COMPLEMENTARY PROTECTION TRAINING MANUAL

JANUARY 2012

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# Refugee Review Tribunal Members’ Training Manual

## I Introduction and Context

A The Structure of the Australian Complementary Protection Regime

B Complementary Protection and the Jurisdiction of the RRT

C Complementary Protection and the Refugees Convention

D What Kinds of Cases Succeed on the Basis of Complementary Protection?

E Using International and Foreign Jurisprudence

## II Standard of Proof: Section 36(2)(AA)

A Substantial Grounds for Believing

B Necessary and Foreseeable Consequence

C Real Risk

D Circumstances in Which There is Taken Not to Be a ‘Real Risk’: Section 36(2B)

E Torture

## III The Criteria for Complementary Protection

A Arbitrarily Deprived of His or Her Life

B Death Penalty Will Be Carried Out

C Types of Treatment or Punishment

D Intention and Purpose Requirements

E Torture

F Cruel or Inhuman Treatment or Punishment

G Degradation Treatment or Punishment
## IV  EXCLUSION FROM COMPLEMENTARY PROTECTION ..............................................................87

## V  GENERAL CONSIDERATIONS IN COMPLEMENTARY PROTECTION CLAIMS ..............90

### A  PERSONAL FEATURES OF THE APPLICANT TO BE TAKEN INTO ACCOUNT ...............90
   I  Health and other physical conditions ................................................................................91

### B  PROPORTIONALITY ............................................................................................................93

### C  CREDIBILITY .....................................................................................................................94

### D  INTERPRETING THE ACT OVER TIME: EVOLVING HUMAN RIGHTS LAW .............96
I INTRODUCTION AND CONTEXT

On 19 September 2011, the Australian Parliament passed legislation inserting complementary protection into the *Migration Act 1958* (Cth). It received royal assent and thus became law on 14 October 2011. ‘Complementary protection’ describes protection that is complementary to Australia’s obligations under the Refugees Convention,¹ based on the expanded principle of non-refoulement under human rights law.²

The Migration Amendment (Complementary Protection) Bill 2009, introduced to Parliament in September 2009, proposed changes to the *Migration Act* to bring domestic law into line with Australia’s non-refoulement obligations under international human rights law.³ In so doing, it sought to align Australian law with comparable provisions in the European Union (‘EU’), Canada, the United States and New Zealand.⁴ This Bill was the subject of a Senate inquiry in October 2009, which produced a report and a number of recommendations,⁵ but the Bill lapsed with the prorogation of Parliament in August 2010. A substantially similar Bill—

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the Migration Amendment (Complementary Protection) Bill 2011—was introduced to Parliament in February 2011 and was passed seven months later.6

The purpose of this Manual is to provide both a training device and a reference tool for RRT Members dealing with complementary protection claims. It draws extensively on international and comparative jurisprudence and commentary to elucidate how concepts contained in the Australian legislation have been interpreted elsewhere. This helps to place Australian law in a broader context and to facilitate harmonized approaches to precepts derived from international law.7

As noted in the Explanatory Memorandum to the 20098 and 2011 Bills,9 and both Second Reading Speeches,10 the complementary protection regime in Australia was introduced to reflect Australia’s international obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’), the 1966 International Covenant on Civil and Political Rights (‘Covenant’) and the 1989 Convention on the Rights of the Child (‘CROC’).

The Act follows and reflects a series of recommendations in Australian parliamentary and international UN reports that Australia should adopt a system of ‘complementary protection’. The Explanatory Memorandum to the 2011 Bill states that:

The introduction of a statutory framework for considering complementary protection claims is an important change, the need for which has been identified by the Senate Legal and Constitutional References Committee report ‘A Sanctuary under Review: An examination of Australia’s Refugee and Humanitarian Determination Processes’ (June 2000); the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004); the Legal and Constitutional References Committee report ‘Administration and Operation of the Migration Act 1958’ (March 2006); and the Australian Human Rights Commission. The need for complementary protection provisions has also been identified in the international context by the United Nations Committee Against Torture, the United Nations Human Rights Committee, and the Executive Committee of the United Nations High Commissioner for Refugees.11

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6 The main changes were the removal of a ‘purpose’ requirement in the definitions of ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ (s 5(1)), and the deletion of ‘irreparable harm’ from the standard of proof in s 36(2)(aa).
8 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth).
9 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), 1.
10 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 9 September 2009, 8986–92 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services); Commonwealth of Australia, Parliamentary Debates, House of Representatives, 24 February 2011, 1356–59 (Chris Bowen, Minister for Immigration and Citizenship).
11 2011 Explanatory Memorandum, above n 9, 3. See also Executive Committee Conclusion 87 (1999), [f]; Executive Commission Conclusion 89 (2000), recitals.
In the 2009 Bill’s Second Reading Speech, the Honourable Laurie Ferguson MP, Parliamentary Secretary for Multicultural Affairs and Settlement Services, also noted that:

The United Nations Committee against Torture recommended, most recently in May 2008, that Australia adopt a system of complementary protection ... . In addition, the United Nations Human Rights Committee recommended, in May 2009, that Australia should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.12

Importantly, the introduction of codified complementary protection does not remove the discretionary power of the Minister for Immigration and Citizenship to grant a visa for compassionate or humanitarian reasons, pursuant to section 417 of the Migration Act, if the Minister considers it is in the public interest to do so. This option remains open for people who are found not to have a protection need under the Refugees Convention or on the basis of complementary protection.

Further reading


A THE STRUCTURE OF THE AUSTRALIAN COMPLEMENTARY PROTECTION REGIME

The Migration Amendment (Complementary Protection) Act 2011 amends the Migration Act by creating a new class of people to whom a protection visa may be granted. Section 36(2) now provides that a protection visa is to be granted not only to non-citizens to whom Australia has protection obligations under the Refugees Convention, but also to non-citizens with respect to whom:

the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

12 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 9 September 2009, 8989 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).
As is the case for refugees, protection is also extended to members of the same family unit.\(^\text{13}\)

Section 36(2A) provides that a non-citizen will suffer ‘significant harm’ if:

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

These can be described as the ‘complementary protection’ criteria.

The terms ‘torture’, ‘cruel or inhuman treatment or punishment’, and ‘degrading treatment or punishment’ are defined in section 5(1) of the *Migration Act*.

Section 36(2B) provides that there is no ‘real risk’ of significant harm if:

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

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

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

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

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

(i) the non-citizen is a danger to Australia’s security; or

\(^{13}\) *Migration Act* 1958 (Cth), s 36(2)(c).
(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

B  COMPLEMENTARY PROTECTION AND THE JURISDICTION OF THE RRT

The RRT has jurisdiction to review a decision to grant a protection visa, whether on the basis of the Refugees Convention or complementary protection. The wording of section 36(2)(aa) makes clear that a protection claim must first be assessed against the Refugees Convention. The complementary protection criteria only require consideration if the person is found not to be a refugee (see section I.C below).

The RRT does not have jurisdiction to review a decision under section 36(2C)(a) or (b), which are the complementary protection ‘exclusion clauses’. Section 500(1)(c), as amended, provides that the Administrative Appeals Tribunal has jurisdiction to review such decisions.

C  COMPLEMENTARY PROTECTION AND THE REFUGEES CONVENTION

As noted above, the Refugees Convention retains its primacy for protection visa claims. Complementary protection does not supplant or compete with the Refugees Convention; by its nature, it is complementary to refugee status determination carried out in accordance with the Refugees Convention. The complementary protection criteria are only considered following a comprehensive evaluation of the applicant’s claim against the Refugees Convention definition, and a finding that the applicant is not a refugee.

This accords with the general approach in other jurisdictions. For example, in the EU, the Qualification Directive stipulates in article 2(e) that a beneficiary of subsidiary protection (as it is called there) is a person ‘who does not qualify as a refugee’. In Canada, decision-makers have considered it superfluous to consider complementary reasons for protection when refugee status has been made out. Although the New Zealand legislation suggests that both the refugee and the complementary protection claim must be considered, the Immigration

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14 Section 36(2)(aa) refers to its application to ‘a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)’). The 2011 Explanatory Memorandum, above n 9, [66] states: ‘This retains the primacy of the Refugees Convention and means that non-citizens found to be owed protection obligations under the Refugees Convention do not require further assessment of other non-refoulement obligations’.
15 See Migration Act 1958 (Cth), s 411(1)(c) (as amended).
16 See also 2011 Explanatory Memorandum, above n 9, [154].
17 EU Qualification Directive, art 2(e); Re IVH [2004] RPDD No 57 (Canada). Section 137 of the NZ Immigration Act ‘directs both counsel and decision-makers to engage in the first instance with refugee law and jurisprudence’. This ‘means that a person cannot be considered for protected person status unless and until their predicament is determined not to be one which falls within the scope of the Refugee Convention’: AC (Syria) [2011] NZIPT 800035 (27 May 2011), [45].
18 See eg Re IVH [2004] RPDD No 57.
19 See Immigration Act 2009, s 137(1).
and Protection Tribunal has determined that the latter is unnecessary if the refugee claim succeeds.\(^{20}\)

In the Australian context, this means that RRT Members should continue to assess protection claims in the same way that they have always done, constantly mindful of the evolving scope of the notion of ‘persecution’ and the way in which developments in human rights law inform and expand its meaning. This was confirmed in the Second Reading Speech for the 2011 Bill, where the Minister stated that the structure of the legislation ‘recognises the primacy of the refugees convention as an international protection instrument and is supported by the UNHCR.’\(^{21}\)

This accords with Objective 3 of Goal 1 of the *Agenda for Protection*—a programme of action adopted in 2002 by the Executive Committee of UNHCR (of which Australia is a member). It urged States:

> to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.\(^{22}\)

Similarly, Executive Committee Conclusion No 103, adopted in 2005, encouraged States to establish a single, comprehensive procedure

which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied.\(^{23}\)

This approach was reiterated in the Proust Report to the Minister for Immigration in 2008, which endorsed the views of the Refugee Council of Australia:

> Under such a system, there would be a single administrative process that would first consider whether a person is a refugee, and then, if the answer is no, assess whether there are grounds for complementary protection.\(^{24}\)

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**Further reading**


\(^{20}\) *AB (Iraq)* [2011] NZIPT 800014, [61]–[72].


\(^{22}\) UNHCR, *Agenda for Protection* (3rd edn, 2003) 34 (Objective 3, Goal 1).

\(^{23}\) Executive Committee Conclusion No 103 (2005), [q].

D WHAT KINDS OF CASES SUCCEED ON THE BASIS OF COMPLEMENTARY PROTECTION?

A survey of the jurisprudence in other jurisdictions reveals that complementary protection is typically granted where a nexus cannot be established with a Refugees Convention ground, or where the treatment feared does not reach the level of severity of ‘persecution’. ‘Significant harm’ in section 36(2A) should be interpreted as requiring a lower threshold of harm than ‘serious harm’ in section 91R (with respect to persecution). This approach is consistent with the international obligations which complementary protection is intended to reflect, as well as international and comparative jurisprudence. Indeed, the term ‘significant harm’ was deliberately introduced in order to avoid confusion with section 91R. As the Explanatory Memorandum to the 2011 Bill stated:

The reference to ‘significant harm’ reflects Recommendation 1 of the Senate Legal and Constitutional Affairs Legislation Committee report on the Migration Amendment (Complementary Protection) Bill 2009. That recommendation was that the words ‘irreparably harmed’ used in that bill be replaced with ‘subject to serious harm’. This item uses the word ‘significant’ instead of ‘serious’ because ‘serious harm’ is defined elsewhere in the Act (in subsection 91R(2) of the Act).

This Manual examines international and comparative jurisprudence in detail to give RRT Members an understanding of the way in which complementary protection has been applied elsewhere.

E USING INTERNATIONAL AND FOREIGN JURISPRUDENCE

The complementary protection provisions of the Australian legislation draw heavily on international sources, and it is clear from the Second Reading Speeches and the Explanatory Memoranda to the 2009 and 2011 Bills that this was intentional. In particular, these documents refer to:

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25 For example, in a survey in 2006 of the 13 positive decisions where a Canadian Refugee Protection Division member granted protection pursuant to section 97, 11 (84.6 per cent) were based on a lack of nexus: J Reekie and C Layden-Stevenson, ‘Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)’ in International Association of Refugee Law Judges (ed), Forced Migration and the Advancement of International Protection (Proceedings of the 7th World Conference, 2006) 270. See, for example, discussion below about cases involving forced marriage (section III.F.(iv)).

26 In France, 95 per cent of successful subsidiary protection claims were granted on the ground of inhuman or degrading treatment or punishment: L Dufour, ‘Subsidiary Protection according to the Qualification Directive: An Overview of Early Implementation in France’, Budapest conference paper (2008) (copy with authors).

27 2011 Explanatory Memorandum, n 9 above, [64].
The Migration Act itself only makes explicit reference to the Covenant (see subsection 5(1)), but the definitional provisions in subsection 5(1) adopt similar, if not identical, language to these other treaty provisions. It is useful to recall the remarks of Mason CJ and Deane J in Minister of State for Immigration and Ethnic Affairs v Teoh:

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.30

The meaning of the complementary protection criteria in Australian law should therefore be informed by the views of the UN Human Rights Committee, the Committee against Torture, and the Committee on the Rights of the Child. Their interpretations can be found in their General Comments on particular treaty provisions, Concluding Observations on country reports, and ‘views’ on individual cases (considered by the Human Rights Committee pursuant to its Optional Protocol, and by the Committee against Torture pursuant to article 22 of CAT). In a number of those cases, the Committees have assessed the scope of non-refoulement in relation to torture, arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment. It should be recalled that while the Committee against Torture and the Human Rights Committee provide extensive commentary on the meaning of terms such as ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’, the decisions of these Committees are not legally binding on States. However, they have a strong political influence and represent the views of experts in the field.

In Europe, the European Court of Human Rights has developed an extensive jurisprudence on these issues, particularly in the removal context. Its decisions are binding on the parties and have led to considerable domestic modifications in States of the Council of Europe. In particular, the ‘trickle effect’ of the European Court of Human Rights’ decisions can be found in the domestic jurisprudence of courts such as the Supreme Court of the UK (formerly the House of Lords), as well as in codified regional and domestic law. The EU Qualification Directive, which is the regional instrument implementing a common complementary protection regime for the EU Member States, is also subject to interpretation by the Court of Justice of the European Union (when a Member State refers a particular point of interpretation

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28 In 2006, Justice Kirby acknowledged ‘Australia’s duty of non-refoulement’ under CAT and the Covenant: Minister for Immigration and Multicultural and Indigenous Affairs v QAAH [2006] HCA 53, [120]–[121]. The principle of non-refoulement has been implied into the Covenant, whereas it is expressly provided for in CAT. For example, in Kindler v Canada, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991 (11 November 1993), the UN Human Rights Committee stated: ‘if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant’. For a very clear elucidation of this principle in the European context, see MSS v Belgium and Greece, European Court of Human Rights, Application No 30696/09 (21 January 2011).

29 Each of these provisions is extracted in full in the Annex to this Manual.

to it). Over time, this court may produce decisions on points of interpretation which are relevant to the Australian context.

Domestic complementary protection regimes that may serve as useful points of comparison for Australia include those of the EU Member States (and the UK in particular); section 97 of Canada’s *Immigration and Refugee Protection Act*, and sections 130 and 131 of New Zealand’s *Immigration Act 2009*. Case law from these jurisdictions may be instructive for RRT Members, although Members must be alert to any legislative differences. It should be noted that there is limited detailed analysis of successful complementary protection claims in Canada because many positive decisions by members of the Refugee Protection Division (RPD) are brief, delivered orally, and unreported. By contrast, negative decisions tend to be longer and more detailed. The US and Hong Kong have minimalist systems of complementary protection in place for people at risk of torture under CAT and are likely to be of less utility to the RRT.

In addition, many States have enshrined key human rights terms (eg torture, inhuman treatment, etc) in constitutions or bills of rights. Jurisprudence resulting from these sources may also be useful for RRT Members. Below is a list of provisions in foreign legislative instruments which utilize similar wording to the Australian complementary protection regime (albeit not in the specific context of asylum). Protection from torture, cruel, inhuman or degrading treatment or punishment is provided in:

- Sections 12(1)(d) and (e) and 12(2) of the *Constitution 1996* (South Africa)
- Schedule 1, article 3 of the *Human Rights Act 1998* (UK)
- Section 12 of the *Charter of Rights and Freedoms 1982* (Canada)
- Sections 9–11 of the *Bill of Rights Act 1990* (NZ)

For these reasons, this Manual draws extensively on international and comparative jurisprudence to provide a framework of accepted international standards and understandings of the key terms of Australia’s complementary protection provisions.

**Further reading**


- J Reekie and C Layden-Stevenson, ‘Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)’

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31 Reekie and Layden-Stevenson, above n 25, 270.
• V Zederman, ‘The French Reading of Subsidiary Protection’
II STANDARD OF PROOF: SECTION 36(2)(aa)

A SUBSTANTIAL GROUNDS FOR BELIEVING

Section 36(2)(aa) of the Migration Act sets out the threshold which applicants for complementary protection must meet:

the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

This is a much higher threshold than is required in international human rights law and complementary protection regimes elsewhere. This is because the section combines a number of independent threshold tests—intended to explain each other, not be read together—into a single, cumulative test. This is discussed in detail below. The reason why this is problematic is because if the threshold for obtaining complementary protection is set too high, there is a risk that people will be exposed to refoulement, contrary to Australia’s international obligations. This would undermine the very protection that the legislation is intended to ensure.33

1 International law: CAT

In the international law non-refoulement context, the term ‘substantial grounds for believing’ appears in article 3 of CAT. It states that:

No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The UN Committee against Torture’s jurisprudence interprets ‘substantial grounds’ as involving a ‘foreseeable, real and personal risk’ of torture.34 For instance, the threat of torture does not have to be ‘highly probable’35 or ‘highly likely to occur’, but must go ‘beyond mere theory or suspicion’ or ‘a mere possibility of torture’.36 The danger must be ‘personal and

33 As UNHCR noted in its submission to the Senate Committee inquiry into the 2009 Bill, ‘there is no basis for adopting a stricter approach to assessing the risk of ill-treatment in cases of complementary protection than there is for refugee protection because of the similar difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face’: UNHCR, Submission 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 (2009), [34].
present’. Substantial grounds’ may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving country. Furthermore, ‘it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable’. 39

Article 3(2) of CAT requires attention to be paid to ‘all relevant considerations’, including the general human rights situation in the State to which return is contemplated. The Committee has emphasized that it will not allow doubts about the facts of the case to prevent it from ensuring the applicant’s security. To this end, it has repeatedly acknowledged that inconsistencies in applicants’ stories are not material and should not cast doubt on ‘the general veracity of the author’s claims’, because ‘complete accuracy is seldom to be expected by victims of torture’ (especially where they are suffering from post-traumatic stress disorder). The brevity of the Committee’s views in negative decisions provides little further assistance in determining how, and against what standards of authority and corroboration, evidence is tested.

2 Comparative jurisprudence: Europe

Since 2004, complementary protection has been codified in the EU in the Qualification Directive (where it is called ‘subsidiary protection’). Article 2(e) of that Directive provides that the standard of proof for subsidiary protection is that ‘substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin … would face a real risk of suffering serious harm as defined in Article 15.’ Since the language ‘substantial grounds … for believing’ was common to the case law of the

37 2011 Explanatory Memorandum, above n 9, [67]; Report of the Committee against Torture, above n 37, Annex IX, [7].
39 Ibid, [9.6].
43 The Committee often includes a formulaic conclusion that the facts alleged lack ‘the minimum substantiation that would render the communication compatible with article 22 of the Convention against Torture’: see eg X v Switzerland, Communication No 17/1994, UN Doc CAT/C/13/D/17/1994 (17 November 1994), [4.2]; Y v Switzerland, Communication No 18/1994, UN Doc CAT/C/13/D/18/1994 (17 November 1994), [4.2].
44 Amendments to the EU Qualification Directive will be published shortly as part of the next stage of the development of the Common European Asylum System. For the amending text, see Council of the European Union, ‘Note from Presidency to Permanent Representatives Committee (Part II): Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (Recast)’ Doc 12337/1/11 Rev 1 (ASILE 56, CODEC 1133) (6 July 2011).
45 EU Qualification Directive, art 2(e).
46 It is also important to clarify that the ‘belief’ here does not relate to the applicant’s belief (unlike the applicant’s well-founded fear in Convention claims), but rather to the decision-maker’s judgment that substantial grounds (based on objective circumstances, such as analysis of country conditions and human rights standards) exist for believing that the applicant would face serious harm if removed.
European Court of Human Rights,\textsuperscript{47} the Committee against Torture and the Human Rights Committee,\textsuperscript{48} it was incorporated in article 2(e) of the Directive in order to avoid divergence between international and Member State practice.

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

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

Whereas the Committee against Torture considers that the ‘substantial grounds’ test is met by a ‘foreseeable, real and personal risk’—in other words, the focus of the inquiry is whether a ‘real risk’ exists—the Qualification Directive, on a literal reading, requires a foreseeable, real and personal risk of a real risk.

A very recent and clear summary of the European Court of Human Rights’ approach to cases concerning non-return to torture or inhuman or degrading treatment or punishment (pursuant to article 3 of the European Convention on Human Rights (‘ECHR’)) can be found in the decision of \textit{Abdolkhani v Turkey}. It is cited here to demonstrate the process of reasoning that the court goes through in such cases:

72. The Court reiterates at the outset that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see \textit{Üner v. the Netherlands} [GC], no. 46410/99, § 54, ECHR 2006-XII; \textit{Abdulaziz, Cabales and Balkandali v. the United Kingdom}, 28 May 1985, Series A no. 94, § 67; \textit{Boujlifa v. France}, 21 October 1997, § 42, \textit{Reports} 1997-VI). The right to political asylum is not explicitly protected by either the Convention or its Protocols (see \textit{Salah Sheekh v. the Netherlands}, no. 1948/04, § 35, ECHR 2007-I). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the individual concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (see \textit{Saadi v. Italy} [GC], no. 37201/06, § 125, 28 February 2008).

73. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess

\textsuperscript{47} Although the decisions of the European Court of Human Rights are not binding on Australian decision-makers, that court’s long-standing and comprehensive jurisprudence on similar human rights provisions should be regarded as persuasive authority.

the conditions in the receiving country against the standards of Article 3 of the Convention (see Mamakulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see Hilal v. the United Kingdom, no. 45276/99, § 60, ECHR 2001-II).

74. Owing to the absolute character of the right guaranteed by Article 3, the existence of the obligation not to expel is not dependent on whether the risk of ill-treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials. What is relevant in this context is whether an applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her (see Salah Sheekh, cited above, § 147).

75. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe the existence of that practice and his or her membership of the group concerned (see Saadi, cited above, § 132). In such circumstances, the Court would not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection afforded by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, § 148).49

The UK Asylum and Immigration Tribunal has interpreted the ‘real risk’ test as meaning that the risk ‘must be more than a mere possibility’—a standard which ‘may be a relatively low one’.50 This is discussed further below.

3 UK approach: ‘substantial grounds’ test the same standard as ‘well-founded fear’

Significantly, the UK takes the view that the ‘substantial grounds’ test in article 2(e) of the Qualification Directive is intended to replicate the ‘well-founded fear’ standard from the Refugees Convention.51 In Sivakumaran, the House of Lords said that the well-founded fear

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49 Abdolkhani v Turkey, European Court of Human Rights, Application No 30471/08 (22 September 2009), [72]–[75].
50 Kacaj v Secretary of State for the Home Department [2001] INLR 354, [12]. This threshold has also been used in Canada with respect to ‘well-founded fear’ in Convention refugee claims: Ponniah v Canada (Minister of Employment and Immigration) (1991) 13 Imm LR (2d) 241, 245 (FCA).
51 During the drafting of the EU Qualification Directive, Sweden sought to replace ‘substantial grounds’ with ‘well-founded fear’ (as per the original draft article 5(2) of the EU Qualification Directive) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees.
standard implies ‘a reasonable degree of likelihood’, which generally falls somewhere lower than the ‘balance of probabilities’. As the UK Asylum and Immigration Tribunal stated in *Kacaj*:

> The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person’s human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. … Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual’s human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.53

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

> There is nothing in the jurisprudence of the human rights’ Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed, in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to result in inconsistent decisions.54

4 **The North American approach: ‘substantial grounds’ test higher than ‘well-founded fear’**

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

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52 *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, 994 (HL) (Lord Keith); 996 (Lord Bridge, Lord Templeman); 997 (Lord Griffiths); 1000 (Lord Goff).
53 *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [10]. See also *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, [30].
54 *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [15].
55 *Immigration and Refugee Protection Act* (Canada), s 97(1)(a) (emphasis added).
56 This test derives from *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680, 57 DLR (4th) 153 (CA).
where the standard of proof for torture-based claims is ‘more likely than not’, a higher standard than the ‘reasonable possibility’ test in asylum claims.\(^{57}\)

When the Canadian Act came into force, however, the Immigration and Refugee Board’s Legal Services division explained that ‘all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, “reasonable chance or serious possibility”. The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds.\(^{58}\) This approach was initially adopted by decision-makers, until the Federal Court of Appeal ruled conclusively in *Li v Canada (Minister of Citizenship and Immigration)* that a higher standard of proof was to be applied for section 97(1)(b) claims.\(^{59}\) First, the court observed that section 97(1)(a) uses almost identical language to article 3 of CAT, which means that the Committee against Torture’s interpretation of article 3 is highly relevant. Accordingly, the court concluded that the relevant standard was ‘on the balance of probabilities’ or ‘more likely than not’.\(^{60}\) Secondly, the court said that the different nature of claims under section 96 (Convention refugees) compared to section 97(1)(a) (torture cases), such as the issue of nexus, meant that an identical standard of proof was not necessary, even though it recognized that there was ‘no rational sense’ in adopting a higher standard for the latter. Significantly, the court extended this higher threshold to section 97(1)(b) claims (risk to life or to a risk of cruel and unusual treatment or punishment) in the ‘absence of some compelling reason’ to the contrary.\(^{61}\)

It has been suggested that an advantage of this dual threshold approach is that it ‘should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection.’\(^{62}\) While that is important, there is no compelling reason why rigorous interpretation cannot occur even if the same standard of proof is applied. However, it has also been noted that in practice, the higher standard applied to section 97 can work to the advantage of applicants who are found not to be credible, since objective factors, such as country of origin conditions, may trump credibility issues and require that protection be granted.\(^{63}\)

5 Australian jurisprudence: Extradition law

In Australia, ‘substantial grounds for believing’ is the codified standard of proof in section 19(2)(d) of the *Extradition Act 1988* (Cth). That section provides that a

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59 *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1, 2005 FCA 1 (a challenge to the Supreme Court of Canada was ruled out).
60 Ibid, [18]–[28]. Since this was the interpretation which had been given in *Suresh v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 5 (FCA), Justice Rothstein said that Parliament could have enacted a lower test had it desired to depart from that interpretation.
61 *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1, 2005 FCA 1, [38].
62 Reekie and Layden-Stevenson, above n 25, 282.
63 Observations of Justice Carolyn Layden-Stevenson, Research Workshop on Critical Issues in International Refugee Law, York University, Toronto (1–2 May 2008).
person is only eligible for surrender in relation to an extradition offence for
which surrender of the person is sought by the extradition country if ... the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence. (emphasis added)

An ‘extradition objection’ is defined in section 7 to include being

sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country [or, if] the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions ....

Apart from the omission of ‘particular social group’, this provision substantially mirrors article 1A(2) of the Refugees Convention.

In Cabal (No 2), (then) Justice French defined the meaning of ‘substantial grounds for believing’ for the purposes of Australian extradition law:

The term ‘substantial grounds’ is ambulatory. ... The requirement that the grounds for believing there to be an extradition objection should be substantial is evaluative in character. It must be applied having regard to the legislative purpose. In relation to the political objections in s7(b) and s7(c) material which demonstrates a real or substantial risk that the circumstances described in those paragraphs exist or will exist may be sufficient to satisfy the condition in s19(2)(d). The very nature of those objections is such that the evidence relied upon to make them out or to show substantial grounds for believing that they exist may be indirect or circumstantial in character. On the other hand, that which is necessary to demonstrate the other objections in s7 is likely to be fairly clear-cut.64

In Cabal (No 3), Justice French held that:

The onus is upon the applicants and while it does not require that the extradition objection is proven on the balance of probabilities—Cabal (No 2) at 748-749, that onus is not easily discharged. It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offences have been committed.65

In Rahardja v Republic of Indonesia, the Federal Court of Australia held that:

The inquiry [as to what constitutes substantial grounds for believing] is speculative, because it is concerned with future and hypothetical events, ... [counsel for Mr Rahardja] submit, it is inappropriate to apply an inflexible

65 Cabal v United Mexican States (No 3) [2000] FCA 1204, [220] (emphasis added).
standard, such as the balance of probabilities, and a lesser degree of likelihood is sufficient to establish substantial grounds for the extradition objection’… the minimum requirement is that the substantial ground of belief be ‘not trivial’ or merely theoretical… *it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance*…

The court went on to say:

> it is sufficient if the person raising the objection establishes a substantial or real chance of prejudice; it is not necessary to show a probability of prejudice or any particular degree of risk of prejudice.67

### 6 Recommended approach for the RRT on the appropriate standard of proof

The Explanatory Memorandum for the 2011 Bill states that ‘the risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable’,68 which echoes statements by the UN Committee against Torture on the interpretation of article 3 of CAT.69 However, for the reasons stated by the UK Asylum and Immigration Tribunal above, and bearing in mind the protection function of both section 36(2)(a) and section 36(2)(aa), it is recommended that RRT Members follow the UK approach rather than the North American one.70

This approach sits most comfortably with the existing Australian approach to ‘substantial grounds for believing’ in extradition law, which does not require a standard as high as ‘balance of probabilities’ (cf the US and Canada). Rather, ‘it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance.’71 This test echoes the ‘well-founded fear of persecution’ standard of proof applied in Australian refugee law: whether the applicant faces a ‘real chance’ of persecution, ‘regardless of whether it is less or more than fifty per cent.’72 Thus, a single standard of proof based on the ‘well-founded fear of persecution’ standard is appropriate in the Australian context.

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**Further reading**


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66 *Rahardja v Republic of Indonesia* [2000] FCA 1297, [37] (emphasis added).
67 Ibid, [47].
68 2011 Explanatory Memorandum, above n 9, [67].
70 The New Zealand Immigration and Protection Tribunal has noted the different standards of proof in Canada and the UK, but has not yet settled on which approach New Zealand will take: *AC (Syria)* [2011] NZIPT 800035, [126]–[134].
71 *Rahardja v Republic of Indonesia* [2000] FCA 1297, [37].
72 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, [19].
B NECESSARY AND FORESEEABLE CONSEQUENCE

International jurisprudence indicates a strong overlap between the term ‘necessary and foreseeable consequence’ and the meaning of the term ‘real risk’. In fact, the UN Human Rights Committee has never used ‘necessary and foreseeable consequence’ to impose an independent test for non-removal; rather, it has only used it to explain the meaning of ‘real risk’. That using both phrases is tautological was highlighted when the complementary regime was first introduced into Parliament. In the Second Reading Speech to the 2009 Bill, the Parliamentary Secretary stated:

A risk of harm must go beyond mere theory or suspicion to give rise to a non-refoulement obligation. According to the commentary of the United Nations Human Rights Committee, a real risk of harm is one where the harm is a necessary and foreseeable consequence of removal.

Thus, in ARJ v Australia, the Human Rights Committee stated that States parties to the Covenant are prevented from exposing a person to ‘a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant’. The risk of such ill-treatment ‘must be real, i.e. be the necessary and foreseeable consequence of deportation’. In that case, the test was formulated in relation to articles 6 and 7 respectively as follows:

– does the requirement under article 6, paragraph 1, to protect the author’s right to life and Australia’s accession to the Second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of deportation to Iran?

73 In Mutombo v Switzerland, although the Committee against Torture did use both terms to find that the return of a applicant would ‘have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured’, it did not explain the distinction, if any, between the two terms: see Mutombo v Switzerland, Communication No 13/1993, UN Doc CAT/C/12/D/13/1993 (27 April 1994), [9.4].


– do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to Iran?\textsuperscript{77}

The overlapping nature of these tests has already received judicial consideration in Australia. In \textit{obiter}, Tracey J stated:

I do not accept the applicant’s contention that the minister necessarily erred in her construction and application of the treaty obligations to which she had regard. In \textit{Kindler v Canada} (United Nations Human Rights Council, 30 July 1993, Communication No 470/1991, unreported) (Kindler) the United Nations Human Rights Committee (the committee) said that the relevant question under Art 6 of the ICCPR was whether Canada had exposed ‘a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life’ contrary to the ICCPR. The minister approached the matter in this way when she accepted the departmental assessment ‘that country information did not support the view that torture or death would be a “necessary and foreseeable consequence” of the [applicant’s] removal from Australia which is the test for risk set by the United Nations Human Rights Commission’. The applicant’s allegation of error is founded on a more recent formulation of the test by the committee which, it is contended, rephrases the relevant question such that the ‘necessary and foreseeable consequence’ test should not be read as qualifying the test of ‘real risk’. The two tests are set to be cumulative. Reliance was placed on two of the committee’s decisions in 2006 which related to Canada. The committee’s decisions included statements that:

\begin{quote}
States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment …
\end{quote}

— and that:

\begin{quote}
The committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant’s removal] there is a real risk that the [applicant] would be subjected to treatment prohibited by articles 6 and 7 [of the ICCPR].
\end{quote}

Attention was directed to one of the committee’s decisions in 2004 involving Denmark. There it held that the relevant question was whether expulsion would ‘expose [the applicant] to a real and foreseeable risk of being subjected to treatment contrary to Art 7 [of the ICCPR]’. Reliance was also placed on a comparison of the draft and final versions of the committee’s general comment 31. In none of these instances was the \textit{Kindler} formulation criticised or rejected. Nor do the formulations which are relied on lend clear support to the applicant’s contentions that there are two tests to be applied cumulatively. In any event, even if the more recent expressions of the committee’s understanding of the relevant

\textsuperscript{77} Ibid, [6.10].
obligations are to be understood as reflecting a differing view from that previously expressed, it does not follow that the minister has erred by preferring the opinion expressed in cases such as Kindler.\textsuperscript{78}

Tracey J’s discussion of the two terms—‘necessary and foreseeable consequence’ and ‘real risk’—is inconclusive with respect to their interpretation in the complementary protection context. It does, however, highlight the problematic nature of the overlap.

The following section discusses the meaning and significance of the term ‘real risk’.

\section*{C \textbf{REAL RISK}}

The language used in the Explanatory Memorandum reveals that the drafters derived the concept of ‘real risk’ directly from international jurisprudence:

\begin{quote}
The effect of new subsection 36(2B) is to state expressly when there is taken not to be a real risk that a non-citizen will suffer significant harm (and therefore when Australia will not owe a non-refoulement obligation to the non-citizen). Australia’s non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. The purpose of new subsection 36(2B) is to ensure that Australia’s non-refoulement obligations are applied and implemented consistently with international law.\textsuperscript{79}
\end{quote}

The meaning of the term has already been considered above in relation to ‘substantial grounds for believing’, given the interconnectedness of the various elements of the threshold test. As outlined there, the Committee against Torture describes the meaning of ‘substantial grounds’ as involving a ‘foreseeable, real and personal risk’ of torture.

In the UK, a ‘real risk’ ‘must be more than a mere possibility’—a standard which ‘may be a relatively low one’.\textsuperscript{80} In the case of Kacaj, the UK Asylum and Immigration Tribunal stated that the standard of proof was the same as a ‘well-founded fear’ of persecution.\textsuperscript{81} It also held that ‘the words substantial grounds for believing do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They… demonstrate that it is not that of a proof beyond a reasonable doubt.’\textsuperscript{82}

It is helpful to recall that the Australian test for ‘well-founded fear of persecution’ requires the decision-maker to consider whether the applicant faces a ‘real chance’ of persecution. In Chan Yee Kin v Minister for Immigration and Ethnic Affairs, the High Court of Australia held

\begin{quote}
\textsuperscript{78} AB v Minister for Immigration and Citizenship (2007) 96 ALD 53, [29].
\textsuperscript{79} 2011 Explanatory Memorandum, above n 9, [85].
\textsuperscript{80} Kacaj v Secretary of State for the Home Department [2001] INLR 354, [12]. This threshold has also been used in Canada with respect to ‘well-founded fear’ in Convention refugee claims: Ponniah v Canada (Minister of Employment and Immigration) (1991) 13 Imm LR (2d) 241, 245 (FCA).
\textsuperscript{81} See discussion in section II.A.3 above (on substantial grounds); cf North American position, discussed above in section II.A.4.
\textsuperscript{82} Kacaj v Secretary of State for the Home Department [2001] INLR 354, [12]. See also R v Governor of Pentonville Prison ex p Fernandez [1971] 2 All ER 691, 697 (Lord Diplock), who said that the expression ‘real risk’ in relation to a risk of persecution had the same meaning as ‘a reasonable chance’, ‘substantial grounds for thinking’ and ‘a serious possibility’.
\end{quote}
that ‘real’ means a substantial and not a remote chance. It includes a less than 50 per cent chance.83

To succeed in a claim based on article 3 of the ECHR, an applicant must show that there are substantial grounds for believing that he or she would face a real (‘foreseeable’84) risk of being subjected to torture or inhuman or degrading treatment or punishment if removed.85 The risk is to be considered as at the date of the decision-maker’s consideration of the case.86 A mere possibility of harm is insufficient, but it is not necessary to show definitively, or even probably, that ill-treatment will occur. Even a small risk can be significant and ‘real’ where the foreseeable consequences are very serious.87 One commentator has argued that the more the ill-treatment is caused by underlying social and political disorder, such as civil war or terrorism, the higher the minimum level of severity will be assessed.88

As in international law, there are no exceptions to article 3 of the ECHR. This means that there is no scope for balancing a person’s conduct (however abhorrent) against the risk of harm if he or she is returned. This has been affirmed consistently by the European Court of Human Rights,89 such as Saadi v Italy, where it was said:

Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.90

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

84 Soering v United Kingdom (1989) 11 EHRR 439, [100].  
85 See E Lauterpacht and D Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion’ in E Feller, V Türk and F Nicholson (eds), Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection (Cambridge University Press, 2003), [246], [249], [252]. However, it should be recalled that art 3 ECHR also applies to the manner in which an expulsion is carried out: see N Mole, ‘Asylum and the European Convention on Human Rights’, Council of Europe H/Inf (2002) 9, 40–41.  
86 Salah Sheekh v The Netherlands (2007) 45 EHRR 50, [136].  
89 This was established in Chahal v United Kingdom (1996) 23 EHRR 413, [79]–[80] and has been affirmed in a long line of cases.  
90 Saadi v Italy (2008) 24 BHRC 123, [139].
required to show the existence of further special distinguishing features.\footnote{Salah Sheekh v The Netherlands (2007) 45 EHRR 50, [148]. The court tried to disguise that it was reconsidering Vilvarajah v United Kingdom (1991) 14 EHRR 248, but mainly in an attempt to appease the Dutch judiciary: see J-F Durieux, ‘Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection’, Refugee Studies Centre Working Paper Series No 49 (October 2008) 12. This is not extinguished by section 36(2B)(c).} For the same reasons, the RRT should adopt the view that ‘real risk’ in the complementary protection context is based on the term ‘well-founded fear’. It should be interpreted consistently with this jurisprudence.

Further reading


J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 9, 62–64, 68, 80, 143, 150


D CIRCUMSTANCES IN WHICH THERE IS TAKEN NOT TO BE A ‘REAL RISK’: SECTION 36(2B)

Section 36(2B) sets out three situations in which ‘there is taken not to be a real risk that a non-citizen will suffer significant harm’ if removed:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

These limitations on the definition of ‘real risk’ overlap with established notions of refugee law pertaining to the internal relocation and State protection exceptions. To the extent that they are consistent, existing Australian jurisprudence will apply to complementary protection analysis in these respects.

Similar exceptions exist in other jurisdictions. For example, section 97(1)(b) of Canada’s *Immigration and Refugee Protection Act* premises protection from a risk to life or to cruel and unusual treatment or punishment (but not torture) on the following four conditions:
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,\(^92\)
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards,\(^93\) and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.\(^94\)

The exceptions in New Zealand law are very similar to those in Canada. New Zealand’s \textit{Immigration Act 2009} provides that complementary protection will not be granted where the applicant can ‘access meaningful domestic protection in his or her country or countries of nationality or former habitual residence’.\(^95\) In cases involving a risk of arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment (but not torture), protection will not be forthcoming if the harm is ‘inherent in or incidental to lawful sanctions … unless the sanctions are imposed in disregard of accepted international standards’,\(^96\) or if it results from ‘the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality’.\(^97\)

In the EU, the Qualification Directive does not set out a list of exceptions per se to complementary protection. However, article 8 states that consideration of whether an internal relocation alternative is available forms part of the protection assessment itself.\(^98\) A new recital provides that where harm emanates from the State or its agents, ‘there should be a presumption that effective protection is not available to the applicant’, and in cases concerning unaccompanied minors, ‘the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should be part of assessing whether protection is effectively available.’\(^99\)

Article 7 of the Qualification Directive provides that protection is generally available in the country of origin if it is effective and of a non-temporary nature,\(^100\) and the State (or parties or organizations controlling it) takes reasonable steps to prevent the persecution or suffering of serious harm. This is satisfied if the State (or parties controlling it) operates (inter alia) an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

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\(^92\) This is similar to \textit{Migration Act 1958} (Cth), s 36(2B)(c).
\(^93\) This requirement is contained in the definitional provision for each of the complementary protection criteria: \textit{Migration Act 1958} (Cth) s 5(1).
\(^94\) The \textit{Migration Act 1958} (Cth) does not contain this limitation; cf \textit{Immigration Act 2009} (NZ), s 131(5)(b); \textit{D v United Kingdom} (1997) 24 EHRR 423, [49]–[54].
\(^95\) \textit{Immigration Act 2009} (NZ), s 130(2).
\(^96\) Ibid, s 131(5)(a).
\(^97\) Ibid, s 131(5)(b).
\(^98\) The proposed recast version of the EU Qualification Directive provides that such protection will be available if the applicant ‘can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there’: Council of the European Union, above n 44. The recast version also requires Member States to obtain up-to-date information from relevant sources, such as UNHCR.
\(^99\) Council of the European Union, above n 44.
\(^100\) This is a new element of the recast version of art 7: ibid.
Comparative case law on these exceptions may provide useful guidance to the RRT, and some examples are summarized below.

1 Internal relocation alternative (s 36(2B)(a))

The internal relocation alternative already forms part of the RRT’s analysis of refugee claims, and section 36(2B)(a) imports this to the complementary protection context as well. Whether it is ‘reasonable’ for an individual to relocate will depend on the precise circumstances of each case. RRT Members should consider relevant Australian refugee jurisprudence on this issue.101

In particular, RRT Members should consider the High Court’s decisions of SZATV v Minister for Immigration and Citizenship102 and Plaintiff M13/2011 v Minister for Immigration and Citizenship.103 In Plaintiff M13/2011, Hayne J stated:

> Consideration may be given to the possibility of a claimant for protection relocating in the country of origin if relocation is a reasonable (in the sense of practicable) response to the fear of persecution. As three members of this Court pointed out in SZATV v Minister for Immigration and Citizenship, ‘[w]hat is “reasonable”, in the sense of “practicable”, must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality’.

Internal relocation may require more rigorous consideration in the complementary protection context, given the absolute prohibition on return to treatment proscribed by articles 6 and 7 of the Covenant and article 3 of CAT. The question in such cases is not about the reasonableness of the ‘response to fear of persecution’, but rather the reasonableness of a response to a ‘real risk’ of ‘significant harm’, including death.

It is instructive to note the case law of the European Court of Human Rights on this point. In relation to non-removal to torture or inhuman or degrading treatment or punishment under article 3 of the ECHR, the court has stated:

> the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 [ECHR] may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.

More recently, the same court noted the following in relation to article 8 of the EU Qualification Directive (on internal protection):

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102 SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18, 27 (Gummow, Hayne and Crennan JJ). See also 48–49 (Kirby J); 49 (Callinan J).


In the United Kingdom an application for asylum or for subsidiary protection will fail if the decision-maker considers that it would be reasonable—and not unduly harsh—to expect the applicant to relocate. The Court recalls that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision. However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment.106

Canadian courts have also considered internal relocation in the context of complementary protection claims. For example, in Re RCC, the applicant had been subjected to extortion, assault and threats to him and his family by a criminal group. The Immigration and Refugee Board of Canada found that he could have attained sufficient safety in the nation’s capital, Kiev, where his sister lived, which was over 600 kilometres from his hometown. Before travelling to Canada, the applicant had in fact lived in Kiev for one month without difficulty. The Board found that he did not require protection in Canada because in Kiev, the risk to life or of cruel and unusual treatment or punishment did not exist.107

2 Protection from authorities is available (s 36(2B)(b))

This provision is presumably intended to ascertain whether State protection is available where the individual fears harm by non-State actors. In most other jurisdictions, this element is inherent in the assessment of the risk of harm itself.

The State protection principle is an existing part of the RRT’s analysis of refugee claims. Section 36(2B)(b) introduces similar considerations into the complementary protection context. As a result, RRT Members should consider relevant Australian authority including Minister for Immigration and Multicultural Affairs v Khawar108 and Minister for Immigration and Multicultural Affairs v Respondents S152/2003109 when making a determination pursuant to this provision.110

106 Suﬁ and Elmi v United Kingdom, European Court of Human Rights, Application Nos 8319/07 and 11449/07 (28 June 2011), [266] (citations omitted); see also [36].
The UK House of Lords has observed that:

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

 Similar findings have been made in Canada. For example, in Re KFF the applicant had been subjected to a number of robberies and threats in Guyana by people who perceived him to be a wealthy businessman. He was refused protection because effective State protection was found to be available.

3 General risk (s 36(2B)(c))

This provision may be intended to ‘close the floodgates’ for claims in situations of generalized violence. However, it needs to be approached with great caution to ensure that Australia does not violate its international obligations. There is nothing in international refugee or human rights law which precludes States from granting protection to large numbers of people at risk. Protection is not premised on exceptionality of treatment. For example, in assessing whether a practice amounts to ‘torture’, article 3(2) of CAT requires decision-makers to ‘take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ This demonstrates that the existence of widespread violations of human rights may in fact substantiate the existence of torture.

Even so, the Committee against Torture has held that an applicant must still show that he or she is personally at risk. The complementary protection regime in Australia reinforces this by requiring that the ‘real risk’ is related to the particular ‘non-citizen’. This prescription (in section 36(2)(aa)) is reflected in section 36(2B)(c). It provides that there is no real risk unless the applicant faces the risk ‘personally’. The Explanatory Memorandum to the 2011 Bill emphasized this when it prescribed that the relevant danger must be ‘personal and present’.

Submissions to the Senate Committee reviewing the 2009 Bill expressed concern that the provision might be used to exclude women fleeing genital mutilation or domestic violence, despite comments made during the 2009 Second Reading Speech which referred expressly to

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111 Bagdanavicius v Secretary of State for the Home Department [2005] UKHL 38, [24].
113 A similar ‘general risk’ exception was removed from New Zealand’s complementary protection legislation before it was passed on account of its possible inconsistency with international protection obligations. See Human Rights Commission of New Zealand, Submission on the Immigration Bill (2 November 2007), [11.6].
115 2011 Explanatory Memorandum, above n 9, [67].
the role of complementary protection in protecting women from such harm.\footnote{Commonwealth of Australia, \textit{Parliamentary Debates}, House of Representatives, 9 September 2009, 8992 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).} Although the Senate Committee recommended an amendment to the provision to make clear that such women would be covered by complementary protection, it was not altered. Neither female genital mutilation nor domestic violence was mentioned in the 2011 Bill’s Explanatory Memorandum or Second Reading Speech, although express reference was made to protection against ‘honour killing’ and persecution based on sexual preference.\footnote{Commonwealth of Australia, \textit{Parliamentary Debates}, House of Representatives, 24 February 2011, 1356 (Chris Bowen, Minister for Immigration and Citizenship). ‘Honour killings’ were also referred to in Commonwealth of Australia, \textit{Parliamentary Debates}, House of Representatives, 9 September 2009, 8992 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).}

However, as the following discussion demonstrates, this does not mean that the existence of widespread practices of ill-treatment precludes individuals from being recognized as having a complementary protection need.

In the EU, article 15(c) and recital 26 of the EU Qualification Directive cumulatively set a very high threshold for protection in situations of general risk. Article 15(c) extends complementary protection to civilians who face a ‘real risk’ of a ‘serious and individual threat’ to their ‘life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. Recital 26 provides further that: ‘Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.’ There have been many cases about how personal this risk needs to be.\footnote{See EU Qualification Directive, art 15(c), recital 26.} The Court of Justice of the European Union recently clarified that an applicant does not have to ‘adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances’.\footnote{\textit{Elgafaji v Staatssecretaris van Justitie}, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber) 17 February 2009, [45].} Rather, the threshold is met where the indiscriminate violence feared ‘is so serious that it cannot fail to represent a likely and serious threat to that person.’\footnote{Ibid, [42].} In other words, the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.\footnote{Ibid, [37]. See also the approach in AM \& AM (Armed Conflict: Risk Categories) Somalia CG [2008] UKAIT 00091, [110]; \textit{Lukman Hameed Mohamed v Secretary of State for the Home Department}, AA/14710/2006 (unreported, 16 August 2007): ‘It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk’, cited in UNHCR, ‘UNHCR Statement: Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence’ (January 2008), 6. See also European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), ‘The Impact of the EU Qualification Directive on International Protection’ (October 2008), 26–29.}
The European Court of Human Rights has stated that in demonstrating a ‘real risk’ of inhuman or degrading treatment or punishment, an applicant does not have to establish ‘further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk.’

Similarly, the Federal Court of Canada has held that while a claimant must establish a personal and objectively identifiable risk, this ‘does not mean that the risk or risks feared are not shared by other persons who are similarly situated.’

In refugee law cases involving situations of generalized violence, ‘it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.’ Thus, ‘the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.

For a consistent approach, the relevant question under section 36(2A)(c) should be whether the applicant faces a real risk of any of the proscribed forms of harm, irrespective of whether it is individually targeted. Otherwise, there is an additional evidentiary burden for complementary protection that goes beyond what is required under the Refugees Convention.

E LAWFUL SANCTIONS

Section 36(2B) contains three circumstances in which there is taken not to be a ‘real risk’ requiring complementary protection. However, the legislative definitions of ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ provide that acts or omissions ‘arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant’ do not count as these forms of ill-treatment. In other words, there is a ‘lawful sanctions’ exception contained within the definitions of three of the complementary protection criteria. In Canada and New Zealand, this exception is listed separately (ie like the circumstances contained in section 36(2B)).

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123 Salah Sheekh v The Netherlands (2007) 45 EHRR 50, [148].
124 Surajnarain v Canada (Minister of Citizenship and Immigration) [2008] FC 1165, [11]. See also Salibian v Canada (Minister of Citizenship and Immigration) [1990] 3 FC 250, 259; Sinnappu v Canada (Minister of Citizenship and Immigration) [1997] 2 FC 791 (TD), [37]; Prophète v Canada (Minister of Citizenship and Immigration) [2008] FC 331; Prophète v Canada (Minister of Citizenship and Immigration), 2009 FC A 31; Re FXY [2003] RPDD No 81. See also Re WYZ [2003] RPDD No 106 (in relation to a Sri Lankan claimant).
125 Goodwin-Gill and McAdam, above n 105, 129. See the reference there in fn 364 to R v Secretary of State for the Home Department, ex parte Jeyakumaran, No CO/290/84, QBD, (unreported, 28 June 1985).
126 J Hathaway, The Law of Refugee Status (Butterworths, 1991) 97 (citations omitted). The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that a applicant show ‘a pattern or practice … of persecution of a group of persons similarly situated to the applicant’, and his or her ‘own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable’: Immigration and Nationality Act (1952), 8 CFR §208.13(b)(2)(iii)—asylum (emphasis supplied); §208.16(b)(2)—withholding of removal.
127 As UNHCR noted in the context of the EU Qualification Directive, provided that the risk is real, rather than remote, this should be sufficient to establish the individual requirement: UNHCR, above n 122, 6.
128 Immigration and Refugee Protection Act (Canada), s 97(1)(b)(ii); Immigration Protection Act 2009 (NZ), s 131(5)(a).
The inclusion of a lawful sanctions clause derives from article 1 of CAT, and in the legislation it has been transposed to apply to cruel, inhuman or degrading treatment or punishment as well. In international law, the concept was originally meant to apply to disciplinary measures against prisoners that fell below the threshold of corporal punishment, but it has become very controversial in terms of its scope of application.

The former UN Special Rapporteur on Torture, Nigel Rodley, argued that lawful sanctions ‘must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, which is common to almost all penal systems. Deprivation of liberty, however unpleasant, as long as it comports with basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners, is no doubt a lawful sanction.’

‘Lawful sanctions’ are not defined in international law, but may include things like the use of force by police in law enforcement. Examples could include detaining a person to prevent escape, quelling a riot, or stopping a crime from being committed. However, the use of such force must be proportionate (see section V.B below), and must be in accordance with general human rights standards. The mere permissibility of treatment under domestic law ‘cannot be invoked as justification’ under CAT.

In Ng v Canada, the UN Human Rights Committee found that ‘execution by [cyanide] gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to a violation of Article 7’ of the Covenant, even though it was a lawful sanction in the US. In a number of cases in the 1990s, the Human Rights Committee held that death by lethal injection did not breach article 7. However, more recently, the Committee against Torture has stated that States should ensure that execution methods, ‘in particular lethal injection’, do not cause ‘severe pain and suffering’, thus implying that it may constitute cruel, inhuman or degrading treatment. The issue remains to be reconsidered by the Human Rights Committee. This underscores the importance of considering contemporary jurisprudence in complementary protection claims. Since human rights treaties are ‘living instruments’, forms of harm that were once considered not to constitute prohibited ill-treatment may subsequently be found to do so.

The European Court of Human Rights has considered the issue of lawful sanctions in relation to the Covenant’s regional equivalent, the ECHR. In Jabari v Turkey, the court held that expulsion to the penal sanction of stoning in Iran, which was lawful in that country, would not be considered a lawful sanction in Europe. Accordingly, return to it would amount to a breach of the prohibition on torture. The Committee against Torture has also held that death

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130 See ibid, 83, citing UN Doc E/CN.4/1997/7, [8].
134 Concluding Observations on the USA, UN Doc A/61/44 (19 May 2006), [31], in relation to article 16 of CAT on cruel, inhuman or degrading treatment or punishment.
135 Tyrer v United Kingdom, (1979–80) 2 EHR 1, [31]; see also Soering v United Kingdom, (1989) 11 EHRR 439, [102].
136 Jabari v Turkey, European Court of Human Rights, Application No 40035/98 (11 July 2000), [41]–[42].
by stoning would be contrary to CAT, even if it were a sanction provided by law in a country.\textsuperscript{137}

The Australian legislation’s reference to ‘lawful sanctions that are not inconsistent with the Articles of the Covenant’ makes clear that they must be assessed against international human rights law standards.\textsuperscript{138}

Given the lack of uniformity in States’ views on the meaning of lawful sanctions, however, Nowak and Steiner conclude that ‘the lawful sanctions clause has no scope of application and must simply be ignored.’\textsuperscript{139}

**Case examples**

There has been considerable discussion in the jurisprudence of the UN Committee against Torture and the UN Human Rights Committee as to whether the death penalty constitutes a lawful sanction. Given that section 36(2A)(b) contains a prohibition on return to the death penalty, this issue is not examined here.\textsuperscript{140}

The other key area discussed in the lawful sanctions jurisprudence is corporal punishment. The Human Rights Committee has held that ‘corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure’, is a violation of article 7 of the Covenant.\textsuperscript{141} This is the case no matter how brutal the crime it seeks to punish.\textsuperscript{142} The Committee against Torture adopts this approach as well.\textsuperscript{143}

The UN Committee on the Rights of the Child has also stressed that ‘[t]here is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.’\textsuperscript{144}

Corporal punishment is discussed further below in section III.G.2.(b).

**Further reading**

GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford

\textsuperscript{137} AS v Sweden, Communication No 149/1999, UN Doc CAT/C/25/D/149/1999 (15 February 2001), [8.6]–[9].

\textsuperscript{138} In NZ law, this is made clear in relation to cruel, inhuman or degrading treatment or punishment claims: *Immigration Act 2009* (NZ), s 131.

\textsuperscript{139} Nowak and Steiner, above n 129, 84.

\textsuperscript{140} However, for a clear analysis of the jurisprudence that has developed in both Committees, see *Torture in International Law: A Guide to Jurisprudence* (Association for the Prevention of Torture and the Center for Justice and International Law, 2008), 32–36, [http://cejil.org/sites/default/files/torture_in_international_law.pdf](http://cejil.org/sites/default/files/torture_in_international_law.pdf).

\textsuperscript{141} UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [5].

\textsuperscript{142} Osbourne v Jamaica Communication No 759/1997, UN Doc CCPR/C/68/D/759/1997 (13 April 2001), [9.1].

\textsuperscript{143} *Concluding Observations on Saudi Arabia*, UN Doc CAT/C/CR/28/5, 2002, [8(b)].

\textsuperscript{144} UN Committee on the Rights of the Child, ‘General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19; 28, para 2; and 37, inter alia)’, UN Doc CRC/C/GC/8 (2 March 2007), [18].
J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 8, 58 (internal relocation); 9, 13, 21, 26, 34, 41–47, 65, 70–78, 80, 108, 113, 174, 210 (general threat)

III THE CRITERIA FOR COMPLEMENTARY PROTECTION

The criteria on which complementary protection can be granted are listed in section 36(2A) of the Migration Act:

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

The ill-treatment (‘significant harm’) in each of these paragraphs must qualitatively attain a ‘minimum level of severity’, the assessment of which is relative and ‘depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim’.

Each of the criteria for complementary protection is discussed in turn below.

A ARBITRARILY DEPRIVED OF HIS OR HER LIFE

This provision is based on Australia’s obligations under article 6 of the Covenant, which requires the State to take all reasonable measures to safeguard the right to life. It is paralleled by article 2 of the ECHR, section 97(1)(b) of the Canadian Immigration and Refugee Protection Act, and section 131 of New Zealand’s Immigration Act 2009.

The State’s obligation to protect people from ‘arbitrary deprivation of life’ means that it must itself refrain from killing people, and also that it must exercise due diligence in preventing people from being killed by other actors. Furthermore, protection of the right to life requires that States ‘adopt positive measures’, as a matter of law and practice, such as measures ‘to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics’.

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146 Soering v United Kingdom (1989) 11 EHRR 439, [100], [104]. See also Ireland v United Kingdom (1979–80) 2 EHRR 25, [162], [167], [174]; Tyrer v United Kingdom (1979–80) 2 EHRR 1, [29], [80].

147 For discussion of the application of art 2 ECHR in non-removal cases, see McAdam, above n 2, 147–49.

148 Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General’, UN Doc A/61/311 (5 September 2006), [37].

149 UN Human Rights Committee, ‘General Comment No 6: The Right to Life (Art 6)’ (30 April 1982).
The term ‘arbitrarily’ is intended to reflect that the protection of life covers more than just intentional killings.\textsuperscript{150} Furthermore, it means that deprivation of life can only be justified by reference to pre-existing law, which must in turn conform to international standards reflected in human rights instruments, such as the Covenant.\textsuperscript{151}

In other contexts, international bodies have made numerous statements as to what constitutes ‘arbitrary’ conduct. In \textit{C v Australia}, the UN Human Rights Committee held that mandatory detention of asylum seekers in Australia constituted ‘arbitrary’ treatment, because its duration ‘continued beyond the period for which the State party can provide appropriate justification’.\textsuperscript{152} The Committee also found that the lack of a chance of substantive judicial review of such detention amounted to arbitrary conduct.\textsuperscript{153}

There have been only a few individual communications to the UN Human Rights Committee relating to arbitrary deprivation of life.\textsuperscript{154} In \textit{Suárez de Guerrero}, the Committee found a violation because the killing was intentional, without warning, and ‘disproportionate to the requirements of law enforcement’.\textsuperscript{155} Most of these cases have concerned killings, allegedly by government authorities.

The right to life is very closely connected to other human rights. The right to an adequate standard of living under human rights law, including adequate food, clothing, housing and the continuous improvement of living conditions,\textsuperscript{156} and the right not to be deprived of means of subsistence.\textsuperscript{157} The UN Commission on Human Rights has observed that the right to life ‘encompasses existence in human dignity with the minimum necessities of life’,\textsuperscript{158} and the UN Human Rights Committee has acknowledged that article 6 has a socio-economic component.\textsuperscript{159}

The UN Convention on the Rights of the Child links the right to life to the State’s duty ‘to ensure to the maximum extent possible the survival and development of the child’.\textsuperscript{160} The Committee on the Rights of the Child has explained the need to view and implement the right to life holistically, ‘through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment’.\textsuperscript{161}

\textsuperscript{152} \textit{C v Australia}, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (13 November 2002), [8.2].
\textsuperscript{153} Ibid.
\textsuperscript{154} See Nowak, above n 150, 129–31.
\textsuperscript{155} \textit{Suárez de Guerrero v Columbia}, 45/1979, [13.2]–[13.3], cited in ibid, 129.
\textsuperscript{156} International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’), art 11
\textsuperscript{157} Covenant, art 1(2); ICESCR, art 1(2). See eg F Menghistu, ‘The Satisfaction of Survival Requirements’ in Ramcharan, above n 151, 63.
\textsuperscript{159} UN Human Rights Committee, ‘General Comment No 6: The Right to Life (Art 6)’ (30 April 1982).
\textsuperscript{160} CROC, art 6(2).
In the Canadian case of *Re MQF*, for example, the Immigration and Refugee Board of Canada found that a nine year old child had a protection need on the basis of risk to life. The Board held that if the child were returned to Haiti, his life would be at risk because his biological family was unknown, and he would be at risk of becoming a street child who would be homeless and prey to prostitution.\(^{162}\)

An analysis of the views expressed by the UN Human Rights Committee in relation to individual complaints suggest that the following criteria apply to article 6 cases:

- the risk to life must be actual or imminent;
- the applicant must be personally affected by the harm;
- environmental contamination with proven long-term health effects may be a sufficient threat, however there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment;
- a hypothetical risk is insufficient to constitute a violation of the right to life; and
- cases challenging public policy will, in the absence of an actual or imminent threat, be considered inadmissible.\(^{163}\)

The Committee has also stated that article 6 of the Covenant requires States to minimize war and armed conflict.\(^{164}\) For case law discussing protection from armed conflict, and the requisite degree of risk of individual harm, see section II.D.3.

The right not to be arbitrarily deprived of life is also contained in section 9 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): ‘Every person has the right to life and has the right not to be arbitrarily deprived of life’. Although this provision is yet to be judicially considered, the Victorian Department of Justice has provided extensive guidance on its legal meaning.\(^{165}\) It defines ‘arbitrary’ in this context as being ‘based on a decision unrelated to any test laid down by law or recognised at law.’\(^{166}\) It notes that ‘the right to life not only imposes a negative duty on states [ie, a duty not to kill, but it] also give[s] rise to a positive obligation on a state’ to take actions and decisions which sustain life. As examples, the Department cites the withdrawal of medical treatment and use of extreme force by enforcement officers as acts which might breach the right to life, and the delivery of medical resources as life-sustaining activities that fulfil the obligation imposed by the right to life. It is foreseeable that such issues may give rise to claims of complementary protection under the *Migration Act*.\(^{167}\)

\(^{162}\) *Re MQF* [2004] RPDD No 87. Similarly, in the United Kingdom, the Asylum and Immigration Tribunal (‘AIT’) has acknowledged that ‘if survival comes at a cost of destitution, begging, crime or prostitution, then that is a price too high’: *FB (Lone Women—PSG—Internal Relocation—AA (Uganda) Considered) Sierra Leone* [2008] UKAIT 00090, [39].


\(^{166}\) Ibid, 60.

\(^{167}\) In relation to medical treatment, see *D v United Kingdom* (1997) 24 EHRR 423, *N v United Kingdom*, European Court of Human Rights, Application No 16565/05 (27 May 2008) and accompanying discussion in section III.F.4 below.
In Europe, case law on ‘arbitrary deprivation of life’ has focused on issues relating to medical treatment, law enforcement and actions by police in the domestic context. With regard to medical treatment, the European Court of Human Rights has recognized that ‘a public authority may be in breach of the right to life if it has undertaken to provide a particular form of treatment generally and has limited treatment on an arbitrary or discriminatory basis, putting an individual’s life at risk.’

Although the European Court of Human Rights has confirmed that article 2 (protection of the right to life) may be relied upon to prevent removal, no removal case has succeeded solely on this ground. Typically, the analysis of such issues tends to be subsumed in consideration of claims based on article 3 of the ECHR (relating to torture or inhuman or degrading treatment). If a finding is made under article 3, then the article 2 claim is not generally considered.

‘Honour killings’, referred to in the 2009 and 2011 Second Reading Speeches as covered by complementary protection grounds, may fall within the arbitrary deprivation of life category.

**Case examples**

See S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, Oxford University Press, 2004) [8.02]–[8.64] for article 6 cases concerning the following rights:

- Right not to be killed by the State
- Capital punishment
- Positive right to life

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168 A two-stage test has been laid out by the European Court of Human Rights with respect to the actions of law enforcement officers and the prohibition on the ‘deprivation of life’. This test, although clear, would be very difficult to apply prospectively, as would be required for a complementary protection claim based on this prohibition. In *Osman v United Kingdom* (1998) 29 EHRR 245, [11.6], the court held that, for a successful claim under this provision, ‘it must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’

169 Department of Justice, Government of Victoria, above n 165, 61. See *Nițecki v Poland*, European Court of Human Rights, Application No 65653/01 (Grand Chamber, 21 March 2002); *Pentiacova v Moldova*, European Court of Human Rights, Application No 14462/03 (4 January 2005). See also *R (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392.

170 For example in *Z and T v United Kingdom* (2005) 31 EHRR 505; *Soering v United Kingdom* (1989) 11 EHRR 439 ‘applies equally to the risk of violations of [article] 2’. See also *R v Special Adjudicator (Respondent), ex parte Ullah [2004] UKHL 26, [40] (Lord Steyn): ‘If article 3 may be engaged it is difficult to follow why, as a matter of logic, article 2 could be peremptorily excluded. There may well be cases where article 3 is not applicable but article 2 may be’.

171 A breach of art 2 ECHR has only been found in one removal case, and on that occasion it was in conjunction with art 3: *Bader v Sweden*, European Court of Human Rights, Application No 13284/04 (8 November 2005).

Women and the right to life
- Participation in war
- Nuclear capability
- Abortion
- Euthanasia

**Further reading**


**B DEATH PENALTY WILL BE CARRIED OUT**

1 International jurisprudence

Section 36(2A)(b) is based on Australia’s obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (‘Optional Protocol’), and the UN Human Rights Committee’s progressive development of article 6(1) of the Covenant (which precludes States that have abolished the death penalty from returning a person to face it). Australia has also concluded many bilateral treaties prohibiting extradition to the death penalty. Jurisprudence from Australia relating to these agreements is therefore pertinent.

The prohibition on the death penalty under the Optional Protocol is absolute. The additional requirement in section 36(2A)(b) of the *Migration Act*—that the death penalty not only be imposed but also carried out—is without precedent in other complementary protection regimes, and is at odds with the general prohibition on return to the death penalty that has

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174 In *Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (5 August 2003), [10.4], the Human Rights Committee relevantly stated that a State that has abolished the death penalty ‘may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out’.

175 For examples of such a provision in an Australian bilateral treaty, see Treaty between Australia and the Federal Republic of Germany concerning Extradition, art 8; Treaty on Extradition between Australia and the Federative Republic of Brazil, art 4; Treaty between Australia and Finland concerning Extradition, art 6; Treaty between Australia and the Republic of Indonesia, art 7.


177 Although this appears to contrast with the qualified prohibition in article 6 of the Covenant, that must now be read in light of *Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (5 August 2003) (see above n 174).
been developed in international and comparative law.\textsuperscript{178} Presumably, its purpose is to permit return to States that may impose but never carry out the death penalty. For example, many States have a long-standing moratorium on the death penalty,\textsuperscript{179} others leave open the possibility of late pardons and others still permit the payment of ‘blood money’ to have a death sentence commuted.\textsuperscript{180} The more common method for dealing with this contingency is the use of ‘diplomatic assurances’ that such a penalty will not, in fact, be carried out.

In light of the unprecedented qualification on this prohibition of return to the death penalty, namely that ‘it will be carried out’, it will be for the RRT to define the limits of this provision. In so doing, international practice on the death penalty, moratoria and pardons will need to be considered, as will the legal value of case-specific diplomatic assurances where these are, in fact, given.

It is also useful in this context to consider the UN Human Rights Committee’s interpretation of article 6 of the Covenant more generally. While the UN seeks the elimination of the death penalty altogether, article 6 stipulates that where it is used, it must be only for ‘the most serious crimes’ where the punishment has been ordered ‘in accordance with the law in force at the time of the commission of the crime’. It must only result from ‘a final judgment rendered by a competent court’.\textsuperscript{181}

2 Comparative jurisprudence

Section 36(2B)(b) is mirrored in the complementary protection regimes of the EU and Canada.\textsuperscript{182} The jurisprudence that has developed in relation to these provisions may provide useful guidance to the RRT.

Domestic courts in Europe have recognized the possible infringement of a person’s right to life as a justification for refusing to extradite that person. For example, the Supreme Court of the Netherlands refused to extradite an American staff sergeant on capital charges on the basis that the Netherlands was a party to Protocol No 6 of the ECHR, which prohibits the death penalty for peacetime offences.\textsuperscript{183} The Italian Constitutional Court has held that the prohibition on the death penalty in the Italian Constitution is absolute and precludes extradition for a capital offence, regardless of assurances given by the requesting State that the death penalty will not be carried out.\textsuperscript{184}


\textsuperscript{180} See eg \textit{Concluding Observations on Yemen}, UN Doc A/57/40 vol I (30 October 2002), [83(15)].


\textsuperscript{182} EU Qualification Directive, art 15(a); \textit{Immigration and Refugee Protection Act} (Canada), s 97(1)(b).

\textsuperscript{183} \textit{Short v Kingdom of the Netherlands}, HR 30 March 1990 (The Netherlands), excerpted at (1990) 29 \textit{International Law Materials} 1375.

3 Case examples: European Court of Human Rights

GB v Bulgaria (2004)

The applicant was detained pending a moratorium on executions. He claimed that the fear resulting from the possible resumption of executions amounted to a violation of the ECHR. The European Court of Human Rights rejected this claim in light of information that the death penalty was going to be abolished and that there were safeguards in place in the intervening period. Moreover, the court held that the applicant’s treatment was not, as he claimed, akin to the ‘death row phenomenon’ (which has been found to be a violation of article 3 of the ECHR),185 That said, the court found a breach of the prohibition on inhuman treatment because of the conditions of detention as they affected the applicant.186

Bader and Kanbor v Sweden (2005)

The applicant was sentenced to death in absentia by a Syrian court after a hearing in which all evidence was submitted by the prosecution and where the applicant was not represented. The European Court of Human Rights found that the applicant had a well-founded fear that he would indeed be executed if deported by Sweden back to Syria. Further, since executions took place without any public scrutiny or accountability and under uncertain circumstances, the court found that the applicant would be caused considerable fear and anguish. In addition, the summary nature of the judgment against him and the disregard for his hearing rights amounted to an unfair trial. The court held that his expulsion to that treatment was prohibited by articles 2 and 3 of the ECHR.187

For examples from the UN Committee on Human Rights, see:


4 Death row phenomenon188

Courts have considered the ‘death row phenomenon’ on numerous occasions. This describes a situation of prolonged detention pending the imposition of the death penalty. In most cases, the UN Human Rights Committee has held that a long delay on death row does not ordinarily violate the Covenant. However, where special circumstances exist, the Committee has been willing to find that the delay amounts to a breach of article 7. This has been found in cases

186 *GB v Bulgaria*, European Court of Human Rights, Application No 42346/98 (11 March 2004), [75]–[88].
187 *Bader and Kanbor v Sweden*, European Court of Human Rights, Application No 13284/04 (8 November 2005), [44]–[48]. The language of ‘well-founded fear’ was used here: [46].
188 See additional discussion at section III.F.(v).
involving a minor detained on death row;\textsuperscript{189} where a warrant was issued for the execution of a person suffering from mental illness;\textsuperscript{190} where a prisoner was returned to death row after having been told that his sentence had been commuted;\textsuperscript{191} and where detention in a death cell awaiting execution was unreasonably prolonged.\textsuperscript{192}

The UN Committee against Torture has not yet considered a matter involving the ‘death row phenomenon’, but it has implied that certain circumstances surrounding execution may violate article 16 of CAT (on cruel, inhuman or degrading treatment or punishment).\textsuperscript{193} The Committee has also stated that overcrowding on death row could constitute cruel, inhuman or degrading punishment.\textsuperscript{194}

The first case in which the European Court of Human Rights recognized an implied non-refoulement obligation under article 3 of the ECHR was one involving the death row phenomenon. In \textit{Soering v United Kingdom},\textsuperscript{195} the court concluded that:

having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.\textsuperscript{196}

The applicant was eventually extradited on the basis of diplomatic assurances from US authorities that he would not be subjected to the death penalty if found guilty.

The Inter-American Court of Human Rights has found that the mental anguish of awaiting execution without advance notice of when it will occur amounts to a violation of the prohibition on cruel, inhuman and degrading treatment.\textsuperscript{197}

Thus, while exposure to the ‘death row phenomenon’ may not be sufficient to found a claim under section 36(2A)(b), there is considerable authority to suggest that it may justify the complementary protection criteria under section 36(2A)(c), (d) or (e).

\textsuperscript{190} \textit{RS v Trinidad and Tobago}, Communication No 684/1996, UN Doc CCPR/C/61/D/684/1996 (4 November 1997).
\textsuperscript{193} This suggestion was made in response to an allegation that the State party would not execute a pregnant woman until two months after she had given birth: ‘Summary Record of the 381st Meeting: Italy, Libyan Arab Jamahiriya’, UN Doc CAT/C/SR.381 (11 May 1999), [38].
\textsuperscript{194} \textit{Concluding Observations on Zambia}, UN Doc CAT/C/ZMB/CO/2 (26 May 2008), [19].
\textsuperscript{195} \textit{Soering v United Kingdom} (1989) 11 EHRR 439, [91].
\textsuperscript{196} Ibid, [111].
\textsuperscript{197} \textit{Hilaire v Trinidad and Tobago}, Series C No 94 [2002] IACHR 4 (21 June 2002), [167].
Further reading


C TYPES OF TREATMENT OR PUNISHMENT

The Australian legislation separates out the following forms of treatment—‘torture’ (section 36(2A)(c)), ‘cruel or inhuman treatment or punishment’ (section 36(2A)(d)), and ‘degrading treatment or punishment’ (section 36(2A)(e)). This suggests that they must be considered separately, and that RRT Members will need to precisely determine what kind of significant harm will be suffered and why.

By contrast, the standard approach internationally—and in other Australian federal legislation (eg the Criminal Code, section 268)—is to regard these forms of harm as part of a sliding scale, or hierarchy, of ill-treatment, with torture the most severe manifestation. In other words, the distinction is one of degree. Courts and tribunals are therefore generally content to find that a violation falls somewhere within the range of proscribed harms, without needing to determine precisely which it is. Indeed, the UN Human Rights Committee considers it undesirable ‘to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’. For that reason, ‘and as no legal consequences derive from the precise qualification of a particular practice’, the Human Rights Committee commonly fails to determine precisely which aspect of article 7 of the Covenant has been violated, and there is accordingly very little jurisprudence from that body about the nature of each type of harm. Decisions of this Committee should therefore be read in this light. Similarly, the UN Committee against Torture has not made a clear distinction between ‘torture’ and the other forms of ill-treatment, suggesting that the severity of pain and suffering is ‘not a decisive criterion distinguishing torture from inhuman treatment.’

Although the European Court of Human Rights tends to examine the distinctions between these forms of harm more carefully, it mainly does so in order to distinguish ‘torture’ from the other types of significant harm. This distinction ordinarily turns on the basis of ‘the intensity of the suffering inflicted’. Furthermore, both the Human Rights Committee and the European Court of Human Rights have explained that these terms cannot be defined, especially since their meaning will evolve over time.

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199 UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [4].
200 Nowak, above n 150, 72.
201 Nowak and Steiner, above n 129, 57.
202 Ireland v United Kingdom (1979–80) 2 EHRR 25, [167]. See discussion of the slightly different approaches between the European and international jurisprudence on singling out ‘torture’ from the other forms of ill-treatment in Nowak and Steiner, above n 129, 67–73.
203 Ireland v United Kingdom (1979–80) 2 EHRR 25, [166]. See discussion of the slightly different approaches between the European and international jurisprudence on singling out ‘torture’ from the other forms of ill-treatment in Nowak and Steiner, above n 129, 67–73.
204 Selmioui v France (1999) 29 EHRR 403, [101]; UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [4].
The approach in the Australian *Migration Act* imposes a higher level of scrutiny than is required under international human rights law and comparative complementary protection schemes. It risks shifting the focus of the inquiry away from recognition that the treatment is inhuman or degrading, and thus gives rise to a protection obligation, to a technical justification of which form of harm it is, arguably increasing the level of complexity in decision-making and reducing efficiency. RRT Members should be aware of this so that the focus remains on the human rights protection intended to be afforded, rather than technicalities.

Indeed, as Elias CJ in the New Zealand Supreme Court stated, ‘[i]t seems to me unduly refined to conduct three distinct inquiries in applying the phrase’, 205 or to spend time ‘dwelling on precise classification of treatment as cruel or degrading’. 206 She instead preferred to regard the concept of ‘cruel, inhuman or degrading treatment or punishment’ as the ‘compendious expression of a norm’, 207 ‘proscribing any treatment that is incompatible with humanity’. 208 She concluded: ‘In most cases treatment which is incompatible with the dignity and worth of the human person will be all three. And, even if separately classified, I think they are properly regarded as equally serious.’ 209

Finally, it should be noted that foreign judicial bodies have often found it unnecessary to distinguish between ‘treatment’ and ‘punishment’, since punishment generally involves treatment. 210 If the RRT follows this approach, it will be unnecessary to determine whether the prospective harm constitutes ‘treatment’ or ‘punishment’.

Importantly, an assessment of the severity of harm includes a subjective element. Thus, where the actor inflicting harm is aware that the victim is particularly sensitive, it is possible that acts which would not otherwise amount to torture or cruel, inhuman or degrading treatment or punishment could do so. 211 This is discussed in more detail in section V.A below.

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208 Ibid.
D INTENTION AND PURPOSE REQUIREMENTS

The Migration Act contains an ‘intent’ requirement for the elements of torture, cruel or inhuman treatment or punishment, and degrading treatment or punishment.

Whereas the definition of ‘torture’ in article 1 of CAT requires an act to be ‘intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind’, evidence of intent is not generally considered to be a requirement of the other ill-treatment grounds in international or comparative jurisprudence. Many commentators take the view that recklessness is encompassed by the torture definition, but negligence is not.

By contrast, in cases concerning cruel, inhuman or degrading treatment or punishment, intention may be relevant in some cases to bolstering the ill-treatment claim, but it is not a formal component of establishing that ill-treatment under international law. Thus, international and comparative jurisprudence consistently focuses on the nature of the alleged violation on the individual concerned, rather than the intention of the perpetrator. This is different from the Australian position, which requires intent to be shown (see further below).

Indeed, in international and comparative case law, an absence of intent may distinguish ‘torture’ from ‘cruel, inhuman or degrading treatment or punishment’, which can be satisfied by mere negligence. The UN General Assembly and, in turn, the European Court of Human Rights have both distinguish ‘torture’ from the other forms of inhuman treatment on this ground: it is ‘an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment’. In Ireland v United Kingdom, the court stated that the distinction between ‘torture’ and ‘inhuman treatment’ was that to torture attaches ‘a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’. The New Zealand Supreme Court has affirmed that there is no intent requirement for cruel, inhuman or degrading treatment or punishment. It requires an objective assessment.

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212 In art 1 CAT, the intention ‘must be directed at the conduct of inflicting severe pain or suffering as well as at the purpose to be achieved by such conduct’: Nowak and Steiner, above n 129, 74.
213 This argument is also made strongly in M Foster and J Pobjoy, Submission 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 (2009), 20.
214 Although there is an indication that at least one member of the UN Committee against Torture would accept negligence as falling within the scope of the definition: see Discussion of Denmark in UN Committee against Torture, ‘Summary Record of the 757th meeting’, UN Doc CAT/C/SR.757 (8 May 2007), [35], referred to in Association for the Prevention of Torture and the Center for Justice and International Law, above n 140, 12.
215 In Peers v Greece (2001) 33 EHRR 1192, [74] the European Court of Human Rights said that there does not need to be any intention to humiliate. The court was relying on V v United Kingdom, European Court of Human Rights, Application No 24888/94 (16 December 1999), [71].
216 Nowak, above n 150, 161.
217 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 3452(XXX), UN GAOR, 30th sess, 2433rd plenary mtg, UN Doc A/10034 (9 December 1975); cited also in Ireland v United Kingdom (1979–80) 2 EHRR 25, [167].
219 Taumoana v Attorney-General [2008] 1 NZLR 429, [64], [69] (Elias CJ); [171] (Blanchard J).
Similarly, mistreatment that occurs without a purpose may also distinguish ‘torture’ from the other forms of ill-treatment. This is reflected in the *Migration Act*, since only ‘torture’ has a purpose requirement.

However, the *Migration Act* includes an intent requirement not only for ‘torture’, but also for ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’. It is expressed differently in each of the three criteria. In the case of ‘torture’ and ‘cruel or inhuman treatment or punishment’, the requirement is that the act or omission constituting significant harm is ‘intentionally inflicted’. As explained above, this imposes a requirement that is not present in international and comparative jurisprudence, and which, in fact, constitutes a key distinction between torture and other forms of harm. This suggests that mere negligence will not suffice to substantiate a complementary protection claim in Australia, although a deliberate omission (eg withholding food or water) will. Perhaps the intention is to exclude claims based on general poverty or lack of resources which do not result from any ill-intent on the part of the State.

By contrast, the intent requirement for ‘degrading treatment or punishment’ is an intention to cause ‘extreme humiliation which is unreasonable’. Demonstrating the intention of an unrepresented actor in a future act of ill-treatment in a legal proceeding is inherently difficult. In the context of a complementary protection claim, the evidence of intention will be circumstantial and almost certainly based on imputation. As such, the intention requirement should be liberally applied and implied into the act of which the applicant is at ‘real risk’.

This approach is consistent with European practice. In *Aksoy v Turkey*, for example, the European Court of Human Rights found that ill-treatment was inflicted intentionally where the applicant was suspended by his arms, which were tied together behind his back. The court held that such treatment could only have been ‘deliberately inflicted’, as it would have required ‘a certain amount of preparation and exertion’ and was performed with the aim of eliciting admissions from the applicant. However, the court does not demand that an intention to humiliate be demonstrated before a breach of article 3 of the ECHR can be substantiated. In *Labita v Italy*, the court stated: ‘The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account … but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.’

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220 Nowak, above n 150, 161.
221 *Aksoy v Turkey*, European Court of Human Rights, Application No 21987/93 (18 December 1996), [64].
222 See eg *Peers v Greece* (2001) 33 EHRR 1192, [74]; *Alver v Estonia*, European Court of Human Rights, Application No 64812/01 (8 November 2005); *Novoselov v Russia*, European Court of Human Rights, Application No 66460/01 (2 June 2005).
223 *Labita v Italy*, European Court of Human Rights, Application No 26772/95 (6 April 2000), [120] (emphasis added).
E  TORTURE

**Note:** In interpreting this section, RRT Members are reminded to consult the relevant sections of this Manual on intent requirements, the distinction between ‘treatment’ and ‘punishment’, and the general considerations that need to be taken into account. In terms of the elements of the definition of ‘torture’, there is very little case law on ‘act or omission’. The meaning of ‘severe pain or suffering’ is discussed in relation to each of the complementary protection criteria, as well as in section III.C (Types of Treatment or Punishment). The meaning of ‘intentionally inflicted’ and ‘purpose’ are discussed in section III.D (Intention and Purpose Requirements). Lawful sanctions are examined in section II.E (Lawful sanctions).

Section 5(1) of the *Migration Act* defines ‘torture’. It provides that:

*torture* means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

(a) for the purpose of obtaining from the person or from a third person information or a confession; or

(b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or

(c) for the purpose of intimidating or coercing the person or a third person; or

(d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or

(e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

The Explanatory Memorandum for the 2011 Bill provides some useful guidance as to the intention of Parliament in relation to the interpretation of ‘torture’, which ‘is exhaustively defined’ in the Act.\(^{224}\) It ‘derives from *non-refoulement* obligations which are contained in Article 3 of the CAT and implied under Articles 2 and 7 of the Covenant.’\(^{225}\)

The purpose of stating expressly what *torture* does not include, is to confine the meaning of *torture* to the meaning expressed in international expert commentary (for example, commentary by relevant international human rights treaty bodies) on the meaning of that term as defined by this item. As for items 2 and 3, this definition covers acts or omissions which, when carried out, would violate Article 7 of the Covenant. For the purposes of this definition, the

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\(^{224}\) 2011 Explanatory Memorandum, above n 9, [48].

\(^{225}\) Ibid, [51].
act or omission is not limited to one that is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity as is required under Article 1(1) of the CAT. Torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity. In choosing to adopt a definition that is broader than the definition outlined in Article 1(1) of the CAT, Australia is mindful that Article 1(2) of the CAT enables States Parties to adopt national legislation that contains provisions of wider application than the CAT definition. 226

The definition of ‘torture’ in the Migration Act is thus based on article 1 of CAT, but in line with the broader international human rights jurisprudence, it does not limit acts of torture to those committed in an official capacity. It therefore differs from the definition of torture in article 1 of CAT,227 as well as the definition applied in Australian extradition law cases relating to torture (see below) and Canadian torture-based claims pursuant to section 97(1)(a) of Canada’s Immigration and Refugee Protection Act 2001.228 RRT Members therefore need to be alert to this distinction when considering jurisprudence relating to these provisions. The reason for this difference is because under article 7 of the Covenant, there is no public official requirement for torture. As the UN Human Rights Committee has stated, the aim of article 7 of the Covenant is ‘to protect both the dignity and the physical and mental integrity of the individual from acts prohibited by that provision, ‘whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.’229

Under Australian law, it must also be shown that the act of torture is committed for one of the enumerated purposes in section 5(1). By contrast, under article 1 of CAT, the purposes are not fixed: the term ‘for such purposes as’ is used. Paragraphs (d) and (e) of the Australian definition provide scope for including acts or omissions ‘related to a purpose mentioned in paragraph (a), (b) or (c)’, or harm inflicted ‘for any reason based on discrimination that is inconsistent with the Articles of the Covenant’.

It is important to note that the Explanatory Memorandum makes clear that the Australian legislation should be interpreted in line with ‘the meaning expressed in international expert commentary (for example, commentary by relevant international human rights treaty bodies).’230 Therefore, like the intent requirement, the purpose requirement should be liberally interpreted. Decisions by the International Criminal Tribunal for Rwanda231 and the

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226 Ibid, [52].
227 Despite the public official requirement in CAT, the Committee against Torture held in Elmi v Australia, Communication No 120/1998, UN Doc CAT/C/22/D/120/1998 (14 May 1999), [9.6] that Somali factions exercising de facto powers comparable to those exercised by a legitimate government could be regarded as ‘persons acting in an official capacity’ for the sake of assessing whether an act prohibited by CAT had taken place. The fact that such an act takes place in a State with a failed central government is pertinent to such an assessment under CAT: GRB v Sweden, Communication No 83/1997, UN Doc CAT/C/20/D/083/1997 (15 May 1998), [2.3].
228 See generally Immigration and Refugee Board of Canada, above n 58, 23–24.
229 UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [2].
230 2011 Explanatory Memorandum, above n 9, [52].
231 Prosecutor v Akayesu (Trial Judgment), ICTR-96-4-T (2 September 1998), [593].
International Criminal Tribunal for the Former Yugoslavia have made it clear that the list of purposes is not exhaustive.232

1 Australian domestic jurisprudence

Australia ratified CAT on 8 August 1989 and the treaty entered into force on 7 September 1989. Australia has given effect to several of its provisions in its domestic law, but not all.

The first Australian statute to implement some of CAT’s provisions was the *Crimes (Torture) Act 1988* (Cth). Section 3 of that Act provides that:

‘act of torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

(a) for such purposes as:

(i) obtaining from the person or from a third person information or a confession;

(ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed; or

(iii) intimidating or coercing the person or a third person; or

(b) for any reason based on discrimination of any kind;

but does not include any such act arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights (being the Covenant a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*).

That Act, and its definition, were repealed and replaced by the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).233 This amending Act inserted an offence of torture into the *Criminal Code Act 1995* (Cth). That Act now contains an offence of torture in section 274.2. It states:

(1) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person (the victim); and

(b) the conduct is engaged in:

(i) for the purpose of obtaining from the victim or from a third person information or a confession; or

(ii) for the purpose of punishing the victim for an act which the victim or a third person has committed or is suspected of having committed; or

232 *Prosecutor v Furundzija* (Trial Chamber II), IT-95-17/1 [1998] ICTY 3 (10 December 1998), [162].

(iii) for the purpose of intimidating or coercing the victim or a third person; or

(iv) for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); and

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

(2) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person; and

(b) the conduct is engaged in for any reason based on discrimination of any kind; and

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

The basis of discrimination under the *Crimes Act* is broader than under the *Migration Act*. In the former, ‘discrimination of any kind’ is sufficient as a purpose for which an act will constitute torture, whereas for the latter, the discrimination must be of a kind that is inconsistent with the Covenant. This, however, is unlikely to result in any major differences in practice. Nevertheless, Australian jurisprudence regarding the definition of torture under the *Crimes Act* must be read in light of these differences.

Only the provision defining ‘torture’ in the 1988 Act has been judicially considered. In *Habib v Commonwealth of Australia*, Black CJ stated:

Torture offends the ideal of a common humanity and the Parliament has declared it to be a crime wherever outside Australia it is committed. Moreover, and critically in this matter, the *Crimes (Torture) Act* is directed to the conduct of public officials and persons acting in an official capacity irrespective of their citizenship and irrespective of the identity of their government. The circumstance that a prosecution may only be brought against an Australian citizen or a person present in Australia and requires the
consent of the Attorney-General of the Commonwealth has evident practical consequences, but prohibited conduct is not thereby deprived of its character as a crime nor is the strength of the Parliament’s emphatic disapproval of such conduct in any way thereby diminished.

The *Crimes (Torture) Act* reflects the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy.

As well, and again consistently with Australia’s obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances, answering in the negative the moral and legal questions whether superior orders can absolve the torturer of individual criminal responsibility and whether, in extreme circumstances, torture may be permissible to prevent what may be apprehended as a larger wrong: see the *Crimes (Torture) Act*, s 11; the *Torture Convention*, Art 2.\(^{234}\)

In the same decision, Jagot J stated that ‘[t]he “clearly established principles of international law” include the crime of torture which has the status of a *jus cogens* violation.’\(^{235}\) She went on to state:

The *Crimes (Torture) Act* creates an offence of torture. The effect of the legislation is to render torture unlawful under Australian law no matter who engages in it or where it is engaged in, and regardless of whether a prosecution may be commenced and sustained against the alleged torturer. The statute thus reflects and embodies our Parliament’s endorsement of the common law’s ‘extreme revulsion ... for the practice and fruits of torture’ ....

The prohibition on torture is an absolute requirement of customary international law. The prohibition is codified in the Torture Convention to which each of the states in question is party (other than Pakistan which is a signatory). It is conduct which the Commonwealth Parliament has proscribed by legislation expressed to apply throughout the world and to all persons, consistent with the international consensus that the torturer must have no safe haven. In terms of the ‘degree of codification or consensus concerning a particular area of international law’ (the first *Sabbatino* factor) the prohibition on torture is an agreed absolute value from which no derogation is permitted for any reason. The prohibition is a clearly established principle of international law in the sense described in *Kuwait Airways No 5* at [139]. The international community has spoken with one voice against torture.\(^{236}\)

This authority makes clear that the status of torture in international law is respected in Australia as a consequence of its incorporation into domestic legislation.

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\(^{234}\) *Habib v Commonwealth of Australia* [2010] FCAFC 12, [8]–[10].

\(^{235}\) Ibid, [101].

\(^{236}\) Ibid, [112], [117] respectively (citation omitted).
Torture is also mentioned in relation to the discretion of the Attorney-General not to extradite someone from Australia. Along with the provision set out above, these are the only two pre-existing attempts to codify article 3(1) of CAT, although the Australian executive arm of government has concluded many bilateral treaties to prohibit extradition to torture. Pursuant to section 22(3)(b) of the 
Extradition Act 1988 (Cth), a person can ‘only be surrendered in relation to a qualifying extradition offence if … the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture’. Torture is not specifically defined in this Act, nor does the Act make relevant reference to CAT. Asylum seekers are not protected by this provision unless they are subject to an extradition request.

Australian courts have considered the meaning of torture in the extradition context already. These decisions are not directly relevant to complementary protection since they rely on a definition of torture that has an ‘official capacity’ requirement. However, the matter of de Bruyn is instructive in one respect. It was concerned with claims that the Minister should not have authorized extradition because it ‘would be unjust, oppressive or incompatible with humanitarian considerations to surrender’ the applicant to his country of origin. In the leading judgment for the Federal Court in de Bruyn, Kiefel J (now of the High Court of Australia) wrote that such a finding required an assessment of the ‘point where the level of risk or threat arising from conditions in the … requesting country is so high as to come within the circumstances of which the [prohibition] speaks.’ Such an approach accords with international jurisprudence discussed below, namely that an assessment of the nature of harm and its risk of materializing is central to a non-removal case.

Australian courts have rarely directly addressed the question of return to torture pursuant to article 3 of CAT. The most detailed of these analyses was given by way of obiter by Lee and Katz JJ in Nagaratnam v Minister for Immigration and Multicultural Affairs. After detailing the relationship between articles 3(1), 3(2) and 1 of CAT, their Honours held that ‘the obligation under Art 3(1) on parties to the Torture Convention is not dependent upon the apprehended torture’s being inflicted on a discriminatory ground.’ This view is confirmed in paragraphs (a)–(d) of the definition of ‘torture’ now incorporated in section 5(1) of the 
Migration Act. Their Honours then quoted the view of the UN Committee against Torture that the host State must refrain from expelling someone where this ‘would have the

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238 For examples of such provisions in Australian bilateral treaties, see Treaty on Extradition between Australia and the Republic of Chile, art VII; Treaty between Australia and the Republic of Indonesia, art 9.
239 The Act does make one reference to CAT in section 5, but this relates to a definition of what does not constitute a ‘political offence’ for the purposes of the Act.
240 In De Bruyn v Minister for Justice and Customs [2004] FCAFC 334, [55], the Federal Court held that ‘the reference to torture in the Act is directed to institutionalised conduct by government authorities for the purpose of punishment, intimidation or coercion.’ In the same judgment, Kiefel J stated that conduct between inmates in a gaol did not fall within this definition, even if ‘corrupt wardens ignore or even encourage it’ ([55]). Her Honour’s decision in this respect was relied upon by the Commonwealth Minister in Rivera v Minister for Justice and Customs [2006] FCA 1784. In that matter, Moore J found that there was no substance to the applicant’s claims ‘that even though abuse by one prisoner of another may not constitute torture, if government authorities had engaged in threats and acts which caused that abuse, then that conduct can amount to institutionalised torture’ ([63], [66]).
242 ibid, [66].
243 Nagaratnam v Minister for Immigration and Multicultural Affairs [1999] FCA 176, [30]–[33].
244 ibid, [32].
foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured'. This view is now largely reflected in section 36(2)(aa) of the Migration Act.

Prohibition of torture is also specified under other legislative frameworks in Australia. Section 10(a) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) states that ‘a person must not be … subjected to torture’. Section 10(1)(a) of the Human Rights Act 2004 (ACT) provides that ‘no-one may be … tortured’. At the time of writing, these provisions had not been judicially interpreted.

2 Rape as torture

When introducing the first complementary protection bill to the Australian Parliament in 2009, the Parliamentary Secretary stated that victims of rape who are liable for execution because of that rape ‘may not be covered under the Refugees Convention’, but may have the benefit of complementary protection. He went on to state that:

The Rudd Labor government is convinced that Australians would expect claims of this gravity [including] execution for victims of rape and so-called honour killings to be dealt with through a process that affords natural justice and access to independent merits review. Where such claims are accepted as true, Australians would expect a protection visa to be granted. That is why we have introduced this bill: to establish a fair, transparent and robust system for considering just those sorts of complementary protection claims ...  

International jurisprudence has increasingly acknowledged that rape can constitute torture. The International Criminal Tribunal for Rwanda found that rape constitutes torture where it is used for ‘such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person’. The International Committee for the Red Cross has also stated that rape constitutes torture under article 147 of the Fourth Geneva Convention on the Laws of War.

The first court to find that rape could constitute torture was the Inter-American Court of Human Rights. It did so in the 1996 case of Martin de Mejia v Peru, where it found that rape amounted to ‘psychological torture’. In 1997, the European Court of Human Rights held for the first time that rape constituted torture. In that case, a 17 year old woman was held for three days, during which time she was blindfolded, beaten, stripped, placed in a tyre and hosed with pressurized water. She was then taken to another location where she was stripped again and raped by a member of the security forces.

246 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 9 September 2009, 8989–90 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services). No reference to rape was made in the Second Reading Speech for the 2011 Bill.  
247 Prosecutor v Akayesu (Trial Judgment), ICTR-96-4-T (2 September 1998), [597].  
250 Aydin v Turkey, European Court of Human Rights, Application No 23178/94 (25 September 1997), [83]–[87].
3 International case examples

Since the UN Human Rights Committee and the Committee against Torture rarely distinguish between the type of proscribed treatment under article 7 of the Covenant and article 3 of CAT (respectively) that has been violated, the vast majority of jurisprudence comes from the European Court of Human Rights (and previously also the European Commission on Human Rights) on article 3 of the ECHR.\(^{251}\) That said, the UN Special Rapporteur on Torture has previously stated that ‘the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted’.\(^{252}\)

For a detailed analysis of the case law of the UN committees, see:

  [http://cejil.org/sites/default/files/torture_in_international_law.pdf](http://cejil.org/sites/default/files/torture_in_international_law.pdf)

**UN Committee against Torture**

RRT Members are reminded that the definition of ‘torture’ under CAT includes a public official requirement. This is not part of the Australian legislative definition of torture in the Migration Act and it is important to be mindful of this difference.

A detailed analysis of the case law of the UN Committee against Torture and the UN Human Rights Committee can be found in *Torture in International Law: A Guide to Jurisprudence*.\(^{253}\) Cases are grouped there under the following themes: conditions of detention, solitary confinement, incommunicado detention and enforced disappearances, relatives of victims of human rights violations, and extradition and expulsion.

In short, violations of the prohibition on torture may be found in each of these (non-exhaustive) categories if the ill-treatment is sufficiently severe. In the sections below, some of these themes are examined in relation to the less extreme forms of ill-treatment (namely cruel, inhuman or degrading treatment or punishment).

**UN Human Rights Committee**

Most individual complaints in which the Committee has found a violation of the prohibition on torture relate to the former military dictatorship in Uruguay. These complaints were generally submitted by family members of the victims, who in most cases did not survive

\(^{251}\) That provision does not include a reference to ‘cruel’ treatment or punishment, so the discussion is about the meaning of ‘inhuman’.

\(^{252}\) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN Doc E/CN.4/2006/6 (23 December 2005), [39].

\(^{253}\) Association for the Prevention of Torture and the Center for Justice and International Law, above n 140.
their ill-treatment. Victims, usually during interrogation in an initial period of incommunicado detention, were subjected to torture, including ‘systematic beatings, electric shocks to fingers, eyelids, nose and genitals when tied naked to a metal bedframe … or in coiling wire around fingers and genitals …, burnings with cigarettes, extended hanging from hand and/or leg chains, often combined with electric shocks, repeated immersion in a mixture of blood, urine, vomit and excrement … standing naked and handcuffed for great lengths, threats, simulated executions or amputations.’

The Committee has also found beatings, electric shocks, mock executions, deprivation of food and water, and thumb presses to amount to torture under article 7 of the Covenant. Incommunicado in detention in a secret location for over three years constitutes torture.

Severe beatings causing concussion, broken bones, wounding and burning amount to torture.

**European Court of Human Rights**

RRT Members are reminded that article 3 of the ECHR does not contain a definition of ‘torture’. Instead, the European Court of Human Rights relies upon international jurisprudence and its own extensive case law on the meaning of that term. Like the Australian legislation, the ECHR does not have a ‘public official’ requirement—a feature which distinguishes the European jurisprudence from that of the Committee against Torture.

**Aksoy v Turkey** (1996)
The applicant was suspended naked by his arms which were tied behind his back. This caused severe pain and temporary paralysis of both arms. The court held that this amounted to torture.

**Çakici v Turkey** (1999)
The applicant was subjected to electric shocks and beatings which caused broken ribs and a split head while he was detained. This was found to amount to torture.

**Mikheyev v Russia** (2006)

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254 Nowak, above n 150, 162, referring to cases such as Rodríguez v Uruguay, Communication No 322/1988, UN Doc CPR/C/51/D/322/1988 (19 July 1994), [2.1]; Motta v Uruguay, Communication No 11/1977 (29 July 1980); Burgos v Uruguay, Communication No 52/1979 (29 July 1981). The Committee does not explain whether each one of these incidents could amount to torture, or whether their cumulative impact brought them within the definition. Certainly, other case law indicates that ill-treatment does not have to reach as extreme a threshold as this to amount to torture.


257 For an extensive list of case examples, see Interights, Prohibition of Torture and Inhuman or Degrading Treatment or Punishment under the ECHR (Article 3): Interights Manual for Lawyers (Interights, 2008) http://www.interights.org/document/104/index.html.

258 Aksoy v Turkey, European Court of Human Rights, Application No 21987/93 (18 December 1996), [64].

259 Çakici v Turkey, European Court of Human Rights, Application No 23657/94 (8 July 1999), [89]–[92].
The applicant was subjected to electric shocks via his ears. He was threatened with beating and electric shock application to his genitals. The applicant gave evidence that he attempted to escape further ill-treatment by means of suicide by jumping from the window. Prior to his incarceration, he had shown no signs of mental disorder. He sustained general and permanent disability as a result of the events. The court found that this amounted to torture.\footnote{Mikheyev v Russia, European Court of Human Rights, Application No 77617/01 (26 January 2006), [135].}

\textit{Abdulsamet Yaman v Turkey} (2004)

The applicant, while detained by police, was blindfolded, stripped naked and immersed in cold water. At another time, he was suspended from the ceiling pipes by his arms. Still further, he was forced to stand on a chair, which was eventually removed to leave him hanging, with electric cables attached to his body, including his sexual organs. He also had his testicles squeezed by police officers. The court found that this amounted to torture.\footnote{Abdulsamet Yaman v Turkey, European Court of Human Rights, Application No 32446/96 (2 November 2004), [56].}

\textit{Selmouni v France} (1999)

While in detention, the applicant was struck numerous times. Medical evidence supported this claim and indicated that the blows must have been heavy and caused substantial pain. The applicant was also dragged by his hair and forced to run down a corridor with people on either side attempting to trip him. At another time, a police officer instructed him to ‘suck’ his penis, before urinating on him. He was also threatened with a blow lamp and a syringe. The court found that the suffering this caused was severe and amounted to torture.\footnote{Selmouni v France, European Court of Human Rights, Application No 25803/94 (28 July 1999), [80].}

\textit{Ilhan v Turkey} (2000)

The applicant was kicked and beaten by police with sufficient force as to cause brain damage. There was a 36 hour delay in seeking medical attention for his initial injuries. The court held that this amounted to torture.\footnote{Ilhan v Turkey, European Court of Human Rights, Application No 22277/93 (27 June 2000), [87].}

\textit{Elci v Turkey} (2003)

Four applicants were detained in cold, damp and dark conditions without adequate bedding, food or sanitary facilities. At times, they were also blindfolded. They were insulted and slapped prior to signing confessions. The court found that this amounted to torture.\footnote{Elci v Turkey, European Court of Human Rights, Application Nos 23145/93 and 25091/94 (13 November 2003), [646]–[647].}

\textit{Bati v Turkey} (2004)

In this matter, the court looked at all of the circumstances of the detention of 13 applicants to find that, as a whole, the situation left them in a permanent state of pain and anxiety because of the uncertainty of what would happen next and the intense violence to which they were subjected. This was found to amount to torture.\footnote{Bati v Turkey, European Court of Human Rights, Application Nos 33097/96 and 57834/00 (3 June 2004), [138].}
Bursuc v Romania (2004)
Two traffic police officers hit the applicant on the head, and handcuffed and beat him after a brief verbal altercation. The applicant was then dragged by his hands, face down along the ground, while six officers hit and kicked him. Medical diagnoses found that he had swelling of the brain, an injury to his eye retina and a torn anus. This treatment was found to amount to torture.266

Corsacov v Moldova (2006)
A 17 year old was arrested. He was punched, kicked and beaten with batons, and later suspended on a metal bar for an extended period. Of particular importance to the court was that he was beaten on the soles of his feet, a practice known as falaka. The applicant spent 70 days in hospital and attained second degree invalidity status as a result of his injuries. The court found that he had been subjected to torture.267

Salman v Turkey (2000)
The victim was taken into custody in good health but later died. He sustained bruising and abrasions to his feet, and a broken sternum. Falaka was alleged. The court found that the victim had been subjected to torture.268

Ilascu v Moldova and Russia (2004)
Following a trial that was found to be unfair, the applicants were initially held without access to the outside world and without toilets, water or natural light. They were given only 15 minutes of outdoor exercise each day. They were then moved to a cell without natural light from which they were not able to send or receive mail, nor allowed regular visits from family or lawyers. Medical treatment was denied to them. The applicants lived in constant fear of execution. All of these factors in combination led the court to find that the applicants had been subjected to torture.269

Nevmerzhitsky v Ukraine (2005)
The applicant was on hunger strike. He was repeatedly subjected to force-feeding by having a rubber tube inserted down his throat into which a nutritional mixture was poured. On each occasion he was handcuffed and had a mouth-widener imposed on him. The court found that this amounted to torture because of the unnecessary use of force in restraining the applicant.270

266 Bursuc v Romania, European Court of Human Rights, Application No 42066/98 (12 October 2004), [78]–[92].
267 Corsacov v Moldova, European Court of Human Rights, Application No 18944/02 (4 April 2006), [54]–[67].
268 Salman v Turkey, European Court of Human Rights, Application No 21986/93 (27 June 2000), [97]–[103].
269 Ilascu v Moldova and Russia, European Court of Human Rights, Application No 48787/99 (8 July 2004), [424]–[449].
270 Nevmerzhitsky v Ukraine, European Court of Human Rights, Application No 54825/00 (5 April 2005), [86]–[88]. See further section V.B.
Further reading


MD Evans, ‘Getting to Grips with Torture’ (2002) 51 *International Comparative Law Quarterly* 365


F Cruel or Inhuman Treatment or Punishment

Note: In interpreting this section, RRT Members are reminded to consult the relevant sections of this Manual on intent requirements, the distinction between ‘treatment’ and ‘punishment’, and the general considerations that need to be taken into account. In terms of the elements of the definition of ‘torture’, there is very little case law on ‘act or omission’. The meaning of ‘severe pain or suffering’ is discussed in relation to each of the complementary protection criteria, as well as in section III.C (Types of Treatment or Punishment). The meaning of ‘intentionally inflicted’ and ‘purpose’ are discussed in section III.D (Intention and Purpose Requirements). Lawful sanctions are examined in section II.E (Lawful sanctions).

Section 5(1) of the Migration Act defines the concept of ‘cruel or inhuman treatment or punishment’. It provides that:

cruel or inhuman treatment or punishment means an act or omission by which:

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

(b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature

but does not include an act or omission:

(c) that is not inconsistent with Article 7 of the Covenant; or

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

The Explanatory Memorandum for the Act provides some guidance as to the intention of Parliament in relation to the interpretation of this term, including that the term ‘is exhaustively defined’ in the Act.271 It relevantly states:

The purpose of expressly stating what cruel or inhuman treatment or punishment does not include is to confine the meaning of cruel or inhuman treatment or punishment to circumstances that engage a non-refoulement obligation.

This definition derives from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant.272

271 2011 Explanatory Memorandum, above n 9, [15].
272 Ibid, [19]–[20].
1 Australian domestic jurisprudence

Some other legislative frameworks in Australia also prohibit cruel or inhuman treatment or punishment. These may be useful reference points for interpretation of this concept under the Migration Act, even though they relate to non-asylum contexts. For example, section 13ZB of the Terrorism (Community Protection) Act 2003 (Vic) provides that ‘a person being taken into custody, or being detained, under a preventative detention order must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the order or implementing or enforcing the order’. Section 84(1) of the Evidence Act 2008 (Vic) provides that evidence influenced by ‘violent, oppressive, inhuman or degrading conduct’ or a threat of that conduct is not admissible in a court. Section 10(1)(b) of the Human Rights Act 2004 (ACT) provides that ‘no-one may be … treated or punished in a cruel, inhuman or degrading way’. References to prohibitions of actions that are conducted in a ‘cruel, inhuman or degrading manner’ also appear in section 48 of the Crimes (Forensic Procedures) Act 2000 (NSW) and section 51 of the Crimes (Forensic Procedures) Act 2000 (ACT).

Section 10(b) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) states that ‘a person must not be … treated or punished in a cruel, inhuman or degrading way’. The Victorian Department of Justice forewarned that issues may arise under this provision in relation to detention facilities and conditions, mandatory sentences, corporal punishment, searches and the restraint of people. The Department’s Guide to that Act noted that State responsibility in this respect may be enlivened in, ‘for example, a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service’. RRT Members should note that under the Migration Act, there is no requirement of State involvement in the ill-treatment.

Section 10(b) of the Victorian Charter was extensively discussed in Review of P. In that matter, the Mental Health Review Board of Victoria held that the deleterious side effects of treatment with an antimale hormone, which reduced the applicant’s bone density and caused osteoporosis, amounted to a breach of the prohibition on cruel, inhuman or degrading treatment. The Board determined that cruel, inhuman or degrading treatment could occur outside of a penal or quasi-penal context.

The Board grappled with the issue of when medical treatment amounted to cruel, inhuman or degrading treatment. It held that a minimum level of severity had to be reached, and that determining whether it passed the threshold required a consideration of both degree and intensity. ‘In assessing the level of severity … all the facts must be considered, not just the level of impairment.’

The Board also noted that a ‘therapeutic necessity’ generally cannot be regarded as cruel, inhuman or degrading. In reaching this conclusion, it referred extensively to and relied upon international jurisprudence. In particular, the Board applied the test in Herczegfalvy v
Austria,276 which requires that medical necessity must be shown in order to avoid the conclusion that the treatment is inhuman or degrading.277

Considerations of conduct that is ‘cruel, inhuman or degrading’ is not new to the Migration Act itself. Pursuant to section 258F:

For the purposes of this Act, the carrying out of an identification test (by an authorised officer or otherwise) under section 40, 46, 166, 170, 175, 188 or 192 is not of itself taken:

(a) to be cruel, inhuman or degrading; or

(b) to be a failure to treat a person with humanity and with respect for human dignity.

However, nothing in this Act authorises the carrying out of the identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.

The Explanatory Memorandum to the Act that introduced this provision in 2003 stated that: ‘This section reflects Articles 7 and 10(1) of the International Covenant on Civil and Political Rights.’278 It is yet to be judicially interpreted, however.

2 International and foreign jurisprudence

As discussed in section III.C above, the standard approach internationally is to regard torture and cruel, inhuman or degrading treatment or punishment as harms falling on a continuum, or hierarchy, of ill-treatment, with torture the most severe manifestation.279 For this reason, RRT Members should also consult sections III.E and III.G. The following section summarizes the way courts and tribunals have interpreted the ‘cruel’ and ‘inhuman’ elements.

In the Greek case, the European Commission on Human Rights established that ‘inhuman treatment’ covers ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’.280 It does not have to encompass actual bodily harm.281 Treatment has been found to be ‘inhuman’, inter alia, where it was premeditated, applied for hours at a time, and caused actual bodily injury or intensive physical and mental suffering.282 The European Court of Human Rights has also found that certain

277 See further section V.B below.
278 Explanatory Memorandum, Migration Legislation Amendment (Identification and Authentication) Bill 2003 (Cth), [16].
279 Ireland v United Kingdom (1979–80) 2 EHRR 25, [167]; Anker, above n 198, 465, 482, 485; Suntlinger, above n 198, 212.
281 Soering v United Kingdom (1989) 11 EHRR 439, [100]; Ireland v United Kingdom (1979–80) 2 EHRR 25, [167].
282 Referred to in Becciev v Moldova (2008) 45 EHRR 331, [39].
discriminatory acts may amount to inhuman or degrading treatment because they are an affront to human dignity.283

The European Court of Human Rights extensively revisited the concept of ‘inhuman treatment’ in Ireland v United Kingdom.284 It held that certain techniques used on prisoners:

caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. … The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.285

A similar prohibition on inhuman treatment appears in section 97(1)(b) of the Immigration and Refugee Protection Act 2001 (Canada), although it uses the term ‘unusual’ in place of ‘inhuman’ and it does not refer to ‘degrading’ treatment or punishment.286 In a non-asylum context, section 12 of the Canadian Charter of Rights and Freedoms provides protection against ‘cruel and unusual punishment’. The test for finding a breach of this prohibition was spelled out in Smith,287 which provides a useful guide to how this threshold has been articulated in another jurisdiction. In that case, the Canadian Supreme Court held that:

A punishment will be cruel and unusual … if it has any one or more of the following characteristics:

(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

(2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

(3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.288

The test of being ‘so excessive as to outrage the standards of decency’ was endorsed in Australia by the ACT Bill of Rights Unit in its Guidelines for ACT Departments on the Human Rights Act 2004 (ACT).289 Article 3(3) of the Third Geneva Convention, concerning the treatment of prisoners of war, also refers to ‘outrages upon personal dignity, in particular, 283 East African Asians v United Kingdom (1973) 3 EHRR 76. In the UK, serious and systematic discrimination of homosexuals has been found to violate art 3 ECHR (eg M v Secretary of State for the Home Department [2002] EWCA Civ 952; J v Secretary of State for the Home Department [2006] EWCA Civ 1238), although such cases may also amount to persecution on account of membership of a particular social group, resulting in refugee status (eg S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473). 284 Ireland v United Kingdom (1979–80) 2 EHRR 25. 285 Ibid, [167]. See case examples below. 286 For an example of the application and interpretation of this provision, see Re RCC [2002] RPDD No 462. 287 R v Smith (Edward Dewey) [1987] 1 SCR 1045. 288 Ibid, [94]. 289 Bill of Rights Unit, Department of Justice and Community Safety, The Human Rights Act 2004, Guidelines for ACT Departments: Developing Legislation and Policy (2004), 21.
humiliating and degrading treatment’ as constituting prohibited acts against ‘persons taking no active part in the hostilities’. A similar test, namely that an act ‘shocks the conscience’, has been referred to in the House of Lords. These may be useful references for RRT Members when determining whether an act amounts to cruel or inhuman treatment.

3 Cases relating to cruel or inhuman treatment or punishment

The following section discusses cases under particular thematic groupings. It provides a sense of the kinds of issues that may be encompassed by cruel and inhuman treatment. It should be noted that there may be overlap between the examples here and those in the ‘degrading treatment or punishment’ section below, given that courts in other jurisdictions often do not distinguish between these forms of ill-treatment. Both sections should therefore be consulted.

(i) Threats of torture

The European Court of Human Rights has held that inhuman treatment can be constituted by threats of torture. In Gäfgen v Germany, the court held that a threat to inflict rape and pain on a person suspected of murder amounted to inhuman treatment, even though the threat had not been shown to ‘have had any serious long-term consequences for the [suspect’s] health’. In Campbell v United Kingdom, the court defined the threshold for threats to constitute inhuman treatment. It held that the treatment must be ‘sufficiently real and immediate’, and the threat itself must cause a level of suffering befitting the requirement of mental suffering. Similarly, the Inter-American Court of Human Rights has held that threats can amount to a violation of the Inter-American Convention to Prevent and Punish Torture. In Maritza Urrutia v Guatemala, it stated that a threat can cause ‘such a degree of moral anguish that it may be considered “psychological torture.”’

(ii) Medical treatment and necessity

In Herczegfalvy v Austria, the European Court of Human Rights found that treatment that would otherwise be inhuman or degrading (in that case, forced feeding and forcible medical treatment) will not be if it is a ‘medical necessity’ or ‘therapeutic necessity’. The crucial factor is whether ‘a medical necessity has been convincingly shown to exist’. That case involved a prisoner whose severe mental illness caused him to be violent. He was forcibly

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291 A (FC) and others (FC) v Secretary of State for the Home Department [2005] UKHL 71, [126] (Lord Hope).
292 For an extensive list of case examples, see Interights, above n 257.
293 Gäfgen v Germany, European Court of Human Rights, Application No 22978/05 (1 June 2010, rectified 3 June 2010), [69].
294 Campbell v United Kingdom, European Court of Human Rights, Application No 7511/76 (25 February 1982), [26]–[27].
295 Maritza Urrutia v Guatemala, Series C No 103 [2003] IACHR (27 November 2003), [92].
296 See also section V.B below on proportionality.
297 Herczegfalvy v Austria, European Court of Human Rights, Application No 10533/83 (24 September 1992), [82].
administered with food and sedatives, and was isolated and handcuffed to his bed for a period of time. The European Court of Human Rights held that:

the established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.299

The court also noted that the test of what is ‘necessary’ is to be judged by the psychiatric principles generally accepted at the time.300

Similarly, prison conditions that might otherwise be regarded as ‘degrading’ may not reach that threshold if they are necessary to prevent suicide or escape (again, provided the necessity test can be made out).301

In Jalloh v Germany, the Grand Chamber found that the force-feeding of liquids given to a person suspected of ingesting a bag of drugs amounted to inhuman treatment, since the drugs would have passed naturally through his system with time.302

In the UK House of Lords, Lord Bingham held that ‘the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one’.303

(iii) Incarceration

The UN Human Rights Committee has considered Australia’s non-refoulement obligations where removing a person would violate article 7 of the Covenant. In C v Australia, the Committee found that Australia would breach article 7 if it returned a man to Iran after he had acquired a serious mental illness (paranoid schizophrenia) as a direct result of spending more than two years in Australian immigration detention.304

The European Court of Human Rights has also considered the following cases:

Tomasi v France (1992)
The applicant sustained bruises and abrasions while in police detention. Medical evidence suggesting a large number of blows of significant intensity was sufficient for the European Court of Human Rights to find that inhuman treatment had been inflicted upon the applicant.305

299 Herczegfalvy v Austria, European Court of Human Rights, Application No 10533/83 (24 September 1992), [82].
300 Ibid, [83].
301 Krücher and Möller v Switzerland (1982) 34 DR 25 (European Commission on Human Rights).
302 Jalloh v Germany, European Court of Human Rights, Application No 54810/00 (11 July 2006), [82]–[83].
304 C v Australia, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (13 November 2002), [8.4]–[8.5].
305 Tomasi v France, European Court of Human Rights, Application No 12850/87 (27 August 1992), [112]–[116].
**Hulki Gunes v Turkey (2003)**
The applicant sustained a number of grazes and bruises while in custody. He alleged that these had resulted from 15 days of ill-treatment. The European Court of Human Rights found that this amounted to inhuman or degrading treatment.306

**Balogh v Hungary (2004)**
During a police interrogation, the applicant was repeatedly slapped across the face, requiring the reconstruction of his ear drum. The European Court of Human Rights found that this amounted to inhuman or degrading treatment contrary to article 3 of the ECHR.307

**Mouisel v France (2002)**
The applicant suffered from leukaemia. His health degenerated during his period of detention. The prison authorities did not react to the medical report regarding his need for greater medical treatment. The European Court of Human Rights held that this amounted to ill-treatment contrary to article 3.308

**McGlinchey v United Kingdom (2003)**
The applicant had asthma and a heroin addiction when she was taken into custody. She was weighed on arrival, although the prison authorities did not trust the accuracy of the scales. As a result of continuous vomiting, the applicant lost 10 kilograms in the first five days of her detention. Doctors attended to her regularly on weekdays but not at all on the weekend. On the first Monday morning she was found to have collapsed. She died two weeks later. The European Court of Human Rights found that the authorities had treated her in a manner which was inhuman or degrading.309

**Tekin v Turkey (1998)**
The applicant was held in a cell without a bed or blankets in sub-zero temperatures for four days during which he was also denied food and liquid. He had only one kidney. The European Court of Human Rights found that this amounted to inhuman and degrading treatment.310

Cases on lack of adequate health care and lack of resources are discussed under ‘Breaches of socio-economic rights’ below (section III.F.4).

**(iv) Female genital mutilation, forced marriage and domestic violence**

At the outset, it should be noted that these forms of harm may constitute persecution. If such persecution is found to be linked to a Convention ground, then women affected by them will be refugees.311 Very often, the appropriate ground will be ‘particular social group’, and

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306 Hulki Gunes v Turkey, European Court of Human Rights, Application No 28490/95 (19 June 2003), [91].
307 Balogh v Hungary, European Court of Human Rights, Application No 47940/99 (20 July 2004), [44]–[54].
308 Mouisel v France, European Court of Human Rights, Application No 67263/01 (14 November 2002), [36]–[48].
309 McGlinchey v United Kingdom, European Court of Human Rights, Application No 50390/99 (29 April 2003), [47]–[58].
310 Tekin v Turkey, European Court of Human Rights, Application No 22496/93 (9 June 1998), [48]–[54].
whether or not such a social group exists will depend on the situation in the country of origin.  

Given that female genital mutilation can amount to persecution, it certainly also constitutes cruel or inhuman treatment. In his Second Reading Speech to the 2009 Bill, the Parliamentary Secretary expressly referred to female genital mutilation as a basis on which a complementary protection claim in Australia could be founded. He stated:

it is not certain that a girl who would face a real risk of female genital mutilation would always be covered by the Refugees Convention, whereas she would be covered under complementary protection. ... The Rudd Labor government is convinced that Australians would expect claims of this gravity; claims involving female genital mutilation... to be dealt with through a process that affords natural justice and access to independent merits review. Where such claims are accepted as true, Australians would expect a protection visa to be granted. That is why we have introduced this bill: to establish a fair, transparent and robust system for considering just those sorts of complementary protection claims... .

A number of submissions to the Senate Committee reviewing the 2009 Bill expressed concern that women at risk of genital mutilation might not, in fact, be covered by complementary protection given the exception in section 36(2B)(c). This section provides that a person does not face a ‘real risk’ of significant harm warranting complementary protection if it ‘is one faced by the population of the country generally and is not faced by the non-citizen personally’. For analysis of this provision in relation to female genital mutilation, see section II.D.3 above.

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312 French case law shows that very similar cases may lead to different protection outcomes depending on how the situation in the country of origin is characterized. For example, in Tabe, the French Refugee Appeals Board held that in cases where the attitude of women wanting to avoid a forced marriage ‘is perceived by part or whole of the society of their country of origin as transgressing customs and laws in force and who are facing, for such reason, persecution that the authorities are unwilling or unable to prevent’, then they ‘must be regarded as belonging to a particular social group as defined by article 1A(2) of the Geneva Convention.’ However, ‘when those conditions are not fulfilled, especially when their behaviour is not perceived to be infringing social order, such women are nevertheless likely to face inhuman or degrading treatments’ and therefore entitled to complementary protection: Tabe (CRR, Reunited Sections, 29 July 2005) cited in L Dufour, ‘The 1951 Geneva Convention and Subsidiary Protection: Uncertain Boundaries’ in International Association of Refugee Law Judges (ed), Forced Migration and the Advancement of International Protection (Proceedings of the 7th World Conference, 2006), 258.

313 See eg RRT Gender Guidelines (10 May 2010), 2. A new recital to the recast EU Qualification Directive provides: ‘For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation, forced abortion, should be given due consideration insofar as they are related to the applicant’s well-founded fear of persecution’; Council of the European Union, above n 44.

314 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 9 September 2009, 8989–90 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).

315 See eg Refugee Council of Australia, above n 116, 5; Amnesty International, above n 116, 7.
Finally, as noted above, the Explanatory Memoranda to both the 2009 and the 2011 Bills referred to protection against ‘honour killings’ as falling with the complementary protection grounds.316

(v) Death row phenomenon

Exposure to the ‘death row phenomenon’ may amount to cruel, inhuman or degrading treatment or punishment. See section III.B.4 above for analysis.

(vi) Victims of crime

A considerable number of complementary protection claims have succeeded on the basis that the applicant is a victim of crime, fleeing such things as mob violence, blood feuds317 or the mafia.

**HLR v France** (1997)
The applicant had previously been imprisoned for drug offences in Colombia and was presently the subject of a deportation order from France. He argued that he should not be returned to Colombia because he would be subjected to acts of vengeance by drug traffickers who had recruited him. The European Court of Human Rights found that this would not amount to a violation of article 3 of the ECHR, because there was only evidence of a generally violent situation in Colombia, and no evidence of a realistic threat of violence against the applicant.319

**Re IDQ** (2002)
The Canadian Immigration and Refugee Board found that the applicant’s children were subjected to several kidnapping attempts for the purpose of extortion of the applicant. These were carried out by a group not considered (by the Board member) to be a paramilitary group, but rather a gang of ‘common criminals’. The applicant was granted protection under s 97(1)(b) as there was neither an internal relocation alternative available nor sufficient State protection.320

**Re XHN** (2002)
This case also involved ‘common criminals’ seeking the details of the applicant’s late husband’s transactions. The applicant was granted protection.321

**Re ZZE** (2003)


319 *HLR v France*, European Court of Human Rights, Application No 24573/94 (29 April 1997), [37]–[44].

320 Re IDQ [2002] RPDD No 189.

A successful Colombian businessman was subjected to extortion threats. The Canadian Immigration and Refugee Board noted that Colombian law enforcement was overwhelmed and not able to provide protection from such threats to the applicant. The applicant was granted protection.\(^{322}\)

*Re WCZ (2003)*

The Jamaican applicant witnessed a shooting in Canada while in Canada without any legal status. He agreed to testify as a witness in the murder case. As a result of giving that evidence, he was subjected to threats and physical attacks when he returned to Jamaica. He returned to Canada and successfully claimed protection.\(^{323}\)

*Re EYL (2002)*

The applicant feared return to Cambodia on account that he might be falsely accused of a high-profile crime, tortured into a confession by State authorities and victimized by mob violence. Since there was no nexus with the Refugees Convention, the decision-maker found the applicant to be in need of complementary protection on the grounds of torture (section 97(1)(a)) and a risk to life or to cruel and unusual treatment or punishment (section 97(1)(b)).

The French Refugee Appeals Board has granted subsidiary protection:\(^{324}\)

- to a Nigerian ill-treated by offenders, who wanted him to join their group;\(^{325}\)
- to an Ukrainian who was swindled out of his money by Tartar offenders;\(^{326}\)
- to Albanian claimants, mugged by a gang, or victims of a vendetta and of the ‘Kânun law’ (a system of revenge, by which the family of deceased tries to recover his/her honour by killing a member of the murderer’s family);\(^{327}\)
- to claimants who decided to expose criminal acts.\(^{328}\)

(vii) *Enforced disappearances*

Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance provides:

1. No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross,
flagrant or mass violations of human rights or of serious violations of international humanitarian law.  

Although Australia has not ratified that treaty, it is arguable that a threat of enforced disappearance could amount to a real risk of arbitrary deprivation of life, or a real risk of cruel or inhuman treatment or punishment. RRT Members should be alert to claims on this basis, especially in light of the jurisprudence discussed in the following section (which finds that a relative of a person who has disappeared may be the victim of a violation of the prohibition on inhuman treatment).

(viii) Relatives of victims of serious human rights violations

There have been a number of cases before the UN Human Rights Committee, the European Court of Human Rights and the African Commission on Human and Peoples’ Rights in which States have been found to have violated the prohibition on inhuman treatment by failing to disclose the whereabouts of a disappeared person, thus causing mental suffering to their close relatives.

The European Court of Human Rights has held that the violation against the relatives lies in the behaviour of the State in responding to enquiries about the disappeared relatives. It is on this basis that the family member is a direct victim of a State violation of the prohibition on inhuman and degrading treatment. The court has also found relatives of victims of other serious human rights abuses to be victims of inhuman and degrading treatment themselves. In Sultan Öner v Turkey, for example, the court found that children who witnessed their mother arbitrarily arrested and beaten had been subjected to inhuman treatment.

In Çakici v Turkey, the European Court of Human Rights held that special factors are required to establish such a claim. These factors must give ‘the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives’ of those who suffer serious human rights violations. Relevant factors may include: a parent–child bond, whether the family member witnessed events associated with the relative’s disappearance, the family member’s attempts to attain information after the disappearance, and the response of the authorities to those enquiries.

To our knowledge, no court or tribunal has yet considered a claim for complementary protection on the basis of a close personal relationship with a disappeared person or victim of

330 See also Association for the Prevention of Torture and the Center for Justice and International Law, above n 140, 43–46 for discussion of enforced disappearances cases before the Committee against Torture and the Human Rights Committee.
331 Tanis v Turkey, European Court of Human Rights, Application No 65899/01 (2 August 2005), [217]–[221]; Bazorkina v Russia, European Court of Human Rights, Application No 69481/01 (27 July 2006), [131]–[133].
332 Sultan Öner v Turkey, European Court of Human Rights, Application No 73792/01 (17 October 2006), [128]–[135]. See also Mubilanzila Mayeka v Belgium, European Court of Human Rights, Application No 13178/03 (12 October 2006), [62]–[63]. For cases before the Human Rights Committee, see Association for the Prevention of Torture and the Center for Justice and International Law, above n 140, 45–46.
333 Çakici v Turkey, European Court of Human Rights, Application No 23657/94 (8 July 1999), [98].
334 Ibid.
335 Ibid.
another form of serious human rights abuse. Were this to arise in the Australian context, the RRT would need to consider: first, the strength of the claim that the person had suffered severe anguish; and secondly, the overriding purpose of the complementary protection regime. If the purpose of the complementary protection regime is to ensure that Australia does not send an individual to a place where he or she will be subjected to significant harm, then it is possible that a complementary protection claim based on a relative’s disappearance could succeed, since relatives of victims of serious human rights abuses have in some cases been found to be victims of inhuman and degrading treatment themselves. Alternatively, if the purpose of complementary protection is to go some way to providing a remedy for the victim of inhuman treatment, then, arguably, protection in Australia would not result in relief for a person whose best remedy would be information about the disappeared relative in the country of origin. Furthermore, it is arguable that the inhuman treatment, as psychological and emotional distress, would be experienced wherever the relative were situated. It would not be confined to the territory of the State responsible for inflicting that harm.

(ix) General

International

_Linton v Jamaica_ (1992)
The applicant, while detained, was subjected to physical abuse, shown a mock execution and denied medical treatment for injuries sustained during an attempted escape. The UN Human Rights Committee found that this amounted to cruel and inhuman treatment.336

See also:

- Lord Lester, D Pannick and J Herberg, _Human Rights Law and Practice_ (3rd edn, LexisNexis, 2009) (which also includes examples from the European Court of Human Rights)

_Europe_

_Ireland v United Kingdom_ (1978)
UK security forces detained people in Northern Ireland who were suspected of involvement in ‘terrorism’. They were forced to stand with their legs and hands spread apart and with their hands above their head, had dark hoods placed over their heads for extended periods, were subjected to continuous loud noise, and were deprived of sleep, food and drink. The European Court of Human Rights found that these techniques, in combination, amounted to inhuman treatment.337

_López Ostra v Spain_ (1994)

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337 _Ireland v United Kingdom_ (1979–80) 2 EHRR 25, [166].
The applicants lived near a waste processing plant that emitted noxious fumes and significant noise. They claimed that the effect on their health amounted to degrading treatment. The European Court of Human Rights found that this was not a sufficiently severe form of ill-treatment to amount to a breach.338

Africa

*Modise v Botswana (2000)*

The applicant was Batswana by ancestry but was denied citizenship in Botswana. He alleged that this was because of his political activities. He was forced to live in a rural area not known to him near the Batswana border for eight years, and between that area and Botswana in a ‘no man’s land’ for seven years. He was deported from Botswana on four occasions when he attempted to re-enter. The African Commission on Human and Peoples’ Rights found that this treatment amounted to a violation of the right to freedom from cruel, inhuman or degrading treatment.339

**Further reading**


## 4 Breaches of socio-economic rights

An applicant may seek to argue that a lack of resources or economic opportunities in the country of origin amounts to cruel, inhuman or degrading treatment, thus warranting complementary protection.

The European Court of Human Rights has consistently observed that it is not the function of the ECHR to iron out socio-economic differences between States, noting that ‘the level of treatment available in the Contracting State and the country of origin may vary considerably.’340 In the House of Lords, Lord Hope has described the jurisprudence as setting ‘limits ... on the extent to which [Contracting States] can be held responsible outside the areas that are prescribed by articles 2 and 3 and by the fundamental right under article 6 to a fair trial.’341 The trade-off for accepting that harm derives from a State’s lack of resources to

338 *López Ostra v Spain*, European Court of Human Rights, Application No 16798/00 (9 December 1994), [59]–[60].


340 *N v United Kingdom* [2008] ECHR 453, [44]. The dissenting judges describe this as the majority’s fear that any broader interpretation could ‘make Europe vulnerable to becoming the “sick-bay” of the world’: dissenting judgment, [8].

341 *EM (Lebanon) v Secretary of State for the Home Department (AF and others intervening)* [2008] UKHL 64, [13].
redress an applicant’s predicament is that only the most exceptional cases receive international protection.

It therefore seems unlikely that a lack of basic services in the country of origin would, in and of itself, substantiate a complementary protection claim on the basis of arbitrary deprivation of life or cruel, inhuman or degrading treatment, unless it were to render survival on return impossible.\textsuperscript{342} Something else—a distinguishing feature making the lack of such services particularly deleterious on the applicant—would appear to be necessary.\textsuperscript{343} Timing will play a major role in whether claims are successful, since the imminence of harm on return, which is related to the level of deprivation in the country of origin, will be a key factor in the decision.

These issues have primarily been addressed in the so-called ‘health’ or ‘medical’ cases. The seminal case is \textit{D v United Kingdom} in the European Court of Human Rights, which concerned a man from St Kitts who had been receiving treatment for HIV while imprisoned in the UK. At the time of his application, he was in the advanced stages of an incurable illness, and it was an ‘established fact that the withdrawal of his current medical treatment would hasten his death on account of the unavailability of similar treatment in St Kitts.’\textsuperscript{344} He argued that his removal to St Kitts would ‘condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution’, which would be inhuman and degrading.\textsuperscript{345}

Even though the applicant argued that the conditions in the country of origin were themselves ‘inhuman or degrading’, this was not the basis on which the case was decided.\textsuperscript{346} The court stated that the UK had ‘assumed responsibility for treating the applicant’s condition’,\textsuperscript{347} that he had ‘become reliant on the medical and palliative care’, and that the ‘abrupt withdrawal of these facilities [would] entail the most dramatic consequences for him’.\textsuperscript{348} Thus, the UK’s withdrawal of medical treatment to him was itself a breach of article 3 of the ECHR in the circumstances.

The general principle is expressed as follows:

\begin{quote}
The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the \textit{D.} case the very exceptional circumstances were that the applicant was critically ill and \textit{appeared to be close to death, could not be guaranteed any nursing}\textsuperscript{342}
\end{quote}

\textsuperscript{342} If the lack of services results from a direct act or omission by the State, then a violation of article 3 may be more readily found: see \textit{Sufi and Elmi v United Kingdom}, European Court of Human Rights, Application Nos 8319/07 and 11449/07 (28 June 2011), and discussion below.

\textsuperscript{343} On this point, see \textit{D v United Kingdom} (1997) 24 EHRR 423, [53]. Indeed, some domestic complementary protection schemes deliberately ‘carve out’ protection exceptions where the risk is faced generally by the population as a whole, requiring the applicant to show an individual risk: eg \textit{Immigration and Refugee Protection Act 2001} (Canada), s 97(b)(ii); EU Qualification Directive, art 15(c) and recital 26.

\textsuperscript{344} \textit{D v United Kingdom} (1997) 24 EHRR 423, [40].

\textsuperscript{345} Ibid.

\textsuperscript{346} See Ibid, [49] distinguishing the reasoning in this case from other removal cases.

\textsuperscript{347} Ibid, [53].

\textsuperscript{348} Ibid, [52].
or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.349

In the non-removal context, the English courts have found that the denial of subsistence support to asylum seekers living in the UK violates article 3 of the ECHR where it may result in their destitution. The House of Lords stated that treatment is inhuman or degrading ‘if, to a seriously detrimental extent, it denies the most basic needs of any human being’.350 While the court noted that there is no general public duty to house the homeless or provide for the destitute, the State does have such a duty if an asylum seeker ‘with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life’.351 Relevant factors to be considered include the asylum seeker’s ‘age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation’.352

The European Court of Human Rights has also held that ‘a situation of extreme material poverty’ can violate article 3.353 In MSS v Belgium and Greece, the Belgian government was found to have breached its non-refoulement obligations under article 3 by returning an asylum seeker to Greece, thereby knowingly exposing the applicant to conditions of detention and living conditions that amounted to degrading treatment354—namely:

living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.355

Subsequently, in Sufi and Elmi v United Kingdom, the European Court of Human Rights held that people returned to Somalia who needed to seek refuge in particular refugee camps would face a real risk of treatment contrary to article 3 on account of the dire humanitarian conditions there (extreme overcrowding; extremely limited access to shelter, water and sanitation facilities; risk of violent crime, exploitation, abuse and forcible recruitment; a real risk of refoulement; and no foreseeable improvement in their situation).356

353 MSS v Belgium and Greece, European Court of Human Rights, Application No 30696/09 (Grand Chamber, 21 January 2011), [252].
354 Ibid, [367].
355 Ibid, [254]; see also [253]: ‘The Court reiterates that it has not excluded “the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity” (see Budina v. Russia, dec., no. 45603/05, ECHR 2009...).’
356 Sufi and Elmi v United Kingdom, European Court of Human Rights, Application Nos 8319/07 and 11449/07 (28 June 2011), [291]–[292].
Significantly, the court noted that:

If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State’s lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N v the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict.  

This suggests that in cases concerning the deliberate action or inaction by a State, non-return on the basis of inhuman treatment in the receiving State may be more readily established. In *Sufi and Elmi v United Kingdom*, the court distinguished its approach in *N v United Kingdom* (that ‘[h]umanitarian conditions would ... only reach the Article 3 threshold in very exceptional cases where the grounds against removal were “compelling”’)* and *MSS v Belgium and Greece*, to hold that in cases where ill-treatment relates to a deliberate act or omission by a State, the court must ‘have regard to an applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame’.

However, as the English Court of Appeal noted in *RS (Zimbabwe)*, since there is only one legal test for article 3, assessment of harm should not depend ‘on whether the “lack of sufficient resources” in the receiving State occurs as a consequence of some malign influence by that State or because of benign matters. The effect on the individual is the same in either case and it either reaches the threshold set by the ECtHR or it does not.’ As a matter of human rights law, this is the correct approach. The principal focus in every case should remain the nature of significant harm a person would face if removed.

By way of analogy, it is useful to recall that refugee law recognizes that ‘persecution’ can encompass the deprivation of socio-economic rights, not just violations of civil and political rights. The *Migration Act* expressly enumerates ‘significant economic hardship that threatens the person’s capacity to subsist’, ‘denial of access to basic services, where the denial threatens the person’s capacity to subsist’, and ‘denial of capacity to earn a livelihood of any

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357 Ibid, [282].
358 Cited in ibid, [280].
359 Ibid, [283]. This resonates with recent UK authority that has suggested a greater willingness to find a violation of article 3 where it can be attributed to the deliberate action or inaction of a State, rather than something more ‘natural’, such as an illness: see *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, [254], citing an earlier decision of the AIT in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, quoted in M Foster, ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ [2009] New Zealand Law Review 257, 300.
360 *RS (Zimbabwe)* v *Secretary of State for the Home Department* [2008] EWCA Civ 839, [31]. See also *ZT v Secretary of State for the Home Department* [2005] EWCA Civ 1421, [16]; ‘Soering came nowhere near to laying down any special rule about the behaviour of the receiving state, within the ambit of the single rule of article 3 in terms of inhuman and degrading treatment.’ There is, however, contradictory authority in *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, [254] citing an earlier decision of the AIT in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, quoted in Foster, above n 359, 300.
kind, where the denial threatens the person’s capacity to subsist as forms of persecution. Since ‘cruel or inhuman’ or ‘degrading’ treatment does not need to be as severe as ‘persecution’, less forms of socio-economic harm should suffice.

Applying this reasoning, it is clear that when the (cumulative) conditions in the country of origin would result in an individual living in destitution or below a minimum subsistence level, removal to such conditions will give rise to a complementary protection claim. It is difficult to see how a decision-maker could reach any other conclusion on a correct application of international human rights law principles, as outlined above.

Finally, it may be useful to note that the UK Asylum and Immigration Tribunal has accepted in the non-refoulement context that ‘poor living conditions are capable of raising an issue under article 3 [of the ECHR] if they reach a minimum level of severity’, including where ‘a person would be exposed to a real risk of existence below the level of bare minimum subsistence that would cross the threshold of Art 3 harm’. It has accepted that removal would violate the prohibition on return to inhuman or degrading treatment where it would result in:

(a) return to ‘a camp where conditions are described as ‘sub-human’ and [the applicant would] face medical conditions described as some of the worst in the world';

(b) the return of ‘an amputee who had serious mental problems who would not receive either financial or medical support in the Gambia, and would only have recourse to begging for his support’;

(c) a 16 year old boy’s return where this would leave him destitute and without any protection;

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362 Migration Act 1958 (Cth), s 91R(2).
363 An analogy can be found in international refugee law. ‘Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin’: E Feller, ‘Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR’ (Strategic Committee on Immigration, Frontiers and Asylum, Brussels, 6 November 2002), 3. See also UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc HCR/IP/4/Eng/REV.1 (2nd edn, 1992), [5].
364 As Cassese has noted, ‘nothing could warrant [article 3’s] possible limitation to only physical or psychological mistreatment in the area of civil rights’: A Cassese, ‘Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2 European Journal of International Law 141, 143.
365 HS (Returning Asylum Seekers) Zimbabwe CG [2007] UKIAT 00094, [59]. The cases discussed here are referred to in Foster, above n 359, 303.
366 Mandali v Secretary of State for the Home Department [2002] UKIAT 0741, [10].
368 R v Secretary of State for the Home Department, ex parte Kebbeh [1999] EWHC Admin 388 (QB), [58], cited in Foster, above n 359, 304.
(d) the return of an applicant and his family to Kabul where they would be ‘reduced either to living in a tent in a refugee camp or … in a container with holes knocked in the side to act as windows’, and the applicant would be unlikely to find work and would ‘be competing with others for scarce resources of food and water as well as accommodation’. Concern was also expressed for the impact of these conditions on ‘five young (some of them very young) children’.370

Further reading


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369 *Korca v Secretary of State for the Home Department* (UKIAT Appeal No HX-360001-2001, 29 May 2002), [9], cited in Foster, above n 359, 304. See also *LM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 325.

370 *GH (Afghanistan) v Secretary of State for the Home Department* [2005] EWCA Civ 1603, [5]. The Court of Appeal rejected an appeal by the government.
G DEGRADING TREATMENT OR PUNISHMENT

Note: In interpreting this section, RRT Members are reminded to consult the relevant sections of this Manual on intent requirements, the distinction between ‘treatment’ and ‘punishment’, and the general considerations that need to be taken into account. In terms of the elements of the definition of ‘torture’, there is very little case law on ‘act or omission’. The meaning of ‘severe pain or suffering’ is discussed in relation to each of the complementary protection criteria, as well as in section III.C (Types of Treatment or Punishment). The meaning of ‘intentionally inflicted’ and ‘purpose’ are discussed in section III.D (Intention and Purpose Requirements). Lawful sanctions are examined in section II.E (Lawful sanctions).

Section 5(1) of the Migration Act defines this term. It provides that:

*degrading treatment or punishment* means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

(a) that is not inconsistent with Article 7 of the Covenant; or

(b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

The Explanatory Memorandum to the 2011 Bill provides some useful guidance as to Parliament’s intention in relation to the interpretation of this term. It relevantly states that ‘degrading treatment or punishment’ is ‘exhaustively defined’ by the Act, and ‘derives from the non-refoulement obligation implied under Articles 2 and 7 of the Covenant’.

1 Australian domestic jurisprudence

Prohibition of degrading treatment or punishment is specified under other Australian legislative frameworks as well. Section 10(b) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) states that ‘a person must not be … treated or punished in a cruel, inhuman or degrading way’. Section 10(1)(b) of the Human Rights Act 2004 (ACT) provides that ‘no-one may be … treated or punished in a cruel, inhuman or degrading way’.

As previously noted, considerations of conduct that is ‘cruel, inhuman or degrading’ is not new to the Migration Act itself. Pursuant to section 258F:

For the purposes of this Act, the carrying out of an identification test (by an authorised officer or otherwise) under section 40, 46, 166, 170, 175, 188 or 192 is not of itself taken:

(a) to be cruel, inhuman or degrading; or

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371 2011 Explanatory Memorandum, above n 9, [21].
372 Ibid, [24].
(b) to be a failure to treat a person with humanity and with respect for human dignity.

However, nothing in this Act authorises the carrying out of the identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.

The Explanatory Memorandum to the Act that introduced this provision in 2003 stated that: ‘This section reflects Articles 7 and 10(1) of the International Covenant on Civil and Political Rights.’\(^{373}\) It is yet to be judicially interpreted, however. References to prohibitions of actions that are conducted in a ‘cruel, inhuman or degrading manner’ also appear in section 48 of the *Crimes (Forensic Procedures) Act 2000* (NSW) and section 51 of the *Crimes (Forensic Procedures) Act 2000* (ACT).

2 **International jurisprudence\(^{374}\)**

As discussed in section III.C above, the standard approach internationally is to regard torture and cruel, inhuman or degrading treatment or punishment as harms falling on a continuum, or hierarchy, of ill-treatment, with torture the most severe manifestation.\(^{375}\) For this reason, RRT Members should also consult sections III.E and III.F. The following section summarizes the ways in which courts and tribunals have interpreted the ‘degrading treatment and punishment’ element.

*(a) Degrading treatment*

‘Degrading treatment’ is treatment which is humiliating or debasing: an affront to human dignity.\(^{376}\) Whereas the distinction between torture and inhuman treatment is often one of degree, ‘degrading’ treatment generally requires gross humiliation before others or being driven to act against one’s will or conscience.\(^{377}\) There does not, however, need to be any intention to humiliate,\(^{378}\) and it does not have to encompass actual bodily harm.\(^{379}\) It can encompass racial discrimination,\(^{380}\) which, in the context of complementary protection, would mean treatment less severe than persecution for reasons of race. The distinction between the Australian intent requirement and the position in international law, which does not contain this, is discussed in detail in section III.D above.

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\(^{373}\) Explanatory Memorandum, Migration Legislation Amendment (Identification and Authentication) Bill 2003 (Cth), [16].

\(^{374}\) See also the discussion of case examples, and the section on breaches of socio-economic rights, in section III.F.4 above.

\(^{375}\) *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [167]; Anker, above n 198, 465, 482, 485; Sunttinger, above n 198, 212.

\(^{376}\) See eg *East African Asians v United Kingdom* (1973) 3 EHRR 76.


\(^{378}\) *Peers v Greece* (2001) 33 EHRR 1192; *Poltoratskiy v Ukraine*, European Court of Human Rights, Application No 33812/97 (29 April 2005), [131]; cf *Migration Act 1958* (Cth), s 5(1).

\(^{379}\) *Soering v United Kingdom* (1989) 11 EHRR 439, [100]; *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [167].

\(^{380}\) *East African Asians v United Kingdom* (1973) 3 EHRR 76.
A characteristic formulation of the test applied by the European Court of Human Rights for ‘degrading’ treatment is set out in Moldovan v Romania:

In considering whether a particular form of treatment is ‘degrading’ within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, for example, Raninen v Finland, judgment of 16 December 1997, Reports 1997-VIII, pp. 2821-22, § 55). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, Peers v Greece, no. 28524/95, § 74, ECHR 2001-III).381

In the Greek case, the court defined ‘degrading treatment’ as that which ‘grossly humiliates [a person] before others or drives him to act against his will or conscience.’382

Degrading treatment may also encompass the denial of socio-economic rights, such as insufficient provision of basic services necessary for a dignified existence, including access to health, shelter, social security, and the education and protection of children, provided that a minimum level of severity is met.383

The concept of ‘degrading treatment’ was considered in the East African Asians case,384 where the applicants suggested that it was constituted by treatment that lowers a person ‘in rank, position, reputation or character, whether in his own eyes or in the eyes of other people’;385 The Commission rejected this, requiring additionally that it grossly humiliate the person before others or drive that person to act against his or her will or conscience.386 Humiliation, rather than actual pain or suffering, is key.387 For example, in Ireland v United Kingdom, the European Court of Human Rights defined degrading treatment as that which ‘arouse[s] in [its] victim feelings of fear, anguish and inferiority capable of debasing them and possibly breaking their physical and moral resistance’.388 This position was recently reiterated in Pretty v United Kingdom, where the court said that degrading treatment occurs:

[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of

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381 Moldovan v Romania, European Court of Human Rights, Application Nos 41138/98, 64320/01 (12 July 2005), [101].
384 East African Asians v United Kingdom (1973) 3 EHRR 76.
385 Ibid, [189].
387 See Tyrer v United Kingdom (1979–80) 2 EHRR 1, [32]. A lack of intent to humiliate will not conclusively rule out a violation of art 3 ECHR: Peers v Greece (2001) 33 EHRR 1192, [74].
388 Ireland v United Kingdom (1979–80) 2 EHRR 25, [167]. See also Bekos v Greece, European Court of Human Rights, Application No 15250/02 (13 December 2005).
fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance. 389

In Loayza Tamayo, the Inter-American Court of Human Rights pinpointed that element of ill-treatment which may make it degrading. It stated:

The degrading aspect is characterised by fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. 390

In the context of assessing a claim regarding imprisonment, the same court held that:

Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person... in violation of [the prohibition on cruel, inhuman and degrading treatment in Article 5 of the American Convention on Human Rights]. 391

(b) Degrading punishment

In the context of article 7 of the Covenant, the UN Human Rights Committee has stated that ‘for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty’. 392 In assessing degrading punishment, its nature, context, manner and method are relevant factors. 393

In considering the level of humiliation and debasement required to violate this provision, numerous judicial and quasi-judicial bodies have held that the humiliation and suffering must go beyond that which is inevitable in legitimate punishment. 394 Thus, while imprisonment resulting from a guilty verdict for a serious offence may cause some suffering and humiliation, it needs to reach a sufficient level of severity to fall within the class of prohibited treatment. 395 Where the requisite threshold is reached, the suffering must be attributable to the ill-treatment. Thus, in Martinelli v Italy, the applicant’s suffering from a pre-existing, progressive cerebral disease while imprisoned was insufficient to found a claim of unlawful treatment. 396

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389 Pretty v United Kingdom (2002) 35 EHRR 1, [52]. See also Ireland v United Kingdom (1979–80) 2 EHRR 25, [167].
390 Loayza Tamayo v Peru, Series C No 33 [1997] IACHR (17 September 1997), [57].
391 Ibid.
392 Vuolanne v Finland, Communication No 265/1987, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), [9.2]. Thus, detention in and of itself does not violate article 7 of the Covenant.
393 Tyrer v United Kingdom (1979–80) 2 EHRR 1, [30].
394 See eg Labita v Italy, European Court of Human Rights, Application No 26772/95 (6 April 2000), [120].
395 This has been held by, for example, the European Court of Human Rights in Kudla v Poland, European Court of Human Rights, Application No 30210/96 (26 October 2000), [99], and in relation to a detained person with a disability in Matencio v France, European Court of Human Rights, Application No 58749/00 (15 January 2004).
396 Martinelli v Italy, European Court of Human Rights, Application No 22682/02 (16 June 2005).
Although, to our knowledge, a risk of corporal punishment has not been relied upon to prevent removal to a country, numerous international bodies (including the UN Human Rights Committee and the Committee against Torture) and courts have held that corporal punishment can amount to degrading treatment.\footnote{See eg UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [5]; \textit{Osbourne v Jamaica}, Communication No 759/1997, UN Doc CCPR/C/68/D/759/1997 (13 April 2000), [9.1]; \textit{Tyrer v United Kingdom} (1979–80) 2 EHRR 1, [33]; see the questions of Ms Belmir and Mr Maríño Menéndez to Luxembourg, ‘Summary Record of the 759th Meeting’, UN Doc CAT/C/SR.759 (3 May 2007), [39]–[40]; questions of Mr Mavrommatis and Ms Belmir to the Netherlands, ‘Summary Record of the 763rd Meeting’, UN Doc CAT/C/SR.763 (14 May 2007), [14], [40]; International Committee on Economic, Social and Cultural Rights, ‘General Comment 13: The Rights to Education (Art 13)’, UN Doc E/C.12/1999/10 (8 December 1999), [41]. In \textit{Higginson v Jamaica}, the UN Human Rights Committee noted that even the imposition of the punishment, whether or not it is carried out, amounts to a violation: \textit{Higginson v Jamaica}, Communication No 792/1998, UN Doc CCPR/C/74/D/792/1998 (28 March 2002), [4.6].}

In the matter of \textit{Tyrer v United Kingdom}, the European Court of Human Rights held that court-sanctioned corporal punishment, in the form of birching, constituted inhuman or degrading treatment. It stated that even though the applicant

\begin{quote}
did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.\footnote{\textit{Tyrer v United Kingdom} (1979–80) 2 EHRR 1, [33].}
\end{quote}

The UN Committee on the Rights of the Child has held that:

\begin{quote}
There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.\footnote{Committee on the Rights of the Child, ‘General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19, 28(2) and 37, inter alia), UN Doc CRC/C/GC/8 (2 June 2006), [18].}
\end{quote}

3 Case examples

The following cases examine when treatment has been found to be ‘degrading’. They are not cases dealing with removal to degrading treatment, but rather the content of such treatment.

\textit{European Court of Human Rights}

\textit{Tyrer v United Kingdom} (1978)

The applicant committed an assault and was ordered by a court to be subjected to birching, a punishment involving beating with a birch rod or bundle of twigs. He was
struck three times on the bare buttocks causing his skin to rise, but not cut. The pain lasted approximately 10 days. The court found that this punishment was degrading.\textsuperscript{400}

\textit{Popov v Moldova} (2005)

A successful litigant claimed that he suffered humiliation for the non-enforcement by authorities of a civil judgment in his favour. The court found the claim inadmissible as this treatment was not sufficiently severe to be degrading.\textsuperscript{401}

\textit{Smith and Grady v United Kingdom} (1999)

Two members of the British armed forces were discharged in accordance with policy following an official investigation into allegations that they were homosexual. The applicants were asked about their sex lives, preferences and habits during that process. The court found that this did not amount to inhuman or degrading treatment. However, it stated that ‘treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3’.\textsuperscript{402}

\textit{Dougoz v Greece} (2001)

The applicant was held pending his expulsion with up to 100 people in a 20-person cell without beds, mattresses, sheets or blankets. The cells were dirty and without sufficient sanitary facilities. Those detained were not allowed time to exercise outside and were denied fresh air or natural light. The court found that these conditions amounted to degrading treatment.\textsuperscript{403}

\textit{Kalashnikov v Russia} (2002)

The applicant was detained in a cell designed for four people that housed between 18 and 24 inmates at any one time. Those detained were forced to share a bed with two or three others. The continuous nature of the severe overcrowding over a period of almost five years led the court to find that the treatment was degrading.\textsuperscript{404}


The applicant was on death row. He was kept in a cell with an open toilet for eight months, without any time out of the cell. The cell was lit 24 hours a day and was without any natural light. He was afforded little human contact during the period. The court found that this amounted to degrading treatment.\textsuperscript{405} Accepting that there was no intention on the part of the authorities to mistreat the applicant, the court held that the serious economic difficulties in the country of detention at the time was not an excuse for the treatment.\textsuperscript{406}

\textsuperscript{400} \textit{Tyrer v United Kingdom} (1979–80) 2 EHRR 1, [29]–[35]. See also \textit{Costello-Roberts v United Kingdom}, European Court of Human Rights, Application No 13134/87 (25 March 1993), [29]–[32].

\textsuperscript{401} \textit{Popov v Moldova}, European Court of Human Rights, Application No 74153/01 (18 January 2005), [26]–[28].

\textsuperscript{402} \textit{Smith v United Kingdom}, European Court of Human Rights, Application Nos 33985/96 and 33986/96 (27 September 1999), [121]; see generally [117]–[122].

\textsuperscript{403} \textit{Dougoz v Greece}, European Court of Human Rights, Application No 40907/98 (6 March 2001), [43]–[49].

\textsuperscript{404} \textit{Kalashnikov v Russia}, European Court of Human Rights, Application No 47095/99 (15 July 2002), [93]–[103].

\textsuperscript{405} \textit{Poltoratskiy v Ukraine}, European Court of Human Rights, Application No 38812/97 (29 April 2003), [129]–[146], [149].

\textsuperscript{406} Ibid, [148].
Mayzit v Russia (2005)
The applicant was detained for over nine months in a dim space (with only one square metre per person). Detainees were able to sleep in turns and were only able to wash every 10 days. The court found that this amounted to degrading treatment.\textsuperscript{407}

Raninen v Finland (1997)
The applicant was handcuffed for two hours, during which time he was briefly exposed to public view. In the absence of evidence that the applicant had been mentally affected, the court found there to be no degrading treatment.\textsuperscript{408}

Öcalan v Turkey (2005)
The applicant was blindfolded and handcuffed for the duration of a flight from Kenya to Turkey, where he was imprisoned on suspicion of being the leader of an armed separatist group. The blindfold was said to be for the purpose of keeping anonymity of those conducting the removal. It was taken off during interrogation. In light of the purpose of the handcuffing being the prevention of the applicant absconding or causing injury or damage, the court found that there was no degrading treatment.\textsuperscript{409}

Khudobin v Russia (2006)
The applicant was not provided with qualified and timely medical assistance while in detention. The court found that this gave rise to a strong feeling of insecurity and physical suffering particularly because he was HIV-positive and had a mental disorder. The court held that this amounted to degrading treatment in the circumstances.\textsuperscript{410}

An applicant who had been HIV-positive for 20 years was detained. His short and medium term chances of survival were found to be reasonable. He was taken to hospital and assessed for his deteriorating health. When satisfied it was in his health interests, the hospital released him to return to prison. The court found that the applicant had not been subjected to degrading treatment.\textsuperscript{411}

Price v United Kingdom (2001)
The applicant, imprisoned for contempt of court, was limbless from birth and suffered kidney problems. She was denied access to the battery charger for her wheelchair. This caused her to be cold from immobility, unable to sleep because of inappropriate bedding and humiliated from being assisted by male prison officers to use the bathroom. The court found that this amounted to degrading treatment.\textsuperscript{412}

Iwanczuk v Poland (2001)

\textsuperscript{407} Mayzit v Russia, European Court of Human Rights, Application No 63378/00 (20 January 2005), [35]–[43].
\textsuperscript{408} Raninen v Finland, European Court of Human Rights, Application No 20972/92 (16 December 1997), section III.
\textsuperscript{409} Öcalan v Turkey, European Court of Human Rights, Application No 46221/99 (12 May 2005), [167]–[169], [170]–[175].
\textsuperscript{410} Khudobin v Russia, European Court of Human Rights, Application No 59696/00 (26 October 2006), [91]–[97].
\textsuperscript{411} Gelfmann v France, European Court of Human Rights, Application No 25875/03 (14 December 2004), [49]–[60].
\textsuperscript{412} Price v United Kingdom, European Court of Human Rights, Application No 33394/96 (10 July 2001), [22]–[30].
The applicant was awaiting trial at the time of an election. He requested permission to vote and was told that he could subject to a requirement that he undergo a search. During the search he was subject to humiliation and taunting about his body, and verbal abuse. When he refused to remove his underpants, permission to vote was denied. The court found that this search was not justified in light of the history of the applicant, who was without a criminal record. The court found that the lack of respect for the applicant’s human dignity amounted to degrading treatment.\footnote{Iwanczuk v Poland, European Court of Human Rights, Application No 25196/94 (15 November 2001), [50]–[60].}

\textit{Lorsé v Netherlands} (2003)

The applicant was suspected of a plan to escape prison and was transferred to a more secure prison as a result. He was subject to restricted contact with other detainees and family, whom he was only allowed to see from behind glass. Once a month he was allowed a visit in the absence of glass during which his only contact was a handshake. Strip searches happened before and after those visits. Strip searches, including anal searches, also happened on a weekly basis, whether or not he had any contact with the outside world. The court held that these searches amounted to degrading treatment.\footnote{Lorsé v The Netherlands, European Court of Human Rights, Application No 52750/99 (4 February 2003), [59]–[74].}

For international cases, see:

- Lord Lester, D Pannick and J Herberg, \textit{Human Rights Law and Practice} (3rd edn, LexisNexis, 2009) (which also includes examples from the European Court of Human Rights)
IV EXCLUSION FROM COMPLEMENTARY PROTECTION

Section 36(2C) sets out the grounds on which a person may be excluded from complementary protection. It provides that:

A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

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

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

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

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

This provision conflates the exclusion clauses in article 1F of the Refugees Convention (section 36(2C)(a)) with the exception to the principle of non-refoulement in article 33(2) of the Refugees Convention (section 36(2C)(b)). Article 33(2) is intended to apply to conduct occurring after a person has been accepted as a refugee, whereas article 1F operates at the point of determining whether a person meets the refugee definition at all.

While using article 33(2) as an additional exclusion clause is unlawful with respect to refugees, the absence of an overarching international instrument on complementary protection means that this is not technically prohibited for people who would fall within section 36(2A).

However, while people caught by section 36(2C) are ineligible for a protection visa, they cannot be removed from Australia (since the exclusion clauses acknowledge that the person concerned is at risk of refoulement). The prohibition on return applies irrespective of how

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415 Refugees Convention, art 42. See also the view of the UK government in House of Commons Select Committee on European Scrutiny, Fourth Report of Session 2002–03 (2003), [6.22]; E Feller, ‘Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR’ (6 November 2002), 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002 13623/02 ASILE 59 (30 October 2002), 3.

416 See also UN Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992), [3].
abhorrant the conduct of the individual concerned might be.\textsuperscript{417} This is because the prohibition on \textit{refoulement} under the Covenant and CAT is absolute.

In the 2011 Bill’s Second Reading Speech, the Minister expressly stated:

> Unlike obligations under the refugees convention, Australia’s non-refoulement obligations under the ICCPR, the CAT and the CROC are absolute and cannot be derogated from.

> While Australia accepts that this is the position under international law, the government is committed to maintaining strong arrangements for protecting the Australian community. The bill is specifically designed to ensure Australia does not become a safe haven for persons who have committed war crimes or others of serious character concern.

> For this reason, specific provisions have been included in the bill to refuse the grant of a protection visa … \textsuperscript{418}

The Explanatory Memorandum to the 2009 Bill stated that ‘alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected.’\textsuperscript{419} The Senate Committee stated that it ‘look[ed] forward to learning further details about what form “alternative case resolution solutions” would take’.\textsuperscript{420} However, this was not elaborated upon in the amending legislation of 2011. The Explanatory Memorandum to the 2011 Bill noted only that:

> In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a non-refoulement obligation, such a person will not be removed from Australia while the real risk of suffering significant harm continues, but will be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia’s non-refoulement obligations; and the individual circumstances of their case.\textsuperscript{421}

In the Second Reading Speech to the 2011 Bill, the Minister added that:

> In the small number of instances where non-refoulement obligations would arise for persons who are excluded on security or serious character grounds, determinations as to post-decision case management will remain with the minister personally.\textsuperscript{422}

\textsuperscript{417} This was established in \textit{Chahal v United Kingdom} (1996) 23 EHRR 413, [79]–[80] and has been affirmed consistently, such as in \textit{Saadi v Italy}, (2008) 24 BHRC 123, [127].


\textsuperscript{419} 2009 Explanatory Memorandum, above n 8, [64].

\textsuperscript{420} Senate Committee Report, above n 5, [3.39].

\textsuperscript{421} 2011 Explanatory Memorandum, above n 9, [90].

In light of the limitations on the RRT’s jurisdiction, Members will not have reason to consider the exclusion provisions. However, the discussion above highlights why it is important that the inclusion clauses are considered before the exclusion clauses are assessed.

Further reading


V GENERAL CONSIDERATIONS IN COMPLEMENTARY PROTECTION CLAIMS

A PERSONAL FEATURES OF THE APPLICANT TO BE TAKEN INTO ACCOUNT

Domestic, regional and international judicial bodies all regard a person’s specific characteristics as relevant to determining whether or not the treatment inflicted on them constitutes torture or cruel, inhuman or degrading treatment. Article 20 of the EU Qualification Directive provides that in considering protection claims, Member States must ‘take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.’ The recast version of the Qualification Directive also adds ‘victims of trafficking’ and ‘persons with mental disorders’.423

This jurisprudence provides that all features of the alleged victim and perpetrator are to be considered cumulatively in determining the gravity and nature of the relevant treatment. These factors are an important element in the balancing act required of decision-makers to determine whether an act constitutes a sufficiently severe form of ill-treatment as to give rise to complementary protection.

Australian domestic law already recognizes that personal characteristics of an applicant are relevant to determining whether a person should be extradited from Australia. For example, various bilateral extradition treaties provide that extradition may be refused if Australia considers that, in the circumstances, the age, health or other personal circumstances of the persons whose extradition is sought would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.424

The European Court of Human Rights has held that:

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of [the prohibition]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.425

In Menesheva v Russia, the court reiterated that:

423 Council of the European Union, above n 44.
424 See discussion in De Bruyn v Minister for Justice and Customs [2004] FCAFC 334, [76] relating to Treaty on Extradition between Australia and the Republic of South Africa, art 3(2)(g). See also Treaty between Australia and Finland concerning Extradition, art 5(c); Treaty on Extradition between Australia and the Kingdom of Belgium, art 3(2)(f); Treaty on Extradition between Australia and the Republic of Korea, art 4(2)(e).
425 Ireland v United Kingdom (1979–80) 2 EHRR 25, [162].
to assess the severity of the ‘pain or suffering’ inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim … 426

In Adam, a case concerning the UK’s treatment of asylum seekers who had been denied work rights, housing and social security by the State, the House of Lords held that in determining whether a person had been subject to cruel or inhuman treatment, relevant factors included:

- age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered and is likely to continue to suffer privation ... 427

The Inter-American Court of Human Rights has held that the wider socio-political context in which the alleged ill-treatment occurred is also relevant to an assessment of the severity of the treatment.428

1 Health and other physical conditions

As noted in Adam above, an applicant’s physical or mental health can have a bearing on whether treatment is cruel, inhuman or degrading in the circumstances. In C v Australia, the UN Human Rights Committee found that holding an individual in immigration detention when there was clear evidence that he had a psychiatric illness (which developed as a result of his protracted detention) constituted a violation of article 7 of the Covenant.429

In Ostrovar v Moldova,430 the fact that the applicant was asthmatic was relevant to a finding that his detention in an overcrowded cell in which smoking was allowed was ‘degrading’. This, in combination with poor medical assistance, sanitary standards and quality of food, resulted in the European Court of Human Rights finding that the applicant had been subjected to degrading treatment.

The relative position of the victim vis-à-vis the perpetrator is also relevant. The UN Special Rapporteur on Torture has stated that, inter alia, ‘the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted’, is a decisive criteria for distinguishing what amounts to torture’.431 In Berlinski v Poland,432 the European Court of Human Rights found that the physical strength of the victim(s)—in this case, bodybuilders—relative to those carrying out the ill-treatment—here, police officers—was relevant in assessing the severity of that treatment.

426 Menesheva v Russia, European Court of Human Rights, Application No 59261/00 (9 March 2006), [61]; Soering v United Kingdom, (1989) 11 EHRR 439, [100]; see also Labita v Italy, European Court of Human Rights, Application No 26772/95 (6 April 2000), [120].
427 R v Secretary of State for the Home Department, ex parte Adam [2005] UKHL 66, [7]–[8].
428 Ximenes-Lopes v Brazil, Series C No 149, [2006] IACHR (4 July 2006), [127].
429 C v Australia, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (13 November 2002), [8.4].
430 Ostrovar v Moldova, European Court of Human Rights, Application No 35206/03 (13 September 2005), [76]–[90].
431 Report of the Special Rapporteur on Torture, above n 252, [39].
432 Berlinski v Poland, European Court of Human Rights, Application No 27715/95 (20 June 2002), [62].
Other factors, such as cultural or religious beliefs, may transform treatment into a kind that is cruel, inhuman or degrading, or even torture. The UN Special Rapporteur on Torture stated in relation to the treatment of detainees at Guantanamo Bay that such factors would include ‘cultural sensitivities’ of the individual (for example, being naked in front of the opposite sex), and phobias (such as a personal fear of dogs). In *Dzemajl v Yugoslavia*, the Committee against Torture similarly held that where the perpetrator of the ill-treatment is aware that the victim is particularly sensitive, it is possible that acts which would not otherwise reach the threshold of severity to constitute torture may do so.

2 Children

Children’s protection claims should be assessed in an age-sensitive manner. The Explanatory Memorandum to the 2011 Bill stated that:

The non-refoulement obligations noted above may also be implied under the CROC, to the extent that the CROC contains obligations in the same terms as the Covenant. Claims by children will be assessed in an age-sensitive way, in view of the specific needs of children.

Although the *Migration Act* does not explicitly refer to CROC, article 37(a) of that instrument provides that: ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.

The European Court of Human Rights has delivered numerous judgments in which the young age of the applicant has been held to be relevant when assessing of the severity of the ill-treatment. In *Mubilanzila Mayeka v Belgium*, a five year old girl was travelling through Belgium with her uncle on her way from the Democratic Republic of Congo to Canada. Her uncle had attained refugee status in Belgium. Due to a lack of travel papers for the girl, she was separated from her uncle and detained with adults for almost two months. No-one was assigned to look after her. The court found that this amounted to inhuman treatment, especially because of her age. In *Aydin v Turkey*, the court found that the young age of a victim of rape and humiliation made the conduct especially grave and abhorrent. In *Rivas v France*, a minor suffered a blow during police questioning that caused a ruptured testicle. The applicant’s age and adolescent build were found to be relevant in considering the gravity of the ill-treatment. The House of Lords has also acknowledged the special vulnerability of children and held that it is a relevant factor in assessing whether the requisite level of severity is met for treatment to constitute cruel or inhuman treatment.

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435 2011 Explanatory Memorandum, above n 9, [83].
436 *Mubilanzila Mayeka v Belgium*, European Court of Human Rights, Application No 13178/03 (12 October 2006).
437 *Aydin v Turkey*, European Court of Human Rights, Application No 23178/94 (25 September 1997).
438 *Rivas v France*, European Court of Human Rights, Application No 59584/00 (1 April 2004).
439 *E (a Child), Re (Northern Ireland)* [2008] UKHL 66 (12 November 2008), see especially Baroness Hale.
Finally, it should be recalled that in any matter involving a child, the child’s best interests are a primary consideration that must be taken into account.\textsuperscript{440} Article 20 of the EU Qualification Directive notes the particular vulnerability of children (both accompanied and unaccompanied). A new recital to the recast version of the Qualification Directive provides that in accordance with CROC:

In assessing the best interest of the child, Member States should in particular take due account of the principle of family unity, the minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his/her age and maturity.\textsuperscript{441}

\section*{B PROPORTIONALITY}

Proportionality is a relevant factor in determining whether a particular form of treatment amounts to torture or cruel, inhuman or degrading treatment. For example, whereas amputating a limb would constitute significant harm in many circumstances, it would not breach of article 7 of the Covenant if it were done to save someone’s life.\textsuperscript{442} This means that assessments of whether article 7 is violated require a proportionality assessment. However, as Joseph, Schultz and Castan observe:

Once a certain act is found to constitute article 7 treatment however, no justification can be raised to prevent a finding of a violation. Proportionality is therefore relevant when considering the appropriate \textit{classification} of the act as article 7 treatment, rather than in considering any alleged \textit{justification} for engaging in article 7 treatment.\textsuperscript{443}

Addressing the issue of proportionality in relation to action by police and security forces, the UN Special Rapporteur on Torture has stated that `only if such use of force is disproportionate in relation to the [lawful] purpose to be achieved and results in pain and suffering meeting a certain threshold, will it amount to cruel or inhuman treatment or punishment.’\textsuperscript{444} In a report to the UN Committee against Torture, the Australian government endorsed this view by stating that it understood the expression `cruel, inhuman or degrading punishment’ to encompass `such acts as excessive punishments out of proportion to the crime committed.’\textsuperscript{445}

The European Court of Human Rights has held that unnecessary force inflicted during arrest or detention diminishes the dignity of the person subjected to it, such that it may amount to degrading treatment. It is therefore not lawful to subject a docile detainee to physical force.\textsuperscript{446} In \textit{Henaf v France},\textsuperscript{447} a 75 year old prisoner was shackled by one ankle to a hospital bed for the duration of the night before undergoing surgery. Two police officers were also there to guard him. The court found that shackling him was disproportionate and unnecessary given

\begin{itemize}
\item \textsuperscript{440} CROC, art 3; \textit{Minister of State for Immigration and Ethnic Affairs v Teoh} (1995) 183 CLR 273.
\item \textsuperscript{441} Council of the European Union, above n 44.
\item \textsuperscript{442} Joseph, Schultz and Castan, above n 164, [9.32].
\item \textsuperscript{443} Ibid. See also \textit{Cabal and Pasini Bertran v Australia}, Communication No 1020/01, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003), [8.2].
\item \textsuperscript{444} \textit{Report of the Special Rapporteur on Torture}, above n 252.
\item \textsuperscript{445} UN Committee Against Torture, \textit{UN Committee against Torture: Addendum to the Second Periodic Reports of States Parties Due in 1994, Australia}, UN Doc CAT/C/25/add. 11 (15 May 2000).
\item \textsuperscript{446} \textit{Labita v Italy}, European Court of Human Rights, Application No 26772/95 (6 April 2000).
\item \textsuperscript{447} \textit{Henaf v France}, European Court of Human Rights, Application No 65436/01 (27 November 2003).
\end{itemize}
the presence of the guards. Similarly, in *Avci v Turkey*, the court found that restraining a person who was in a coma and in danger of dying, and who was also being guarded, was disproportionate.\footnote{448}{*Avci v Turkey*, European Court of Human Rights, Application No 24935/94 (10 July 2001).}

Detention conditions can amount to cruel, inhuman or degrading treatment in certain circumstances. Detention conditions must be conducive to a healthy existence, and particular hardship may cause the detention to be disproportionate.\footnote{449}{See *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (13 November 2002).} For example, in *Alver v Estonia*, the European Court of Human Rights held that overcrowding, poor sanitation, poor ventilation and poor dietary provisions in detention, which resulted in the applicant contracting tuberculosis and developing liver disease, exceeded the unavoidable level of suffering inherent in detention and thus amounted to degrading treatment.\footnote{450}{*Alver v Estonia*, European Court of Human Rights, Application No 64812/01 (8 November 2005).}

However, if an individual has been found to be particularly dangerous, then the proportionality principle may justify otherwise restrictive conditions (in the individual case). One of the most extreme cases is *Ramirez Sanchez v France*.\footnote{451}{Sanchez, better known as ‘Carlos the Jackal’, was convicted of bombings that killed 11 people and injured more than 100, as well as the shooting murders of three other people in a separate incident.} There, the applicant complained of his detention in solitary confinement for eight years and two months. He was prohibited from having contact with prisoners or staff and had very limited visitor rights (although he was visited on average every few weeks by his doctor, and his lawyer, who became his partner). In view of the danger he was believed to pose, the court held that these restrictions did not amount to inhuman treatment because they were ‘necessary’ (that is, proportionate).\footnote{452}{*Ramirez Sanchez v France*, European Court of Human Rights, Application No 59450/00 (4 July 2006).}

### Further reading


### C CREDIBILITY

Protection visa applicants may have experienced significant trauma. Experiences of torture or cruel, inhuman or degrading treatment or punishment may affect their ability to recount their stories, present evidence in a lucid and chronological manner, recall details, and feel sufficiently safe to tell their story to an authority figure. Indeed, such features may in fact help to authenticate their experience of significant harm, rather than provide evidence that...
they are not credible. For these reasons, the existing RRT ‘Guidance on Vulnerable Persons’ is pertinent to complementary protection claimants.

For example, the UN Committee against Torture has repeatedly acknowledged that inconsistencies in applicants’ stories are not material and should not cast doubt on ‘the general veracity of the author’s claims’, since ‘complete accuracy is seldom to be expected by victims of torture’, especially where they are suffering from post-traumatic stress disorder.

Reports from reputable NGOs working with victims of confirm that the experience of torture or cruel, inhuman or degrading treatment often results in long-term difficulties in ‘linear’ story-telling, which is the favoured method of legal testimony. In this regard, Quentin Dignam of the Victorian Foundation for the Survivors of Torture notes:

> Often, torture will have left them confused and forgetful, unable to present a coherent story of the oppression they suffered. ... Some clients choose to delve exhaustively into one element of the story before moving to the next. Others range repeatedly over the whole narrative in progressively greater detail, and with more intense emotional engagement each time until the testimony is complete. ... Officials dealing directly with survivors of torture need to be aware that individuals respond differently to different levels and kinds of stress.

In Canada, there is evidence that applicants who have been found not to be credible in their refugee protection claim (for example, found not to hold a particular religious belief) have nonetheless succeeded on complementary protection criteria:

> There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant’s particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the [Canadian Immigration and Refugee Board member] apply a

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different test, namely whether a claimant’s removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act … 456

Accordingly, ‘a negative credibility determination, which may be determinative of a refugee claim under [the Refugees Convention] is not necessarily determinative of a claim [for complementary protection]’. 457 This is because of the way in which the standard of proof in complementary protection claims was articulated by the Canadian Federal Court of Appeal in \textit{Li}. 458 The court found that there is no subjective component to a complementary protection claim (whereas ‘well-founded fear’ has both a subjective and an objective element). Thus, credibility as to the subjective effect of the significant harm is not relevant in the Canadian context.

\textbf{Further reading}


\section*{D \hspace{1cm} INTERPRETING THE ACT OVER TIME: EVOLVING HUMAN RIGHTS LAW}

Interpretation of the complementary protection criteria will necessarily change over time as human rights jurisprudence evolves. RRT Members must therefore be alert to contemporary international standards. This is relevant not only when considering a particular application before the RRT, but also when applying past case law, since understandings of the scope of concepts like ‘torture’ may have evolved since earlier decisions were made. For example, the European Court of Human Rights has stated that the evolution of human rights standards means that acts that previously were interpreted ‘only’ as inhuman or degrading treatment may need to be reclassified in the future, 459 because the ECHR is a ‘living instrument’ that

456 \textit{Bouaouni v Canada (Minister of Citizenship and Immigration)} [2003] FCJ No 1540; 2003 FC 1211, [41].

457 Ibid.

458 \textit{Li v Minister of Citizenship and Immigration} [2003] FCJ No 1934; 2003 FC 1514 (Gauthier J). This case was affirmed in \textit{Li v Canada (Minister of Citizenship and Immigration)} [2005] FCJ No 1; 2005 FCA 1, [18]–[28].

459 \textit{Selimouni v France}, European Court of Human Rights, Application No 25803/94 (28 July 1999), [101]. In \textit{A v Secretary of State for the Home Department} [2004] UKHL 56, [53], the House of Lords stated that the conduct complained of in \textit{Ireland v United Kingdom} (1979–80) 2 EHRR 25 might now be viewed as ‘torture’.
‘must be interpreted in the light of present-day conditions’. For example, in *Selmouni v France* and *Eliç v Turkey*, the court recharacterized acts that had previously been considered to be ‘inhuman and degrading’ as constituting ‘torture’. The court held that:

the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

In *Henaf v France*, the court said that ‘it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity.’ It is therefore essential that older judgments relating to minimum levels of severity are read in light of these cases, and thus in line with current standards.

This means that Australian jurisprudence on complementary protection should evolve over time, and earlier decisions may need to be re-evaluated in light of new understandings.

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460 *Tyrer v United Kingdom* (1979–80) 2 EHRR 1, [31]; see also *Soering v United Kingdom* (1999) 11 EHRR 439, [102].


462 Ibid, [101].

463 *Henaf v France*, European Court of Human Rights, Application No 65436/01 (27 November 2003), [55]. Noting this approach, the Inter-American Court of Human Rights seems to endorse the idea that distinctions and gradations of treatment are not rigid, but rather evolve with increased protection of fundamental rights: *Cantoral-Benavides v Peru*, Inter-American Court of Human Rights (Judgment of 18 August 2000), [99]–[103].
ANNEX: TREATIES AND LEGISLATIVE EXTRACTS

International Covenant on Civil and Political Rights

Article 2

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

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention against Torture

Article 1

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
Second Optional Protocol to the Covenant

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Convention on the Rights of the Child

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) 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 a prompt decision on any such action.

Article 2(e) of the EU Qualification Directive defines as a ‘person eligible for subsidiary protection’:

a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

‘Serious harm’ is defined in article 15 as:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or

(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Immigration and Refugee Protection Act 2001, s 97(1) (Canada)

For a ‘person in need of protection’, the first ground for protection encompasses persons outside the scope of the Convention who face a personal danger of being tortured, as defined in article 1 CAT. The second encompasses persons falling outside the Convention who face a personal risk to life or a risk of cruel and unusual treatment or punishment where:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
Useful websites

2. For decisions of UN bodies: [www.bayefsky.com/bytheme.php](http://www.bayefsky.com/bytheme.php)
3. Committee Against Torture: [http://www2.ohchr.org/english/bodies/cat/](http://www2.ohchr.org/english/bodies/cat/)
5. Human Rights Committee: [http://www2.ohchr.org/english/bodies/hrc/index.htm](http://www2.ohchr.org/english/bodies/hrc/index.htm)
7. Refworld: [www.refworld.org](http://www.refworld.org)
8. UK Asylum and Immigration Tribunal: [www.ait.gov.uk/](http://www.ait.gov.uk/)