NON-REFOULEMENT AND TORTURE: THE ADEQUACY OF AUSTRALIA'S LAWS AND PRACTICES IN SAFEGUARDING FUGITIVES FROM TORTURE AND TRAUMA

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Introduction

As part of its inquiry into immigration law,[1] the Senate recently investigated Australia's non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). The importance of such an investigation was emphasised in May 1999 when the United Nations Committee Against Torture (UNCAT) handed down its first decision against Australia: *Sadiq Shek Elmi v Australia* (hereafter *SE*).[2] In this case, UNCAT found that Australia would be in breach of its obligations under Article 3 of the Convention against Torture if it continued in its decided course of forcibly returning a Somali national to Somalia, where he would be in danger of suffering torture.[3] This article examines the issues raised in the *SE* case and looks at the implications that these issues have for immigration law in Australia. The nature of the Convention against Torture and the way in which Australia has sought to comply with the obligations it assumed upon signing and ratifying the Convention are examined.[4]

It is disturbing for Australia, a country that takes pride in its human rights record, to be informed by an international human rights committee that it is pursuing a course of action in violation of a convention which seeks to protect people from one of the most extreme of human rights abuses. In defence of Australia's reputation, it may be postulated that SE's case is an anomaly; that it was the unfortunate result of misguided decision makers dealing with a difficult factual situation or with a poorly presented case. This may be suggested even though the likelihood of an aberrant decision should be minimised by the fact that cases are only admitted for hearing before the UNCAT once domestic remedies have been exhausted.[5]

This article attempts to demonstrate that, seen in the context of Australia's immigration law and practice, the decision against Australia in SE's case is actually the foreseeable and likely result of Australia's failure to provide adequately for its "non-refoulement" obligations under Article 3 of the Convention against Torture. The gravity of this failure and hopefully the motivation for its remedy may be realised by recognising the nature of the Convention against Torture and the subject matter that it deals with.

The Case of *SE v Australia*[6]

SE came to Australia in October 1997. He asserts that his life is in danger in Somalia because he is a member of the Shikal clan, whose members are easily identified by their lighter coloured skin and distinct accent. Members of the Shikal clan, he claims, are the target of other clans because of their wealth and because they refused to join or financially support the dominant Hawiye clan. His father, an elder of the Shikal clan, was shot by the Hawiye militia when he refused to "give over" one of his sons to them or to otherwise support the militia. SE's brother was killed when

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the militia detonated a bomb in his home and his sister committed suicide after being raped three times by members of the Hawiye militia.

Following the refusal of the Department of Immigration and Multicultural Affairs (DIMA) to grant SE a protection visa in March 1998, SE sought review by the Refugee Review Tribunal (RRT). The RRT rejected his claim in May 1998. SE then made a request to the Minister for Immigration to use his discretion[7] to overturn this decision, but in July 1998 the Minister declined to consider exercising his discretion. In October 1998 SE was told that he would be deported to Mogadishu.

This decided course of deportation was not reversed despite a request by Amnesty International that the Minister intervene. SE was not permitted by the Minister to lodge a second application for a protection visa, although it was readily determined that he had received inadequate representation for his original application and RRT appeal. In due course, the High Court refused to issue an injunction against his deportation on the grounds that there was not a "serious question" of law to be tried.[8]

However, SE's deportation was delayed, through a series of exceptional events. In summary, the captain of the aircraft designated to fly SE from Melbourne on 29 October 1999 refused to have SE on board after he witnessed his distress. An Urgent Action was issued by Amnesty International on 18 November 1998[9], followed by a protest by the Trades and Labour Council at Perth airport when the DIMA attempted to deport SE on 19 November 1998. DIMA finally agreed to suspend his deportation after the UNCAT requested that they do so while they heard SE's case.

On 20 May 1999 the UNCAT decided against Australia. It stated that SE's deportation would be in breach of Article 3 of the Convention against Torture, which obliges states not to *refoule* individuals to a country where they are likely to suffer torture. What makes this case disturbing is that there was (and is) no provision in Australian domestic law requiring SE's case to be assessed in accordance with the provisions of the Convention, even though Australia has signed and ratified it. Since the circumstances of most asylum seekers do not allow them the opportunity to have their cases heard before the UNCAT, the case demonstrates the need for changes within Australia's immigration laws so as to ensure that Australia's treatment of asylum seekers does not offend against our obligations under the Convention. An appropriate change would be to introduce a humanitarian visa class based upon Article 3, together with a mechanism for reviewing removal decisions so as to ensure compliance with Article 3.

The Nature of the Convention against Torture

As noted above, the Convention against Torture seeks to protect people from one of the most extreme of human rights abuses. The World Conference on Human Rights in June 1993 described torture as "one of the most atrocious violations against human dignity".[10] The status of the right to be protected from torture as one of the most basic of human rights is evidenced by its presence in all general human rights treaties, such as the United Nations Declaration of Human Rights (Article 5) and the International Convenant on Civil and Political Rights (Article 7)[11], and its universal condemnation has allowed it to secure "the rare status of *jus cogens*".[12]

The Convention against Torture not only prohibits torture, but aims for the global elimination of torture.[13] Its non-refoulement provision (Article 3), focuses on the existence of serious harm which will be suffered if a person is returned to a country where he is likely to suffer torture, regardless of the character of the person who will suffer the harm or the connection of the harm with a specific ground. Article 3 of the Convention against Torture states:

> 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 subject to torture.

The abuse which torture constitutes is recognised here to be so extreme that the existence of a possibility of torture is the sole determiner of whether an individual should be afforded protection. This reinforces a view of torture as one of the most serious of human rights abuses as well as recognising that the elimination of torture globally demands that states not only eliminate it within their borders but also recognise that they act as a member of a global community and have global responsibilities towards foreign nationals. Understanding the nature and aims of the Convention against Torture and the place of Article 3 within it is critical for deciding upon an appropriate domestic response to it.

Australia's Response to the Convention against Torture

Australia became a party to the Convention against Torture in 1987[14] and gave effect to several of its provisions in domestic law through the *Crimes (Torture) Act 1988* (Cth). However, the terms of Article 3 were not given domestic legislative force by this legislation. In contrast, Article 3 shapes the *Extradition Act 1988* (Cth) which only allows a person to be extradited once the Attorney-General is content that persons will not be tortured in the country to which they are extradited.[15] Asylum seekers are not protected by this provision because extradition is a mechanism designed to return foreign nationals wanted in relation to alleged criminal offences by another country with which Australia has reached an agreement.

In *SE v Australia*[16] Australia implied that it has provided for its "non-refoulement" obligations under the Convention against Torture. One of the principal grounds on which the argument that SE's claim for Article 3 protection was without merit rested, was that he had failed to gain a visa in Australia, despite exhausting domestic remedies. This argument shows that Australia had not changed its position since its first report to the UNCAT,[17] in which it claimed to have provided for its Article 3 obligations through granting visas to refugees and permitting the Minister to grant visas on humanitarian grounds at his/her discretion.[18]

However, it was not the facts of SE's case, but the provisions of Australian immigration law, which did not meet the requirements of Article 3 of the Convention against Torture. Even though protection visas and humanitarian visas can be issued by DIMA and the Minister, this does not guarantee that those eligible for protection in Australia under Article 3 will receive it. This may be demonstrated by comparing the availability of and criteria relating to protection visas and humanitarian visas with the terms of Article 3.

Protection visas

Individuals will gain a cl 866 protection visa[19] if they can satisfy the Minister for Immigration that they are a refugee.[20] The definition of "refugee" is taken from Article 1 of the Refugee Convention,[21] which defines a refugee as a person:

> who owing to a well-founded fear of being persecuted for reasons of religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country.[22]

The problem with using this definition as the basis of the main on-shore humanitarian visa in Australia is that it does not cover all individuals who are protected under Article 3 of the Convention against Torture.

The focus of Article 3 is the existence of serious harm which will be suffered, rather than its connection with a specific ground or the person making the claim, as is the case with the Refugee Convention.[23] Although both the Refugee Convention and the Convention against Torture seek

to protect people from being returned to a place where they will suffer human rights abuses, the elements which make up the relevant provisions differ. The extent of these differences emerges when we examine the character of the harm for which protection is granted under Article 3, the proof required, and who is protected from refoulement.[24]

The type of harm suffered

Article 3 only applies to acts of torture.[25] Torture is defined in article 1 as:

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

The European Court of Human Rights has distinguished torture from other inhuman treatment by on the basis of its severity and immoral purpose.[26] In *Ireland v United Kingdom*,[27] five interrogation techniques were deemed not to constitute torture, but instead inhuman and degrading treatment, because torture is constituted only by deliberately inhuman acts which cause extreme suffering.[28] The UNCAT may be influenced to define torture more broadly than the European Court because, unlike the European Convention against Torture, only torture activates Article 3. Nevertheless, the principle of hierarchical abuse will still be maintained with torture being at the top of a hierarchy of abuse.

Since other inhuman treatment constitutes "persecution", the scope of Article 3 is narrower than that of Article 33 (1) of the Refugee Convention with respect to the type of harm suffered.

To constitute "torture" within the Convention against Torture, the relevant act must be committed with the "consent or acquiescence of a public official or other person acting in an official capacity".[29] Here also the scope of the provision is narrower than Article 33(1) of the Refugee Convention.[30] Yet, there may be little practical difference between the scope of the two conventions in this respect.

The notion of torture was defined in this manner because it was expected that criminal acts by private persons would be dealt with through domestic legal systems.[31] The Convention against Torture is an instrument of international law and should not work in competition with domestic legal systems. It was not, however, intended to leave individuals without redress because the state where they suffer harm is incapable or disinclined to protect them.

Individuals who find themselves in this position should be covered by the Convention by virtue of the phrase "with the consent or acquiescence of a public official." Governments will be taken to have acquiesced in torture if they do not act to prevent it. As an example of this, Rodley argues that acts done by paramilitary and other unofficial groups will be covered if public officials ignore those acts.[32] Furthermore, a report by the Special Rapporteur on Torture says that if a state does not intervene when quasi public groups such as tribes commit human rights abuses it will be considered to have consented or acquiesced in the act.[33] Further still, Copelon argues that a state may consent even to private acts of domestic violence when it fails to protect citizens from it.[34]

It is also consistent with the purpose of the public official requirement to interpret the phrase "those acting in an official capacity" as defacto governments, in circumstances where there is no official government. In *SE v Australia* Australia claimed that the applicant did not face torture as defined by Article 1 because those who threatened to harm him were members of "armed

Somali clans", not public officials or person acting in an official capacity.[35] The UNCAT held that, given Somalia was in a state of civil war and without an official government, the factions in question came within the definition because they had set up quasi-governmental institutions and exercised powers similar to those used by legitimate governments.[36]

Proving the existence of harm

Article 3 requires that *substantial* grounds exist for believing that a person *will* be in danger of being subjected to torture.[37] It uses a probability standard of proof and deals only with future risk, since its aim is to protect from harm rather than bring redress for past abuses.[38]

What constitutes substantial evidence will be dependent upon a particular factual situation.[39] *Balabou Mutombo v Switzerland* indicated that "substantial grounds" means that the risk of an individual being tortured is a "foreseeable and necessary consequence" of their return.[40] However, this is not a firm definition because it still requires an opinion as to what is foreseeable in the relevant circumstances and it has not been used as a test in later cases.

As indicated by paragraph 2 of Article 3, the general human rights situation in a country should be examined in determining whether an individual is threatened by torture. However, this is not taken as an absolute or an exhaustive proof,[41] but as a means by which a view may be "strengthened".[42] Following from this, although general human rights abuses exist in a country, Article 3 may not operate because the person in question is not at risk.[43] Moreover, it may be held that a person is in danger of torture although their country does not have a constant pattern of human rights abuses.[44]

In assessing the significance of inconsistencies and contradictions within an applicant's story, the UNCAT has repeatedly stated that "complete accuracy is seldom to be expected by victims of torture."[45] As well as considering the characteristics of torture victims, the UNCAT focuses upon the paramount aim of the article, which is to protect the security of individuals. Consequently, it has held that despite the existence of doubts regarding the facts of a case, the security of an individual must be ensured.[46]

Taylor observes that Article 3 does not consider the subjective fear of an applicant in the way Article 33(1) of the Refugee Convention does.[47] However, the practical significance of this distinction is minimal because, as Taylor notes, the subjective fear of a refugee must have an *objective foundation* by which a court is able to establish, under *Chan*, that there is a "real chance" they will be persecuted.[48]

Moreover, the standard or proof required under Australian law seems greater than that required by the UNCAT. The *Migration Act 1958* places the onus of proof upon applicants to ensure that the Minister "is satisfied" that they have a genuine fear based upon a real risk of persecution.[49] By contrast, under the Convention against Torture, the burden of proof, at least with regard to evidence of country conditions critical to an assessment under Article 3, is placed upon the state in which relief is sought.[50] In addition, the UNCAT is concerned that the paramount aim of Article 3, that persons be protected from torture, is met, despite doubts which may exist concerning the facts of a case.[51]

Who is protected from refoulement?

There are several significant differences with regard to the class of persons protected from refoulement under the Refugee Convention in comparison with the class protected by the Convention against Torture.

A refugee is someone who is part of a persecuted group. A refugee who is protected from refoulement is someone who is not protected or assisted by agencies other than the UNHCR (Refugee Convention, Article 1D); is not a national

of the country where he/she resides (Refugee Convention, Article 1E); has not committed a crime against peace, a war crime, or a crime against humanity (Refugee Convention, Article 1F (a)); has not committed a serious non-political crime (Refugee Convention, Article 1F (b)); has not committed acts "contrary to the purposes and principles of the United Nations" (Refugee Convention, Article 1F (c)); and is not a danger to the security or the community of the country where he/she seeks refuge (Refugee Convention, Article 33 (2)).

In contrast, a person is protected by Article 3 of the Convention against Torture regardless of characteristics such as those referred to in the Refugee Convention. "[T]here are no preclusions for those...considered to be criminals, national security risks, or even torturers."[52] In *D v the United Kingdom*[53] it was held that protection should be given to a drug dealer. In *Chahal v United Kingdom* the successful applicant was an alleged terrorist involved with planning terrorist attacks in the country where he sought asylum. While these are decisions of the European Court of Human Rights, and the jurisprudence of the UNCAT may develop differently on this issue, the reasoning of the ECHR is important. In *Chahal v United Kingdom* the ECHR explained that a claim for protection under the Convention against Torture should be decided without regard to the applicant's conduct or national security because it is fundamental to democratic society that individuals be protected from torture and the irreversible harm caused by it.[54] Such a broad approach is also consistent with the philosophy behind the Convention against Torture: that is, that all persons, regardless of their status, have a right to be protected from torture and that states have an interest in making the elimination of torture their highest priority within the decision making process.

Those concerned with national security should be mindful of the following issues. First, the Convention against Torture does not require Australia to do anything more than ensure that it does not return an individual to a country where they are at risk of torture. It does not impose upon Australia an obligation to grant a torture victim permanent residence or refugee status. Australia may send torture victims to any country where they are not under threat of torture.[55] This feature of the provision has been recognised by United States law. The United States offers asylum seekers under the Convention against Torture relief in two forms. Asylum seekers who do not meet the definition of a refugee but who meet the requirements of Article 3 are granted similar rights to refugees, including the right not to be deported and the right to work. Asylum seekers who meet the requirements of Article 3 and are prevented from gaining refugee status under article 1 (F) of the *Refugee Convention* because of crimes they have committed, are granted 'deferral from deportation'. Through this, the United States recognises that it is obliged not to *refoule* torture victims but it reserves the right to send them to a safe third country and the right not to give them permanent resident status.[56]

Secondly, the Convention against Torture does not prevent a state from subjecting a person to domestic jurisdiction.[57] Granting an individual protection does not mean that that person has been placed above the law. Furthermore, torture victims who have violated international law, such as war criminals or torturers, may be brought before the International Criminal Court or extradited to a country where they may be tried for their crimes.[58]

Thirdly, sensationalised claims should not be permitted to distort what is actually involved in implementing Article 3 of the Convention against Torture. Only a small number of people seek asylum under the Convention against Torture. As noted above, torture is an extreme form of abuse which is considerably narrower in form than "persecution" as defined by the Refugee Convention. Of the limited number of asylum seekers who are covered by the Convention against Torture, only a minority will have a criminal history. It is important not to compromise the principles and objectives of the

Convention against Torture in reaction against this small number of individuals. To do so would involve passing severe moral judgment upon an individual whose past actions have been inevitably influenced by a situation in which gross human rights abuses threatened them, and/or were perpetrated against them. Moreover, this severe moral judgment is coupled with abrogation of moral responsibility on our behalf if we are to place individuals at risk of being tortured. The question asked should not be, "Why should we implement laws which allow criminals to enter Australia?", but, "How can we retain laws which do not protect people from being tortured?".

Nevertheless, it would be possible to limit the application of Article 3 in a similar manner to that achieved through the exclusions found in Articles 1 and 33 of the Refugee Convention discussed above.

Another difference between those who are protected by the Convention against Torture and those protected by the Refugee Convention is that torture victims do not need to be part of a group towards which harm is directed. The "nexus" requirement of refugee asylum, which stipulates that claimants must be able to connect their suffering to discrimination against a group, is not present in the Convention against Torture because of the exceptional and often individually focused nature of torture. As was the case with SE, the "nexus" requirement of the Refugee Convention narrows the scope of the Torture Convention's protection so as to render it ineffective for some asylum seekers who have legitimate claims for protection based upon severe human rights abuse. Both DIMA and the RRT determined that SE did not satisfy the "nexus" requirement because he could not show that he would be persecuted for one of the reasons mentioned in Article 33 of the Refugee Convention. Yet, as the UNCAT found, he was at risk of facing torture. His case demonstrates that the elements which make up the relevant provisions of these Conventions are distinct and that claims must be assessed separately under each Convention.

The Minister's Discretion

From the discussion above it is evident that individuals under threat of torture may not be refugees because the harm they suffer is not harm suffered by a group, or because they do not meet the character requirements in the Refugee Convention. Australian law has allowed for such torture victims by giving the Minister of Immigration a discretionary power to grant humanitarian visas under s.417 of the *Migration Act 1958*. Unfortunately, torture victims such as SE are not adequately protected by this discretion, because it is a personal discretion exercised by a politician in accordance with the public interest and not subject to adequate review.

A Personal Discretion

The Minister has an unenviable task in being required to exercise this discretion justly in relation to the thousands of requests he receives each month. In fact, it is an impossible task for one person to complete, and it is unreasonable for us to expect one person to remedy all the problems caused by our inadequate visa provisions, considering the time and expertise required for such a task. The discretion requires the application of complex international law principles to numerous factual situations. In the context of the Refugee Convention, this process has required the regular guidance of the High Court.[59] It is arguable that it may be even more difficult to implement the Convention against Torture, which is a more recent Convention around which little jurisprudence has so far developed.

Only a decision not to consider whether to use the discretion can be delegated to DIMA[60] Yet, the problem of inadequate expertise is evident at this level as well. The case of *SE v Australia* indicates that staff may not be adequately trained to identify cases which are covered by the Convention against Torture.

Exercised by a Politician

Procedural fairness with respect to the Minister's discretion is compromised by the fact that the Minister is not an independent decision maker, in that he/she is not independent of immigration control and other government interests.[61] As a politician, the Minister may be reluctant to exercise this discretion because of the possible political implications that a decision may have, especially since s.417(4) requires that the decision be made public.[62]

Furthermore, there is evidence which suggests that the political leanings of the Minister may affect DIMA staff who have been delegated the task of deciding whether the Minister should consider exercising this discretion. In 1995 Cooney showed that MIRO officers were unwillingly to recommend that the Minister use his discretion under s351 (which is worded in similar terms to those of s 417) because they were concerned that they would be labelled critics of government policy.[63]

Exercised in Accordance with the Public Interest

This discretion must be exercised in the "public interest". The relevant "public interest" promoted or protected by a particular decision must be stated when a decision to exercise this discretion is tabled before Parliament in accordance with s.417(4). The problem here is that the focus on the "public interest" diverts attention away from, or even contradicts, the goal of protecting the basic human rights of an individual[64]- which is the focus of the Convention against Torture.

Inadequate Review

This discretion is non-compellable and the Minister's decision (or that of DIMA staff) not to use it cannot be questioned.[65] This means that applicants do not receive a hearing at all if a decision is made not to exercise the discretion.

When the Minister does exercise this discretion, an applicant does not receive procedural fairness because hearings are by written submissions only (which may be particularly difficult for non-English speaking asylum seekers and those who have traumatic stories to relate) and applicants do not have effective access to judicial review because the discretion is non-compellable.[66] Neither can unfavourable decisions be reviewed by the public because there is no requirement that they be tabled in Parliament or otherwise made public.

As mentioned above, only a favourable decision by the Minister receives a form of review. Under s.417(4) the Minister must table a favourable decision, with the reasons he/she made it, in Parliament. However, the quality of such a review is affected by the fact that Parliament "may lack the time, expertise and political will to properly review specific cases".[67]

SE v Australia demonstrates how flawed this discretion is as a safeguard for torture victims.[68] In its submission to the UNCAT, Australia argued that our domestic law had adequately assessed whether SE had a genuine claim to protection under Article 3. Australia relied in part on the fact that DIMA had assesed SE's case to determine whether it should be referred to the Minister, and that the Minister had declined to exercise his discretion when requested to do so. In light of the UNCAT's decision, the competence of the Minister and his department to identify those in need of Article 3 protection is open to question. This emphasises the need for judicial review of the exercise of the Minister's discretion, something which was unavailable to SE.[69]

Deportation

Under s198 of the Act, an unlawful non-citizen[70] must be removed from Australia.[71] That section states that an "officer *must* remove as soon as reasonably practicable" an unlawful non-citizen who is detained and who does not have a valid visa or visa application. In *SE v Minister*,[72] SE argued that this provision

must be read as not requiring the removal of individuals to a place where their human rights risked violation, because such an action would breach Australia's obligations under international treaties such as the Convention against Torture. It was held that the operation of this section was not limited in this way as a matter of statutory construction.[73]

In practice this means that the nature of the destination to which someone is to be removed and whether they will suffer human rights abuses at this destination are not considered during the deportation process. The justification is that such issues have already been sufficiently considered by those who examined the individual's visa application.[74] Thus, in *SE v Minister,* when an officer of DIMA was asked whether he had examined the conditions in Somalia (where the appellant was to be sent) before he exercised his statutory duty to remove the appellant from Australia he answered, "No, that had already been done". When asked, "By whom?", he replied, "...the RRT process".[75] The flaw within such reasoning is evident from the discussion above. Not all applicants to whom Australia has an obligation not the remove under Article 3 of the Convention against Torture will be able to obtain a visa under our current provisions.

Recommendations for change

Although the Convention against Torture is a relatively recent Convention which has yet to be widely implemented, Australia may look to the example of other countries, such as Germany and the United States, in assessing how it may provide for its Article 3 obligations within its immigration laws. Article 3 of the Convention against Torture is reflected in Germany's immigration law, both in its visa provisions and its mechanisms for deportation review. Under s53 of the *Aliens Act* of Germany, asylum seekers will not be deported if they are in "concrete danger" of being subjected to torture [s52(1)]. Under s53(6) of the same Act, deportation can be prevented if an asylum seeker's life, bodily integrity or freedom is under immediate and personal danger.[76]

The United States has gone further than Germany to guarantee asylum seekers relief based upon the Convention against Torture. Within United States law, although torture victims cannot seek redress under Article 22 of the Convention against Torture,[77] they have been able to apply directly for the protection of Article 3 since its ratification by the United States in 1994.[78] In 1998/1999, the United States implemented a new procedure which integrates determinations under the Convention against Torture into the asylum adjudication process. This procedure allows asylum seekers to apply for relief under the Convention against Torture at any stage during their proceedings. Moreover, Immigration & Naturalisation Service officials and immigration judges are trained to raise Convention against Torture claims themselves when they think that is appropriate. One of the most significant features of these provisions is that they recognise that humanitarian status is not discretionary, but *required* for individuals who qualify for protection under the Convention against Torture.[79]

Through its reluctance to give full effect to its obligations under Article 3, Australia is failing to play its part in eliminating torture. In view of this, Australia should follow the lead of the United States and create a separate ground of relief for asylum seekers modelled on the features of Article 3 of the Convention against Torture.

Conclusion

The case of *SE v Australia* draws attention to the fact that Australia has failed to provide adequate protection for asylum seekers who are at risk of torture. Although Australia has claimed otherwise, a close examination of our on-shore cl 866 protection visa and the Minister's discretion under s 417 to grant visas on humanitarian grounds shows that these mechanisms do not adequately protect individuals covered by Article 3 of the

Convention against Torture. In order to remedy this situation two changes should be made to the *Migration Act 1958.* Firstly, a visa class should be created which is based upon Article 3 of the Convention against Torture.[80] Secondly, deportation orders ought to be reviewable by reference to Article 3 of the Convention. Such measures will demonstrate that Australia is committed to the world-wide elimination of torture.

Endnotes

1 Inquiry into the Operation of Australia's Refugee and Humanitarian Program. The inquiry was being conducted by the Senate Legal and Constitutional References Committee pursuant to a notice of motion passed by the Senate on 13 May 1999. The Committee's report, *A Sanctuary Under Review - An Examination of Australia's Defence and Humanitarian Determination Processes* was tabled in the Senate on 28 June 2000.

2 Communication No. 120/1998. Date of communication: 17 November 1998.

3 Prior to *SE v Australia* two communications had been accepted by the Committee Against Torture: *H v Australia* Communication 102/1998 and *NP v Australia* Communication 106/1998. The first of these was discontinued when the complainant returned to her home country. The second was rejected by UNCAT on its merits. Subsequent to UNCAT's decision against Australia in *SE v Australia* there has been an increase in the number of complaints lodged, including CAT Communication 136/1999, CAT Communication 138/1999 and CAT Communication 139/1999. Refer: Attorney-General's Department, Submission to the Senate Legal and Constitutional References Committee: Operation of Australia's Refugee and Humanitarian Program, Submission No. 75, 1999.

4 Victims of torture are also protected under the International Convenant on Civil and Political Rights (ICCPR) (refer to Articles 6 and 7) which Australia ratified on 13 August 1980. For a discussion of the extent to which Australia upholds those provisions see S. Taylor, "Australia's Implementation of Its Non-Refoulement Obligations Under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Convenant on Civil and Political Rights", (1994) 17(2) *UNSWLJ* 432.

5 See Article 22, paragraph 5 (b) of the Convention against Torture which precludes the UNCAT from considering a communication before all domestic remedies have been exhausted. Although the provision allows for communications to be heard in exceptional circumstances where domestic remedies are "unreasonably prolonged" or "unlikely to bring effective relief" (Article 22 (5) b), this requirement of admissibility has been interpreted quite strictly. In *M.A. v Canada*, Communication No. 22/1995, the applicant argued that his chance of success was almost non-existent because of binding jurisprudence and the review process. The Committee held that they could not accept this argument because they could not assess whether domestic remedies would be successful, but only if they were "proper remedies". The Committee explained that "special circumstances" were needed before this requirement could be wavered. *M.A. v Canada*, Communication No. 22/1995 U.N. Doc. A/50/44/ at 73 (1995).

6 The facts of SE's case are set out by the UNCAT in *SE v Australia* at paragraphs 2.1-2.7.

7 Under s417 *Migration Act 1958* the Minister has a discretion to grant a humanitarian visa to an asylum seeker if it is in the public interest to do so.

8 Hayne J refused SE an interim injunction on 16 November 1998. Special leave to appeal to the full bench of the High Court was subsequently denied.

9 This Urgent Action is only the third ever issued by Amnesty International against Australia, the last being in 1989. See Paul Whittaker, "The Alarming Case of Sadiq Shek Elmi", *Amnesty International Australia Newsletter*, January - February 1999. Vol. 17. No. 1.

10 United Nations Department of Public Information, New York, 1993, DPI/1394-393999 at 60 in P. Burns QC and O. Okafor, "The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or How it is Still Better to Light a Candle than to Curse the Darkness", (1998) 9(2) *Otago Law Review* 399.

11 See P.B. Sharvit, "The Definition of Torture in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment", 23 *Israel Yearbook on Human Rights* 147, 148.

12 *In the Matter of Anwar Haddan* Exclusion Proceedings Board Immigration Appeals, File No. A22/751/813 (United States) at 28.

13 Fact Sheet No. 17, United Nations Human Rights Website, The Committee against Torture, http://www.unhcr.ch/html/menu6/2/fs17.htm, Introduction, at 1.

14 Taylor, (1994) above n 5 at 466-433.

15 Section 22(3). See ibid, at 450. Taylor questions the value of this safeguard since it is not exercised by an independent decision maker.

16 *SE v Australia* above n 3, paragraphs 4.10-4.16.

17 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment - Consideration of Reports Submitted By the States Parties Under Article 19 of the Convention: Australia*, 27 August 1999 at paragraphs 70 (p 12) and 73 (p 13).

18 Taylor raises the issue as to whether class 800 territorial asylum visas, not mentioned in the report, are an avenue through which Australia's non-refoulement obligations may be satisfied. She concludes that territorial asylum is not a real option for asylum seekers. Taylor, (1994) above n5., at 466-467.

19 Migration Regulations 1994 (Cth), Sch 2, cl 866.

20 M Crock, *Immigration and Refugee Law in Australia,* Federation Press, 1998, p 126.

21 *Migration Act 1958* (Cth), s 4(1).

22 Refugee Convention, Art 1A(2). The 1967 Protocol extends this definition to events occurring after 1951. See Art (A) (2).

23 D. Anker, *Law of Asylum in the United States.* Boston, Refugee Law Centre, 3rd ed, 1999, p 18.

24 Despite the use of the word "refoulement", it should be noted that the Article 3 is wider than Article 33 (1) of the Refugee Convention in that it is not limited to non-refoulement.

25 Anker, above n 24 at 480, 483.

26 The U.N Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 states that torture "constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Ibid, Anker, 482.

27 25 Eur Ct. H.R. (ser A) 167 (1968) in J H Burgers and H Danelius *The UN Convention against Torture: A Handbook on the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment,* Nijhoff Sold and Kluwer Academic Publishers, 1988 pp 115-117.

28 This hierarchical distinction was also used in *Tyer v United Kingdom* 26 Eur. Ct. H.R. (ser A) 29 (1978) in Anker, above n 24, 484.

29 Convention against Torture, Article 1. States are responsible for acts of torture by their public officials regardless of whether their conduct was approved by the state. Anker, above n 24., 504.

30 Taylor, above n 5., at 442-3.

31 Burgers and Danelius above n 28., at 120.

32 N.S. Rodley, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", *Guide to International Human Rights Practice* 60, Hurst Hannum ed, 2d ed. 1992, 91 in Anker, above n 24., 503.

33 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences,* U.N. ESCOR, Comm'n Hum Rts, 53rd Sess, 14, U.N. Doc E/CN.4/1997/47 (1997) in Anker, ibid., at 504.

34 R. Copelon, *Recognising the Egregious in the Everyday: Domestic Violence as Torture* 25 Colum. Hum Rts. L. Rev (1994) at 355-56, in Anker, ibid., 506-7. In extending torture to private acts the purpose requirement of the definition should not be forgotten. Sharvit notes that, while the purposes listed in Article 1 are not exhaustive, they all share a connection with the "interests or policies of the State and its organs": Sharvit, above., n 5 at 163-4. Yet torture can still be extended to domestic violence if the patriarchal interests of a state are recognised and its purpose is held to be discrimination according to sex. Such an interpretation is allowable by the fact that the list of purposes is not exhaustive and that "the 'purpose' element should be liberally construed or de-emphasised." N.S. Rodley, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", in *Guide to International Human Rights Practice* 60, 70 (Hurst Hannum ed., 2d ed, 1992) and A. Clapman, *Human Rights in the Private Sphere* 200 (1993) in Anker, id., at 499.

35 *SE v Australia* above n 3., paragraph 4.4.

36 Id. paragraph 6.5.

37 Burgers and Danelius, above n 28., at 127.

38 Anker, above n 24, at 509.

39 *Balabou Mutomo v Switzerland* Communication No. 13/1993, Committee Against Torture. UN Doc UNCAT/C/12/D/13/1993 (27 April 1994) published in (1995) 7 (2) *IJRL* 330.

40 See *Balabou Mutomo v Switzerland* id., at 330.

41 Burgers and Danelius, above n 28., at 128.

42 See *Balabou Mutomo v Switzerland* above n 42., 331.

43 Ibid., at 330.

44 Id.

45 See *Ismail Alan v Switzerland* Committee against Torture, Communication No. 21/1995 , published in (1996) 8 (3) *IJRL* 448; *Pauline Muzonzo Paku Kisoki v Sweden,* Committee against Torture, Communication No. 41/1996, published in (1996) 8 (4) *IJRL* 657; *Kaveh Yaragh Tala v Sweden* Committee against Torture, Communication No. 43/1996 at paragraph 10.3, U.N. Doc. UNCAT/C/17/D/43/1997 at http://www1.imn.edu/humanrts/cat/decisions/CATVWS43.htm.

46 *Balabou Mutomo v Switzerland* above n 42., at 330; *Tahir Hussain Khan v Canada* Committee against Torture, Communication No. 15/1994, paragraph 12.3, U.N. Doc.A/50/44 at 46 (1995) at http://www1.imn.edu/humanrts/cat/decisions/CATVWS43.htm.

47 Taylor, above n 22., at 443.

48 Ibid., 438. In *Chan* Mc Hugh J directly stated this point, saying that the subjective frame of the applicant "*must* be supported by an objective element." (emphasis added). See *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R., 379.

49 See *Minister for Immigration v Wu Shan Liang* 70 ALR (1996) 568, 577.

50 Anker, above n 24., 511.

51 See references at footnote 45.

52 Anker, above n 24., p469.

53 The European Court of Human Rights, case number: 146/1996/767/964.
54 *Cahal v United Kingdom* 23 Eur. H.R. Rep. 82 (1996) (Eur. Ct. H.R.) in Anker, above n 24., at p 519.
55 Deborah L. Benedict, "A Survey of State Implementation of the Obligation of Non-Refoulement Embodied in Article 3 of the Convention against Torture in the Context of Refugee Protection", University of Michigan Law School, Externship Paper, Fall 1999, at 6.
56 Ibid., 13.
57 Anker, above n 24, at 519.
58 Benedict, above n 59, at 6.
59 See Law Council of Australia, Submission to Senate Legal and Constitutional References Committee: Operation of Australia's Refugee and Humanitarian Program, 1999 at 14. They pose as an example the case of *Applicants A and B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 in which the High Court looked at the definition of a "particular social group" under the Refugee Convention and stated that such a group could not be defined as those who shared an experience of persecution.
60 Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs (1996) 141 ALR 322. Merkel J explained, at first instance, that there are three separate decisions which can be made under s 417. A decision to exercise the discretion; a decision not to exercise the discretion and a decision not to consider whether to consider exercising the discretion.
61 Taylor, above n 5 at 464.
62 Law Council of Australia, above n 63, at 15.
63 S. Cooney, *The Transformation of the Migration Act,* (1995), AGPS, 90 quoted in Law Council of Australia.
64 Law Council of Australia, above n 63, 16.
65 Section 475(1)(c) *Migration Act 1058.*
66 *Ozmanian v Minister for Immigration, Local government and Ethnic Affairs* (1996) 141 ALR 322.
67 Law Council of Australia, above n 63 at 16.
68 The inadequacy of the discretion would also be shown by unpublished cases in which the asylum seeker has not sought an exercise of the Minister's discretion because they are not aware of it or they do not have the monetary resources to continue review to that stage.
69 SE could not have his case reviewed because the Minister had decided not to consider using his discretion.
70 A non-citizen is unlawful if they do not have a valid visa. A valid visa may be a substantive visa or a bridging visa if they are awaiting a decision on a visa application or appeal.
71 Removal is the automatic end process of a failed visa application. The Minister has a limited, non-reviewable discretion to interfere in this process by substituting a negative decision from the IRT or the RRT (ss 345, 251, 391, 417 and 454 of the Act), granting a visa to an individual under an application bar who is facing removal under ss91C-91E of the Act (s 91F) or permitting a person to lodge a second visa application (ss 48A, 48B). Refer to M. Crock, above n 21, at 274.
72 *Re: Minister for Immigration and Multicultural Affairs & Amp; Anor; Ex Parte SE* [1998] HCA 72 (25 November 1998).
73 The wording of the provision does not allow for it to be interpreted in a manner consistent with Australia's international human rights responsibilities, under *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.
74 Presumably the justification behind deporting those who have not made an application for a protection visa is that are not in need of protection because they have not asked for it.
75 *Re: The Minister for Immigration and Multicultural Affairs and ANOR Ex parte SE* M99/1998 (9 November 1998) Transcript of proceedings before Hayne J on 4 November 1998, at 31. RRT refers to the Refugee Review Tribunal.
76 "Providing Protection- Asylum Determination in selected European countries: Germany, Austria, Hungary, Poland and Switzerland", Supplementary Report 4. 28.
77 Burns and Okafor, above n 11. at 420.
78 Anker, above n 24., at 466. For a discussion of why and how the Convention against Torture was directly applied in United States law see *In the Matter of Anwar Haddan* Exclusion Proceedings Board Immigration Appeals. File no. A22/751/813 (United States). This case identified the Convention against Torture as "Supreme Law" within the United States, by which judges were bound despite contrary state law. See Section III.
79 Benedict., above n 59 at 12-13.
80 Such a visa class may also incorporate articles 6 and 7 of the International Covenant on Civil and Political Rights.