



CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

...Get wisdom; and whatever you get, get insight.
Proverbs 4:7

HORDES OR HUMAN BEINGS?

**– A DISCUSSION OF SOME OF THE PROBLEMS
SURROUNDING AUSTRALIA'S RESPONSE TO ASYLUM
SEEKERS AND POSSIBLE SOLUTIONS TO THOSE
PROBLEMS.**

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Introduction

Resolving the issues in the granting of refugee status and the treatment of refugees and asylum seekers is by no means easy. This paper will examine the attitude of Australia towards refugees by giving a brief historical context, examining the relevant international human rights conventions, the operation of domestic law including the *Migration Act 1958*, its amendments and regulations and commenting on some case law, position papers or submissions, and journal articles. The paper will give some consideration to the current processes of review and their adequacy in accurately determining whether an applicant is eligible for refugee status and hence able to seek protection under the principle of non-refoulement contained in Article 33 of the COR. In view of the fact that the development of a category of safe havens in Australia is relatively recent, there will be some consideration of newspaper articles, documents placed on internet sites of the UNHCR and non government organisations and press releases. The paper will also endeavour to formulate possible further safeguards which may assist Australia in meeting its obligations under the COR whilst allaying the concerns about the so-called 'non genuine' refugees and 'forum shoppers'. This paper will not cover in any depth the issue of the detention of asylum seekers although this is certainly an issue of concern to the Commission for Justice, Development and Peace (Melbourne Archdiocese) (CCJDP)

Catholic social teachings have called upon society to welcome persons experiencing persecution and to respect the human dignity of all people.¹ They note that we all belong to one human family and as such have obligations to promote the rights and development of all peoples across the world, irrespective of national boundaries.² The gospel teachings enjoin all to care for the orphan, the widow and to welcome and care for the stranger. (Is 58: 6-7; Matt. 25: 34-46). In addition, the flight of the refugees Mary, Joseph and Jesus into Egypt should remind us of the circumstances which can lead people to leave behind their home, family, friends, business to escape corruption, persecution and political conflict.

In this the year of the Great Jubilee marking approximately 2000 years since the birth of Jesus Christ, the call to justice contained in the Jubilee message of the Jubilee,

The Spirit of the Lord is upon me,
because he has annointed me
to preach good news to the poor.
He has sent me to proclaim release to the captives
and recovering sight to the blind,
to set at liberty those who are oppressed ,
to proclaim the acceptable year of the Lord. (ie the Jubilee)
Luke 4:18-19

Pope John Paul II in the context of immigration has stated that,

"... in the modern world, public opinion is often the chief rule that political leaders and legislators prefer to follow. The danger is that information, filtered

¹ *Peace on Earth*, 11 April 1963

² *The Development of the Peoples; The Social Concerns of the Church*, 26 March, 1967

only according to a country's immediate problems, will be reduced to absolutely inadequate aspects, far from expressing the tragic reality of the situation."³

This Occasional Paper raises, in the light of the Papal warning, some serious questions surrounding the conflict between domestic preoccupations in Australia and our responsibilities as part of a global community.

The Australian Catholic Bishop's have made many statements in relation to refugees and asylum seekers' that still resonate in the context of today's response to refugees and legislative frameworks,

"The presence in Australia of asylum seekers, including some hundreds of "boat people" in detention is a clear reminder that we share the refugee problems of the world currently struggling to cope with some twenty million displaced people.

Many nations, initially sympathetic to the plight of these people, are now closing their doors, fearing they will be disadvantaged politically and economically by continuing to provide a welcome.

It would be a pity if Australia, with a very good record of accepting and settling refugees from all over the world, were ever to act in a similar way and turn its back on people fleeing political or religious persecution.

We must continue to play our part as peace makers but also remain sympathetic to people driven by endless warfare, famine or persecution, whether political or religious."⁴

and

"The Bishops are concerned that the proposed legislation would prevent some people having access to the full range of Australian law available to others. Such distinctions having once been made, other people could be put in a similar position. Then no longer will Australia be the land of a 'fair go'. Archbishop Hickey, speaking on behalf of the Bishops said, 'These are real people with real fears about enforced sterilisation and abortion. If they are not to be considered part of a special group, at least their claims of persecution should be assessed on an individual basis and that right written into the legislation."⁵

³ "Faith Calls us to welcome the immigrant," *L'Obsevatore Romano*, 4 November, 1998, p 8. Also see further discussion in the *Opening Statement of the Australian Catholic Bishops Conference Committee for Migrants and Refugees and the Committee for Family and Life*, 13 August 1999 on "The Operation of Australia's Refugee and Humanitarian Program" to the Senate Legal and Constitutional Affairs References Committee, Research Department, GPO Box 368 Canberra, 2601

⁴ *Refugee Week: Don't Close Our Doors to Asylum Seekers*, Media Release of the Australian Catholic Bishops, 24 June 1993, Collected in *Australian Catholic Bishops' Statements 1985-1995*, Australian Catholic Bishops' Conference, St Pauls Publications, NSW, 1997, p 245-246

⁵ *Refugee Rights Controversy*, Media Release of the Australian Catholic Bishops, 3 February 1995, Collected in *Australian Catholic Bishops' Statements 1985-1995*, Australian Catholic Bishops' Conference, St Pauls Publications, NSW, 1997, p 247

The business of granting refugee status for government, courts, tribunals and immigration officials is a complex and difficult one. The most pressing concerns are: the need to ascertain the bona fides of the applicant for refugee status; the desire of government to appease the populace having regard to its own continuance in power; the financial impact of increased numbers of refugees; the need to deter persons from being encouraged to falsely seek refugee status, especially caused by concern about so-called "bogus operations".

A definition of a refugee is contained within the Convention on Refugees (COR) in Article 1A(2) and offers certain people protection in Nation-States if they fit within the definition. In Australia, since May 1999 a new class of temporary safe haven has been extended to some groups of people emerging from a conflict. The scope of a "safe haven" is detailed in Part 4 below. Although there are benefits in offering immediate temporary asylum for groups of people who are in immediate danger, the new category of "safe haven" could deprive recipients of many of the valuable checks and balances that review processes can provide by limiting applications from individuals within the group for individual protection visas (which have review processes, albeit many of them reduced by recent legislative and regulatory amendment.) It can also mean that persons who would otherwise be entitled to refugee status under the COR and the rights attached thereunder at international and domestic law are not appropriately processed. A failure to make a determination in such circumstances should not act to quarantine Australia from its obligations under the COR as it would be an artificial method distorting the key humanitarian aims of the COR.

If Australia is to operate in a manner consistent with the operation of international human rights law, particularly the 1951 *Convention Relating to the Status of Refugees* (COR), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* and the *Convention on Civil, Political and Rights* (ICCPR), then it must take care that the factors outlined above are not used as justifications to override human rights and humanitarian considerations and thereby to place Australia at odds with the undertakings it has made to the international community.

The adoption of policies which are inflexible, or which treat refugees as a group without taking into consideration the individual circumstances of each case, may operate to expose individuals to injustice or danger and run the risk of reducing the capacity for Australia to give expression to the intentions of the COR. In addition, it is the writer's submission that the provision of due process ought to be applied across the board to ensure that the intent and application of the COR is not inadvertently discarded.

The Minister for Immigration (Minister) and the Department of Immigration (DIMA) have argued that for reasons of consistency or to avoid lengthy and prolonged litigation, normal principles of justice and process ought be dispensed with and that those factors justify the changes to migration law in recent times.⁶ Such arguments sit

⁶ In the Second Reading speech to the House of Representatives by the Minister proposing the introduction of the *Migration Legislation Amendment (Judicial Review) Bill 1998* (a Bill which reduces grounds for non-citizens to have their case reviewed) it was stated that the intention in introducing the Bill was "the growing costs and incidence of immigration litigation and associated

uneasily with the basis of the common law, that is, that the law is to be applied to the individual facts and circumstances of each case, rather than uniformly applied irrespective of the individual circumstances of the case. To ignore the fact that different cases raise different issues can run the risk of injustice, or in case of refugees fleeing persecution, a risk of return to a country where they will be exposed to personal danger. This is why flexibility in the operation of regulations and the law as it is applied to consideration of individual cases is a hallmark of our common law. There are certain areas where not individual cases but the uniform application of the law applies, for instance in areas of strict liability such as some driving offences⁷, the mandatory sentencing laws of the Northern Territory and Western Australia⁸ and in

delays in removal of non-citizens with no right to remain in Australia." The claims for the Bill appear to be in direct contrast to a number of Australia's international obligations. In relation to the status of non citizens Article 16 of the 1954 *Convention Relating to the Status of Stateless Persons* requires that they shall have free access to the courts and enjoy the same treatment as a national. Similarly, Article 16 of the COR states that refugees shall have free access to the courts and receive the same treatment as a national. Article 14 of the *International Covenant on Civil and Political Rights* states that "All persons shall be equal before the courts and tribunals..." The mere fact that a refugee has been processed by DIMA does not mean that on review a decision as to his status as a refugee may not be overturned. Review processes are fundamentally important in providing a check on initial decision-makers. Legal aid access to asylum seekers was largely removed in July 1998, many asylum seekers have limited financial resources and access to competent advice can be stifled due to difficulties presented by DIMA limiting such access. A flow on effect is ill prepared applications, operations of unscrupulous migration agents and lawyers and decisions that do not give appropriate weight to issues raised as to the fears of persecution, if these are able to be communicated in the first instance (this was one of the problems in SE's Case. He was unrepresented at the Refugee Review Tribunal case) it may mean that genuine cases are missed. The Refugee Council of Australia (RCA) in its submission on the Bill noted that "It is appropriate for the government to be concerned about the costs to the taxpayer of litigation that has no merit but not about litigation per se... access to the courts is both a fundamental human rights enshrined in international law and fundamental to living in a democratic state." The RCA's submission notes that such restrictions on judicial review seem to be proposed mainly in the areas involving migrants and thereby presume a lesser right to access to the courts than to citizens and in this sense the legislation is discriminatory. In September 1998, the government was strongly criticised by a Federal Court judge for failure to translate RRT decisions into the applicant's own language. If proper interpretation services were provided said the judge, the number of applications for judicial review would substantially decrease. See Worldwide Refugee Information, United States Committee for Refugees, Country Report: Australia. http://www.refugees.org/conutryrpt/easia_pacific/australia.htm In an opinion piece written by Minister Ruddock he expressed concern over the increase in the number of appeals against Refugee Review Tribunal decisions. He argues that these create delays in the removal of unlawful citizens. It is important in this writer's view that, before removing the grounds of appeal, investigations should be made as to why the appeals are occurring and ensuring due process and accuracy in the decisions at first instance. The Minister states in the article that claims that the government and DIMA 'get it wrong' are from groups or individuals "who benefit from ever expanding work loads of litigation and lobbying." Such claims demonstrate the need for independent oversight to ensure that political and media hype and an inability to admit impediments are excluded to ensure a careful consideration of the individuals who are concerned about persecution. *The Age*, 30 December 1998. On 24 May 1999 Minister Ruddock was reported in *The Age* as saying he was intent on ensuring a comprehensive system to send illegal immigrants home quickly rather than letting them spend months fighting in the courts. In this writer's view, submissions as to the costs of litigation and appeals are arguments not for limiting the fundamental human rights of people but rather, ensuring that the decisions made at first instance are made on the basis of the full facts and with accuracy. This would presumably reduce the number and cost of appeals. Oddly, such an argument receives little consideration.

⁷ *The Road Safety Act* 1986 (Vic), also the *Telecommunications (Interception) (State Provisions) Act* 1988 (Commonwealth) details some strict liability offences.

⁸ These laws are currently under review by the Senate Legal and Constitutional References Committee whose terms of reference include the examination of whether these laws are in breach of Australia's international human rights obligations.

the area of Migration law which is under consideration in this paper. The underlying issue is whether such a uniform application of the law in relation to refugees is consistent with international law.

Abuse of process by some ought not to be used as a justification to avoid due process for all persons. In recent years there has been a flurry to "stop illegal entrants"⁹ and only assist "genuine refugees" with accompanying claims that Australia takes seriously its international obligations to "genuine refugees".¹⁰ The difficulty, in the writer's submission, is that if proper care is not taken in the processing of refugees and the proper exercise of discretion which reside with the Department, the Minister and in increasingly limited instances, the tribunals and courts, then there is increased scope for the so-called "genuine refugee" to be returned home to possible persecution or danger, an outcome that would place Australia in breach of the obligations of non-refoulement under Article 33 of the COR.

Australia's adoption of a special category of "refugees seeking safe haven" due to a humanitarian imperative is a recent phenomenon. That categorisation, instead of treating refugees on the basis of their individual circumstances, deals with them as a group from a designated country with attached rights or non-rights. The Minister confirmed on 1 May 1999 that the government would activate plans that had been formulated since April 1999¹¹ to provide safe haven in Australia for 4000 displaced Kosovars. This method of granting safe haven was extended to include East Timorese Evacuees on 14 September 1999.¹² Accordingly, there is very little material commenting on this initiative in journals and there is limited relevant case law specifically on the matter of persons in the safe haven category, although there are some principles to be derived from case law.

1. Australia's History in Assisting Refugees

Unfortunately, Australia's beginnings in the area of racial respect and refugee protection are unimpressive. From the early nineteenth century Australia played unwilling host to a number of persons from different countries. Their presence was accepted due mainly to the contribution such people could make to Australia's labour force.

Initially, Australia was home to the Aboriginal people. In 1788 Australia saw the arrival of the British including the English, Scottish and Welsh and the Irish. As a colony its main purpose for settlement was to relieve England of its convict

⁹ Media Release: "New campaign to Stop Illegal Entrants", 29 October 1999, http://www.minister.immi.gov.au/media_releases/media99/

¹⁰ Media Release: "Ruddock Announces Tough New Initiatives, 13 October 1999, http://www.minister.immi.gov.au/media_releases/media99/

¹¹ Media Release for the Minister for Immigration and Multicultural Affairs, "Kosovars to be given temporary safe haven in Australia," Saturday 1 May 1999, http://www.minister.immi.gov.au/media_releases/media99/

¹² Media Release for the Minister for Immigration and Multicultural Affairs, "Minister Announces Extension of Safe Haven Care to East Timorese Evacuees," 14 September 1999, http://www.minister.immi.gov.au/media_releases/media99/

population.¹³ In the 1830s German Lutherans settled in South Australia and some Indians were in service as servants in some households. The advent of the gold rush in the 1850s saw the arrival of Chinese and some Americans. The 1860s saw the arrival of "Kanaka", Melanesians to assist on the plantations in Queensland. Many of these were kidnapped from the Pacific Islands as a source of labour. Approximately 60,000 "Kanaka" were brought to Queensland up until the 1890s and many were returned home after their work was completed.¹⁴

Prior to Federation in 1901, the notions that formed the "White Australia" policy were in place. In the main this policy was about keeping Australia white and Anglo-Saxon. The founding fathers had redrafted section 117 of the *Constitution* to remove references to equality before the law and the equal application of the laws to ensure racist colonial legislation would be valid.¹⁵ One of the first Acts passed by the Australian Parliament was the *Immigration Restriction Act* 1901 (Commonwealth) which gave legislative force to the White Australia policy. Alfred Deakin, the first Attorney General who introduced the Bill stated,

"The ultimate result is a national determination to make no truce with coloured immigration, to have no traffic with the unclean thing, and to put it down in all its shapes without much regard to cost. Those Chinese, Japanese, or coolies who have come here under the law, or in spite of it, are not to be permitted to increase."¹⁶

The leader of the Labour Party in 1901 stated in the Brisbane Worker:

"Australia is to be saved from the coloured curse..."¹⁷

There was other legislation enforced such as the *Pacific Islanders Act* 1901 (Commonwealth) which stated no Pacific Islander was to enter after March 1904 without a license. Pacific Islanders found would be deported after 1907 unless certain exceptions operated.

During the World War One, Australia was unnerved by close relations between the United Kingdom and Japan. After the war, in the discussions about the League of Nations, the forerunner of the United Nations, the Japanese moved to incorporate a racial equality clause into the League's Covenant. Prime Minister Hughes opposed the inclusion of the clause because he considered it placed the White Australia policy at peril. His views prevailed and the clause was omitted.¹⁸

¹³ Manning Clark, *A Short History of Australia*, Revised Edition, Signet Books, New York, 1969, page 24

¹⁴ *Retreat From Injustice: Human Rights in Australian Law*, Nick O'Neill and Robin Handley, The Federation Press, NSW, 1994, page 471-472

¹⁵ *Retreat From Injustice: Human Rights in Australian Law*, Nick O'Neill and Robin Handley, The Federation Press, NSW, 1994, page 472

¹⁶ J. Lack and J. Templeton, *Sources of Australian Immigration History 1901-1945*, Parkville, History Department, University of Melbourne, 1988, 11-12, referred to in *Retreat From Injustice: Human Rights in Australian Law*, Nick O'Neill and Robin Handley, The Federation Press, NSW, 1994, page 472

¹⁷ Manning Clark, *A Short History of Australia*, Revised Edition, Signet Books, New York, 1969, page 197

¹⁸ *Parliament and Politics in Australia: Political Institutions and Foreign Relations*, Paul Henderson, 5th Edition Heinemann Educational Australia, 1988, page 372

Nevertheless during the 1920s there was some softening of views when Prime Minister Hughes stated,

" Clearly we must prove by our deeds that we recognise our duty to populate and develop this great heritage of ours. Press forward with a vigorous policy of immigration of people who can be assimilated into the Australian community..."¹⁹

This statement was more focussed on European immigration than Asian.

Australia's first serious entrée into the arrival of refugees occurred in the 1930s with the entry of 15,000 Jews, some European Christians and anti Nazis. World War II saw a shift in Australia's attitude to foreign entry. The war saw the exposure of Australian troops to other countries and a rise in compassion for Europeans due to their treatment by the Nazis. Hathaway states the view that because refugees seeking protection were largely of European stock, their cultural assimilation was seen as relatively straightforward. They also met post War labour shortages. In addition, refugees who were anti communist were seen as strategic to the capitalist objectives.²⁰

In 1945 the first Minister of Immigration, Mr Arthur Calwell established a Department of Immigration. His policy, still envisaged an influx of European stock:

" We know what is in store for Australia unless it is peopled, unless it is filled with good, healthy persons of the type from which we sprung..."²¹

Paul Henderson expresses the view that Australia had a "threat complex" which remained after 1945. He attributes it to Australia's isolation, its unguarded land mass and largely unpopulated hinterland. He views this as a partial explanation for Australian fears of the China, Japan and Indonesia.²² Henderson, in referring to the period from 1901 until 1945 has stated that,

" In the period under discussion, the nature of the Australian Government, our geographic position, the personality of the Prime Minister, Australia's economic and trading interests, the desire for security, our historical concern about Asians, our inadequate defences, all had significant bearing upon foreign policies. From time to time other internal influences including newspapers, radio, religions, pressure groups and population size affected decisions."²³ Later, in this paper some consideration will be given to the current statements of the Minister of Immigration, recorded in the press, which echo some of these earlier concerns.

¹⁹ *Retreat From Injustice: Human Rights in Australian Law*, Nick O'Neill and Robin Handley, The Federation Press, NSW, 1994, page 474

²⁰ J. Hathaway, *Can International Refugee Law Be Made Relevant Again?* World Refugee Information, United States Committee for Refugees, 1999, 1 at 2
http://www.refugees.org/world/articles/intl_law_wrs96.htm,1

²¹ H Martin, *Angels and Arrogant Gods*, Canberra, AGPS, 1988, page 1

²² *Parliament and Politics in Australia: Political Institutions and Foreign Relations*, Paul Henderson, 5th Edition Heinemann Educational Australia, 1988, page 388

²³ *Parliament and Politics in Australia: Political Institutions and Foreign Relations*, Paul Henderson, 5th Edition Heinemann Educational Australia, 1988, page 351

In 1945, Australia became one of the founding members of the United Nations (UN) with Doctor Evatt the Minister for External Affairs and Mr Frank Forde the Deputy Prime Minister forming the initial delegations. There was support for the Declaration of Human Rights but Henderson notes that the initial delegation was very keen to protect "domestic jurisdiction" largely to continue the protection of domestic policies such as the White Australia policy.

In 1947, Australia joined the International Refugee Organisation until it was disbanded in 1953. In the processes leading to the drafting of the COR in 1951, the absence of a duty among states to grant permanent residence was critical to the successful negotiation of the treaty. The States demanded that it was crucial to their sovereignty that they ought to decide which refugees ought to be allowed to resettle in their country but were willing to protect refugees from return to persecution.²⁴ In order to secure homes for the millions of refugees from the Second World War, the Office of the United Nations High Commissioner on Refugees was established (UNHCR).²⁵ By 1963, two million post war immigrants had arrived in Australia.²⁶ These were largely Anglo-European and the concept of their assimilation²⁷ in the Australian community was very strong. In the latter part of the 1960s and the 1970s, a movement against the anti Asian nature of immigration occurred. In 1966, the Minister for Immigration agreed that Asian business people who were able to assimilate would be considered if they could be useful for Australia's development.

The advent of a Labor government in the 1970s saw a shift in attitudes towards assimilation as criteria for immigration, largely under the aegis of the Minister for Immigration, Mr Al Grasby. The focus of immigration policy became one of multiculturalism with a focus on the richness that differing cultures could contribute, a respect for the cultures living in harmony with Australia's society and way of life. There was an appreciation that many ethnic and Aboriginal people because of their culture could experience disadvantages and attempts were made to undertake special measures and redress discrimination on the grounds of race, colour or disadvantage. Using the race power found in section 51 (xxvi) of the Constitution the *Racial Discrimination Act 1975* (Commonwealth) was passed to further enable the operation of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) in the context of Commonwealth jurisdiction. In many states and territories similar legislation was passed, eg the *Equal Opportunity Act 1977* (Victoria). This legislation aims to protect and provide remedies for people who experience discrimination on racial grounds. It was a major advance in the recognition of the human rights of people with different racial backgrounds.

Just after the Vietnam War in 1975, there were many displaced Vietnamese. Australia agreed to take Vietnamese refugees and many refugees at great risk travelled huge distances to Australia aboard boats, becoming, "boat people" as the countries of first

²⁴ J. Hathaway, *Can International Refugee Law Be Made Relevant Again?* World Refugee Information, United States Committee for Refugees, 1999, 1 at 2

http://www.refugees.org/world/articles/intl_law_wrs96.htm.1

²⁵ *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428 Annex (V)

²⁶ *Retreat From Injustice: Human Rights in Australian Law*, Nick O'Neill and Robin Handley, The Federation Press, NSW, 1994, page 475

²⁷ G. Bolton, *The Oxford History of Australia*, Vol 5, 1942-1988, Melbourne Oxford University Press, 1990 page 106

asylum, Malaysia, Thailand and Hong Kong could not accommodate the numbers. In addition, instability and persecution in the region lead to the arrival of refugees from Cambodia. In 1981, 2000 refugees reached Australia by sea and 43,000 by air from refugee camps. Hathaway notes that the reasons which saw an acceptance of the arrival of European refugees in the 1940s changed with the advent of Asian refugees in the 1970s until the current day of refugees from the "poorer countries of the South: their 'different' racial and social profile is seen as a challenge to the cultural cohesion of many developed states."²⁸ In a second wave of refugees in 1989, Chinese people were included in these numbers. These increased after the student demonstration in Tiananmen Square as there were many students studying in Australia who feared returning to China. Subsequent to troubles and uprisings in Iraq, Lebanon, Iran and Afghanistan many people applied to immigrate or to gain refugee status in Australia. The early 1990s saw an increase in internal conflicts in Africa, particularly in Somalia and Ethiopia, and in the Balkans. Many people in an effort to escape persecution sought refuge in Australia under the *Migration Act 1958*.

Re-emerging in Europe in the late 1980s until the late 1990s has been the view that States only have a duty to admit refugees temporarily. This was first proposed in Norway but has gained precedence amongst the European Community Ministers for Immigration and in 1999 has been used in Australia with the safe haven visa. This will be discussed in more detail later in this paper.

It is noted that the current situation in relation to the potential numbers of refugees arriving on Australian shores bears some analogy to the period between 1901 and 1945 that Henderson commented upon. Taylor²⁹ points out that 60% of the world's population live in the Asia-Pacific region. It is inevitable that Australia will not be able to isolate itself from issues and instability in its own region for much longer.

The problem in the main is that Australia continues to deal with the issue of refugees as an issue of domestic politics, requiring policies of deterrence or policies which give precedence to economic expenditure and the preservation of an illusive largely Anglo Saxon identity,³⁰ rather than an issue requiring policies which promote and advocate a humanitarian context and dealing with refugee issues in a context of global responsibility. This will be a theme developed throughout this paper. Richard McGregor has commented³¹ that "Australia's immigration program resembles part xenophobic Europe is not as remarkable as it first seems...It was always a defensive rather than a positive ethos, and remains so today. But rather than being ahead of the community on immigration, politicians are now following what they believe is an entrenched antagonism to newcomers..."

²⁸ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999, 1 at 2
http://www.refugees.org/world/articles/intl_law_wrs96.htm,1

²⁹ *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32

³⁰ In an article in *The Australian*, 7 January 2000, it was reported that a new study by Dr Charles Price a demographer at Monash University stated that 60% of the Australian population is now ethnically mixed. 20% having at least four different ancestries.

³¹ Opinion Editorial Piece, *The Australian*, 23 November 1998

It seems that Australian policy may continue along the lines of the historical response outlined above unless the nation can see the value of a more expansive and holistic approach to its international humanitarian and human rights responsibilities in conjunction with the rest of the world. Unless Australia deals with the realities of world conflict and international responsibility it will continue, speaking metaphorically, to batten down the hatches whilst the water continues to force its way in.

This very cursory look at Australian approaches to immigration is important when looking at the threads that continue to underlie Australia's approach to refugees and response to the various calls to limit and control aliens on Australian shores. Any examination of the Convention on Refugees must be placed in the context of the country applying that convention. David Matas, a Canadian lawyer notes five political factors which interfere in refugee protection. These are racism, ideology, economics, concern over numbers and the assertion of sovereignty³². All these factors are prominent in the current debate of the late 1990s in Australia.

2. International refugee law

The Preamble to the Convention on Refugees (COR) notes that a grant of asylum will place heavy burdens on certain countries. It notes that finding a satisfactory solution relies upon international cooperation. Article 1A (2) of the Convention was amended by the *Protocol Relating to Refugees* of 1967³³, to include events after 1951 in the definition of refugee. It applies to a person who as:

"a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it."

In addition to this definition, and critical to any consideration of the granting of temporary safe haven, is the responsibility of Australia under the Convention for States to protect from return persons who may be persecuted. Article 33 gives rise to a principle of non-refoulement (or non-return). The COR states:

"No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member of a particular social group or political opinion."

³² Editors A.G. and P. Mahoney, *A History of the Politics of Refugee Protection in the 21st Century, A Global Challenge*, Martinus Nijhoff Publishers, 1993 pages 619-628

³³ 21 January 1967, 606 UNTS 267, Article I (2) removes the temporal limitation. Acceded to by Australia on 13 December 1973

Savitri Taylor³⁴ argues for a liberal interpretation of the COR in view of the humanitarian purpose of the COR.

Penelope Mathew³⁵ has noted that this protection cuts across the central principle of state sovereignty and creates tensions as states try to control immigration. She observes that "as the number of refugees steadily increases, states are adopting many restrictive strategies to fend off refugee flows."³⁶ Likewise, Taylor argues that Australia fails to implement the intentions of Article 33 because it fails to identify the people who should benefit from the provisions of the Article by being unduly restrictive in its interpretation and application of the key elements of the Convention.³⁷ The creation of safe haven status without additional safeguards remains unduly restrictive and may fail to identify people who should benefit from Article 33. For government "safe havens" are one means of stemming the flow of refugees in the long term whilst enabling Australia to respond to an immediate need to grant a haven and thus serves the dual purpose of appeasing the calls for a humanitarian response by the electorate whilst limiting the degree to which those who hold safe haven status can apply for some longer term of protection. The problem with this level of pragmatism is that the real purpose of the provision in the Convention is not to appease domestic political agendas but rather to ensure those persons who are vulnerable to persecution are not returned to a situation of danger. The concept of safe haven in many ways is a good one in theory as it allows for return when a country establishes stability, peace or democracy. In practice, the problem is how determinations of such peace and stability are made. This will be discussed later in the paper.

3. Australian laws and regulations on refugees

Section 51 (xxxvii) of the *Constitution of Australia*³⁸ enables the Federal Parliament to make laws for the peace, order and good government of Australia with respect to immigration, aliens and nationality. In order for international law to be a part of Australian law it must be incorporated into Australian law by the legislature. The COR does not advise States parties how they are to implement their obligations. However, some possibility for the application in the common law of the international covenants that Australia has signed and ratified exists insofar as the courts have demonstrated a willingness to take international law into consideration in order to clarify ambiguities in the law.³⁹ The COR definition of refugee was incorporated under Australian law with the enactment of section 36 of the *Migration Act 1958* (Commonwealth). The framework governing the entry by non-citizens who wish to stay in Australia either temporarily or permanently is contained within the *Migration*

³⁴ *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32 at 38

³⁵ P. Mathew, *Implementing Australia's International Obligations Towards Refugees*, *Agenda*, Volume 3, Number 4, 1996, 471

³⁶ P. Mathew, *Implementing Australia's International Obligations Towards Refugees*, *Agenda*, Volume 3, Number 4, 1996, 471

³⁷ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, at 33-34

³⁸ *Commonwealth of Australia Constitution Act 1901*

³⁹ *Koowarta v Bjelke-Peterson and Others* (1982) 153 CLR 168

*Act*⁴⁰ along with the *Migration Regulations* 1994 (Commonwealth). However the Act is not a specific enactment implementing the COR. The Act and Regulations confer extensive powers on the Minister for Immigration and his Department. For instance if a refugee is unsuccessful in an application for a protection visa⁴¹ he or she can ask the Minister to exercise their discretion on humanitarian grounds.⁴²

The situation in relation to non-citizens has in some sense improved. Prior to 1994 new arrivals were subject to turn around provisions and were deemed not to have entered Australia at all.⁴³ They were afforded no procedural safeguards. In May 1992, the Act was amended to include a definition of "designated person" who could remain in Australia in detention whilst awaiting the processing of their visa application. Some confusion was created in the terminology and by the end of 1992 a distinction was made between a "lawful non citizen" and an "unlawful non-citizen", the latter being a person who holds no visa. Section 189 provides that once in detention unlawful non-citizens must be kept in detention until otherwise authorised. Non citizens in breach of the legislation can be detained, arrested and removed from Australia. This provision on detention has been the subject of much concern particularly from the Human Rights and Equal Opportunity Commission (HREOC)⁴⁴ and in the United Nations Human Rights Committee's conclusions in *A's Case*.⁴⁵

4. The Establishment of a Safe Haven Category

On the 30 April 1999, the Senate passed the *Migration Legislation Amendment (Temporary Safe Haven Visas) Act*, (Commonwealth) 1999 hereafter referred to as "the Amendment Act". This amendment inserted a new section 37A creating a "class of temporary visa to travel to, enter and remain in Australia to be known as a temporary safe haven visa."⁴⁶ Up until the recent influx of refugees "safe haven" was granted to persons from a designated proclaimed country. Section 37A(2) gives the Minister the capacity to extend or revoke the visa on the day specified in a notice. Subsections (3) and (4) outline the circumstances in which this can occur, namely, "if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned." There is no definition in the legislation provided of what makes a "fundamental, durable and stable" change and therefore a large discretion is

⁴⁰ It is noted that the legislative history of the Act in relation to detention of asylum seekers was not so much about the legitimate aim of limiting illegal entry into Australia but rather of deterring asylum seekers. Mr Hand MP, House of Representatives, Hansard, 5 May 1992, P. Mathew, *Implementing Australia's International Obligations Towards Refugees, Agenda*, Volume 3, Number 4, 1996, 471, at 475. A review of the Minister's press statements from September 1999 until December 1999 reveals a similar consideration in relation to the *Border Protection Legislation Amendment Act* 1999 which received by partisan support in the Parliament from the government and Opposition parties.

⁴¹ The section relating to protection visas is contained in the *Migration Reform Act* 1992 (Commonwealth) section 26 B 1) now section 36

⁴² Section 417 *Migration Act* (Commonwealth) 1958

⁴³ See *Migration Act* 1958 sections 88 and 89 and *Those who've come across the seas: Detention of unauthorised arrivals*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998, page 17

⁴⁴ Report, *Those who've come across the seas: Detention of unauthorised arrivals*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998

⁴⁵ *A v Australia*, Communication No. 560/1993, Views of the Human Rights Committee, 30 April 1997: UN Doc. CCPR/C/59/D?560?1993

⁴⁶ In addition see *Migration Amendment Regulations* 1999 (Number 2)

left with the minister to change the status of the individual visa holder. Subsection (5) provides that if a visa has not been revoked, then it will cease to be in effect on the date specified in the notice. Subsection (6) provides that the Minister does not have a duty to consider whether to exercise the power under subsection (2), that is the power to extend or revoke the visa.

The Amendment Act also inserted section 91H, which states:

" This subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8."

Section 91K states that an application by a person with a safe haven visa for another type of visa is invalid although under section 91L the Minister can intervene in the public interest.

This new section significantly impedes the possibility of a visa holder being accepted under other categories of refugee status that might offer protection of a more long term or flexible nature. It contains what could be considered an express intention of the Parliament to exclude judicial oversight.

At the end of the Cold War in 1989, there was an expectation about peace and worldwide cooperation. Since then there have been an increasing number of countries experiencing internal conflicts, border conflicts and ethnic cleansing. These include the former Yugoslavia, Rwanda, Somalia and East Timor. In the United Nations Human Development Report⁴⁷, the United Nations Development Program counted only three wars between states from 1989-1992 but there were seventy-nine instances of intra State conflict.⁴⁸ These new conflicts are often complex. For instance, in Somalia, Australian troops serving in 1992 noted that there was much disarray as the struggle for locals to survive with the unclear demarcations between combatant and civilian creating extreme difficulties.⁴⁹ Membership of a clan, family or political group in Somalia could expose an individual to threat of persecution. This poses a dilemma for Australian authorities in future if they choose to use safe haven designations for a particular country where the level of conflict and number of warring groups is confusing. Often, by virtue of the complex nature of internal tensions, familial ties, political activities or perceived loyalties, an individual within the safe haven category may attract more likelihood of persecution than the overall group. A capacity to provide a number of safety nets is thus important, as the fundamental threat may not have abated for certain members of the group. Enabling a safe haven visa holder to apply for more permanent or protective status and access to judicial review are all-important safeguards.

⁴⁷ N.Y. Oxford Press, 1994

⁴⁸ S. Malik and A. Dorman, *United Nations and Military Intervention: A Study in the Politics of Contradiction, Military Intervention from Gunboat Diplomacy to Humanitarian Intervention*. Editor, A. Dorman and T.G. Otte, Dartmouth Publishing Company, Aldershot, England, Chapter 6.

⁴⁹ Major M.J Kelly, *The Australian Experience in Somalia: Peace Operations: Tackling the Military, Legal and Policy Challenges*, 1997, Chapter 8

Section 500A outlines grounds under which the Minister may refuse to grant safe haven status. If, in the Minister's opinion, there is a reasonable suspicion of criminal conduct, the person/s is a threat to national security or the person's presence in Australia would prejudice Australia's international relations (and other categories not of any great relevance to this paper), the Minister can exclude these people. This section leaves matters to the "opinion" of the Minister and can exclude people for "criminal conduct" that may be untested, untried, without conviction or charges being laid and possibly without evidence. The compliance of a home country with the provisions describing standards for a fair trial in Article 14 of *the International Covenant on Civil and Political Rights* may be missing and activities of a political nature which may be criminal in the home country may be perfectly legal in a democratic country such as Australia. This is an area which needs more clarity.

Section 500A (11) states that⁵⁰ "The rules of natural justice, and the code of procedure set out in subdivision B of Division 3 of Part 2 (section 37A) do not apply to a decision under subsection (1) (refusal to grant safe haven visas) or (3) (refusal to grant or cancel a person's temporary safe haven visa)."⁵¹ This provision therefore places significant limitation on the capacity of safe haven recipients to seek review.

Under the amendments of the Migrations Regulations 1994 (Regulation 2.07AC), a safe haven visa is designated as a Class UJ visa and can be granted by a person outside Australia if the interviewee indicates to an authorised officer that they accept the offer of 'temporary stay' and the authorised officer endorses in writing the interviewee's acceptance of the offer. It can be extended to family members if the interviewee as such (subsection 4) indicates them.

5. The argument in favour of 'safe havens'

Alice Jackson Smith discusses some of the arguments in favour of the granting of temporary safe haven.⁵² She does so, mindful of the American objections to such policies on the grounds that "America cannot be held responsible for all the world's unfortunate souls in war torn lands." She argues for the existence of temporary safe haven plans on three grounds:

1. *Moral and humanitarian.* This involves the humanitarian responsibility not to return an alien to a likelihood of death or serious harm. She argues safe haven ought to have the attribute of a positive act of assistance to distressed people and should not be a punishment for those who have to flee a country because of the threat from violence.
2. *International obligations and benefits.* Smith notes that despite the COR there are customary norms of temporary refuge.⁵³ She argues that to reject individuals with compelling claims because they do not meet the narrower refugee definition may amount to a violation of international law.⁵⁴

⁵⁰ Other than subsections referred to other comments in brackets added by writer for clarification purposes.

⁵¹ Brackets inserted by the writer.

⁵² A. J. Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, *Virginia Journal of International Law*, Volume 28:2, 509-560

⁵³ Professor D. Perluss and J. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Va. J Int'L. 551,558-571 (1986)

⁵⁴ *Paquete Habana*, (1900) 175, U.S. 677, 700. More and more Nation States seek to argue narrower definitions of refugees should apply which see assessments of refugee status based on very difficult

3. *Political and practical domestic concerns.* Smith argues that granting safe havens can give a country like the United States credibility and influence over other countries. She notes that because of poor treatment of first asylum seekers and the absence of an equitable refugee program, the United States loses credibility and influence in the world. It makes it very hard, in light of the resources and proportion of land held by the United States and the rare mass influxes of refugees it takes for them to sustain the high moral ground.

This last mentioned argument also holds true for Australia, for if it is seen to be pulling its weight in the taking of refugees by the international community then it gives credence to arguments that other countries should do the same. In addition, the countries currently bearing the large burden for the world's refugees are often those with very little land and resources and sentiments of cynicism about whether there is real concern over refugee populations by the developed world are evident in smaller countries which themselves have a high intake of refugees.⁵⁵

Smith⁵⁶ argues that granting safe haven status alleviates the need to harbor illegal refugees in order to protect them from violence⁵⁷ She argues that aliens are less likely to circumnavigate regular immigration channels if there is little chance for them to adjust to permanent status and they must return home once harmful conditions abate. This view would appear to hold sway with the executive government in Australia as a means of overcoming an immediate humanitarian crisis without being held to any degree of permanency.

Smith acknowledges throughout her article that the provision of safe haven status is by no means the best option in a humanitarian sense but may have the best chance of acceptance given the American public sentiment towards immigrants. She notes that safe havens status could reduce resultant law enforcement problems and costs to society. She condemns hasty legal responses which capture people in genuine need of assistance and which lead to unhelpful legal precedents made to cope with the "hordes" that are expected. Australia is at risk of making such hasty legal responses and this is discussed in more detail later in this paper under the title Review Processes. (Part 10)

Smith does not limit her safe haven to just a provision of a place to stay but she argues for a program which gives beneficiaries permission to work and address problems with detention. She argues that such approaches ensure these people can make a contribution to the nation. Again we see at play in the proposal of Smith attention to the pragmatics of what might be politically palatable over the genuine need for refuge that persons fleeing their countries might have.

tests, searches for the use of "key" or trigger words', rather than the ascertainment of whether a person fits into the COR definition by virtue of the facts of their case.

⁵⁵ Thailand, the Phillipines, and Africa

⁵⁶ A.J Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, Virginia Journal of International Law, Volume 28:2, 509 (1988)

⁵⁷ A claim was made by some Catholic nuns that they would consider harboring East Timorese if the Australian government did not respond to the plight of the East Timorese in November 1998.

6. The argument against restrictions on the recipients of 'safe haven' status from claiming refugee protection in Australia.

By the end of 1998 Australia had hosted nearly 15,000 refugees and asylum seekers during that year. These included 10,000 persons resettled during the year, 2,000 persons who were granted asylum, and 2,972 applicants in pending asylum cases. Under its refugee and special humanitarian programmes, Australia allocated 12,000 admission places for 1998-1999. This consisted of 10,000 'offshore places' and 2,000 'onshore places.'⁵⁸ The 'offshore' and 'onshore' places are linked which can create tensions between those awaiting placements and refugees arriving on boats. By comparison with efforts in other countries, Australia takes a relatively small proportion of refugees. To illustrate the point, the UNHCR noted in 1998 that Australia took 61,800 people as "Refugees and Others" whilst the Netherlands took 131,800. Given the relative wealth of Australia, its land-mass and population the comparison with the Netherlands highlights how few refugees Australia takes comparatively.⁵⁹ Of the other nations France took 131,800, the United Kingdom 116,000, Germany 949,200 and in our region Thailand took 138,000.

When a non-citizen wishes to claim protection under the non-refoulement provision of Article 33 of the COR they normally apply for a class of visa known as a "protection visa". The Refugee Review Tribunal (RRT) is given the power to affirm or vary the primary stage decision and to determine whether it considers the decision at first instance to be in error. In theory the claimant can seek an injunction or writ of mandamus from the High Court against the decision-makers. In addition, the Minister can, under section 417 of the *Migration Act*, intervene to vary or set aside a decision and under subsection (2) is not bound by other key provisions such as Parts AA or AC of Division 3 or Part 2 of the Act or the regulations. These opportunities for review are unavailable to a recipient of safe haven status save for the possibility that the Minister might exercise his/her discretion.

The problems which arise in connection with the category of safe haven status are not only that government need not consider a "well founded fear of persecution" prior to returning the safe haven recipients to their country of nationality but that other political factors unrelated to a change in the "fundamental, durable and stable nature" in the country concerned can be the motivating factors behind a decision to return safe haven recipients. Taylor, speaking of the Cambodian refugees in the early nineties, notes that there was a widespread perception amongst lawyers representing Cambodian asylum seekers that the granting of asylum would undermine the Cambodian peace process of which Australia was the architect.⁶⁰ After an appearance on Channel Nine's "A Current Affair" in June 1990 during which the former Prime Minister, Mr Hawke, asserted the boat people were not "genuine refugees", Keely J⁶¹ noted that on the evidence before him, the Prime Minister's comments were motivated

⁵⁸ See Worldwide Refugee Information, United States Committee for Refugees, Country Report: Australia http://www.refugees.org/conutryrpt/easia_pacific/australia.htm

⁵⁹ UNHCR *Statistical Overview for 1988-1998*, <http://www.unhcr.ch> These figures include categories other than refugees as well.

⁶⁰ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, 48

⁶¹ *Mok Gek Bouy v Minister for Immigration, Local Government and Ethnic Affairs and Michael Paterson* No VG 453 of 1992, (1993) 47 FCR, 1

by immigration and foreign policy concerns.⁶² Likewise, in relation to the recent pressures due to the arrival of boat people, it was reported that the Minister has said that the return of 54 Chinese illegal immigrants should send a clear message that the journey to Australia was dangerous, futile and not worth risking life. It is reported that he added, "It should also emphasise the fact that if people believe the lies peddled by the people smugglers, they will pay the price when they are sent home to a possible lifetime of debt."⁶³ There is little indication in these comments whether it is safe for these people to be returned home and whether the principles of non-refoulement are being taken into account. The main consideration appears to be deterrence, with little opportunity or scope provided to ascertain the cause of the boat people's flight from China.

In November 1999, under mounting pressure from lawyers, the Labour Party and the Democrats to lengthen the stay of East Timorese safe haven recipients, the Minister stated he would consider personal pleas on a case-by-case basis.⁶⁴ The motivation for the Minister's response appears to have emerged not from concern over possible danger to refugees but in response to political pressure. Such decision making can only increase the levels of uncertainty and trepidation of persons who are safe haven recipients.

Although the government determines that the provision of safe haven status will cease, there may still be danger in the country of origin for the refugees. For instance, in the case of the East Timorese, their safe haven status was to conclude on 8 December 1999. There was still some degree of potential danger within their country of origin. In *The Australian* on 20-21 November 1999 it was reported that militia forces were still attacking convoys of refugees on their way back to East Timor.⁶⁵

It is important to note that Smith in her article does not directly propose limitations on the capacity of persons holding safe haven to apply for refugee status or extensions of their stay which, in the Australian model, remain at the discretion of the Minister and outside normal fair procedural processes.

The Smith model⁶⁶ for America would require that the Attorney General's decisions made under the safe haven statute should be explicitly available to judicial review. She is critical of what is called the Mazzoli proposal⁶⁷ which like the Australian version attempts to deny judicial review of actions taken under the safe haven statute. Smith argues that judicial review would help prevent abuse and errors by immigration

⁶² *Mok v Minister for Immigration and Ethnic Affairs*, 13-14 November 1993

⁶³ *The Age*, 29 November 1999

⁶⁴ *The Australian*, 30 November 1999. See also *The Age*, 29 November where Senator Con Sciacca using colourful imagery is quoted as stating, "We brought them here as guests just eight weeks ago, and now the Government is saying 'We don't want you here any more. Go home and here's a tarp and some rice. See you later.'"

⁶⁵ It was reported that a pregnant woman and her husband who were aboard the UN High Commissioner for Refugees convoy was beaten up by the militia. *The Weekend Australian*, 20-21 November 1999, 13

⁶⁶ A. J. Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, *Virginia Journal of International Law*, Volume 28:2, 509

⁶⁷ A. J. Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, *Virginia Journal of International Law*, Volume 28:2, 509, 549 and 555. Under this model the definition of excludable aliens is quite wide casting the net to include groups whom may be subject of persecution because they have a degree of mental retardation and other difficulties.

officers and the Minister⁶⁸ whose power is great in eligibility determinations that may involve the life or death of safe haven recipients. She argues that review is particularly important when the Executive decides to deny or terminate a country's safe haven designation. She states that refusals could be based on improper criteria, such as the race of potential beneficiaries, and proposes a standard of proof which is "that the decision was rationally related to the result". She argues this very limited standard would accommodate the Executive's need for flexibility whilst ensuring a check on any abuse of discretion.

The argument against enabling stronger threads of humanitarianism in the safe haven category is that the protection offered would no longer be temporary and that it would attract unmanageable numbers of applicants. This argument however loses weight because the provision of safety nets which ensures that those at risk of persecution upon return to their homelands are able to gain the longer term protection as a refugee only ensures that the obligations of non-refoulement are met and does not entail others who are the recipients of safe haven visas to stay on permanently. It therefore becomes imperative that Australia formulates mechanisms that enable processes of determination to be more fair, more comprehensive and more swift.

7. The Kosovan Context

After the crisis in Kosova, Australia was required to take 200 refugees under its humanitarian program. After an initial indication that the government would probably be unable to take any more refugees from Kosova, a decision was made to take up to 4000 refugees on a temporary basis initially for three months.⁶⁹ Amnesty International expressed concern over the plan to give short-term shelter, stating that it set a dangerous precedent giving government arbitrary powers to force recipients home before it was safe.⁷⁰ The safe haven enabled a temporary stay but access to medical, dental and recreation services and accommodation in military barracks.

It is interesting to note that with the agreement to grant safe haven to the East Timorese at about the same time as granting safe haven status for the Kosovars, an imperative to make room for the new arrivals may have fast tracked the departure of the Kosovars who were granted inducements⁷¹ to depart and whose stay was briefly extended after lobbying. The degree to which an independent assessment of whether a "fundamental, durable and stable change" in circumstances in the country had occurred is a matter that has not been sufficiently addressed.

8. The East Timorese context

⁶⁸ The brackets are inserted by the writer.

⁶⁹ *Migration Legislation Amendment (Temporary Safe Havens Visas) Act* (Commonwealth) 1999 and the *Migration Amendment Regulations* 1999 (Number 2)

⁷⁰ *Sydney Morning Herald*, 23 April 1999

⁷¹ For instance "reconstruction assistance" was to be provided in the sum of \$3000 for Kosovars prepared to return home. Providing assistance for resettlement whilst not a bad thing ought not to be provided as an inducement to return home when the safety of such an action may be uncertain.

There had been a number of East Timorese applying for refugee status prior to the provision of safe haven visas for East Timorese people fleeing from the conflict after the referendum. Some had been engaged in the process for ten years. The Australian government unsuccessfully argued that as Portugal was the former colonial power, the East Timorese held Indonesian and Portuguese nationality and because they were not refugees in Portugal they did not have refugee status in Australia. Justice Finkelstein in the Federal court rejected this claim on the basis that the real position of nationality may not offer protection. Finkelstein J noted that East Timoreans are not automatically regarded as Portuguese citizens and that there was no clear indication that the claimed nationality is recognised to exist. He noted the "potentially serious consequences that may flow from a wrong decision."⁷² The Federal government after lodging an appeal against this decision and with the world focus of attention on the violence and activities of the militia which erupted after the referendum, indicated that it was "looking for a favourable solution." There was mounting pressure on Australia as a key player in the region to undertake an active humanitarian role. Requests for an Australian response and the reception of refugees were being made by the United Nations Secretary General, Mr Kofi Annan and the United Nations High Commissioner for Refugees. Media coverage of alleged atrocities and community outrage and support for the East Timorese people all combined to influence government acceptance of refugees but only on the safe haven basis⁷³ which had been used relatively successfully with the Kosovars as persons coming from outside Australia. It also saw Australia seemingly relax its previously vehement opposition to the claims of earlier East Timorese applicants for refugee status mentioned above.

The arrival of a number of illegal immigrants in August, October and November 1999 from China and the Middle East has seen a change of sympathies with a persuasive media and governmental campaign to revert to a "tough stance" on refugees with references to the 'significant costs' involved in the up keep and detention of refugees, focus on criminal gangs making money from refugees, "forum shoppers" and "queue jumpers".⁷⁴ This frenzy assisted the government in its political battle to engage the

⁷² *Lay Kon Tji V Minister for Immigration and Ethnic Affairs* (1998) 1380 FCA (30 October 1998)

⁷³ *Migration Amendment Regulations* 1999 (Number 7)

⁷⁴ The discussion around illegal immigrants in the latter part of 1999 has also seen the resurrection of the notion of 'safe third country provisions', particularly with the passage of the new *Border Protection Legislation Amendment Act* 1999 in November 1999. Such provisions are beyond the scope of this paper but these are by no means an appropriate solution given the Preamble of the COR which requires universal cooperation of Nation States and the need for burden sharing. In a letter dated 22 November 1999 from the Minister addressed to Rev Rex Fisher a Uniting Church Minister, the Minister states, "Many of these people are not fleeing to the most logical place of protection- they are seeking out Australia as their preferred destination for migration." Savitir Taylor in her article, *Australia's 'Safe Third Country' Provisions Their Impact on Australia's Fulfillment of its Non Refoulement Obligations*, *University of Tasmania Law Review*, (1996) Volume 15 Number 2, 197 argues that safe third country provisions are not a legitimate application of customary international law as it puts Australia in breach of the provision of non refoulement in the COR. The passage by a refugee through a third country en route to the State where he or she presents a claim is not sufficient to relieve the obligations in the State where the application is made. Viewing a mere transit stop as a place of safe refuge is problematic as the relevant State may have no intention of taking on the refugee, may return the refugee to the place of threatened persecution or may itself be a State with a minimum adherence to international human rights standards. The new *Border Protection Legislation Act* proposes that a stay of merely seven days will qualify a person as being able to take advantage of safe third country provisions and therefore ineligible for refuge in Australia. The reality in some of the regions, for instance Iran as from March 2000, is that refugees are being ejected. The embracing of the concept of safe third country merely underlines the fact that Australia continues to isolate itself from the real life exigencies of refugees who are stateless

support of the Labor and Democrat parties for the further tightening of regulations and provisions restricting refugee rights for persons arriving in Australia illegally. These provisions are likely to make it more difficult for refugees with a fear of persecution to be able to present their case as the emphasis will be on deterrence and return.

With the passage of time, the concern over East Timor left the front pages of the newspapers and with the further shift in the public's attitude against illegal arrivals the Federal government has retreated from its earlier position requiring that the East Timorese with existing applications for refugee status take their cases back to DIMA and the RRT. The government also endeavoured to legislatively remove consideration in the Federal Court of the issue of Portuguese nationality. The Federal government has now passed legislation to ensure that the principle of capacity to seek or hold citizenship in another country is used as a bar to claiming refugee status in Australia.⁷⁵

9. Recent Developments in the Extension of Temporary Protection.

The arrival of Afghan and Iraqi boat people over the period from November 1999 until January 2000 has seen the establishment of new visa arrangements granting safe haven for a period of three years but unlike the safe haven status for the Kosovars and the East Timorese this temporary protection applies to people who have already arrived on Australian shores and who may be unauthorised. This has avoided the long-term detention of this class of persons (as they will be returned when certain conditions are deemed to be met), but there are limitations on access to permanent residency attached, in addition to limitations in accessing reunification with family

whilst on a superficial level being able to indicate to the populace that there are viable alternatives if Australia returns asylum seekers to the place of last destination. The trend to use safe third country status to avert obligations under Article 33 has also gained precedence in Europe with the Dublin Convention (Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990) and the Schengen Agreement (Convention Applying the Schengen Agreement, 14 June 1985) noting that the primary responsibility for determining a claim lies with the country allowing the refugee to enter its territory. The reality is that in many places of conflict and where there is a fear of persecution the borders lie in areas which also have significant problems or resource shortages, so again such policies are likely to leave the burden for taking refugees with nations already significantly over burdened rather than with nations which have the capacity to contribute and share the burden. The Ex Com (A program of the UNHCR) Conclusion No 58 (CL) 1989, the content of which has been regarded in the past by the Attorney General as highly persuasive, requires that the removal of a refugee to a country where there will be a real risk of being exposed to torture or cruel and degrading punishment or threat of life is not to occur. This provision gains some acknowledgement in section 91N (3) of the new Act. The problem in practice will lie in the mechanisms which enable the possibility of such a threat to be determined. If refugees are to be turned around without an opportunity to present their case as to the risks they face then the provision will have little effect and place Australia in likely breach of Article 33. In addition, screening procedures in some countries to determine whether a person is a refugee may not be effective thus exposing the refugee to risk. There is therefore an argument in favour of Nation States working globally to ensure that all nations bear the burden of refugees and that procedures are put in place where possible to ensure proper processing of refugees both on-shore and off-shore. This is currently where there is a significant deficiency in the writer's view which leads to problems further down the line. For instance Taylor in the aforementioned article in this note at page 216 states that some countries of first asylum reduce the water, food, shelter and other services supplied to camps in order to encourage asylum seekers to return home. The United Nations High Commissioner for Refugees, Mrs Sadako Ogato is very critical of any strategies which seek to eliminate refugees as a category or which expose men and women to life threatening situations. See *Colloquium on The Global Refugee Crisis – A Challenge for the 21st Century*, Brussels 20 May 1999, www.unhcr.ch/refworld/unhcr/hcsspeech

⁷⁵ *Border Control Legislation Act 1999*

and sponsorship provisions and having access to their personal travel documentation.⁷⁶ There is an amount paid for subsistence living. In a newspaper report⁷⁷ the Minister for Immigration, Mr Ruddock claimed that by "jumping the queue" these people had sought to gain benefits from those who are more vulnerable. As this paper will demonstrate, the notion of queues is often misused and it is not so easy, given the lack of effective processes to assess refugees, to be assured that the particular refugees he refers to in fact are not vulnerable. The Premier of Western Australia, Mr Richard Court, in the same report demands that the Federal Government get "tougher" on "queue jumpers" stating that "people that are illegal and are coming here with obvious people smuggling racket(s)... I don't think we should give them the time of day."

10. Australian Review Processes for Refugees

Ryszard Piotrowicz has stated, "In dealing with asylum seekers, judges are confronted with a profound challenge: balancing what is right in law with concern for human rights. The choice is stark: if an asylum seeker is wrongly refused permission to remain in Australia, the upshot may be his or her death. Decision makers have little room for error."⁷⁸

It is important to outline the review processes and their effectiveness in providing a check or safeguard against non- refoulement. The High Court of Australia has interpreted the Commonwealth's power in relation to aliens (section 51 (xix)) differently to its power in relation to the treatment of citizens, permitting the Parliament to confer on the Executive the power to detain an alien in a range of circumstances. There is little scope for the High Court to intervene in the detention of an asylum seeker. In the *Chu Lim case*⁷⁹, section 183 of the *Migration Act* amongst other sections were challenged. This section stipulated that "No court may order the release of a designated person." This was one of many efforts in the past decade to limit the capacity of the court to conduct judicial review of asylum seekers. It was held by the High Court that the Parliament could not prevent the court from having oversight over the lawfulness of the detention. Other sections in the Act which were challenged unsuccessfully have the effect of limiting the review of a decision by the court to ensuring the terms of the legislation are correctly interpreted and applied.

In the case of a non-lawful arrival in detention there is a two-tier process once an asylum seeker has applied for asylum. The first stage is consideration by the Department of the application and the second enables a review of the department's initial decision by the Refugee Review Tribunal (RRT). Section 411 gives the RRT the power to review a decision including refusal to grant a protection visa. The RRT may affirm DIMA's decision, vary it, set it aside, or substitute a new decision which is taken to be a decision of the Minister (section 415). Further possibilities in the review process are appeals against an RRT decision to the Federal and to the High Court. As stated earlier review by the RRT does not apply with the Class UJ safe haven visa. The only form of review lies with the Minister.

⁷⁶ *Migration Amendment Regulation 1999* (Number 10)

⁷⁷ *The Australian*, 7 January 2000

⁷⁸ Opinion Editorial, *The Australian*, 20 November 1998

⁷⁹ *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97

In the *Migration Act* (Commonwealth) 1958 under section 481 (1) (a) the capacity of an applicant to appeal to the Federal Court has been significantly watered down by limitations on the grounds of appeal. This move has been strongly criticised by the High Court in the recent decision in *Abebe's case*⁸⁰. The court expressed a strong view that insistence on the High Court using its original jurisdiction to intervene rather than the use of the appellate jurisdiction of the Federal Court will have significant implications for court resources and create delays in process. In *Abebe's case*, the issue was the validity of Parliament, having conferred jurisdiction on a Federal Court under section 74 of the Constitution, seeking to constitutionally limit the grounds upon which the court could examine the correctness or the lawfulness of the decision, thus limiting the grounds upon which the Federal Court could examine decisions in the RRT. The plaintiff in the case had applied for a protection visa and claimed she had been denied natural justice and that the decision was not reasonable. The decision of the High Court largely turned on the definition and application of the word "matter". The court determined that Parliament was acting within the power conferred by section 77 of the Constitution when it authorises a Federal or State Court a matter to determine by reference to a legal rule or principle or standard. The court, however, was critical of Parliament's use of the power in section 77 commenting, "that restrictions may have significant consequences for this court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched section 75 (v) jurisdiction of this Court. The effect on the business of this court is certain to be serious."⁸¹ The Executive continues to respond to court review by moving the goal posts. In *Lim's case*⁸² the High Court was critical of Parliament's haste in rushing legislation to legalise detention of some asylum seekers by placing legislation before Parliament the night before the hearing of the application in the Federal court. In another case, after a decision of Sackville J in the Federal Court which held that a Chinese couple were indeed refugees as they faced persecution as a result of their membership of a particular social group⁸³, the then Minister for Immigration (after lodging an appeal in the Federal Court) hedged his bets by drafting a Bill, the *Migration Legislation Amendment Bill (Number 3) 1995* (Commonwealth) that provided that fertility control practices could not be used to found a claim of refugee status. The Bill became unnecessary as the Full Federal Court overruled the decision of Sackville J.

There are many illustrations of patchwork attempts through legislative measures to close off any avenues that the High Court or Federal Court has found available to claimant refugees. Whilst acknowledging the importance and relevance of Parliamentary sovereignty in a Westminster tradition⁸⁴, it is submitted that the judiciary also has a long recognised responsibility to ensure due process is followed

⁸⁰ *Abebe v The Commonwealth; Re Minister for Immigration and Multi Cultural Affairs; ex* (1999) HCA, 14 April 1999

⁸¹ *Abebe v The Commonwealth; Re Minister for Immigration and Multi Cultural Affairs; ex* (1999) HCA, 14 April 1999, page 16 at paragraph 50

⁸² *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 67 ALJR 125. See for discussion K. Murphy, *Who's Afraid of the Big Bad Courts? Detention of Asylum Seekers*, *Law Society Journal of New South Wales*, 32 July – December 1994, 60, 61

⁸³ *Minister for Immigration, Local Government and Ethnic Affairs v Respondent A* (1994) 127 ALR 383.

⁸⁴ Fiona Wheeler, *Original Intent and the Doctrine of Separation of Powers in Australia*, (1996) Vol 7 *Federal Law Review* pages 96-109

and that in the exercise of its judicial powers the court should remain unfettered by executive intrusions.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,⁸⁵ although many of the provisions of the *Migration Act* 1958 were upheld, section 54R was held to be unconstitutional because adjudgment and punishment of criminal guilt was a judicial power within the separation of powers doctrine⁸⁶ contained in Chapter III of the Constitution. It is submitted that the continued legislative curtailment of avenues allowed by the courts has the potential to seriously erode the capacity of the court to exercise judicial powers. Piotrowicz's point about the tension between the law and human rights is underlined. In the case of asylum seekers, the constant reductions in the court's ability to scrutinise executive action, although held constitutionally permissible by the High Court, may still offend international law in light of Article 16 of the CORs requirement that refugees be treated as nationals before the courts. As an amalgam, such legislative changes can seriously reduce a court's capacity to exercise judicial review in an effective and real sense. In holding that section 54R was invalid as it attempted to exclude the court from ordering the release from custody of a "designated person" the judges stated,

"It is one thing for the Parliament, within the limits of legislative power conferred upon it by the Constitution to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Chapter III itself, entrusts to Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts which it designates."⁸⁷

There is some case law surrounding the issue of what is or is not judicial power and the manner of its exercise, but there is still much, that requires further clarification by the High Court.⁸⁸ Various members of the court have taken different approaches as to the nature and manifestations of judicial power. Christine Parker⁸⁹ in analysing the different interpretations demonstrates this point when explaining that Toohey J saw Chapter III as providing an important "check" on other arms of government and as ensuring that cases are free from executive determination and are determined in accordance with due process. If a court is no longer able to consider a range of factors in its consideration of a case due to Parliamentary prescription or disallowance, then

⁸⁵ (1992) 176 CLR, 1

⁸⁶ *Queen v Kirby and Others; Ex Parte Boilermakers' Society of Australia* (1955-1956) 94 CLR 254

⁸⁷ Dawson, Brennan and Deane JJ (1992) 176 CLR,1 at page 37 See also further discussion in L. Curran, *The Australian Judiciary – Sustaining Independence*, Occasional Paper No. 5, Catholic Commission for Justice Development and Peace, October 1998 and also as part of a research paper submitted in 1998 as part of the Masters Program I the subject, Current Issues in Constitutional law at Melbourne University.

⁸⁸ Mason J, *Polyukhovic V The Queen*, (1991) 172 CLR, 501, 532 and Toohey J at page 720, *Kitto J R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* 123 CLR 374-375, Gaudron J, *Harris V Caladine* (1990 – 1991) 172 CLR, 84 at 150. See also L. Curran, *The Australian Judiciary – Sustaining Independence*, Occasional Paper No. 5 – October 1998

⁸⁹ Christine Parker, *Protection of Judicial Process as an Implied Constitutional Principle* (1994) *Adelaide Law Review* 341 at page 347

this must detract from the exercise of unfettered judicial power, according to Toohey's analysis.

Parker notes that Gaudron J enlarges the definition of judicial power to include only descriptions of which decisions can be an exercise of judicial power and describes how a decision should be made in order to be an exercise of judicial power. Although there is no implied guarantee of due process of law in the Constitution,⁹⁰ these descriptions of the manner of exercise of judicial power are helpful since what is contained in the Constitution are provisions affording protection against government action that disregards the judicial power of the court.

Mary Crock has commented on the difference in the treatment by the courts of cases involving migrants and refugees to others where the human rights of citizens are affected. It could be argued that this is because of the very explicit power under section 51 that the Framers have given to the Executive in relation to "aliens," but Crock believes that there are external factors which have influenced the court.⁹¹

Crock argues that there is significant political pressure on the High Court due to its consideration of public opinion and political criticism which can result in a difference in case outcomes. She draws on the case of Applicants A and B⁹² where by a narrow majority 3-2 the court held that A and B were not refugees as they could not be called members of a social group. The couple was endeavouring to escape from China's "one child policy" which involves coercion and forced abortions. It was found that although the applicants had a well-founded fear of persecution under the COR it was not sufficient to qualify A and B as refugees. She draws a distinction with *Marion's case*⁹³ where the sterilisation of persons with an intellectual disability, a breach of human rights, was a matter for judicial oversight and review. She argues that the High Court has largely resigned from its role of review and cites the case of *Chan Yee Kin*⁹⁴ where the High Court criticised the role of the Full Federal Court in scrutinising too widely the written reasons of the RRT. The role of the Federal Court, it held, was limited to seeing if the evidence was such that the decision-maker could or could not be satisfied that the person fitted the definition of refugee and it was not to examine whether the refugee in fact fitted the definition. The result of such a narrow role could lead to an absurd if not dangerous result for a refugee.

It is likely that we have not seen the last of proposals seeking to limit the ability of the judiciary to rectify errors of law made by the executive by narrowing the grounds of review.⁹⁵

In addition to the application of the law the Human Rights and Equal Opportunity Commission (HREOC) has direct and indirect responsibilities under the Human

⁹⁰ *Kruger v The Commonwealth of Australia* (1997) CLR 991

⁹¹ M. Crock, *Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law*, *International Journal of Refugee Law*, Volume 10, Number 1-2 January- April 1998, Oxford University Press, 49, at 51-73

⁹² *Applicants A and B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331

⁹³ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218

⁹⁴ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR, 379

⁹⁵ For further discussion see K. Murphy, *Who's Afraid of the Big Bad Courts? Detention of Asylum Seekers*, *Law Society Journal of New South Wales*, 32 July – December 1994, 60-61

Rights and Equal Opportunity Act 1984 to ensure Australia's compliance with its human rights obligations and to make recommendation for improvements. It has the capacity to deal with complaints from asylum seekers⁹⁶ and to conduct inquiries into areas of human rights on its own initiation or at the recommendation of the Federal Attorney General. In its report, *Those who've come across the seas: Detention of unauthorised arrivals*⁹⁷ the HREOC concludes that "Australian law does not permit the individual circumstances of detention of non-citizens to be taken into consideration by the courts. Neither does it permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Therefore, Australia is in breach of ICCPR article 9.4 and the Convention on the Rights of the Child (CROC) article 37(d)."⁹⁸

Article 9.4 of the ICCPR states,

"Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if that detention is not lawful."

Article 37(d) of the CROC states,

" Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to prompt decision on any such action."

Although the High Court has retained some power to check the lawfulness of detention, under international law such checking involves consideration of whether the detention is reasonable and proportionate. In addition, according to the United Nations High Commissioner on Refugees (UNHCR) *Guidelines on Detention of Asylum Seekers*,⁹⁹ detention ought to be exceptional and a last resort. The *Migration Act* has excluded these as considerations in the testing of lawfulness. The HREOC notes that in most cases Australia's policy of detention is both mandatory and automatic and applies to almost all unauthorised persons until their claim is determined.¹⁰⁰ In the case of those in safe havens, permission to leave the facility in which they are housed is granted and recipients are allowed to perform limited work and integrate into the community. However, such integration and access to the community is tightly controlled by DIMA.

In an effort to assist the United Nations Human Rights Commissioner, Ms Mary Robinson, the International Commission of Jurists (ICJ) was preparing to take testimonials from East Timorese refugees who had safe haven at Puckapunyal (Vic),

⁹⁶ The role of the HREOC in relation to complaints handling has been changed by the recently passed *Human Rights Legislation Act (Number 1) 1999* (Commonwealth) and will be further changed by a Bill entitled *Human Rights Legislation Bill (Number 2) 1998* which is currently before Parliament.

⁹⁷ Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998

⁹⁸ *Those who've come across the seas: Detention of unauthorised arrivals*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998, page 53

⁹⁹ Guideline 3 examines exceptional grounds for detention

¹⁰⁰ *Those who've come across the seas: Detention of unauthorised arrivals*, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998, page 50

East Hills (NSW) and Leewin (Western Australia). In an article in *The Age* newspaper on 16 November 1999 it was reported that the Federal government in a letter to the ICJ on 12 November 1999 had ruled that Australian lawyers could not interview East Timorese refugees at their army camp havens about war crimes they may have witnessed. The grounds for this refusal are spurious and accompanied a series of negative comments about the exercise from the Federal Attorney General, Daryl Williams, in the preceding month. In the letter the Minister stated, "I am advised that witnesses to atrocities can experience additional trauma by re-telling their stories and that such actions could also be counter-productive if an international authority needed to have recourse to the same primary source of evidence." After all the UNHCR is an international body which can only ascertain human rights abuse if evidence can be collected from the first hand testimonials of people who witnessed the human rights abuses.

The prevention, by the government, of trained professionals who are well aware of the trauma experienced by the survivors of a conflict from obtaining testimonial evidence, voluntarily given, for the furtherance of an inquiry into human rights abuses is an exercise of control which is not only paternalistic and not in line with Australia's role in assisting the United Nations but in the view of the President of the ICJ, Justice John Dowd, was an endeavour by the Australian government to appease Indonesia.¹⁰¹

11. Politics versus Pragmatics

Mathew points out that the Australian government uses four main strategies in its efforts to minimise the numbers of asylum seekers. These are:

1. Decreasing the likelihood of the making of claims for refugee status (in particular, by failing to inform asylum seekers of their rights).¹⁰²

¹⁰¹ Meanwhile in East Timor the progress of the United Nations Human Rights Commission from gaining access to sites and entry has been 'hindered by bureaucracy and politics' SBS News Broadcast, 16 November 1999

¹⁰² This strategy has received some criticism from both the HREOC. Report, *Those who've come across the seas: Detention of unauthorised arrivals*, pages 213-225 Human Rights and Equal Opportunity Commission, Commonwealth of Australia, 1998. In *Wu Yu Fang and Others v Minister for Immigration and Ethnic Affairs and Anor* (1996) 135 ALR 583, the Federal Court held that Parliament had chosen to take a tough stand on the provision of information to non-citizens and that the court was bound by section 256 of the Migration Act which states that the Department does not have to inform a detainee of his/her right to legal advice. This does not sit comfortably with the international covenants Australia has signed on the right to a fair trial (Article 14 of the ICCPR) and provisions stating that non-nationals will be treated as nationals in relation to equality before the law. See discussion later in this paper.

In addition, in the 1998 *National Human Rights Register*, Non Government organisations complained that access to lawyers and legal information was becoming increasingly difficult because of the obstacles presented by the Department of Immigration (see entries from the Jesuit Refugee Service and the former Refugee Advice Casework Service), *National Human Rights Register*, 1998, Catholic Commission for Justice, Development and Peace, Melbourne, May 1998. Mathews also notes that the DIMA is not required to inform asylum seekers of the need to fill out an application form completely nor of their rights to seek legal assistance. She refers to a case in 1995 where a boat load of Sino-Vietnamese asylum seekers took a view that because the asylum seekers did not use key 'trigger' words there was no basis to a claim for asylum. See *Wu Yu Fang and Ors v Minister for Immigration and Ethnic Affairs* (Federal Court, O'Loughlin J, Unreported, 27 July 1995 cited by P. Mathew, *Implementing Australia's International Obligations Towards Refugees, Agenda*, Volume 3, Number 4, 1996, 471, at 472. Similarly non-government organisations in the Human Rights Register referred to above for the years 1998 and 1999 reported similar difficulties in the processing of applications and asylum seekers by DIMA officials. The difficulties in making an assessment as to whether an asylum

2. Detaining asylum seekers.
3. Attempting to shift the burden of refugees to other countries.¹⁰³
4. Legislative interpretation of the Convention definition of a Refugee. This has been used to narrow the scope of judicial review, to place limitations on the categories and claims that can be made by refugees and to require that they make application elsewhere, eg the safe third country provisions in the *recent Border Protection Legislation Amendment Act 1999*. (See footnote 58 above)

In 1992 the Australian Joint Standing Committee on Migration Regulations¹⁰⁴ stated, "In the Committee's view, issues of persecution require political judgement not a legal solution. The basis for refugee refusals in Australia after *Chan* is likely to be credibility grounds. This not only limits the capacity for government to refuse refugee applications..."

This view is reminiscent of the State sovereignty argument used by Nation-States in the negotiation for the COR in 1951 but it still may not meet many of the humanitarian objectives of Article 33.

As James Hathaway has stated,

"States pay lip service to the importance of honoring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders... The United Nations High Commissioner for Refugees (UNHCR) shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and intergovernmental activities that undermine this principle. So long as there is equivocation about the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility towards them... This apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether."¹⁰⁵

Hathaway has also observed that States believe that technologies of border control can prevent most asylum seekers reaching their territories. The most recent legislative interventions in Australia demonstrate this is also a view of the Australian government. He notes that increasingly governments deal with refugees on a harsh and unregulated basis because they see international refugee law as failing to reconcile the State interests. Such an attitude by States presents problems for those

seekers is in danger if returned to their country becomes more difficult to ascertain when the issues of language barriers, fear of authority figures in view of past experience in their own countries, access to interpreters who can understand the dialect are considered. The decision of DIMA to look for trigger words is a very random and ineffective way of determining whether someone has a genuine need and claim for asylum.

¹⁰³ In recent months the concept of safe third countries which has gained precedence in Europe, particularly in Germany has been discussed as a live option for Australia in statements by the Minister for Immigration, Mr Philip Ruddock in the media.

¹⁰⁴ *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (1992) AGPS, 63

¹⁰⁵ J. Hathaway, *Can International Refugee Law Be Made Relevant Again?* World Refugee Information, United States Committee for Refugees, 1999
http://www.refugees.org/world/articles/intl_law_wrs96.htm

who seek the implementation of humanitarian responses.¹⁰⁶ The poorer states lack the resources and sophisticated border control systems used by the Western world to enforce *non-entrée* and therefore often refugees are coerced to return to countries of origin and face the consequences.¹⁰⁷ In desperately poor countries like Jordan, Guinea, Lebanon and Armenia, Hathaway points out that the ratio of the refugee population to the total population is 1:10. This policy of burden sharing often has no mechanism to offset the enormous contributions of Southern States in their reception of refugees.¹⁰⁸

Crock warns,

"Asylum seekers represent a direct threat to the orderly conduct of a migration programme because they come uninvited and yet mandate consideration because of the obligations created by Australia's ratification of the 1951 Convention... The concept of protection obligations for refugees appears to be something too difficult for politicians to sell on the political hustings."¹⁰⁹

Taylor also believes humanitarian considerations are often expendable when politics intervenes stating,

"In other words both sides of politics are united in the view that the function of interpretation is not to ensure that those who are entitled to protection receive it but to manipulate the Refugee Convention so as to give effect to the government's political choices, in particular its wish to deal with on-shore asylum seekers as if they were purely and simply an immigration control problem."¹¹⁰

Recent talk of queue jumping implies that some of the regions which house displaced people have orderly operations that resemble a queue. Non government organisations report that the reality is far from this.¹¹¹ Australia has very few overseas posts in areas and regions from which displaced people, and amongst them refugees and asylum seekers, come. The post in Nairobi is a very good example of the weaknesses in Australia's offshore assessment system. There are some 8,500 applications pending assessment. Applicants come from Kenya, Southern Sudan, and Somalia and from the East Coast of Africa down through central Africa. There are only 2.5 Australian staff stationed at the post and other staff members are locals. Problems of corruption and

¹⁰⁶ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999

http://www.refugees.org/world/articles/intl_law_wrs96.htm, 3

¹⁰⁷ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999

http://www.refugees.org/world/articles/intl_law_wrs96.htm, 4

¹⁰⁸ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999

http://www.refugees.org/world/articles/intl_law_wrs96.htm, 4

¹⁰⁹ M. Crock, *Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law*, *International Journal of Refugee Law*, Volume 10, Number 1-2 January- April 1998, Oxford University Press, 49, 67

¹¹⁰ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, 60

¹¹¹ This material was used by the writer in an Opinion Piece in *The Age*, 24 December 1999 by David Pargeter, Liz Curran and Charlie Ocampo. The material was gathered from NGOs who have activities in overseas refugee camps.

the taking of bribes by staff occur meaning that many refugees have difficulty registering their applications because when they leave their camps to deal with their resettlement applications in Nairobi they often lose their right to reside in the camp. This does not take account of the often-tortuous journey to and from the camps to Nairobi which can be long and expensive.

The situation in Islamabad is a similar story: too few staff, bribes and an overburdened office. The difficulties for poor women in the "Women 'at risk' Program" in gaining access to the queues and having their visas recommended by the UNHCR is also fraught as they cannot find the money to bribe their way beyond the front gate office. It is understood that recently a busy post in Damascus was simply closed and files were transferred to Beirut and Lebanon affecting many Iraqi refugees. Such stories demonstrate the notion of a 'queue' which implies orderly processing is misleading. The words chosen by our politicians and other members of the community to describe modern-day seekers of asylum are: "forum shoppers", "queue jumpers", "boat people", "illegals". These phrases serve a subtle but dangerous purpose by converting people into objects of blame often with little understanding of the plight of many of these people. Such words begin and sustain the process of alienation and turn the majority against the minority.

Australia, instead of focussing only on deterrence and the removal of due process for refugees in Australia could take a more global and effective approach framed in a humanitarian context by improving its offshore assessment system and employing more staff in overseas posts who can deal more effectively with resettlement applications. Under the *Convention on Refugees*, all Nation States are supposed to work together to resolve the problems refugees experience.

At the time of writing this paper the Senate and Legal Constitutional Affairs References Committee is conducting an inquiry into the operation of Australia's refugee and humanitarian programme, which inquiry was commissioned on the 13 May 1999. This inquiry was activated after the controversial deportation of a pregnant Chinese woman to China which holds a restriction on child birth policy and the near deportation of a Somali man whom it was alleged faced significant threats to his life if he was returned to Somalia. The Senate Committee was due to report on the 18 October 1999 but was still conducting hearings in early November 1999 and will make its final report in February 2000¹¹².

The terms of reference were fairly broad examining amongst other items:

1. Whether Australia's treaty commitments under the COR, the Convention Against Torture and Other Cruel, Inhuman and or Degrading Treatment or Punishment and the ICCPR are capable of being met given that the fundamental principle of non-return to face torture or death is not present at law or subject to the rule of law.
2. The importance of maintaining full judicial oversight of any administrative process that directly affects Australia's compliance with its international legal obligations. (e)
3. The circumstances surrounding the deportation of Mr SE and the Chinese woman (j), (i) (g) and (h)

¹¹² Telephone conversation with Senator Barney Cooney on 23 December 1999

4. The accessibility of judicial review for impecunious asylum seekers particularly since the changes to legal aid guidelines. (k)
5. The potential implications for the future operation of Australia's refugee policy and program following the enactment of the principle of providing temporary safe haven (d)
6. The adequacy of a non-compellable, non-reviewable ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death.

All of these matters are of relevance to the topic of this paper, particularly items 1, 4, 5 and 6.

Taylor¹¹³ has observed,

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

12. The determination in Australia of what makes a refugee have a "well founded fear of persecution"

One source as to how Australia should implement its international obligations is the United Nations High Commissioner for *Refugees Handbook on Procedures and Criteria for Determining Refugee Status*.¹¹⁴ The UN considers this handbook to be evidence of states' practice on interpretation of the COR. The Executive Committee of the High Commissioner's Programme (Ex Com) views the Handbook as a guide for governments.¹¹⁵ DIMA sees the Handbook as a guide only. The High Court sees the handbook as on a level with academic commentators rather than as an interpretive guide.¹¹⁶

The handbook notes that the required "well founded fear of persecution" can have subjective and objective elements and requires a knowledge of conditions in the country of alleged persecution but adds that the applicant's account should be given the benefit of the doubt in relation to unproved statements.¹¹⁷ It is relevant to note that

¹¹³ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, at 42

¹¹⁴ The UNHCR Handbook

¹¹⁵ EXCOM is an advisory body only to the UNHCR

¹¹⁶ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, at 37. See also *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 Alr 412, Mason CJ at 425, 430 and 451 and Dawson, Toohey and McHugh JJ respectively.

¹¹⁶ *Commonwealth of Australia Constitution Act 1901*

¹¹⁷ Paragraph 196, UNHCR Handbook.

it is implicit in this statement that the Handbook would presume that an applicant has an opportunity to put their case and have it examined. Australia's development of safe haven status, without the capacity prior to or during departure for the recipient to make application for the protection of refugee status, risks offending Article 33. Although the Minister may decide that there has been a fundamental change in the circumstances of the country of origin, there may be cases where particular individuals or groups of people may be in jeopardy. This may arise by virtue of their prior involvement in political movements, family membership or other threats to safety.

The UNHCR Handbook proposes consideration of not just the individual circumstances but indicates that what has happened to friends, family members, relatives and other people of the same racial or social group may reveal a valid fear of persecution by the applicant at some future time. The Handbook, again, notes that where there is insufficient evidence, the benefit of the doubt should go to the applicant.

The category of safe haven status may have to be considered in relation to future arrivals from a variety of regions and circumstances of conflict, which may not now be anticipated. There is no criteria provided to ensure that the determination of a fundamental change is referable to an informed assessment with a number of preconditions to be met prior to the assessment being made. Although it may be safe for many to be returned to their country of nationality there may be circumstances relating to individuals or particular groups which place them at significant risk. Clan groupings and animosities in both Rwanda and Somalia are indications of how complex relationships between warring factions can become. The inability to apply flexible criteria and assessment in individual cases could see instances where persons are returned home even though they may be exposed to a real threat. The limitations imposed by making such considerations matters for ministerial discretion is problematic. It would seem that the government is too naïve to grasp the complexities of the realities of life in a refugee's country or it may be that the apparent naivety is a convenient tool for excluding the refugee from a humanitarian response.

Article 32 (2) states that the expulsion of a refugee shall only be in pursuance of a decision reached in accordance with due process of the law. The legislature in Australia has endeavoured to make it clear to the courts that it has no intention of allowing the courts to review determinations by the Minister in relation to safe haven status.

In examining Australia's obligation of 'non refoulement', the High Court has indicated that a refugee's fear of persecution will be well founded if there is a real chance that he or she will be persecuted if returned to the country of nationality. The chance must not be a remote one.¹¹⁸ Dawson J rejected the use of the Handbook's emphasis on a subjective test. Gaudron J took some time in her deliberations to consider the humanitarian framework within which the COR was to operate. She left the content of a 'well founded fear' in the hands of the decision-maker. The decision-maker is to evaluate the emotional and mental state of the applicant and the objective circumstances so far as they were capable of ascertainment giving weight to the

¹¹⁸ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, at 418, 425, 432, 448

credibility of the account and the broad principles accepted within the international community. In other words Gaudron J found that there were both subjective and objective elements to be considered in reaching a decision. The restrictive approach to the concept of "well founded fear" taken by the court's majority is in line with the United Kingdom's approach.¹¹⁹

Gaudron J provides a different framework for the assessment of the conditions necessary for an assessment of applications for refugee status giving credence to the purpose of the Convention, but in practice, for her decision to be applied correctly, it needs to be made by persons with professionalism and a capacity to make assessments on an individual case basis without reference to political drivers.

Gerry Fox¹²⁰ refers to a media statement by Michael Phillips, in the early 1990s who was then the Assistant Director of the Immigration Department's Determination of Refugee Status Branch. Phillips states that Immigration officers were biased in their assessments and had often already made up their minds prior to sitting down and assessing the claim. Fox notes that limitations of natural justice and the denial to asylum seekers of opportunities for support during the process of applying for a refugee determination is an effective way of discouraging appeals but the question is, at what cost? There is no concerted official effort by the Australian government in place which effectively tracks the progress of refugees after they are returned home. Recently, there was much controversy over the return of a Chinese woman Ms Zhu Qing Ping to China by immigration authorities whilst she was eight and a half months pregnant and who had her baby aborted by Chinese authorities. This was a rare case where the consequence of the return of an asylum seeker was publicised. Allegations that the lady was sedated prior and during the flight were also made although a preliminary report by a former Defence Department Secretary, Mr Tony Ayers¹²¹ found that she was not sedated on the plane. This report has been contradicted. In a letter to the editor,¹²² Susan Engwerda who, with the knowledge of DIMA was in Guangzhou, spent hours with Mrs Zhu who told her "categorically that she had been sedated and required assistance to board the plane." Ms Engwerda states the Mr Ayer's inquiry was incomplete and that she was never approached to give a report despite her involvement in the case. The Senate Inquiry referred to above may clarify matters as further evidence was given on this point in late November 1999. It is interesting to note that Amnesty International is now actively seeking to track what happens to asylum seekers who are returned to their country of origin. This is likely to have the effect of placing more pressure on political parties to consider the humanitarian implications of their decisions.

An editorial in *The Australian*¹²³ stated, "The Immigration Department has shown itself time and time again to be bureaucratic, defensive against criticism, unsympathetic to those who do not know its rules and procedures and oblivious to the need for change...Mr Ruddock complains that Parliament has not given his

¹¹⁹ *R v Secretary of State for the Home Department; ex parte Sivakumaran* (1988) 1 AC 958, at 999-1000 – "a reasonable degree of likelihood of persecution", 'substantial grounds for thinking' they would be persecuted. See Lord Keith of Kinkell, page 995

¹²⁰ G. Fox, *Asylum Seekers and Human Rights, Impact*, Volume 22-23, (1992-1993) 16, at 17

¹²¹ *The Age*, 25 June 1999

¹²² *The Age*, 29 June 1999

¹²³ *The Australian*, 12 November 1999

department the tools for the job. We might suggest that on the performance of his department, Parliament is right to be wary of giving it more powers to abuse."

Article 31 of *The Vienna Convention on the Law of Treaties* requires that any text must be interpreted having regard to the object, scope and purpose of the original treaty or Convention. In the clamour to control immigration and to deter refugees, the aim and purpose of the COR is often lost. Although both in the minority, Brennan CJ and Kirby J¹²⁴ have seen fit to examine the Preamble to the Convention and stressed the importance of the humanitarian purpose of the instrument. This seems more in line with the Vienna Convention than more restrictive definitions which have been narrowly looking at the historical considerations¹²⁵ from which the COR arose.¹²⁶

13. The desirability of treating refugees as part of a group

In criticising the basis upon which the Australian government processes refugee applications, Taylor has stated,

" ... both sides of politics are united in the view that the function of interpretation is not to ensure that those entitled to protection receive it but to manipulate the Refugee Convention definition so as to give effect to the government's political choices..."

This often ignores the fact that the refugee crisis is worldwide and is not just an endeavour by persons to have a holiday in Australia. It is not easy for persons to leave their homelands, exposing themselves to danger, separation from family members and dispossession.

It has been argued by De Jong, that to presume that every individual case subject to the COR should be the subject of individual appraisal is too time consuming, costly and cumbersome for Nation States who have more important business to attend to.¹²⁷ The difficulty for Nation States is that Article 33 requires that asylum seeker applications need to be examined individually before a decision is made to repatriate or expel. Politicians, in an effort to reduce the obligations to receive refugees colour the picture of asylum seekers by claiming that there is a possibility of refuge elsewhere. One of the claimed benefits of temporary protection for refugees stems from the view in Europe that there is a need to ensure the return of refugees. When the guestworker programmes came to an end in the 1970s there were 12 million temporary residents left living in Western Europe. Over time the people in these programmes had developed personal attachments to the state that had hosted them.

De Yong observes that when the refugee flow was relatively small, politicians could afford to be liberal. It is problematic that many refugees must wait long periods of

¹²⁴ *Applicants A and B v Minister for Immigration and Ethnic Affairs*, (1997) 142 ALR 331, 337 and at 382 respectively

¹²⁵ J. C. Hathaway, *The Evolution of Refugee Status in International Law 1920-1950*, 33 ICLQ 348 (1984) was used by the majority the Convention was never intended to cover more general situations of need after the Cold War.

¹²⁶ *Applicants A and B v Minister for Immigration and Ethnic Affairs*, (1997) 142 ALR 331, Dawson J 340, McHugh at 360

¹²⁷ C. De Jong, *The Legal Framework: The Convention relating to the Status of Refugees and the Development of the Law Half a Century Later*, *International Journal of Refugee Law*, October 1998, Volume 10 Number 4, Oxford University Press, 688, at 689

time for their applications to be processed and bottlenecks continue to develop. One tactic to reduce the backlog is to treat refugees as part of a group and process them as a group. This may certainly be cheaper and speedier and facilitate responses in times of emergency, but it can also allow people to slip through the safety net. If individuals cannot apply for refugee protection status because they are being classified and treated as a group and are then exposed to danger if they are particularly vulnerable when returned home, Australia would be in breach of its obligations against non-refoulement. The dilemma is by no means an easy one to resolve but solutions must be found that reinforce rather than weaken humanitarian considerations.

Ryszard Piotrowicz argues that the COR offers little assistance to refugee receiving states, that it does not cover all who need protection and that a reinterpretation of obligations is currently underway.¹²⁸ That reinterpretation he argues, involves Nation States trying to negotiate their way around the COR provisions by reinterpreting the substance of their obligations to refugees. He argues that the treaty has failed to take into account the needs of States and the heavy burdens often imposed upon States. While the COR gives no rights of asylum, non-refoulement requires (in theory) careful consideration of the refugee's position. Piotrowicz, like De Jong, views the solution not to be a continuation of States trying to water down their obligations by reinterpretation but a new more concerted formal international cooperation. The idea is floated that the OECD States, who are better off, should financially agree to taking more refugees rather than continuing to levy the burden at the developing nations. Germany for instance has taken a large number of refugees over the past three decades and racial tensions have become high. Although this paper has been critical of States responses it is important to understand the factors which are driving the Nation states and try to address them. This will not occur unless a more uniform and integrated, shared response to the refugee problem is undertaken which ensures the value of human life and dignity.

Another concern about the processing of new arrivals as part of a group eligible for temporary safe haven is that certain members of a group may have been responsible for perpetrating human rights abuses in their country. This could create great stress upon other recipients who are sharing the same accommodation facilities. Such individuals it may be, should have actually been excluded from protection under the provisions of the COR. The controversial cases involving the alleged Nazi war criminal, Konrad Kalejs is an illustration of what can occur without proper screening processes in place.

14. International Developments

There are a number of movements within the European Union to control the regional flow of refugees by the use of temporary refugee categories which can be compared to Australia's safe haven option. The European Union immigration ministers recently met in October 1999 and resurrected the discussion of the resolution reached by the Council on 25 September 1995 which called for 'burden-sharing with regard to the admission and residence of displaced persons on a temporary basis'¹²⁹ The urgency of this resolution became necessary following the large number of displaced persons

¹²⁸ R. Piotrowicz, *Facing Up to Refugees International Apathy and German Self Help*, *International Journal of Refugee Law*, Volume 10, Number 3, July 1998, Oxford University Press, 410

¹²⁹ OJ 1995 c 262,1

from the Balkans and a concern amongst some member States, especially Germany, that they were bearing an inequitable share of the burden.

A further resolution calling for a rapid response in emergency situations and for burden sharing with regard to admission and residence of displaced persons on a temporary basis was also carried.¹³⁰ The resolutions, which are not legally binding, still recognising national sovereignty by using the words "whom the Member States are prepared to admit."¹³¹ The initial resolutions did not deal with the question of which rights would be granted to those given temporary asylum. Presumably these were left to the Member States themselves to decide. A Committee was set up in 1996 to determine whether a situation requiring concerted action had arisen. The opinion of the UNHCR was also sought and a report prepared for the Council of European States to approve in a non-binding way. Member States' position in relation to persons who have applied for refugee status under COR remains unchanged by this process. Like Australian safe haven status, the benefit of temporary haven can be withdrawn in circumstances where individuals hold criminal records or pose a threat to national security.

There was a further proposal for joint action on temporary protection proposed at a November 1996 Council meeting on Justice and Home Affairs by the European Commission. It presented an initiative to the European Council on 5 March 1997 applying the principles of the Treaty on European Union which has a binding nature,¹³² unlike the resolution of Ministers for Migration described above. Beneficiaries are to be persons fleeing from armed conflict and do not have to be from especially endangered groups. They are given certain rights, for instance to medical and subsistence support. As a result of a Commission report that there can be a "safe return under humane conditions" the Council can decide to phase out temporary protection and return persons to their country of origin. The process of finding a framework for the provision of temporary protection is still under discussion.¹³³ Priority is placed on voluntary repatriation and close cooperation with international organisations. The EU model presents a consideration of broader humanitarian concerns with the emphasis on the words, 'humane conditions' which envisage consideration of other international human rights instruments than the COR. There are provisions covering the monitoring of safe reintegration, non-discrimination and respect for other fundamental human rights and the provision of international aid and matters of safety both physical and legal. Like the Australian position in relation to safe haven, some EU Member States only grant temporary protection on the basis that there is a withdrawal or renunciation of an asylum application.¹³⁴

The Executive Committee of the Programme of the UNHCR (Ex Com) has also looked at standards which ought to be applied if temporary protection is to be

¹³⁰ OJ 1996 L 63, 10

¹³¹ For a more detailed discussion of the resolutions see K. Kerber, *Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States*, *International Journal of Refugee Law*, Volume 9, (1997) Oxford University Press, 453- 457

¹³² COM (97) 93 final.

¹³³ For further discussion see the *Position Paper Regarding the Adoption of the Concept of Temporary Protection in Australia*, Jesuit Refugee Service, 1999

¹³⁴ K. Kerber, *Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States*, *International Journal of Refugee Law*, Volume 9, (1997) Oxford University Press, 453, at 469

considered. In Conclusion 19 (XXXI) on Temporary Refuge (1991)¹³⁵ it states some principles which ought to be applied. It noted the importance of the COR and that such temporary protection should be considered in circumstances of a large influx of refugees, in a crisis situation and in exceptional circumstances. In a further Conclusion 22 (XXXII)¹³⁶ the provision of temporary protection is to be provided without discrimination. It is noted that the Conclusion states that such a mechanism can be a flexible option for Nation States but that it *ought not diminish* protection to refugees under the COR.

It can be argued that the most recent provision of temporary protection offered by Australians onshore for three years does not classify as an exceptional nor large scale influx as the Ex Com frameworks have envisaged.

What is important about the EU response is that it has been undertaken on a regional basis in an attempt to alleviate some nations who were unduly overburdened. Australia's safe haven category was a domestic response to an internal call and representations made by the UNHCR and lacked a regional burden sharing focus. In addition, the considerations which come into play before a decision to return the temporary protection recipients is far more detailed, broad and embedded in assessments based on international human rights standards than the Australian standards the Minister is to apply when considering the removal of safe haven status under the "fundamental, durable change" provisions in section 37A.

15. The need for a re-examination of the role of Nation-States in responding to refugees: human rights and the danger of pragmatics.

In the discussion of immigrants, asylum seekers, refugees and safe haven recipients the essential elements and purpose of the principle of non-refoulement is often lost.

Gerry Fox has stated,

" Our obsession with control and restrictive practices against these asylum seekers appears contrary to international human rights instruments and certainly lacks the humanity these people so desperately need."¹³⁷

As Taylor points out,¹³⁸ in view of the seriousness in sending a person back to an unsafe country, each individual ought to be given a formal opportunity to rebut the presumption that the country to which it is proposed they be removed is safe.

Hathaway suggests a number of solutions which he sees as needed to address the refugee problem, arguing that there is a need for a dependable response to the risk of

¹³⁵ Reproduced in the UNHCR, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, UNHCR 1995 at 41. For further discussions see also *Position Paper Regarding the Adoption of the Concept of Temporary Protection in Australia*, Jesuit Refugee Service, January 2000

¹³⁶ Reproduced in the UNHCR, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, UNHCR, note 15 at 45

¹³⁷ G. Fox, *Asylum Seekers and Human Rights, Impact*, Volume 22-23, (1992-1993) 16, at 17

¹³⁸ S. Taylor in her article, *Australia's 'Safe Third Country' Provisions Their Impact on Australia's Fulfillment of its Non Refoulement Obligations*, *University of Tasmania Law Review*, (1996) Volume 15 Number 2, 197, 233

human rights abuse and which does not compromise the ability of persons to seek protection outside the frontiers of their own State.

He argues for a robust system that has enhanced flexibility whilst at the same time is solution oriented. He argues for temporary refuge where there is a strong emphasis on return and requires that a process must be adopted which is empowering because it has repatriation and development assistance.¹³⁹ This writer notes that the capacity for the provision of temporary protection could avert the need by States to introduce some of the more draconian measures such as limitations on judicial review, turning people around and other such measures. Such temporary protection must allow for the provision of a right for refugees at risk of human rights abuse and with a fear of persecution to apply for more permanent refugee status and to be assisted adequately with the process. The concern that this paper highlights is that the application of temporary refuge may in some cases be inappropriate and the removal of many checks and balances are problematic.

The system currently would appear to operate to deter refugees from being able to seek the necessary protection even though they may qualify for it. The difficulty refugees have in accessing interpreters in their own language, in being able to explain their circumstances to DIMA officials who independently and effectively assess claims, the problems they have in obtaining legal information, legal advisers and legal aid combined with the removal of provisions for natural justice and judicial review, all undermine the capacity to determine refugee status. In the case of safe haven recipients, the additional legislative and regulatory barriers and conditions required prior to the issue of the status deprive individuals in the group of protections under the COR and other international instruments.

Hathaway, like many other writers argues that ultimately the international institutions for refugee protection need to be retooled to promote and coordinate collectivised responsibility. At the moment the record in this area is far from adequate. The UNHCR's efforts to prove their relevance to governments have led to their loss of credibility as they can be seen to prop up national agendas which do not adequately cater for the groups they are to assist. As Hathaway points out the UNHCR should focus more on dependable mechanisms for sharing out responsibilities equitably.¹⁴⁰

The fact remains that it is often the developing nations in the particular regions of instability which are flooded with refugees. More could be done by the developed world, including Australia, to share the burden. A dangerous wedge has been created by government with the continued linking of offshore and onshore refugees creating tensions between long-term refugees and new arrivals. This link should be severed and Australia should think seriously about whether the number of refugees it takes is sufficient given the context of global responsibility.

¹³⁹ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999
http://www.refugees.org/world/articles/intl_law_wrs96.htm, 5

¹⁴⁰ J. Hathaway, Can International Refugee Law Be Made Relevant Again? World Refugee Information, United States Committee for Refugees, 1999
http://www.refugees.org/world/articles/intl_law_wrs96.htm, 4

16. Some Further Safeguards which May Assist Australia in Meeting its Obligation Under the COR and ensuring due process

1. An Independent Assessment of refugee status is needed. There is a problem with DIMA making assessments and having to follow the political guidelines which work towards immigration reductions. Taylor¹⁴¹ has suggested that, if a State were to eschew government involvement in the refugee determination status and an authority were to make assessments based solely on the plausibility of the individual applicant's account there would be less pressure to give consideration to the interests of the State rather than providing safe refuge.
2. More personnel should be placed at posts overseas to ensure that proper examination, processing and assessment is possible.
3. The current system of linking assessment of both offshore and onshore refugees confuses the different circumstances of these refugees. The link between offshore and onshore refugee programs should be severed so that the two groups ought not to have to compete for places but should be processed on the merits of the case.
4. "Special leave" provisions enabling particular cases on appeal before the courts to be referred to other courts would be one way of fast tracking serious cases and reducing outstanding claims. This of course would be of little value if legal representation is not obtained and information about the refugee's claim cannot be presented in a complete form. Improving processes is a better option than the continued removal of appeal rights which erode the capacity of independent checks on the exercise of power. Many of these provisions are set up to catch 'non-genuine' refugees and 'bogus claims' but can disadvantage people who fit within the definition in Article 33.
5. There is a need for a global responsiveness with a greater sharing of the burdens by the developed Nation-States. This will not occur if domestic self-interest is the main consideration of States.
6. A reinforced, better-funded United Nations would be able to make a speedier response and put in place preventative measures so that countries could avoid being faced with major humanitarian crises. Some effort is being made in resolving disputes but often this can be undermined by vested interests in countries with strategic economic or military objectives.
7. It is critical that tracking of what happens to asylum seekers when they are returned to their countries be conducted to monitor what occurs upon their return. It is difficult to assess risk to asylum seekers and convention compliance unless such research is undertaken.
8. The safe haven category needs to be amended to enable applications for refugee status by individuals who are part of the safe haven group whilst they are in Australia and prior to the dissolving of the category upon which the recipients are to be returned home.
9. Judicial review can only help prevent abuse and errors by immigration officers and the Minister¹⁴² whose determinations may involve the life or death of safe haven recipients. Such review is consistent with fundamental human rights observance. Review is particularly important when the Executive decides to deny

¹⁴¹ S. Taylor, *Australia's Interpretation of Some Elements of Article 1A (2) of the Refugee Convention: Marginalising the International Law Claims of On-Shore Asylum Seekers in Pursuit of Immigration Control and Foreign Policy Objectives*, *Sydney Law Review*, Volume 16: 32, 1994, 32, 43

¹⁴² The brackets are inserted by the writer.

or terminate a country's safe haven designation. Refusals could be based on improper criteria such as the race of potential beneficiaries. Smith's proposal¹⁴³ that a standard of proof should be required is worthy of consideration. This standard could accommodate the Executive's need for flexibility whilst ensuring a check on any abuse of discretion. In the writer's view, although this is unlikely to be popular with the Australian Executive, it could have the advantage of ensuring that Australia is meeting its humanitarian obligations and would save the kind of embarrassment that sending refugees home in a situation of threat has created for them in the past.

10. There is no criteria provided to ensure that the determination of a "fundamental change" is referable to an informed assessment, with a number of preconditions to be met prior to the assessment being made in relation to decisions by the Minister to cease safe haven or to return holders of that status.
11. Consideration ought to be given to broadening the factors to be explored prior to a decision to remove safe haven status, including a consideration of broader humanitarian concerns with the emphasis on the words, "humane conditions". This should include consideration of international human rights instruments other than the COR being in place prior to the return of refugees claiming protection. Provisions covering the monitoring of safe reintegration, non -discrimination and respect for other fundamental human rights and the provision of international aid and matters of safety both physical and legal ought to be taken into account.
12. The Minister's decision made under the safe haven legislation should be open to judicial review on the usual grounds of administrative review including procedural fairness. Additionally, the process of applying for status and review ought to be more expeditious. The Federal Court has undertaken many initiatives to address the backlog in its Court. It must be remembered that the judiciary can have an effective role in case management and Executive curtailment of rights to streamline cases in a manner that may impact upon the rights of refugees may not always be the solution.
13. Section 91N of the *Migration Act* should be amended to incorporate a provision that a country can only be described as a "safe third country" if the Minister is satisfied that the country complies with the relevant international law concerning the protection of persons seeking asylum, and meets the relevant human rights standards contained in conventions on torture and other cruel and degrading punishment and the protections of the ICCPR.
14. Australia needs to adopt a comprehensive approach¹⁴⁴ which, rather than responding to the immediate symptoms, addresses some of the causes of dispossession, including ways to prevent forced migration through early intervention, the bolstering of the humanitarian role of the United Nations so that it can work more effectively in reducing the causes of turmoil, unrest, repression, wars, violation of human rights and famine and so on. In an age which prides itself on technological advances there is scope to track refugee movements, gather research of causes and preventative measures and to make more of a concerted effort to implement the necessary changes. To continue to adopt electorally popular short-term solutions will do little to address the humanitarian issues and

¹⁴³ A. J. Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, *Virginia Journal of International Law*, Volume 28:2, 509, 556

¹⁴⁴ For further discussion see C De Jong, *The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later*, *International Journal of Refugee Law*, October 1998, Volume 1. 10 Number 4, Oxford University Press, 688, at 694

refugee flow in the long term. Australia should use its position in the international community to broker and encourage the United States and European Community and other nations to take their responsibilities and dedication of resources more seriously. A new and effective global reception and assessment system which is free from corruption, that is quick in resolving issues but adheres to due process and respectful partnerships with nations struggling to control their populations is needed as a matter of urgency. Currently the problems caused by corruption are often overlooked or tolerated.

15. There is a need for the development of and adherence to human rights policies, to address the consequences and causes of racism, dispute resolution and a strengthening of the United Nations Institutions to ensure their ability to respond.
16. The UNHCR needs to develop a fearless and independent role in ensuring that States bear their responsibilities equitably and in accordance with the spirit of human rights provisions ensuring implementation of the international convention requirements with more rigor.

Conclusion.

It is important amidst the political rhetoric in relation to refugees to remember that the people who will be touched by many legislative measures and policy making are human beings and not "human cargo"¹⁴⁵. The debate should not be closed to the human stories and experiences of displaced people and fear should not harden and close our hearts to strangers who seek our assistance. As the CCJDP has stated in previous Occasional papers the question must be: how do we as a society link the social, religious, political and economic dimensions of life to ensure a more socially just, inclusive framework which respects and delivers human dignity?

De Jong argues that instead of inventing even more ineffective restrictive measures which place us at odds with international obligations, all countries should ensure that efforts are taken to make a comprehensive approach viable.¹⁴⁶

Mary Crock has observed that one of the critical public relations problems for the courts arises from the fact that the applicable standard for determining refugee status is set by international law and not by the Australian Parliament.¹⁴⁷ As the courts continue to shy away from their role of judicial oversight and as popular opinion and the political responses to refugees grows more reactive, knee jerk, lacking in generosity and verging on racist, the courts need to be bold in upholding and discouraging the abuse of human rights and ensuring that processes are in place which avert exposing refugees to real danger.

¹⁴⁵ *New Campaign To Stop Illegal Entrants*, Media Release, Minister For Immigration, 29, October 1999, www.minister.immi.gov.au/media_releases/media99

¹⁴⁶ C De Jong, *The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later*, *International Journal of Refugee Law*, October 1998, Volume 1. 10 Number 4, Oxford University Press, 688, 699

¹⁴⁷ M. Crock, *Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law*, *International Journal of Refugee Law*, Volume 10, Number 1-2 January- April 1998, Oxford University Press, 49, 69

This discussion paper has demonstrated that there are problems in the way in which the safe haven category has been structured. By treating refugees on a group basis and ignoring their individual situations or not permitting review of decisions of the Minister and DIMA officials, the dangers to which these refugees may be exposed to on return to their home States is neglected. In addition, it has argued that the present legislative provisions fail to recognise the importance of judicial review as a check on executive power in relation to refugees. The treatment of refugees and the safe haven status recipients in a different manner to nationals in their access to the courts places Australia in breach of a number of international instruments which require that the treatment of refugees in accessing the court should be the same as it is for nationals.

Many of the policies and legislative frameworks outlined in this discussion paper reveal that governments of both political persuasions have worked on the presumption that new arrivals are not refugees. Such an approach suggests that deterrence and return to the country of the national are higher on the agenda than humanitarian or human rights concerns. It must be remembered that language barriers, experiences of great terror, persecution, cultural differences and a fear of authority and government officials make it difficult for many asylum seekers to adequately communicate in an unfamiliar environment. It is difficult for refugees or asylum seekers to understand the processes which operate. This may act as a deterrent as it confuses potential applicants. It also poses a serious question as to whether Australia genuinely wants to know if people will be persecuted after they return home. The failure of Australia to understand and accept the complexity of conflict and its world wide reverberations can only lead to uninformed, hasty policy-making, policies made in "fits and starts", or in response to matters raised in "talk- back radio". This may suffice in the short-term world of politics and electioneering but will not resolve the difficulties of the flow of refugees in the long term.

This paper has therefore also sought to flag some further safeguards which may be useful in addressing some of the inconsistencies in policy-making both within Australia and overseas. Australia in the past has been careful to be cooperative in the Asian region but it has done so often whilst simultaneously quarantining itself from instability in the region. East Timor may not be the last conflict to see people fleeing violence and persecution given the recent emergence of conflicts in Indonesia in a number of locations.

Australia should commence to position itself so that it is able to deal with such instability through its policies and a greater role on the international stage. Australia must work to ensure that structures and processes are in place which ensure it does not fail in its duties as a Nation State that is a signatory to the COR, the ICCPR, the *Covenant on Economic, Social and Cultural Rights* and the *Convention Against Torture and Other Cruel and Degrading Punishments*. The increasing number of internal conflicts and displaced people is occurring in a climate where very few developed nations have been prepared to ensure there is effective early intervention for the prevention of conflicts; to consider fully the repercussions upon nationals of the embargoes and bombings that can be undertaken; and to commit the resources necessary to ensure humanitarian responses, appropriate infrastructure and support can be provided to conflict areas.

The challenge is for Australia to prove that the sculptor, Auguste Rodin, was wrong when he made the statement, "Civilisation is, after all, but a coat of paint that washes away when the rain falls." If current policies on immigration are not reviewed, Australia will not be able in the long term to take its humanitarian obligations seriously or to cope with the realities that exist in the international community. Effort must be increased to promote the rights and development of peoples all across the world, irrespective of national boundaries.¹⁴⁸

* This paper was written for the Melbourne Catholic Commission for Justice, Development and Peace by Liz Curran who is the Executive Officer. Much of the material used is extracted from research undertaken as part of a Masters in Law at the University of Melbourne.

¹⁴⁸ *The Development of the Peoples; Social Concerns of the Church*, 26 March 1967