around these human rights principles internationally. Since the purpose of the Bill is to implement Australia's international human rights obligations based on the expanded principle of *non-refoulement*, it seems only sensible and appropriate that Australian legislation reflect the language and interpretation of these obligations as closely as possible. This would also enhance the international value of Australian complementary protection jurisprudence.

6. That said, many of the underlying premises of the proposed complementary protection regime are sound and principled. In particular, I welcome the single legal status for Convention refugees and beneficiaries of complementary protection; the derivative status for family members of beneficiaries of

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[5] See eg the creation of a Common European Asylum System; H Lambert, 'Transnational Judicial Dialogue, Harmonization, and the Common European Asylum System' (2009) 58 International and Comparative Law Quarterly 519; AM North and J Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' in J McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford, 2008).

complementary protection; and the fact that complementary protection is available to offshore entry persons.

7. Over time, I would encourage the progressive development of the complementary protection grounds in line with international and regional human rights law.[6] I would also advocate the extension of complementary protection to people fleeing situations of conflict or generalized violence, which is already a codified ground for protection in the regional regimes of the EU, Africa and Latin America.[7]

8. I would also encourage the government to address the protection needs of stateless people, to whom Australia has protection obligations under the two statelessness treaties, and who often have substantially similar protection needs to refugees and beneficiaries of complementary protection.[8] In the Bill's Second Reading Speech, the Parliamentary Secretary for Multicultural Affairs and Settlement Services stated that the government

> is committed to ensuring that other stateless cases are not left in the too-hard basket. The government is acutely aware of past failures to resolve the status of stateless people in a timely manner. The Minister for Immigration and Citizenship is committed to exploring policy options that will ensure that those past failures are not repeated.[9]

It is important that these matters are not only addressed through 'policy options', but also through the creation of a new visa category in Australian law.

9. I would also suggest the inclusion in the Bill of a provision stating that, in accordance with article 3 of the Convention on the Rights of the Child,[10] the 'best interests of the child shall be a primary consideration' in decisions made under section 36. This would give effect to the statement in the Bill's

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[6] As envisaged by the House of Lords, for example, in *Ullah v Secretary of State for the Home Department* [2004] UKHL 26.

[7] Qualification Directive, art 15(c); see also Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12; Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 ('OAU Convention'); Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85). This is in line with customary international law, on which see GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 286ff.

[8] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[9] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives (9 September 2009) 7 (The Hon Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).

[10] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Explanatory Memorandum that '[c]laims by children will be assessed in an age-sensitive way, in view of the specific needs of children.'[11]

10. Finally, it should be emphasized that complementary protection does not supplant or compete with the Refugee Convention. By its very nature, it is *complementary* to refugee status determination done in accordance with the Refugee Convention. This means that Australian decision-makers should continue to assess protection claims in the same way that they have always done, constantly mindful of the evolving scope of the notion of 'persecution' and cognisant of the way in which developments in human rights law inform and expand its meaning. The complementary protection grounds are only considered following a comprehensive evaluation of the applicant's claim against the Refugee Convention definition, and a finding that the applicant is not a refugee. In addition, there will still be purely humanitarian or compassionate cases that should be referred to the Minister under section 417.

11. This submission considers fundamental elements of the complementary protection test proposed in the Bill. It examines these in four parts: the standard of proof, the complementary protection grounds, the exceptions to complementary protection, and exclusion from complementary protection.

[11] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009, para 58.

B STANDARD OF PROOF: s 36(2)(aa)

the Minister is satisfied Australia has protection obligations because the Minister has **substantial grounds for believing** that, as a **necessary and foreseeable consequence** of the non-citizen being removed from Australia to a receiving country, there is a **real risk** that the non-citizen will be **irreparably harmed** because of a matter mentioned in subsection (2A)

'substantial grounds for believing'

International standard under the Convention against Torture ('CAT')

12. The term 'substantial grounds for believing' appears in article 3 CAT: '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.' The UN Committee against Torture's jurisprudence interprets 'substantial grounds' as involving a 'foreseeable, real and personal risk' of torture.[12] The threat of torture does not have to be 'highly probable'[13] or 'highly likely to occur', but must go 'beyond mere theory or suspicion' or 'a mere possibility of torture'.[14] The danger must be 'personal and present'.[15] 'Substantial grounds' may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving country.[16] Furthermore, 'it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable'.[17]

13. Article 3(2) CAT requires attention to be paid to 'all relevant considerations', including the general human rights situation in the State to which return is contemplated. The Committee has emphasized that it will not allow doubts about the facts of the case to prevent it from ensuring the applicant's security.[18] To this end, it has repeatedly acknowledged that inconsistencies in applicants' stories are not material and should not cast doubt on 'the general veracity of the author's claims', because 'complete accuracy is seldom to be expected by

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[12] See eg *EA v Switzerland*, Comm No 28/1995, UN doc CAT/C/19/D/28/1995 (10 November 1997) para 11.5; *X, Y and Z v Sweden*, Comm No 61/1996, UN doc CAT/C/20/D/61/1996 (6 May 1998) para 11.5; *ALN v Switzerland*, Comm No 90/1997, UN doc CAT/C/20/D/90/1997 (19 May 1998) para 8.7; *KT v Switzerland*, Comm No 118/1998, UN doc CAT/C/23/D/118/1998 (19 November 1999) para 6.5; *US v Finland*, Comm No 197/2002, UN doc CAT/C/30/D/197/2002 (1 May 2003) para 7.8.

[13] *Report of the Committee against Torture*, UN GAOR, 53rd Session, Supp No 44, UN doc A/53/44 (1998), Annex IX.

[14] *EA v Switzerland*, *op cit*, para. 11.3.

[15] *Report of the Committee against Torture* (1998), *op cit*, Annex IX.

[16] *Aemei v Switzerland*, Comm No 34/1995, UN doc CAT/C/18/D/34/1995 (9 May 1997) para 9.5.

[17] *Ibid*, para 9.6.

[18] *Mutombo v Switzerland*, Comm No 13/1993, UN doc CAT/C/12/D/13/1993 (17 April 1994) para 9.2; *Khan v Canada*, Comm No 15/1994, UN doc CAT/C/13/D/15/1994 (15 November 1994) para 12.3.

victims of torture'[19] (especially where they are suffering from post-traumatic stress disorder[20]).

14. The brevity of the Committee's views in negative decisions, coupled with the formulaic conclusion that the facts alleged lack 'the minimum substantiation that would render the communication compatible with article 22 of the Convention against Torture',[21] provide little further assistance in determining how, and against what standards of authority and corroboration, evidence is tested.

Comparative jurisprudence: Europe

15. Since 2004, complementary protection has been codified in the EU in the Qualification Directive (where it is called 'subsidiary protection').[22] Article 2(e) of that Directive provides that the standard of proof for subsidiary protection is that 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin … would face a real risk of suffering serious harm as defined in Article 15.'[23] Since the language 'substantial grounds … for believing'[24] was common to the case law of the European Court of Human Rights,[25] the Committee against Torture and the Human Rights Committee,[26] it was incorporated in article 2(e) of the Directive in order to avoid divergence between international and Member States' practice.

16. On its face, the Directive sets out a circular threshold by requiring that:

    (a) substantial grounds have been shown for believing
    (b) that the person concerned, if returned to his or her country of origin … would face a real risk
    (c) of suffering serious harm as defined in Article 15.

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[19] *Alan v Switzerland*, Comm No 21/1995, UN doc CAT/C/16/D/21/1995 (8 May 1996), para 11.3; *Kisoki v Sweden*, Comm No 41/1996, UN doc CAT/C/16/D/41/1996 (8 May 1996) para 9.3; *Tala v Sweden*, Comm No 43/1996, UN doc CAT/C/17/D/43/1996 (15 November 1996) para 10.3.

[20] *Tala*, *op cit*, para 10.3.

[21] *X v Switzerland*, Comm No 17/1994, UN doc CAT/C/13/D/17/1994 (17 November 1994) para 4.2; *X v Switzerland*, Comm No 18/1994, UN doc CAT/C/13/D/18.1994 (23 November 1994) para 4.2.

[22] Amendments to the Qualification Directive will be published shortly as part of the next stage of the development of the Common European Asylum System. For the revisions that were recommended, see 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum' (Brussels, June 2008).

[23] Qualification Directive, art 2(e).

[24] It is also important to clarify that the 'belief' here does not relate to the applicant's belief (unlike the applicant's well-founded fear in Convention claims), but rather to the decision-maker's judgment that substantial grounds (based on objective circumstances, such as analysis of country conditions and human rights standards) exist for believing that the applicant would face serious harm if removed.

[25] Although the decisions of the European Court of Human Rights are not binding on Australian decision-makers, that court's long-standing and comprehensive jurisprudence on similar human rights provisions should be regarded as persuasive authority.

[26] See eg *Soering v United Kingdom* (1989) 11 EHRR 439, para 91; *Chahal v United Kingdom* (1996) 23 EHRR 413, para 74; UN Human Rights Committee, 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/74/CRP.4/Rev.6 (21 April 2004) para 12; CAT, art 3 and decisions of the Committee against Torture applying it.

17. Whereas the Committee against Torture considers that 'substantial grounds' are met by a 'foreseeable, real and personal risk'—in other words, the focus of the inquiry is whether a 'real risk' exists—the Qualification Directive, on a literal reading, requires a foreseeable, real, and personal risk of a real risk. Like the present Bill, the risk of attempting to clarify concepts that are essentially embedded in the Committee against Torture's jurisprudence risks complicating and confusing the test, rather than clarifying it.

18. A very recent and clear summary of the European Court of Human Rights' approach to cases concerning article 3 of the European Convention on Human Rights ('ECHR') can be found in this month's decision of *Abdolkhani v Turkey*. It is cited here to demonstrate the process of reasoning that the court goes through in such cases:

> 72. The Court reiterates at the outset that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, § 67; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI). The right to political asylum is not explicitly protected by either the Convention or its Protocols (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 35, ECHR 2007-I). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the individual concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).
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> 73. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).
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> 74. Owing to the absolute character of the right guaranteed by Article 3, the existence of the obligation not to expel is not dependent on whether the risk of ill-treatment stems from factors which involve the responsibility, direct or indirect, of the

> authorities of the receiving country. Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials. What is relevant in this context is whether an applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her (see *Salah Sheekh*, cited above, § 147).
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> 75. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe the existence of that practice and his or her membership of the group concerned (see *Saadi*, cited above, § 132). In such circumstances, the Court would not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection afforded by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh*, cited above, § 148).[27]

19. The UK Asylum and Immigration Tribunal has interpreted the 'real risk' test as meaning that the risk 'must be more than a mere possibility'—a standard which 'may be a relatively low one'.[28]

20. Significantly, the UK takes the view that the 'substantial grounds' test in article 2(e) of the Qualification Directive is intended to replicate the 'well-founded fear' standard under the Refugee Convention.[29] In *Sivakumaran*, the House of Lords said that the well-founded fear standard implies 'a reasonable degree of likelihood',[30] which generally falls somewhere lower than the 'balance of probabilities'. As the UK Asylum and Immigration Tribunal stated in *Kacaj*:

> The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. … Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a

[27] *Abdolkhani v Turkey*, App No 30471/08 (ECtHR, 22 September 2009), paras 72–75.
[28] *Kacaj** [2001] INLR 354, para 12. This threshold has also been used in Canada with respect to 'well-founded fear' in Convention refugee claims: *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm LR (2d) 241(FCA) 245.
[29] During the drafting of the Qualification Directive, Sweden sought to replace 'substantial grounds' with 'well-founded fear' (as per the original draft article 5(2) of the Qualification Directive) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees.
[30] *R v Secretary of State for the Home Dept, ex parte Sivakumaran* [1988] AC 958 (HL) 994 (Lord Keith); 996 (Lord Bridge, Lord Templeman); 997 (Lord Griffiths); 1000 (Lord Goff).

> reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.[31]

21. In that case, the tribunal rejected the government's submission that a higher standard of proof was applicable to claims under article 3 of the ECHR on the basis that:

> There is nothing in the jurisprudence of the human rights' Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed, in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to result in inconsistent decisions. We therefore reject the argument of the Secretary of State on this issue.[32]

22. For the reasons stated by the UK Asylum and Immigration Tribunal above, and bearing in mind the protection function of both section 36(2)(a) and section 36(2)(aa), Australian decision-makers should follow the UK approach. In particular, given that the Australian test for 'well-founded fear of persecution' is whether the applicant faces a 'real chance' of persecution,[33] it would be a logical and relatively easy step to equate the meaning of 'real risk' in section 36(2)(aa) with 'real chance'.

23. I would also recommend that the legislation itself indicate that the same standard of proof is to apply to the assessment of Convention refugee and complementary protection claims, which could be accomplished by removing the reference to 'substantial grounds for believing' (as outlined in my proposed revision below) to replicate the wording of section 36(2)(a), or by expressly stating that the standard of the proof is 'well-founded fear'.

24. The problem with the very convoluted test currently set out in section 36(2)(aa) of the Bill is that it combines all of the international and regional tests discussed above, *plus* additional ones drawn from various other human rights documents (such as 'necessary and foreseeable consequence' and 'irreparable harm'):

    (a) substantial grounds for believing that,
    (b) as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country,

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[31] *Kacaj*, *op cit*, para 10. See also *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, para 30.

[32] *Kacaj*, *op cit*, para 15.

[33] *Chan v Minister for Immigration and Ethnic Affairs* (1989) CLR 379. There it was held that real, that is, substantial, chance includes less than a 50 per cent likelihood.

(c) there is a real risk that the non-citizen
(d) will be irreparably harmed
(e) because of a matter mentioned in subsection (2A).

It is an amalgam of thresholds that were meant to explain each other, *not* to be used as cumulative tests. This makes it confusing, unworkable and inconsistent with comparable standards in other jurisdictions. Accordingly, the standard of proof needs to be made much simpler, otherwise it is likely to:

(a) cause substantial confusion for decision-makers;
(b) lead to inconsistency in decision-making;
(c) impose a much higher test than is required in any other jurisdiction or under international human rights law; and
(d) risk exposing people to *refoulement*, contrary to Australia's international obligations.

Comparative jurisprudence: Canada and the United States

25. In Canada, the standard of proof for claims relating to torture is that the person would be subjected personally 'to a danger, *believed on substantial grounds to exist*, of torture within the meaning of article 1 of the Convention Against Torture'.[34] This has been interpreted by the Federal Court of Appeal to mean 'more likely than not' or on the 'balance of probabilities', which imposes a higher test for beneficiaries of complementary protection than the 'well-founded fear' of persecution test for Convention refugee claims (which in Canada means a 'reasonable chance or serious possibility' of persecution[35]). It is the same in US law, where the standard of proof for torture-based claims is 'more likely than not', a higher standard than the 'reasonable possibility' test in asylum claims.[36]

26. When the Canadian Act came into force, the Immigration and Refugee Board's Legal Services division explained that 'all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, "reasonable chance or serious possibility". The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds.'[37] This approach was adopted initially by decision-makers, until the Federal Court of Appeal ruled conclusively in *Li v Canada (Minister of Citizenship and Immigration)* that a higher standard of proof was to be applied

[34] Immigration and Refugee Protection Act, s 97(1)(a) (emphasis added).
[35] This test derives from *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680, 57 DLR (4th) 153 (CA).
[36] J Fitzpatrick, 'Harmonized Subsidiary Protection in the European Union—A View from the United States' in D Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, Brussels, 2002) 130; 8 CFR §208.16(c)(2) and §208.13(b)(2).
[37] Immigration and Refugee Board of Canada, *Consolidated Grounds in the* Immigration and Refugee Protection Act*: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 39, available at http://www.unhcr.org/refworld/docid/3d3bd1984.html (accessed 26 September 2009).

for section 97(1)(b) claims.[38] First, the court observed that article 97(1)(a) uses almost identical language to article 3 CAT, which means that the Committee against Torture's interpretation of article 3 is highly relevant. Accordingly, the court concluded that the relevant standard was 'on the balance of probabilities' or 'more likely than not'.[39] Secondly, the court said that the different nature of claims under section 96 (Convention refugees) compared to section 97(1)(a) (torture cases), such as the issue of nexus, meant that an identical standard of proof was not necessary, even though it recognized that there was 'no rational sense' in adopting a higher standard for the latter. Significantly, the court extended this higher threshold to article 97(1)(b) claims (risk to life or to a risk of cruel and unusual treatment or punishment) in the 'absence of some compelling reason' to the contrary.[40]

27. It has been suggested that an advantage of this dual threshold approach is that it 'should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection.'[41] While that is important, there is no compelling reason why rigorous interpretation cannot occur even if the same standard of proof is applied. However, it has also been noted that in practice, the higher standard applied to section 97 can work to the advantage of applicants who are found not to be credible, since objective factors, such as country of origin conditions, may trump credibility issues and require that protection be granted.[42]

Conclusion

28. For the reasons explained by the UK Asylum and Immigration Tribunal at paragraphs 20–21 above, a single standard of proof based on the 'well-founded fear' standard is appropriate, especially in a determination system that considers refugee and complementary protection claims as part of a single procedure (as will be the case in Australia).

'necessary and foreseeable consequence'

29. It is unnecessary to include 'necessary and foreseeable consequence' in section 36(2)(aa). The UN Human Rights Committee has never used this phrase to impose an independent test for non-removal; rather, it has only used it to explain the meaning of 'real risk'. In other words, 'necessary and foreseeable consequence' does not form an additional element of the 'real risk' test—rather,

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[38] *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1, 2005 FCA 1 (a challenge to the Supreme Court of Canada was ruled out).

[39] *Ibid*, paras 18–28. Since this was the interpretation which had been given in *Suresh v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 5 (FCA), Justice Rothstein said that Parliament could have enacted a lower test had it desired to depart from that interpretation.

[40] *Li v Canada*, *op cit*, para 38.

[41] J Reekie and C Layden-Stevenson, 'Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)', in International Association of Refugee Law Judges, *Forced Migration and the Advancement of International Protection* (2008) 282.

[42] Observations of Justice Carolyn Layden-Stevenson, Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, 1–2 May 2008.

it is a way to understand that test by asking whether the alleged harm is a necessary and foreseeable consequence of removal.

30. This is illustrated by the Human Rights Committee's views in *ARJ v Australia*. There, it said that States parties to the ICCPR are prevented from exposing a person to 'a real risk (*that is,* a necessary and foreseeable consequence) of a violation of his rights under the Covenant.'[43] The risk of such ill-treatment 'must be real, *i.e.* be the necessary and foreseeable consequence of deportation'.[44] In that case, the test was formulated in relation to articles 6 and 7 respectively as follows:

> - does the requirement under article 6, paragraph 1, to protect the author's right to life and Australia's accession to the Second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of deportation to Iran?
>
> - do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to Iran?[45]

'real risk'

31. The meaning of this term has been considered at paragraphs 15–24 above, largely because of the interconnectedness of the various elements of the test. As outlined there, the Committee against Torture describes the meaning of 'substantial grounds' as involving a 'foreseeable, real and personal risk' of torture.[46]

32. To succeed on an article 3 ECHR claim, an applicant must show that there are substantial grounds for believing that he or she would face a real ('foreseeable'[47]) risk of being subjected to torture or inhuman or degrading treatment or punishment if removed.[48] The risk is to be considered as at the date of the decision-maker's consideration of the case.[49] A mere possibility of harm is insufficient, but it is not necessary to show definitively, or even probably, that

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[43] *ARJ v Australia*, Comm No 692/1996, UN doc CCPR/C/60/D/692/1996 (11 August 1997) para 6.8 (emphasis added).
[44] *Ibid*, para 6.14 (emphasis added).
[45] *Ibid*, para 6.10.
[46] See cases cited at fn 12 above.
[47] *Soering v United Kingdom* (1989) 11 EHRR 439, para 100.
[48] See E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003), paras 246, 249, 252. However, it should be recalled that article 3 ECHR also applies to the manner in which an expulsion is carried out: see N Mole, 'Asylum and the European Convention on Human Rights', Council of Europe H/Inf (2002) 9, 40–41.
[49] *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para 136.

ill-treatment will occur. The ill-treatment must qualitatively attain a 'minimum level of severity',[50] the assessment of which is relative and 'depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.[51] Thus, even a small risk can be significant and 'real' where the foreseeable consequences are very serious.[52] One commentator has argued that the more the ill-treatment is caused by underlying social and political disorder, such as civil war or terrorism, the higher the minimum level of severity will be assessed.[53]

33. There are no exceptions to article 3 ECHR, which means that there is no scope for balancing a person's conduct (however abhorrent) against the risk of harm if he or she is returned. This has been affirmed consistently by the European Court of Human Rights,[54] most recently in *Saadi v Italy*, where it was said:

> Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.[55]

34. It is not necessary for an applicant to show special distinguishing features if it is accepted that, on the basis of the applicant's ethnic group or similar status, he or she faces a real risk of torture or inhuman or degrading treatment or punishment if removed. In 2007 in *Salah Sheekh v The Netherlands*, the European Court of Human Rights reconsidered its previous interpretation of 'real risk' from *Vilvarajah v United Kingdom*, holding that '[i]t might render the protection offered by [article 3 ECHR] illusory if, in addition to the fact that he belongs to the Ashraf – which the Government have not disputed –, the applicant be required to show the existence of further special distinguishing features.'[56]

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[50] *Greek case* (1969) 12 Yearbook 1, para 11; *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 162; *Tyrer v United Kingdom* (1979–80) 2 EHRR 1, paras 29–30; *Soering v United Kingdom*, *op cit*, para 100.

[51] *Soering v United Kingdom*, *op cit*, paras 100, 104. See also *Ireland v United Kingdom*, *op cit*, paras 162, 167, 174; *Tyrer v United Kingdom*, *op cit*, paras 29, 80.

[52] T Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum' (1990) 2 International Journal of Refugee Law 361, 372.

[53] A Fabbricotti, 'The Concept of Inhuman or Degrading Treatment in International Law and Its Application in Asylum Cases' (1998) 10 International Journal of Refugee Law 637, 646. See also J Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press, Oxford, 1992) 96.

[54] This was established in *Chahal v United Kingdom*, *op cit*, paras 79–80 and has been affirmed in a long line of cases, most recently in *Saadi v Italy* (2008) 24 BHRC 123, para 127.

[55] *Saadi v Italy*, *op cit*, para 139.

[56] *Salah Sheekh v The Netherlands*, *op cit*, para 148. The court tried to disguise that it was reconsidering *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, but mainly in an attempt to appease the Dutch judiciary: see J-F Durieux, 'Salah Sheekh is a Refugee: New Insights into Primary and

35. As noted at paragraph 19 above, the UK Asylum and Immigration Tribunal has interpreted the ‘real risk’ test as meaning simply that the risk ‘must be more than a mere possibility’—a standard which ‘may be a relatively low one’.[57]

‘irreparable harm’

36. This is superfluous and should be removed.

37. The Explanatory Memorandum states that the irreparable harm test

> is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 in assessing a *non-refoulement* obligation under the Covenant. Australia’s *non-refoulement* obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will be irreparably harmed.[58]

38. The relevant section of General Comment 31 reads as follows:

> Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as that contemplated by articles 6 and 7* of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[59]

It is clear from the wording here that the notion of ‘irreparable harm’ is regarded as *inherent in* the treatment proscribed by articles 6 and 7 ICCPR because of its very nature. If individuals are at risk of an article 6 or 7 violation if removed, they do not have to additionally prove that they risk irreparable harm; irreparable harm is synonymous with, or inherent in, the very nature of harm prohibited by those provisions.[60]

39. It should be noted that neither the international jurisprudence, nor that of the European Court of Human Rights or the Canadian courts, imposes ‘irreparable harm’ as an additional threshold.

Subsidiary Forms of Protection’, Refugee Studies Centre Working Paper Series No 49 (October 2008) 12.

[57] *Kacaj*, *op cit*, para 12.

[58] Explanatory Memorandum, *op cit*, para 51.

[59] UN Human Rights Committee, ‘General Comment 31’, *op cit*, para 12 (emphasis added).

[60] This view is supported by the limited references to it in relevant case law: *Etame v Secretary of State for the Home Department* [2008] EWCH 1140 (Admin), para 41; *Chahal v United Kingdom*, *op cit*, para 3 (Joint Partly Dissenting Opinion of Judges Gölcüklü and others); *Jabari v Turkey*, App No 40035/98 (ECtHR, 11 July 2000) para 50.

40. Apart from the Human Rights Committee's reference in General Comment 31, 'irreparable harm' is otherwise known to human rights law only in the context of interim, precautionary or provisional measures. Its threshold in that context is very low: anything that cannot be compensated with damages.[61] In the Inter-American Court of Human Rights, provisional measures have been ordered to avoid the following types of 'irreparable harm': a serious risk to an individual's life or personal integrity[62] (including physical, psychological and moral integrity[63]); an imminent risk to freedom of expression and democratic values;[64] and restrictions on accessing counsel and other infringements on rights of due process.[65] Based on this jurisprudence, if a purpose of including 'irreparable harm' in the standard of proof in section 36 is to make it more difficult for applicants to prove their claim, it is unlikely that it would have this effect.

41. Alternatively, the complementary protection definition could be simplified such that the enumerated grounds in section 36(2A) are removed altogether, and instead replaced by the notion of 'irreparable harm'. In other words, the combination of sections 36(2)(aa) (as per my suggested amendment) and 36(2A) would preclude removal if there were a real risk that an individual would be subjected to irreparable harm. This would then require decision-makers to assess what other ICCPR (or indeed other human rights treaty) provisions could give rise to a *non-refoulement* obligation, since it is clear from General Comment 31 that articles 6 and 7 ICCPR are only illustrative of that obligation. Such a provision would enable the progressive development of complementary protection, which has already been envisaged by such cases as *Ullah* and *EM* in the House of Lords,[66] and the European Court of Human Rights' non-removal decisions under article 8 ECHR (right to respect for private and family life).[67]

42. For the sake of completeness, and to distinguish the threshold of 'real risk' discussed above, it should be noted that the European Court of Human Rights and the House of Lords have imposed a different, higher standard of proof for non-removal cases based on ECHR rights other than articles 2 (right to life), 3 (torture, inhuman or degrading treatment or punishment) and 6 (right to a fair trial). For 'other' ECHR rights, such as article 8 (respect for private and family life), a violation of which may give rise to a protection claim, the test is whether removing the individual would expose him or her to 'a real risk of a flagrant denial' of the right in question.[68] This test stems from the opinion of Judges

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[61] A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd edn, Sweet and Maxwell, London, 2006) para 9.23; see also *RJR-MacDonald Inc v Canada* [1994] 1 SCR 311, para 64: irreparable harm 'is harm which either cannot be quantified in monetary terms or which cannot be cured'.

[62] See eg *Loayza Tamayo v Peru*, Provisional Measures, Inter-Am Ct HR (3 February 2001); *Loayza Tamayo v Peru*, Provisional Measures, Inter-Am Ct HR (2 July 1996).

[63] *Ivcher Bronstein v Peru*, Provisional Measures, Inter-Am Ct HR (23 November 2000).

[64] *The La Nación Newspaper case,* Provisional Measures, Inter-Am Ct HR (23 May 2001).

[65] *Manriquez v Mexico*, Case 11.509, Report No 2/99, Inter-Am Ct HR (1999).

[66] *Ullah v SSHD*, *op cit*; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

[67] For discussion of article 8 ECHR cases, see McAdam (2007), *op cit*, 154ff.

[68] *Ullah v SSHD*, *op cit*, paras 44, 45, 47, 50 (Lord Steyn); *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, para 2 (Lord Hope), paras 34–35 (Lord Bingham), para 45 (Baroness Hale), para 57 (Lord Carswell), para 60 (Lord Brown).

Bratza, Bonello and Hedigan in the European Court of Human Rights case of *Mamatkulov v Turkey*:

> In our view, what the word ‘flagrant’ is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.[69]

43. A ‘flagrant denial or gross violation’ of a right is the same as ‘a complete denial or nullification of it’.[70] It will only be in ‘exceptional circumstances’ that a breach of ‘other’ ECHR rights would not already violate – and hence be caught by – article 3.[71] It has been suggested that part of the consideration whether a violation of an ‘other’ ECHR right is ‘flagrant’ includes ‘where the humanitarian grounds against the removal are compelling.’[72]

44. The ‘flagrant denial’ test is mentioned here simply to highlight a threshold that would be far too stringent for the Bill. It has been developed in Europe in *direct contrast* to the ‘real risk’ standard of proof, which is applied to removal cases concerning arbitrary deprivation of life, the death penalty, torture or cruel, inhuman or degrading treatment or punishment.

45. I therefore recommend that the threshold test in section 36(2)(aa) be simplified to provide a more workable standard of proof that is in line with international and comparative jurisprudence. Replicating the language of section 36(2)(a)—‘the Minister is satisfied’—encourages decision-makers to apply the same standard of proof as for Convention refugee claims (well-founded fear). The following wording shows changes to the Bill using strikethrough to indicate deletions and italics to indicate insertions:

(2) A criterion for a protection visa is that the applicant for the visa is:

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied ~~Australia has protection obligations because the Minister has substantial grounds for believing~~ that~~, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country,~~ there is a real risk that the non-citizen will be *subject to serious harm, as defined* ~~irreparably harmed because of a matter mentioned~~ in subsection (2A);

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[69] *Mamatkulov v Turkey* (2005) 41 EHRR 494, 537, para O-III14. In paras O-III17 and O-III19 they applied the ‘real risk’ standard of proof to this test.

[70] *EM v SSHD*, *op cit*, paras 34-35 (Lord Bingham); see also para 4 (Lord Hope); *Ullah v SSHD*, *op cit*, para 24 (Lord Bingham), paras 69-70 (Lord Carswell); *Devaseelan v Secretary of State for the Home Department* [2003] Imm A R 1, para 111. Lord Carswell likened it to the notion of a fundamental breach, with which the UK courts were familiar in other contexts: *Ullah v SSHD*, *op cit*, para 69 (Lord Carswell).

[71] *Ullah v SSHD*, *op cit*, para 67 (Lord Carswell); *Z and T v United Kingdom*, App No 27034/05 (ECtHR, 28 February 2006) 7; *EM v SSHD*, *op cit*, para 15 (Lord Hope).

[72] *EM v SSHD*, *op cit*, para 17 (Lord Hope).

C THE COMPLEMENTARY PROTECTION GROUNDS: s 36(2A)

46. This section does not purport to comprehensively explain every element of the complementary protection grounds listed in section 36(2A), nor all the exceptions to them. Rather, it highlights concerns with the grounds as currently drafted and recommendations that would better align these provisions with international human rights law and best practice from other jurisdictions.

47. It goes without saying that the prohibition on removal under section 36(2A), like section 36(2), includes the so-called notion of 'chain *refoulement*'. In other words, States are precluded from removing individuals not only to the country where they face direct risk of persecution or serious harm, but also to countries that might subsequently return them to such harm.[73]

Arbitrary deprivation of life: section 36(2A)(a)

48. This section is based on Australia's obligations in article 6 ICCPR not to expose anyone to arbitrary deprivation of life. It accords with comparable provisions in article 2 ECHR,[74] section 97(1)(b) of the Immigration and Refugee Protection Act, and draft complementary protection provisions in New Zealand.[75]

Death penalty: section 36(2A)(b)

49. This section is based on Australia's obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, as well as the approach of the UN Human Rights Committee.[76] There are comparable provisions in EU and Canadian law.[77] However, it imposes a higher evidentiary burden by requiring not only that a person face a real risk of being subjected to the death penalty, but that the death penalty 'will be carried out'. This is at odds with the general prohibition on return to the death penalty that has been developed in international and comparative law.[78] Presumably its purpose it to permit return to States that may impose but never carry out the death penalty, however this would be better addressed by seeking diplomatic assurances in such cases that a person will not be subjected to the death penalty if removed (see further paragraphs 52 and 95 below).

50. However, there is scope for a different interpretation to be placed on section 36(2A)(a) which would require near certainty that the death penalty would be carried out. This might be almost impossible to ascertain in advance, given the

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[73] In relation to article 3 ECHR claims, see eg *Abdolkhani v Turkey*, *op cit*, para 8; *Salah Sheekh v The Netherlands*, *op cit*, para 141. This is partially covered by section 36(5A), but the provision should be strengthened to preclude removal to *any* territory where there is a real risk that the person may be returned to serious harm.

[74] For discussion of the application of article 2 ECHR in non-removal cases, see McAdam (2007), *op cit*, 147–49.

[75] See NZ Immigration Bill, cl 121.

[76] *Judge v Canada*, Comm No 829/1998, UN doc CCPR/C/78/D/829/1998 (5 August 2003).

[77] Qualification Directive, art 15(a); Canadian Immigration and Refugee Protection Act, s 97(1)(b).

[78] See eg *Soering v United Kingdom*, *op cit*; *Judge v Canada*, *op cit*; Qualification Directive, art 15(a); Canadian Immigration and Refugee Protection Act, s 97(1)(b).

possibility of pardons (even at the last minute), which would mean that the provision would not serve its intended protective function.

51. Retaining 'and it will be carried out' also creates interpretational confusion about whether the provision meant to encompass the 'death row phenomenon', which takes into account such matters as the delay between sentence and the carrying out of the death penalty, conditions of detention prior to execution, the personal circumstances of the applicant.[79] However, the death row phenomenon would in any event be caught by sections 36(2A)(c)–(e). Notably, it was a death row phenomenon case that first led the European Court of Human Rights to find that article 3 ECHR precludes removal to situations of torture or inhuman or degrading treatment or punishment.[80]

52. Finally, the inclusion of the words 'and it will be carried out' is arguably superfluous given section 36(2B)(b), which seems to imply the possibility of seeking diplomatic assurances that a person will not be subjected to the death penalty if removed to a particular State (see paragraph 95 below).

53. I therefore recommend deleting 'and it will be carried out' from section 36(2A)(a).

Torture: section 36(2A)(c)

54. The definition of 'torture' is based on article 1 CAT,[81] but in line with the broader international human rights jurisprudence, it does not limit acts of torture to those committed in an official capacity. This is recognized in the Explanatory Memorandum.[82] As the UN Human Rights Committee has stated, the aim of article 7 ICCPR is 'to protect both the dignity and the physical and mental integrity of the individual' from acts prohibited by that provision, 'whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.'[83]

55. There are some small, but potentially significant, differences in the way that the Bill sets out the definition of 'torture'. Whereas in article 1 CAT, the words 'for such purposes as' make clear that the matters that follow (reflected in paragraphs (a)–(c) and (e) of the Bill) are an illustrative rather than exhaustive list of reasons for torture, the Bill is less clear. Although paragraph (d) of the Bill is presumably intended to open up the way for other acts to constitute torture, by including acts 'for a purpose related to a purpose mentioned in paragraph (a), (b) or (c)', this is in fact more limited than article 1 CAT. This is because paragraph (d) of the Bill expressly restricts other acts of torture to those with a purpose *related to* one of the enumerated acts, whereas the formulation in article 1 CAT leaves open the potential scope for development. I would

[79] *Soering v United Kingdom*, *op cit*, para 104.
[80] *Soering v United Kingdom*.
[81] There is a small drafting error: a comma should be inserted after 'physical or mental'.
[82] Explanatory Memorandum, *op cit*, para 41.
[83] UN Human Rights Committee, 'General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)' (10 March 1992), para 2.

recommend amending the Bill's definition of torture to better reflect this (see below).

56. The reference to 'discrimination' should also replicate the language of article 1 CAT (both here and in the Bill's definition of 'cruel or inhuman degrading treatment or punishment') by including the words 'of any kind'. It is important to recall that article 2 ICCPR prohibits discrimination on the basis of *any* status, not just those expressly enumerated in that provision.[84] To ensure that this provision is implemented consistently with international law, I would suggest replacing 'the Articles of the Covenant' with 'Australia's international human rights obligations', to clarify that the provision encompasses discrimination under other human rights treaties as well.

57. I therefore suggest that the definition of 'torture' in the Bill is amended as follows (strikethrough indicates deletions; italics indicates insertions).

> ***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as*:
>
> (a) ~~for the purpose of~~ obtaining from the person or from a third person information or a confession; or
>
> (b) ~~for the purpose of~~ punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
>
> (c) ~~for the purpose of~~ intimidating or coercing the person or a third person; or
>
> ~~(d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or~~
>
> (~~e~~*d*) for any reason based on discrimination *of any kind* that is inconsistent with *Australia's international human rights obligations*~~the Articles of the Covenant~~;
>
> but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

58. While there is considerable jurisprudence on the meaning of 'torture' which I will not examine here, there are two aspects of the torture definition incorporated in the definitions of 'cruel or inhuman treatment or punishment' (section 36(2A)(d)) and 'degrading treatment or punishment' (section 36(2A)(e)) that require examination. These are dealt with separately below: the 'intentionally inflicted'/'intended to cause' requirement, and the 'lawful sanctions' exception.

Intent: sections 36(2A)(c), (d), (e)

59. The 'intent' requirement in the definition of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' contained in sections 36(2A)(d) and (e) imposes a higher test than international law and comparative jurisprudence in the European Court of Human Rights, EU Member States and

[84] ICCPR, art 2(1) reads: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Canada.[85] Constraining the meaning of these forms of serious harm means that Australia cannot be said to be in full compliance with its obligation under article 7 ICCPR not to expose people to such treatment.

60. International and comparative jurisprudence consistently focuses on the nature of the alleged violation on the individual concerned, rather than the intention of the perpetrator. While intention may be relevant in some cases to bolstering the ill-treatment claim, it is not a formal component of establishing that ill-treatment.[86] As the European Court of Human Rights observed in *Labita v Italy*, '[t]he question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account … *but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3*'.[87]

61. Introducing an intent requirement in sections 36(2A)(d) and (e) would also impose a test that is not part of refugee law, thereby complicating the assessment of claims in single determination procedure.[88]

62. As has been noted in the refugee context, and is generally accepted in refugee decision-making,

> [p]roof of legislative or organizational intent is notoriously hard to establish and while evidence of such motivation may be sufficient to establish a claim to refugee status, it cannot be considered a *necessary* condition. Nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status. … Of course, intent is relevant; indeed, evidence of persecutory intent may be conclusive as to the existence of well-founded fear, but its absence is not necessarily conclusive the other way. … The *travaux préparatoires* suggest that the only relevant intent or motive would

[85] US law does not contain a comparable provision.

[86] *D v United Kingdom* (1997) 24 EHRR 423 was the first case where the European Court of Human Rights found a violation of article 3 in the absence of intentionally inflicted harm. It stated (at para 49): 'the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection.' In *Peers v Greece* (2001) 33 EHRR 1192, para 74 the court said there does not need to be any intention to humiliate (relying also on *V v United Kingdom*, App No 24888/94 (ECtHR, 1999) para 71.

[87] *Labita v Italy*, App No 26772/95 (ECtHR, 6 April 2000) para 120 (emphasis added).

[88] Although the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7(2)(g) defines 'persecution' as requiring the 'intentional and severe deprivation of fundamental rights', this definition operates exclusively in an international criminal law context where it is necessary to establish *mens rea*. In the different context of protection, '[n]o asylum seeker is required to show that the crime of persecution has been or is likely to be committed, and certain of the elements of the crime, for example, in relation to "intent", engage evidential issues far beyond the requirements of the well-founded fear test': Goodwin-Gill and McAdam, *op cit*, 96. Indeed, 'conscious, individualized direction … is often conspicuously absent in the practices of mass persecution': Goodwin-Gill and McAdam, *op cit*, 102.

be that, not of the persecutor, but of the refugee or refugee claimant: one motivated by personal convenience, rather than fear, might be denied protection … Otherwise, the governing criterion remains that of a serious possibility of persecution, not proof of intent to harm on the part of the persecutor.[89]

63. By contrast, the definition of 'torture' in article 1 CAT does require evidence of intent. This element has been relied on by the UN General Assembly and, in turn, the European Court of Human Rights to *distinguish* 'torture' from other forms of inhuman treatment: it is 'an aggravated *and deliberate* form of cruel, inhuman or degrading treatment or punishment'.[90] Similarly, in *Ireland v United Kingdom*, the court stated that the distinction between 'torture' and 'inhuman treatment' was that to torture attaches 'a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering'.[91]

64. In terms of the intent requirement in article 1 CAT, does it relate to the intention to commit an act or omit to do something, or intent to cause pain and suffering (which is arguably a more demanding test)? Commentators suggest that because the definition of torture in article 1 CAT refers several times to 'pain and suffering', 'it seems that the relevant intention is to cause, or at least be recklessly indifferent to the possibility of causing, that pain and suffering. Thus, '"negligent" infliction of pain and suffering, which is not as morally culpable as intentional infliction, does not constitute "torture".'[92] It would make little sense if omissions were not also encompassed in the notion of torture, since withholding certain resources, such as food, from a person, may amount to an extreme form of ill-treatment and would be contrary to the CAT's object and purpose.[93]

Lawful sanctions: sections 36(2A)(c), (d), (e)

65. A second element of the definition of 'torture' in article 1 CAT that has been transposed through section 5(1) to 'cruel, inhuman or degrading treatment or punishment' as well, is the exclusion of harms arising from lawful sanctions. The CAT neither defines 'lawful sanctions' nor indicates whether the term refers to an international standard or the domestic laws of each State party. However, the Bill's reference to 'lawful sanctions that are not inconsistent with the Articles of the Covenant' suggests that they are to be assessed against international human rights law standards. This is a welcome approach, since deference to local standards has been criticized as potentially encouraging States

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[89] Goodwin-Gill and McAdam, *op cit*, 100–02 (fn omitted).
[90] UNGA res 3452 (9 December 1975), cited also in *Ireland v United Kingdom*, *op cit*, para 167.
[91] *Ireland v United Kingdom*, *op cit*, para 167 (emphasis added).
[92] S Joseph, J Schulz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, Oxford University Press, Oxford, 2004) 197, referring also to JH Burgers and H Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, Dordrecht, 1988) 118.
[93] On this point, see Joseph and others, *op cit*, 197; A Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff, The Hague, 1999) 15.

to make acts of torture 'lawful sanctions', instead of outlawing them altogether.[94]

'cruel or inhuman treatment or punishment': section 36(2A)(d)[95]

66. It is unclear why the Bill separates out 'cruel or inhuman treatment or punishment' from 'degrading treatment or punishment'. The standard approach internationally is to regard these forms of harm as part of a sliding scale, or hierarchy, of ill-treatment, with torture the most severe manifestation.[96] The distinction between torture and inhuman treatment is often one of degree. Courts and tribunals are therefore generally content to find that a violation falls somewhere within the range of proscribed harms, without needing to determine precisely which it is. Indeed, the UN Human Rights Committee considers it undesirable 'to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.[97] For that reason, the Human Rights Committee commonly fails to determine precisely which aspect of article 7 ICCPR has been violated, and there is accordingly very little jurisprudence from that body about the nature of each type of harm.

67. Although the European Court of Human Rights tends to examine the distinctions more carefully, it mainly does so in order to distinguish 'torture' from the other types of ill-treatment, rather than to distinguish 'inhuman' and 'degrading' from each other.[98] The considerable jurisprudence on the meaning of 'torture', and the fact that it is defined in article 1 CAT (although as the Bill acknowledges, its meaning is slightly broader than this under general international human rights law), may explain why it is dealt with separately in the Bill. However, there is no clear rationale for distinguishing between the other forms of serious harm. For consistency with international and comparative human rights law, I would recommend placing all the harms proscribed by article 7 ICCPR in a single provision.

68. Furthermore, the Human Rights Committee and the European Court of Human Rights have both explained that these terms cannot be defined, especially since their meaning will evolve over time (see further paragraph 77 below).[99]

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[94] See Burgers and Danelius, *op cit*, 121.
[95] See also the section on 'intent' at paras 59–64 above.
[96] *Ireland v United Kingdom*, *op cit*, para 167; DE Anker, *Law of Asylum in the United States* (3rd edn Refugee Law Center, Boston, 1999) 465, 482, 485; W Suntinger, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?' (1995) 49 Austrian Journal of Public International Law 203, 212.
[97] UN Human Rights Committee, 'General Comment 20', *op cit*, para 4.
[98] For example, in *Selmouni v France* (1999) 29 EHRR 403, para 99 (refs omitted), the court stated: 'The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading'. 'Cruel' treatment or punishment is not an element of article 3 ECHR.
[99] *Selmouni v France*, *op cit*, para 101; UN Human Rights Committee, 'General Comment 20', *op cit*, para 4.

69. Yet, the separate provisions in the Bill—sections 36(2A)(c), (d) and (e)—mean that Australian decision-makers will need to precisely determine what kind of ill-treatment has been suffered and why. This imposes a higher level of scrutiny than is required under international human rights law and in comparative complementary protection schemes, and risks shifting the focus of the inquiry away from recognition that the treatment is inhuman *or* degrading, and thus gives rise to a protection obligation, to a technical justification of which form it is, arguably increasing the level of complexity in decision-making and reducing efficiency. It is a procedure that misplaces the focus on technicalities rather than the human rights protection intended to be accorded.

70. Much of the Bill's definition of 'cruel or inhuman treatment or punishment' is based on the definition of 'torture' in article 1 CAT. The elements which are not are contained in paragraphs (b)(iv), (c) and (d). The stated rationale for this is to ensure that the provision encompasses 'an act or omission that would normally constitute an act of torture but which is not inflicted for one of the purposes or reasons stipulated under the definition of torture',[100] or because it 'inflicts pain or suffering but not at the level of severity required to be met under the definition of torture'.[101] The rationale for paragraphs (b)(iv) and (c) is to cover 'any other acts or omissions that violate Article 7 of the Covenant and have not been explicitly outlined in this definition.'[102]

71. For the reasons set out in the Explanatory Memorandum, it appears that the purpose of such a lengthy definition of 'cruel and inhuman treatment or punishment' is to help clarify the meaning of those terms, rather than to restrict it.[103] However, this aim is not necessarily fulfilled in the Bill as it currently stands. Rather, in the absence of legislative guidance that the definition is illustrative only, there is a significant chance that (in accordance with principles of statutory interpretation) decision-makers will seek to interpret the words in their context and will draw inferences from what is included as well as excluded from the definition.

72. In the European context, considerable confusion and inconsistency was created within and between Member States by the separate enumeration of articles 15(b) (precluding return to 'torture or inhuman or degrading treatment or punishment') and (c) (precluding return to a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'). Some States regarded article 15(c) as offering protection only when article 3 ECHR would also be engaged, whereas others read them as entirely independent provisions (in other words, article 15(c)

[100] Explanatory Memorandum, *op cit*, para 16. This is a similar idea to having a provision that sought to provide for protection on account of 'persecution' without a need to link it to one of the five Refugee Convention grounds.
[101] Explanatory Memorandum, *op cit*, para 17.
[102] *Ibid*, para 18.
[103] See also *Ibid*, para 19: This is also suggested by the following explanation: 'The purpose of expressly stating what "cruel or inhuman treatment or punishment" does not include is to confine the meaning of "cruel or inhuman treatment or punishment" to circumstances that engage a *non-refoulement* obligation.'

offering 'supplementary or other protection').[104] The matter was ultimately referred to the European Court of Justice which held that article 15(b) 'corresponds, in essence, to Article 3 of the ECHR', and by contrast,'Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.'[105]

73. Paragraph (a) is arguably rendered superfluous by paragraphs (b)(iv) and (c). However, if it is considered necessary to enumerate the grounds of paragraph (a) for the reasons stipulated in paragraphs 16–17 of the Explanatory Memorandum (referred to in paragraph 70 above), then in my view it would be preferable to include them as merely illustrative of paragraph (c). I recommend that the provision be redrafted as follows (strikethrough indicates deletions; italics indicates insertions).[106]

cruel or inhuman treatment or punishment means an act or omission by which pain or suffering, whether physical or mental, is ~~intentionally~~ inflicted on a person ~~and the act or omission could reasonably be regarded as cruel or inhuman in nature~~, including (but not limited to) situations where:

(a) severe pain or suffering, whether physical or mental, is ~~intentionally~~ inflicted on a person; or
(b) pain or suffering, whether physical or mental, is ~~intentionally~~ inflicted on a person:

(i) for the purpose of obtaining from the person or from a third person information or a confession; or
(ii) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
(iii) for the purpose of intimidating or coercing the person or a third person; or
(iv) for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); or
(v) for any reason based on discrimination *of any kind* that is inconsistent with *Australia's international human rights obligations*~~the Articles of the Covenant~~;

but does not include an act or omission:

~~(d) that is not inconsistent with Article 7 of the Covenant; or~~
(e) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

[104] *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber, 17 February 2009), para 26.
[105] *Ibid*, para 28.
[106] See para 56 above for the explanation of drafting changes to paragraph (v).

74. Paragraph (d) is superfluous. It states that 'cruel or inhuman treatment or punishment' does not include an act or omission 'that is not inconsistent with Article 7 of the Covenant'.[107] Similarly, the introductory line 'and the act or omission could reasonably be regarded as cruel or inhuman in nature' is also unnecessary. This is because whether or not treatment is covered by article 7 is part of the decision-maker's initial assessment: it is a threshold question of classification (see further paragraph 86 below). In other words,

> treatment which may be perfectly justifiable in some circumstances may, in different circumstances, be unlawful. The clearest case is of criminal punishment. A penalty which might be justified for a serious crime could constitute inhuman treatment or punishment if imposed for a petty offence.[108]

75. The European Court of Human Rights has held that forced feeding and forcible medical treatment is not inhuman or degrading treatment where it is therapeutically necessary,[109] the crucial factor being whether 'a medical necessity has been convincingly shown to exist'.[110] Similarly, prison conditions that might otherwise be regarded as 'degrading' may not reach that threshold if necessary to prevent suicide or escape (again, provided the necessity test can be made out).[111] Thus, there is an inherent limiting mechanism in determining what constitutes cruel or inhuman treatment in a particular case. As in refugee determinations, what is central to the decision-maker's reasoning is the particular circumstances of the individual in question, and the particular treatment that he or she is likely to face if removed.

Guidance on the meaning of 'cruel or inhuman treatment or punishment'

76. Since the UN Human Rights Committee rarely explains which type of proscribed treatment under article 7 ICCPR has been violated, the vast majority of jurisprudence comes from the European Court (and previously also Commission) of Human Rights on article 3 ECHR.[112] In the *Greek case*, the European Commission established that 'inhuman treatment' covers 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. … Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others

[107] In terms of drafting, the multiple negatives make this provision confusing to read.

[108] C Ovey and RCA White, *Jacobs and White: The European Convention on Human Rights* (4th edn, Oxford University Press, Oxford, 2002) 76; see also *Kröcher and Möller v Switzerland* (1982) 34 DR 25, where the Commission stated that conditions of detention that might otherwise be considered inhuman were justified where the prisoner posed a particularly high risk.

[109] See *Herczegfalvy v Austria* (1992) 15 EHRR 437, para 82; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 645, paras 96–106, cited in J Herberg and D Pievsky, 'Article 3: Prohibition of Torture and of Inhuman or Degrading Treatment or Punishment' in A Lester, D Pannick and J Herberg (eds), *Human Rights Law and Practice* (3rd edn, LexisNexis, London, 2009) para 4.3.3.

[110] *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, para 30 (Simon Brown LJ).

[111] *Kröcher v Switzerland*, *op cit*.

[112] That provision does not include a reference to 'cruel' treatment or punishment, so the discussion is about the meaning of 'inhuman'.

or drives him to act against his will or conscience'.[113] It does not have to encompass actual bodily harm.[114] Treatment has been found to be 'inhuman' *inter alia* where it was premeditated, applied for hours at a time, and caused actual bodily injury or intensive physical and mental suffering.[115] Certain discriminatory acts may amount to inhuman or degrading treatment since they are an affront to human dignity.[116]

77. The European Court of Human Rights has stated that the evolution of human rights standards means that acts that previously were interpreted 'only' as inhuman or degrading treatment may need to be reclassified in the future,[117] given that the ECHR is a 'living instrument' that 'must be interpreted in the light of present-day conditions'.[118] In *Henaf v France*, the court said that 'it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity.'[119] Since 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies',[120] it is essential that older judgments of the European Court with respect to minimum levels of severity are reviewed in light of these cases, and thus in line with current standards.

78. 'Inhuman' and 'degrading punishment' describe acts of inhuman and degrading treatment respectively that are imposed as a reprimand or penalty. In the context of article 7 ICCPR, the Human Rights Committee has stated that 'for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty'.[121] In assessing degrading punishment, its nature, context, manner and method are relevant factors.[122] Punishment may thus be inhuman where it is wholly disproportionate to the offence

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[113] *Greek case*, *op cit*, 186. For an analysis of the distinction between 'torture', 'inhuman treatment' and 'degrading treatment', see K Röhl, 'Fleeing Violence and Poverty: Non-refoulement Obligations under the European Convention of Human Rights' UNHCR *New Issues in Refugee Research* Working Paper No 111 (Geneva January 2005) 13–16.

[114] *Soering v United Kingdom*, *op cit*, para 100; *Ireland v United Kingdom*, *op cit*, para 167.

[115] Referred to in *Becciev v Moldova* (2008) 45 EHRR 331, para 39.

[116] *East African Asians v United Kingdom* (1973) 3 EHRR 76. In the UK, serious and systematic discrimination of homosexuals has been found to violate article 3 (eg *M v Secretary of State for the Home Department* [2002] EWCA Civ 952; *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238), although such cases may also amount to persecution on account of membership of a particular social group resulting in refugee status: see eg *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, (2003) 216 CLR 473.

[117] *Selmouni v France*, *op cit*, para 101. In *A v Secretary of State for the Home Department* [2004] UKHL 56, para 53, the House of Lords stated that the conduct complained of in *Ireland v United Kingdom*, *op cit*, might now be viewed as 'torture'.

[118] *Tyrer v United Kingdom*, *op cit*, para 31; see also *Soering v United Kingdom* (1999) 11 EHRR 439, para 102.

[119] *Henaf v France*, App No 65436/01 (ECtHR, 27 November 2003) para 55.

[120] *Selmouni v France*, *op cit*, para 101.

[121] *Vuolanne v Finland*, Comm No 265/1987, UN doc CCPR/C/35/D/265/1987 (7 April 1989), para 9.2.

[122] *Tyrer v United Kingdom*, *op cit*, para 30.

committed,[123] or where the individual faces an unjustified or disproportionate sentence for political reasons.[124]

79. The courts have often found it unnecessary to distinguish between 'treatment' and 'punishment', however, since punishment generally involves treatment. Whether a punishment is inhuman or degrading is typically considered together (again suggesting that the terms should not be separated out in the Bill).[125]

'degrading': section 36(2A)(e)

80. Degrading treatment is that which is humiliating or debasing; an affront to human dignity. Whereas the distinction between torture and inhuman treatment is often one of degree, 'degrading' treatment generally requires gross humiliation before others or being driven to act against one's will or conscience.[126] It needs to be severe. There does not, however, need to be any intention to humiliate.[127] It can encompass racial discrimination,[128] which, in the context of complementary protection, would mean treatment less severe than persecution for reasons of race.

81. A characteristic formulation of the test applied by the European Court of Human Rights for 'degrading' treatment is set out in *Moldovan v Romania*:

> In considering whether a particular form of treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, for example, *Raninen v. Finland,* judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22, § 55). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).[129]

82. The concept of 'degrading treatment' was comprehensively considered in the *East African Asians* case, where the applicants suggested that it was constituted by treatment that lowers a person 'in rank, position, reputation or character, whether in his own eyes or in the eyes of other people'.[130] The Commission considered this helpful but too broad, requiring additionally that it grossly humiliate the person before others or drive that person to act against his or her will or conscience.[131] Humiliation, rather than actual pain or suffering, is key.[132]

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[123] *Kotälla v The Netherlands* (1978) 14 DR 238, 240.
[124] *Altun v Federal Republic of Germany* (1984) 36 DR 209, 233; *A v Switzerland*, App No 11933/86 (ECtHR, 14 April 1986).
[125] See eg *Tyrer v United Kingdom*, *op cit*.
[126] Ovey and White, *op cit*, 76.
[127] *Peers v Greece*, *op cit*; *Poltoratskiy v Ukraine*, App No 33812/97 (ECtHR, 29 April 2005) para 131.
[128] *East African Asians v United Kingdom*, *op cit*.
[129] *Moldovan and others v Romania*, App Nos 41138/98 and 64320/01 (ECtHR, 12 July 2005) para 101.
[130] *Ibid*, para 189.
[131] *Greek case*, *op cit*, 186; see *East African Asians*, *op cit*, paras 189, 195.

In the more recent case of *Pretty v United Kingdom*, the court stated that 'degrading treatment' occurs

> [w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[133]

83. Degrading treatment may also encompass the denial of insufficient provision of basic services necessary for a dignified existence, including access to health, shelter, social security, and the education and protection of children, provided that a minimum level of severity is met.[134]

84. The Bill's reference to unreasonableness, in the phrase 'extreme humiliation which is unreasonable', should be deleted. This is because it suggests that extreme humiliation can sometimes be reasonable, a position that is at odds with human rights law and State practice. The original draft of article 15 of the EU Qualification Directive contained a reference to 'serious and unjustified harm', rather than 'serious harm' (as now appears). The notion of 'unjustified harm'—which is comparable to the notion that some forms of extreme humiliation are reasonable—was roundly criticized because it implied that harm might sometimes be justifiable. Goodwin-Gill and Hurwitz noted that the concept of 'unjustified harm' is not only incompatible with fundamental norms of public international law, but it also appears to have no place in State practice.[135] Even if, as the House of Commons Select Committee on European Scrutiny observed, its purpose were to qualify the term 'serious harm' so as to exclude punishment in accordance with the rule of law,[136] 'the word "harm" should only be used in legislation to denote consequences which are wrongful, and therefore incapable of justification'.[137] UNHCR described it as introducing an unwarranted element of judgment, stipulating a test 'incompatible with human rights guarantees and which may limit persecution to only violations of non-derogable human rights'.[138] Germany, Greece and Sweden argued for the removal of the term

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[132] See *Tyrer v United Kingdom*, *op cit*, para 32. A lack of intent to humiliate will not conclusively rule out a violation of art 3: *Peers v Greece*, *op cit*, para 74.

[133] *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52; see also *Ireland v United Kingdom*, *op cit*, para 167.

[134] N Blake and R Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, Oxford. 2003) para 2.97; O Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848, 851.

[135] GS Goodwin-Gill and A Hurwitz, 'Memorandum' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) paras 6–8, in House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office, London, 2002) Oral Evidence 1–2.

[136] View of the Minister of State at the Home Office (Angela Eagle) in House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office, London, 2002) para 99.

[137] House of Commons Select Committee on European Scrutiny, *Fourth Report of Session 2002–03* (The Stationery Office, London, 2003) para 6.25.

[138] UNHCR, 'Some Additional Observations and Recommendations on the European Commission "Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection" COM (2001) 510 final, 2001/0207 (CNS) of 12 September 2001' (Geneva July 2002) 4.

'unjustified harm', describing it as an 'inappropriate expression' that risked allowing acceptance of 'justified harm'.[139] In the face of overwhelming criticism, the reference to 'unjustified harm' was ultimately deleted.

85. Degrading treatment is never justifiable. If, in a particular case, treatment is considered justified in all the circumstances, then that treatment is not 'degrading' as a matter of law (see also paragraph 74 above). As the European Court of Human Rights has explained:

> In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.[140]

86. Indeed, the requirement to examine all the circumstances of a case makes it impossible to define in advance what sorts of treatment are 'degrading' (or 'inhuman', and so on). While there is no balancing test as to whether return should be precluded because of a person's conduct, nor a higher standard of proof imposed because of it,[141] proportionality plays a role in determining whether, in a given context, treatment reaches the article 7 threshold. For example, amputating a limb without anaesthetic to save someone's life would not breach article 7, whereas simply undertaking that act for no reason would. In this respect, the concept of reasonableness may be taken into account.[142] However, if an act is held to violate article 7, then nothing can justify it. As commentators explain: 'Proportionality is therefore relevant when considering the appropriate *classification* of the act as article 7 treatment, rather than in considering any alleged *justification* for engaging in article 7 treatment.'[143]

87. If the rationale for including 'extreme humiliation which is unreasonable' is to exclude degrading treatment arising from lawful sanctions, it is unnecessary, since this matter is already covered by paragraph (b).

88. I therefore recommend that section 36(2A) be reworded as follows to better reflect Australia's international law obligations and comparative complementary protection standards in other countries (strikethrough indicates deletions; italics indicates insertions). To avoid any confusion about the meaning of 'serious harm' (as proposed in my amendments to section 36(2)(aa) above) and to distinguish it from section 91R of the Migration Act, the wording below clarifies that the matters listed in section 36(2A) are encompassed by the notion of 'serious harm'.

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139 12199/02 ASILE 45 (12 September 2002) 3 fn 4.
140 *T and V v United Kingdom* (2000) 30 EHRR 121, para 71.
141 See *Saadi v Italy*, *op cit*, para 139.
142 See Josephs and others, *op cit*, 212–13.
143 *Ibid*, 213.

(2A) Serious harm*, for the purposes of section 36(2)(aa)*, means: ~~The matters that~~:

(a) the non-citizen will be arbitrarily deprived of his or her life; or
(b) the non-citizen will have the death penalty imposed on him or her ~~and it will be carried out~~; or
(c) the non-citizen will be subjected to torture~~;~~ or
~~(d) the non-citizen will be subjected to~~ cruel*,* ~~or~~ inhuman*, or degrading* treatment or punishment~~; or~~
~~(e) the non-citizen will be subjected to degrading treatment or punishment~~.

D EXCEPTIONS TO COMPLEMENTARY PROTECTION: s 36(2B)

Internal flight alternative: section 36(2B)(a)

89. The High Court of Australia has accepted the general proposition that it may sometimes be reasonable for an applicant to relocate elsewhere in his or her country of origin where there is no appreciable risk of the feared persecution manifesting there (because it is localized). What is reasonable will depend on the precise circumstances of each case and the impact on the individual of having to relocate within his or her country.[144]

90. While the European Court of Human Rights has recognized that article 3 ECHR 'does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision', it has emphasized certain preconditions for its application:

> The Court considers that as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 [ECHR] may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.[145]

91. My comments here do not examine the concept or application of the internal flight alternative generally, but rather assess its codification in section 36(2B)(a) with respect to beneficiaries of complementary protection only. I would, however, note the caveats expressed by UNHCR, academic commentators and

[144] *SFATV v Minister for Immigration and Citizenship* [2007] HCA 40, (2007) 223 CLR 18. For detailed consideration of Australian case law on the internal flight alternative, see Refugee Review Tribunal, *A Guide to Refugee Law in Australia* (Cth of Australia, Canberra, 2009) ch 6 (current as at November 2008).
[145] *Salah Sheekh v The Netherlands*, *op cit*, para 141; Goodwin-Gill and McAdam, *op cit*, 123–26.

courts as to the appropriateness and applicability of the internal flight alternative.[146]

92. Presumably the inclusion of an internal relocation principle for beneficiaries of complementary protection is to parallel the jurisprudence that has developed in relation to Convention refugees, and make clear that it should also apply here.[147] However, there is a danger that codification for one group only may lead to the development of different tests, which would be highly undesirable. Furthermore, given the absolute prohibition on return to treatment proscribed by article 7 ICCPR, it is imperative that any internal flight alternative for complementary protection claims is very carefully scrutinized.

Protection from an authority: section 36(2B)(b)

93. Presumably this provision is intended to deal with situations where the feared harm emanates from a non-State actor, but the applicant can obtain protection from the State. As the House of Lords has explained,

> any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts.[148]

94. Indeed, as that statement by the House of Lords indicates, the question whether an individual can obtain protection from an authority in the country to which return is contemplated, goes to the very heart of whether he or she will suffer a real risk of serious harm if removed. Once again, the Bill seeks to separate out matters that comparative jurisprudence regards as being inherent in assessing the risk of harm. While the intention behind this provision may be simply to guide decision-makers, as the Bill currently stands there is a risk that sections like this one will be interpreted as requiring an additional, independent test. The Bill therefore needs to explain that such provisions are intended to clarify the meaning of proscribed harms, rather than to add additional requirements to them.

Diplomatic assurances

95. It is possible that this provision is intended to extend to diplomatic assurances. A number of States accept the conditional extradition of individuals on the receiving State's assurance that they will not be subjected to the death penalty

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[146] See, *inter alia*, *Januzi* v *Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 WLR 397; *SFATV v MIAC*, *op cit*, esp paras 53ff (Kirby J); UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' UN doc HCR/GIP/03/04 (23 July 2003); *Salah Sheekh v The Netherlands*, *op cit*, para 141.

[147] See eg Qualification Directive, art 8; UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, (UNHCR, Brussels, 2007) 3.4.3ff ('UNHCR Study').

[148] *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, para 24.

(even though the domestic law permits it). States regard this as enabling extradition within the framework of their human rights obligations, since (in the absence of evidence to the contrary) they would no longer be violating the principle of *non-refoulement*. In the context of the Bill, this would be a more appropriate way of dealing with the caveat in section 36(2)(a) that the death penalty 'will be carried out', thereby enabling the deletion of those words from the provision (see paragraphs 49 and 52 above).

96. The extension of this practice to cases involving assurances that a person will not be subjected to torture or cruel, inhuman or degrading treatment or punishment has been strongly criticized, however, on the grounds that this violates the absolute nature of States' *non-refoulement* obligations under article 3 CAT, article 3 ECHR and article 7 ICCPR.[149] Furthermore, whereas diplomatic assurances regarding the death penalty can generally be publicly monitored, this is not the case for assurances regarding torture and other forms of serious harm, which are acts that can be carried out in a clandestine manner.

97. The UN Commission on Human Rights Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed concern that diplomatic assurances and memoranda of understanding are being used by States to circumvent the absolute prohibition on torture under international law. He has noted that bilateral agreements are contrary to CAT and undermine the monitoring system provided by the UN treaty bodies. That such agreements are sought 'is already an indicator of the systematic practice of torture in the requested States', and yet assurances seek only to ensure that particular individuals are not tortured, rather than condemning the system of torture as a whole.[150]

98. In *Agiza v Sweden*, the Committee against Torture found that Sweden had violated article 3 CAT when it removed an individual to Egypt, despite diplomatic assurances that he would not be subjected to torture.

> The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for

[149] Goodwin-Gill and McAdam, *op cit*, 261, referring to European Council on Refugees and Exiles, 'Comments on the Commission Working Document on the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments' (London, May 2002), para 2.3.2; see also *Kindler v Canada*, Comm No 470/1991 (30 July 1993) UN doc CCPR/C/48/D/470/1991, para 6.7; S Kapferer, 'The Interface between Extradition and Asylum', UNHCR Legal and Protection Policy Research Series, PPLA/2003/05 (November 2003) paras 134–37, 241. For political vis-à-vis legal considerations, see *Youssef v Home Office* [2004] EWHC 1884 (QB); GS Goodwin-Gill and R Husain,
'Diplomatic Assurances and Deportation', paper given at the JUSTICE/Sweet and Maxwell Conference on Counter-Terrorism and Human Rights (28 June 2005).
[150] UN News Centre, 'Bilateral Deportation Agreements Undermine International Human Rights Law—UN Expert' (26 October 2005); see also UN News Centre, 'United Kingdom Must Not Deport People to Countries with Risk of Torture—UN Rights Expert' (23 August 2005). See also the concern expressed by the Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture: United States of America', UN doc CAT/C/USA/CO/2 (25 July 2006) para 21.

> political and security reasons. … The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.[151]

99. The UN High Commissioner for Human Rights has similarly stated:

> I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement. To begin, it is understood that diplomatic assurances would be sought only after an assessment has been made that there is a risk of torture in the receiving State. If there is no risk of torture in a particular case, they are unnecessary and redundant. It should be clear that diplomatic assurances cannot replace a State's obligation of non-refoulement in these circumstances, either in fact or in law. Second, while some have suggested the establishment of post-return monitoring mechanisms as a means for removing the risk of torture and ill-treatment, we know through the experience of international monitoring bodies and experts that this is unlikely to be an effective means for prevention.[152]

100. The UN Special Rapporteur on Human Rights and Counter-Terrorism has also observed 'that there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment, as has been stated in a number of individual cases considered by international human rights bodies.'[153]

General risk: section 36(2B)(c)

101. This provision seems intended to 'close the floodgates'. It has no legal rationale, since international human rights law is not premised on exceptionality of treatment but proscribes any treatment that contravenes human rights treaty provisions. Indeed, a key purpose of human rights law is to improve national standards and not only the situation of the most disadvantaged in a society. At its most extreme, it could be argued that this provision would permit return even where a whole country were at risk of genocide, starvation or indiscriminate violence, which would run contrary to the fundamental aims and principles of human rights law.

102. It is important to recall that in the assessment of 'torture', article 3(2) CAT expressly requires decision-makers to 'take into account all relevant

[151] *Agiza v Sweden*, Comm No 233/2003, UN doc CAT/C/34/D/233/2003 (20 May 2005), para 13.4 (fn omitted). See also the UN Human Rights Committee case *Alzery v Sweden*, Comm No 1416/2005, UN doc CCPR/C/88/D/1416/2005 (10 November 2006) paras 11.4–11.5.

[152] UN High Commissioner for Human Rights, 'Statement by the High Commissioner' (Louise Arbour), Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (29–31 March 2006).

[153] 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Addendum: Mission to Spain', UN doc A/HRC/10/3/Add.2 (16 December 2008) para 40, referring to *Agiza v Sweden*, *op cit* and *Alzery v Sweden*, *op cit*.

considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.' In other words, widespread violations of human rights can help to substantiate the existence of torture, rather than deny it on the grounds that such violations are faced by the population generally. However, the existence of such a pattern 'does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.'[154]

103. The question of how personal this risk needs to be has been the subject of extensive jurisprudence in the EU, albeit under a differently worded provision. Article 15(c) of the Qualification Directive requires subsidiary protection to be granted to a person facing 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. Recital 26 of the Directive, which is non-binding but of interpretative assistance, provides: 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.

104. The 'individual' requirement in article 15(c), read in conjunction with recital 26,[155] was used by some EU Member States to deny protection to people at risk of serious harm but who could not show that they would be singled out.[156] Not only did this lead to inconsistency between the practice of the Member States, but also within single jurisdictions. For example, the UK Asylum and Immigration Tribunal held that the word 'individual' required the applicant to demonstrate a personal risk 'relating to the person's specific characteristics or profile or circumstances', yet in another case stressed: 'It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual

[154] *Elmi v Australia*, Comm No 120/1998, UN Doc CAT/C/22/D/120/1998 (14 May 1999) para 6.4. See also *Chipana v Venezuela*, Comm No 110/1998, UN doc CAT/C/21/D/110/1998 (10 November 1998) para 6.3; *TA v Sweden*, Comm No 226/2003, UN Doc CAT/C/34/D/226/2003 (27 May 2005) para 7.2. For an example of an individual being unable to demonstrate the personalized nature of risk in Sudan, see *Elmansoub v Switzerland*, Comm No 278/2005, UN doc CAT/C/36/D/278/2005 (17 May 2006) para 6.5. Conversely, the absence of a pattern of gross, flagrant or mass violations of human rights does not mean that a person is not in danger of being subjected to torture in a specific case: *Elmi v Australia*, *op cit*, para 6.4; *Mutombo v Switzerland*, *op cit*, para 9.3; *Kisoki v Sweden*, *op cit*, para 9.2; *TA v Sweden*, *op cit*, para 7.2.

[155] UNHCR has recommended the deletion of recital 26: UNHCR Study, *op cit*, 74.

[156] Ibid, 71ff, citing the approach of authorities in France, Germany and Sweden. The vast majority of Member States supported the requirement on the grounds that it would avoid 'an undesired opening of the scope of this subparagraph': 12382/02 ASILE 47 (30 September 2002) para 4. Lithuania, Belgium, Finland, Austria, the Czech Republic and Hungary chose not to incorporate an 'individual' requirement: see respectively Law on the Legal Status of Aliens (29 April 2004) No IX-2206 (Official Gazette No 73-2539, 3 April 2004) art 87 (Lithuania); *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (15 September 2006) art 26 (Belgium); Aliens Act 2004, section 89; European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection' (October 2008) 27, 218 ('ECRE Study').

Appellant would have to show a risk to himself over and above that general risk.'[157]

105. The European Court of Justice, which oversees the interpretation of the Qualification Directive, has now clarified that article 15(c) does not require an applicant to 'adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances'.[158] Rather, the threshold is met where the indiscriminate violence feared 'is so serious that it cannot fail to represent a likely and serious threat to that person.'[159] In other words,

> the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.[160]

106. It therefore encompasses harm where 'substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.'[161]

107. Accordingly, 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.'[162]

108. As Hathaway has observed in the refugee context, to demand that an applicant is singled out 'confuses the requirement to assess risk on the basis of the applicant's particular circumstances with some erroneous notion that refugee status must be based on a completely personalized set of facts.'[163] In claims based on generalized violence or oppression,

> the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm

[157] *Lukman Hameed Mohamed v Secretary of State for the Home Department* AA/14710/2006 (unreported, 16 August 2007), cited in UNHCR, 'UNHCR Statement: Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence' (January 2008) 6 ('UNHCR Statement'). See also ECRE Study, *op cit*, 26–29.
[158] *Elgafaji v Staatssecretaris van Justitie*, *op cit*, para 45.
[159] *Ibid*, para 42.
[160] *Ibid*, para 37. See also the approach in *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKAIT 00091, para 110.
[161] *Elgafaji v Staatssecretaris van Justitie*, *op cit*, para 35.
[162] *Ibid*, para 39.
[163] JC Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) 91–92 (citations omitted).

in her country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection she is properly considered to be a Convention refugee.[164]

109. Similarly, Goodwin-Gill and I have argued that where large groups are seriously affected by the outbreak of uncontrolled communal violence, 'it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual'.[165]

110. For a consistent, protection-focused, human rights-based approach, the relevant question under section 36(2A) should be whether the applicant faces a real risk of any of the proscribed forms of harm, irrespective of whether it is individually targeted.[166] Otherwise, there is an added an evidentiary burden for complementary protection that goes beyond what is required under the Refugee Convention. This undermines it as a *complementary* form of protection.[167] Indeed, as the European Court of Human Rights has observed in the context of article 3 ECHR, the effect of such a stringent individual requirement 'might render the protection offered by that provision illusory if … the applicant were required to show the existence of further special distinguishing features'.[168] The court has stated that in demonstrating a 'real risk' of inhuman or degrading treatment or punishment, an applicant does not have to establish 'further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk.'[169]

111. The exception in section 36(2B)(c) of the Bill has a similar counterpart in Canadian law. Section 97(1)(b)(ii) of the Canadian Immigration and Refugee Protection Act denies protection to a person facing 'a risk to their life or to a risk of cruel and unusual treatment or punishment if … the risk would be faced by the person in every part of that country *and is not faced generally by other individuals in or from that country*' (emphasis added).

112. At first blush, section 36(2B)(c) of the Bill appears to impose a more exacting test, since it permits an exception to complementary protection only where the 'real risk' of ill-treatment is faced by 'the *population* of the country generally' (emphasis added), by contrast to a risk 'faced generally by *other individuals* in

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[164] *Ibid*, 97 (citations omitted). The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that a applicant show 'a pattern or practice … of persecution of a group of persons *similarly situated* to the applicant', and his or her 'own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable': 8 CFR §208.13(b)(2)(iii)—asylum (emphasis supplied); §208.16(b)(2)—withholding.

[165] Goodwin-Gill and McAdam, *op cit*, 129. See the reference there in fn 364 to *R v Secretary of State for the Home Department, ex parte Jeyakumaran* (No CO/290/84, QBD, unreported, 28 June 1985).

[166] As UNHCR noted in the context of the Qualification Directive, provided that the risk is real, rather than remote, this should be sufficient to establish the individual requirement: UNHCR Statement, *op cit*, 6.

[167] UNHCR has stressed the importance of a full and inclusive interpretation of the refugee definition in the Convention, including recognizing its applicability in situations of generalized violence and armed conflict where a nexus to at least one of the five Convention grounds can be demonstrated: UNHCR Study, *op cit*, 99; see also UNHCR Statement, *op cit*, 5.

[168] *Salah Sheekh v The Netherlands*, *op cit*, para 148. This has been echoed by UNHCR in the specific context of the Qualification Directive: UNHCR Study, *op cit*, 74.

[169] *Salah Sheekh v The Netherlands*, *op cit*, para 148.

or from that country' (emphasis added). However, although on occasion the Canadian provision has been interpreted as applying only to a subset of a population, with the word 'generally' interpreted as meaning 'prevalent' or 'widespread' (rather than all-encompassing),[170] more recent Canadian case law suggests that this approach is erroneous.[171]

113. Canadian guidelines on the forerunner to section 97(1)(b)(ii) stated that '[t]he threat is not restricted to a risk personalized to an individual; it includes risks faced by individuals that may be shared by others who are similarly situated. … Any risk that would apply to all residents or citizens of the country of origin cannot result in a positive decision'.[172] In *Sinnappu*, a specialist in assessing such cases stated that the exception would only apply 'in extreme situations such as a generalized disaster of some sort that would involve all of the inhabitants of a given country.'[173]

114. The advice of the Canadian Legal Services Branch of the Immigration and Refugee Board on section 97(1)(b)(ii) is that the claimant must be able to particularize the risk, rather than it simply being an indiscriminate or random risk, noting that:

> A claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is generalized. However, claims based on personal threats, vendettas, etc. may be able to satisfy the definition (provided that all the elements of s. 97(1)(b) are met) as the risk is not indiscriminate or random.[174]

115. For example, in *Re WXY*, it was held that:

> the risk to his life and the risk of cruel and unusual treatment or punishment feared by the claimant is general to the whole population of Sierra Leone. That risk is linked to the civil war which has been fought in Sierra Leone since 1991, and which, according to the claimant and his counsel, can start again at any moment. However, since the alleged risk is not personal, but faced generally by the whole population, I conclude that the provisions of Section 97(1)(b) do not apply to the claimant.[175]

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[170] *Osorio v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1792, para 26.

[171] *Surajnarain v Canada (Minister of Citizenship and Immigration)* 2008 FC 1165, para 19, relying on *Salibian v Canada (Minister of Citizenship and Immigration)* [1990] 3 FC 250, 259; *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791 (TD), para 37. See also *Prophète v Canada (Minister of Citizenship and Immigration)* 2008 FC 331; *Prophète v Canada (Minister of Citizenship and Immigration)* 2009 FCA 31.

[172] Canadian Department of Citizenship and Immigration Guidelines to assist in Post-Claim Determination Class Risk Review (PDRCC) claims, cited in *Surajnarain v Canada*, *op cit*, para 17.

[173] *Sinnappu v Canada*, *op cit*, para 37, citing Gilbert Troutet.

[174] See Immigration and Refugee Board of Canada, *op cit*, 10, referring to *Sinappu v Canada*, *op cit*.

[175] *Re WXY* [2003] RPDD No 81; see also *Re WVZ* [2003] RPDD No 106 (in relation to a Sri Lankan claimant).

116. In the 2008 case of *Surajnarain*, the Federal Court of Canada held that while a claimant must establish a personal and objectively identifiable risk, this 'does not mean that the risk or risks feared are not shared by other persons who are similarly situated.'[176] Indeed, this shared characteristic is an essence of the Convention refugee definition, which requires persecution to be on account of one's race, religion, nationality, political opinion or membership of a particular social group.

117. For present purposes, the key point is that the wording of section 36(2B)(c) appropriately recognizes that even where risks are very widespread, an individual can still be granted complementary protection if he or she is personally affected. In applying this provision, it will be important for decision-makers to bear in mind the principles explained in paragraphs 108–110 above, in a manner that enables complementary protection to be consistent with—and complementary to—refugee protection.

E EXCLUSION FROM COMPLEMENTARY PROTECTION: s 36(2C)

118. This section conflates the exclusion clauses in article 1F (section 36(2C)(a)) with the exception to the principle of *non-refoulement* in article 33(2) of the Refugee Convention (section 36(2C)(b)). While using article 33(2) as an additional exclusion clause is unlawful under the Refugee Convention with respect to refugees,[177] the absence of an overarching international instrument on complementary protection means that this is not technically prohibited for people who would fall within section 36(2A). Mandal notes the inconsistency of this approach, given that the Convention exclusion clauses represent 'a considered balance between the humanitarian imperative of international protection and the need to maintain the integrity of the institution of asylum',[178] and have been transplanted without elaboration into regional instruments such as the OAU Convention (in Africa) and the Cartagena Declaration (in Latin America).

119. Since the exclusion clauses for complementary protection are wider than for Convention refugees, it is very important for decision-makers to properly assess protection claims against the Refugee Convention criteria first, before considering the complementary protection grounds (see paragraph 10 above).

120. Yet, while the Bill permits the refusal of a protection visa on the basis of section 36(2C) to people who otherwise meet the complementary protection grounds set out in section 36(2A), international human rights law prohibits in absolute terms their return to territories where they are at real risk of such ill-treatment. In other words, the broadened human rights principle of *non-refoulement* permits

[176] *Surajnarain v Canada*, *op cit*, para 11.
[177] Refugee Convention, art 42. See also the view of the UK government in House of Commons Select Committee on European Scrutiny, *Fourth Report of Session 2002–03* (The Stationery Office, London 2003) para 6.22; E Feller, 'Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR' (Strategic Committee on Immigration, Frontiers and Asylum, Brussels, 6 November 2002) 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002 13623/02 ASILE 59 (30 October 2002) 3.
[178] R Mandal, 'Protection Mechanisms outside of the 1951 Convention ("Complementary Protection")' UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (June 2005) para 135.

no exceptions, and even though Australia may deny a protection visa by virtue of section 36(2C), its *non-refoulement* obligations preclude it from removing people who are at risk of serious harm. The prohibition on return applies irrespective of how abhorrent the conduct of the individual concerned might be.[179]

121. There is no clear, consistent State practice as to how 'undesirable', but non-removable, people should be treated. At a bare minimum, however, States must ensure that they do not themselves treat them in a manner that is cruel, inhuman or degrading. The highest appellate courts of France, Germany, Belgium, the UK and South Africa have acknowledged that even people without any formal immigration status are entitled to minimum health and other social services, and that no individual can be denied minimum dignity whatever his or her immigration status.[180] States owe human rights obligations to all people within their territory or jurisdiction.[181]

122. Leaving people to live in the community without work rights or access to social security may amount to cruel, inhuman or degrading treatment. In 2005, the House of Lords held that the State's failure to provide adequately for asylum seekers could amount to inhuman or degrading treatment they were left 'with no means and no alternative sources of support', were 'unable to support' themselves, and were, 'by the deliberate action of the state, denied shelter, food or the most basic necessities of life.'[182] Similarly, while not ruling directly on the matter, the European Court of Human Rights has acknowledged that poor living conditions could raise an issue under article 3 ECHR if they reached a minimum level of severity,[183] which may include living without any social protection. Furthermore, the longer a person remains in a country, the greater

[179] This was established in *Chahal v United Kingdom*, *op cit*, paras 79–80 and has been affirmed consistently, most recently in *Saadi v Italy*, *op cit*, para 127.

[180] France: Conseil constitutionnel DC 93-325 (13 August 1993), DC 97-39 (22 April 1997), DC 79-109 of 9 January 1980); Belgium: Judgment of the Court of Arbitration (22 April 1998), Judgment of Labour Tribunal of Liège 2nd Chamber (24 October 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 January 1959) BVerfGE 9, 89, Judgment (21 June 1987) BVerfGE 45, 187; Judgment (17 January 1979) BVerfGE 50; Judgment (24 April 1986) BVerfGE 172, cited in D Bouteillet-Paquet, 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in Bouteillet-Paquet (ed), *op cit*, 240 fn 98. In South Africa, the Supreme Court of Appeal held that denying employment to asylum seekers, who had no entitlement to social security support, constituted a breach of their right to human dignity under the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, 1996). It noted that although the State did not have a positive obligation to provide employment, deprivation of the opportunity to work attains a different dimension 'when it threatens positively to degrade rather than merely to inhibit the realization of the potential for self-fulfilment': *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326, para 32.

[181] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 111–12; UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: United States of America, UN doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006) para 10.

[182] *R v Secretary of State for the Home Department, ex parte Adam* [2006] 1 AC 396 (HL), para 7 (Lord Bingham).

[183] *Pancenko v Latvia*, App No 40772/98 (ECtHR, 28 October 1999); *BB v France*, App No 30930/96 (Commission, 9 March 1998) (Cabral Barreto).

his or her personal, social and economic ties, and the greater his or her claim on the State's resources.[184]

123. Likewise, holding people in immigration detention without a lawful justification is impermissible as a matter of international human rights law,[185] and therefore would not be a lawful alternative.

124. The Explanatory Memorandum states that 'alternative case resolution solutions will be identified to ensure Australia meets its *non-refoulement* obligations and the Australian community is protected.'[186] This needs to be resolved in a timely manner that is consistent with Australia's human rights obligations more broadly. Leaving people in legal limbo is inconsistent with international human rights law.[187] For a detailed analysis of the status that should be accorded to people protected by the principle of *non-refoulement* but who are ineligible for a protection visa by virtue of section 36(2C), I refer the Committee to my book chapter on this point.[188]

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[184] *Nasri v France* (1995) 21 EHRR 458, paras 3–4 (Judge Morenilla).

[185] ICCPR, art 9(1). See eg *D and E v Australia*, Comm No 1050/2002, UN doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, Comm No 1014/2002, UN doc CCPR/C/78/D/1014/2001 (6 August 2003); *Bakhtiyari v Australia*, Comm No 1069/2002, UN doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, Comm No 900/1999, UN doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, Comm No 560/1993, UN doc CCPR/C/59/D/560/1993 (3 April 1997); *Shams and others v Australia*, Comm No 1255/2004, UN doc CCPR/C/90/D/1255 (11 September 2007); *Shafiq v Australia*, Comm No 1324/2004, UN doc CCPR/C/88/D/1324/2004 (13 November 2006). In *Mayeka v Belgium* (2008) 46 EHRR 23, the European Court of Human Rights found that Belgium violated article 3 ECHR when it held a five year old child in immigration detention for nearly two months, separated from her family. The court stated at para 55: 'In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention.'

[186] Explanatory Memorandum, *op cit*, para 64.

[187] *Ahmed v Austria* (1996) 24 EHRR 278 highlights the social impacts of being in limbo, primarily on the individual but also on the broader social fabric.

[188] McAdam (2007), *op cit*, ch 6.