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Filling the protection gap: current trends in complementary protection in Canada, Mexico and Australia

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Introduction

This paper examines the increasing practice of complementary protection by undertaking a comparative and critical analysis of the laws and procedures of three countries: Canada, Mexico and Australia. The paper assesses these national complementary protection schemes against international legal benchmarks.

Complementary protection describes the protections which states afford people who are at risk of serious human rights violations in their country of origin, but who do not qualify as ‘refugees’ under the 1951 Refugee Convention¹ (Refugee Convention). In accordance with international and regional human rights treaties and principles of international humanitarian law, states are obligated to provide protection to these persons though they may not fit precisely within the Refugee Convention definition. However, it will be seen in this paper that actual practice between states differs significantly in terms of the nature and extent of protection provided.

The three country case studies have been chosen for study because these countries represent three different stages of a state’s legislative engagement with complementary protection. Therefore, each case study facilitates an understanding of the various challenges and opportunities at different temporal stages along the complementary protection continuum: Canada legislated for complementary protection in 2001 (in force since 2002); Mexico in 2010 (in force since 2011). Australia enacted complementary protection legislation in September 2011, and as at the date of writing, this legislation is not yet in force – it is anticipated that this legislation will come into force in March/April 2012.²

The recentness of the Mexican and Australian legislation, coupled with current changes to Canada’s asylum system, positions the complementary protection schemes of each of the three countries as topical and warranting of review. This paper will provide a critical legal analysis of comparative approaches to complementary protection. It will do this by looking critically at the nature, strengths and shortcomings of the three complementary protection schemes.

The central argument of this paper is that national, or domestic, complementary protection schemes must be consistent with international human rights standards. As an increasing number of states engage in legislating for their complementary protection obligations, acute questions arise as to the extent of compliance of domestic practices with international legal standards.³ This study will therefore provide guidance on how complementary protection obligations may be legislatively specified and implemented in compliance with international law.

The structure of this paper is as follows: Part 1 provides an overview and explanation of the international legal basis for complementary protection. Part 2 sheds light on the surrounding contexts for the establishment and implementation of the complementary protection schemes in each of the three countries. Part 3 analyses states’ obligations at international law, and the extent

¹ The Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention).

² Interestingly, New Zealand too enacted legislation providing for complementary protection; in effect as of 2011.

³ The European Union, Canada, the United States, Hong Kong and New Zealand have comparable provisions for complementary protection.

of compliance in the respective domestic schemes. This will be achieved through an assessment of the following six legislative features, examined against international legal benchmarks:

- 1.Scope of protection afforded
- 2.Standard of proof
- 3.Status determination procedures
- 4.Rights afforded to protection beneficiaries
- 5.Rights of appeal
- 6.Cessation of protection

Finally the paper concludes with a summary of the key arguments of the paper. This part also highlights the importance of implementation of the relevant legislation. That it is of limited value that a country legislates for broad human rights protections if these provisions have no effect for lack of implementation. Interwoven throughout the paper is an underscoring of the importance of providing sufficient, durable and consistent protection to those in need.

The legal framework: complementary protection in international law

The Refugee Convention protects people who have a well-founded fear of persecution on the basis of race, religion, nationality, political opinion or membership of a particular social group.⁴ Yet the protection afforded under the Refugee Convention is relatively narrow. It does not extend to cover all people in need of protection from serious human rights violations in their countries of origin. Similarly, while human rights law and humanitarian law do offer some protection, these standards fail to ‘provide protected persons with a clearly defined, internationally recognized status or a specific legal residency status, identity or travel documents’.⁵ Against this backdrop we see a distinct need for additional protection measures.

This need was initially made apparent in cases of persons who had fled generalised violence and other threats caused by internal armed conflict. This need was reflected and articulated in such regional instruments as the 1969 Organization of African Unity Refugee Convention and the Cartagena Declaration on Refugees 1984. Other examples of compelling cases which have revealed the need for a complementary protection system include:

- inter-familial or other personal/relational disputes or threats of violence;⁶
- people who face the death penalty in their country of origin;⁷ and,
- people who face extrajudicial killings, or torture, cruel or degrading or inhuman punishment for non-Refugee Convention reasons.

⁴ Article 1 Refugee Convention.

⁵ UN High Commissioner for Refugees, Providing International Protection Including Through Complementary Forms of Protection, 2 June 2005, EC/55/SC/CRP.16, 21.

⁶ Complementary protection has been granted in Mexico in 2011 on this basis.

⁷ This is contemplated under the Australian scheme, and is explored in this paper in Part 3 below.

To varying degrees, states have long protected people falling outside the scope of the Refugee Convention definition of a ‘refugee’. In general, this has tended to be approached informally – that is, without specific legislative provisions directly addressing this.⁸ However, it is only recently (over the past two decades) that states have expressed this protection as a requirement of international law, commonly labelled as complementary protection,⁹ rather than a discretionary choice of individual states.

The international legal basis for complementary protection derives from the combination of international refugee, human rights and humanitarian law paradigms and precepts, which operate alongside the Refugee Convention.¹⁰ The sources of these laws are principally international customary law and treaties.

While there is no universally accepted definition of the term ‘complementary protection’, it describes the obligation of states to protect people who do not meet the Refugee Convention definition of a ‘refugee’, but who nonetheless are in need of protection on the basis that they face serious violations of their human rights if returned to their country of origin. As Goodwin-Gill and McAdam articulate, the term ‘complementary protection’ denotes states’ protection obligations arising from international legal instruments and customary law that complement the Refugee Convention.¹¹

The central feature of complementary protection is the international legal obligation of non-refoulement - the obligation not to return an individual to a place where they will suffer serious harm. The UN High Commissioner for Refugees (UNHCR) Executive Committee (EXCOM) explains that states ‘are parties to other international instruments that could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would [be] in jeopardy’.¹² As such, the term complementary protection functions as shorthand for non-refoulement under international law.

The non-refoulement obligation is contained in various regional¹³ and international treaties. And, while some have disputed this, it is generally accepted that non-refoulement has attained the status of a principle of customary international law.¹⁴ The list of human rights violations that may give rise to a non-refoulement obligation is not exhaustive. For example, the Human Rights Committee has held that the deportation of a person to a territory where there is a real risk that

⁸ To some extent Mexico is somewhat of an exception to this trend, whereby there have been some instances of “formal” approaches, for example through various Latin American regional treaties granting political asylum.

⁹ It is also referred to as ‘subsidiary protection’, for example within the European Union through the *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L304/12 (EU Qualification Directive).

¹⁰ Goodwin-Gill, G.S. and McAdam J., *The Refugee in International Law*, 3rd ed., Oxford University Press, Oxford, 2007, 285.

¹¹ *ibid*, 286.

¹² *Mutombo v Switzerland*, UN Doc. CAT/C/12/D/12/1993, decision delivered 27 April 1994, paragraph 40.

¹³ See for example Article 22.8 of the American Convention on Human Rights and Article 13 of the Inter-American Convention to Prevent and Punish Torture.

¹⁴ Goodwin-Gill, G.S. and McAdam J., *The Refugee in International Law*, 354.

the person's rights under the ICCPR will be violated as a result may constitute refoulement.¹⁵ However, while it has been held that violations of Articles 6 and 7 of the ICCPR will almost certainly constitute a breach of non-refoulement obligations,¹⁶ the same Committee appears to have deliberately left open the question of what other rights might also attract this standard.

In 2004, a need to harmonise the principles of these above-mentioned laws into one instrument was attempted at a regional level by the European Union (EU) through a binding supranational legal instrument adopted by EU Member States: the EU Qualification Directive. Then in 2005, a non-binding EXCOM Conclusion was agreed at the international level by seventy-two states. This encouraged states to use 'complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 [Refugee] Convention or the 1967 Protocol'.¹⁷

Due to the absence of any binding international agreement on complementary protection, complementary protection practice continues to be *ad hoc* and varied among states, largely decided on the basis of executive discretion rather than any unified international approach.¹⁸ This may be particularly problematic where the effect is to leave the door wide open to the discretion of decision-makers, thereby limiting the predictability of the law. However, there seems to be a growing recognition of international protection obligations arising outside of the Refugee Convention - this is resulting in increasing domestic codification of complementary protection mechanisms.

Setting the scene

Myriad factors have come into play in each of the three countries, influencing the design, development and implementation of complementary protection schemes. This part considers the different contextual factors present in Canada, Mexico and Australia which have influenced complementary protection-directed laws and practice.

¹⁵ *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee, 11 August 1997, paragraph 6.9. The Human Rights Committee has also emphasised the non-exhaustive list of refoulement obligations, prohibiting refoulement where there are 'substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant': UN Human Rights Committee, *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 12.

¹⁶ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, Canada: Supreme Court, 26 September 1991, paragraph 15.3; *Roger Judge v. Canada*, CCPR/C/78/D/829/1998, UN Human Rights Committee, 13 August 2003, paragraph 10.4.

¹⁷ UN High Commissioner for Refugees, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, 6.

¹⁸ Goodwin-Gill, G.S. and McAdam J., *The Refugee in International Law*, 285.

Canada

Canada enacted legislation providing for complementary protection¹⁹ in 2001 through the *Immigration and Refugee Protection Act 2001* (IRPA). Now almost ten years since the IRPA came into force, Canada is in the process of introducing a raft of amendments to its migration policy and laws through the *Balanced Refugee Reform Act* (BRRRA).²⁰ The BRRRA amends the IRPA as well as the *Immigration and Refugee Protection Regulations* (IRPR). Further, Canada's proposed *Preventing Human Smugglers from Abusing Canada's Immigration System Act* (Bill C-4, formerly Bill C-49) indicates other possible significant changes to Canada's complementary protection practice.²¹ These (proposed) changes therefore call for fresh analysis and review of Canada's complementary protection scheme.

Prior to the IRPA, which came into force on 28 June 2002, refugee protection in Canada was informed and determined pursuant to the *Immigration Act*²² - protection claims for refugee status were assessed according only to the five enumerated grounds in the Refugee Convention. Canada's broader non-refoulement obligations were governed outside of the *Immigration Act*. Importantly, prior to the IRPA, persons in Canada who could not be returned to their countries of origin due to non-refoulement obligations did not enjoy the same status as persons deemed to be refugees within the meaning of the Refugee Convention.

The effect of the enactment of the IRPA was to expand the grounds on which refugee protection in Canada could be afforded, allowing for broader international human rights obligations and standards to be considered in refugee status determinations. For the purposes of this paper, the most relevant change that the IRPA brought to Canada's protection scheme was to enable the conferral of refugee protection on both Convention refugees as well as on a 'newly created class of "persons in need of protection"'.²³ This is governed under sections 95-98 of the IRPA. Pursuant to the IRPA, 'persons in need of protection' are those persons whose removal would subject them to torture or a risk to their life or to a risk of cruel and unusual treatment or punishment. This was an important advance: as Reekie and Layden-Stevenson articulate, this had the effect of 'elevat[ing] complementary protection by according it a status similar to that of Convention refugee protection'.²⁴

Turning to consider current changes to Canada's complementary protection scheme - the BRRRA may largely be understood as a response to the administrative challenges surrounding implementation of the IRPA. Canada's refugee protection scheme involves 'very long delays', with claimants frequently waiting years for a decision to be made.²⁵ The Canadian Government

¹⁹ It should be stated from the outset that this paper focuses only on Canada's inland refugee protection system. Protection for persons applying for resettlement from outside of Canada are outside the scope of this paper.

²⁰ The *Balanced Refugee Reform Act* is expected to come into force at June 2012.

²¹ At the time of writing, this Bill was before the Parliament of Canada.

²² R.S.C. 1985 c. I-2.

²³ Reekie, J & Layden-Stevenson, C, *Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)*, 36. IALJR World Conference paper, 2006.

²⁴ *ibid*, 38.

²⁵ Canadian Council for Refugees, *Protecting rights in a fair and efficient refugee determination system: Submission on Bill C-11*, 5 May 2010; UNHCR, *Brief relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act*, Third Session, Fortieth Parliament, 25 May 2010.

has attributed this backlog in claims largely to a system that has been ‘broken’ by abusive, ‘bogus’ claims.²⁶ Non-government practitioners and other commentators have pointed to an under-resourced system and excessive bureaucracy/administration as primary reasons for delay.²⁷

In response, on 30 March 2010, the Canadian Government tabled legislation in the House of Commons to reform Canada’s Inland Refugee Protection System. The bill (Bill C-11) received Royal Assent on 29 June 2010.²⁸ The enactment of this legislation has been accompanied by a commitment to increase funding for the system and to expand the intake size of Canada’s resettlement programme.²⁹

The principle changes that the BRRRA brings to Canada’s complementary protection practice include an amended appeal process, and the introduction of ‘safe-country’ of origin provisions into the IRPA (for an expedited application process).

Bill C-4 is currently being debated in Canadian Parliament. Certain provisions of Bill C-4 (particularly provisions for detention and limits on family reunification rights of certain designated asylum seekers) might be seen as a response to the recent unauthorised arrival in Canada of two boats of (Sri Lankan Tamil) asylum seekers. Importantly, despite Bill C-4 being packaged as legislation targeting human smugglers, it has attracted broad criticism for its provisions that punish refugees, not smugglers. Coupled with the influence of the security agenda and significant economic uncertainty, these proposed changes to Canada’s protection policy reflect a growing impetus in Canada to limit *pull factors* and strengthen *push factors* for people considering seeking asylum in Canada.

It is important to note that the BRRRA and Bill C-4 do not appear to amend sections 95-98 of the IRPA *per se*. Rather, the effect is to amend Canada’s protection practices more broadly, which in turn impacts upon claimants and beneficiaries of complementary protection. These changes are reflective of the significant influence that context has on complementary protection practices.

Mexico

Mexico, too, is currently undergoing significant reform of its migration and asylum policies and legislative framework. Most relevantly, the Law on Refugees and Complementary Protection (*Ley de Refugiados y Protección Complementaria*) (LRPC) came into force on 28 January 2011. This Act, pursuant to Article 28, enshrines into Mexican law a policy of complementary protection. In so doing, Mexico has become the first country in Latin America to establish such broad protection rights. Indeed, Mexico is the only country in Latin America to have legislated for complementary protection. As such, this measure has positioned Mexico as a regional leader in protection practice. The words of High Commissioner for Refugees António Guterres are

²⁶ *ibid* Canadian Council for Refugees, *Protecting rights in a fair and efficient refugee determination system*.

²⁷ See for example commentaries of the Canadian Council for Refugees; Peter Showler.

²⁸ Canadian Council for Refugees, ‘C-11 - Refugee Reform’, accessed 10 January 2012.

²⁹ Citizenship and Immigration Canada, *News Release - Expanding Canada’s Refugee Resettlement Programs*. March 29, 2010.

instructive, labelling the LRPC as a ‘breakthrough piece of legislation that significantly advances international protection practices in Mexico, and for Latin America as a whole’.³⁰

Mexico’s enactment of complementary protection-specific legislation is of particular interest as it suggests a positive trend in complementary protection practice: that of countries increasingly legislating in conformity with international standards and obligations rather than providing only *de facto* protection.

Indeed, Mexico has a long history of protecting asylum-seekers and refugees. Flows into Mexico currently derive predominantly from Latin American countries; Central American countries constitute the main countries of origin. Claimants from other regions of the world (Africa, the Middle East and Asia most notably) are also increasingly reaching Mexico.³¹ At December 2010, at the time of the Mexican Senate’s approval of the LRPC, UNHCR statistics showed Mexico’s refugee population to be at 1,395 people, with most residing in urban areas.³² Further, COMAR (Comisión Mexicana de Ayuda a Refugiados) has provided statistics indicating that between the years 2002-2010, Mexico received 4,251 applications for asylum, with 845 applicants recognised as refugees.³³

Despite Mexico’s history of protecting asylum-seekers and refugees, until 2011 Mexico did not have in force a specific law regulating this practice. Mexico’s federal Population Law 1974 (*Ley General de Población*), a federal law governing, *inter alia*, migration into Mexico, is almost silent on all issues and obligations surrounding protection.³⁴ As such, prior to 2011, Mexico’s legal framework was not fully compliant with international legal standards. While Mexico acceded to the Refugee Convention and its 1967 Protocol in 2000, for the next decade there remained a disjuncture between its domestic legislative framework and its international legal obligations (while noting that international instruments to which Mexico is party automatically form part of Mexican law).

Then in 2010-2011, Mexico enacted two laws: the LRPC and the Migration Law (*Ley de Migración*) (Mexico’s Migration Law). Both of these laws codify significant human rights protections for migrants, asylum claimants and refugees in Mexico. Most relevantly for the purposes of this paper, in the one year of the LRPC’s operation, twenty-one claimants have been granted complementary protection under the Act.³⁵ However, the regulations of the LRPC

³⁰ United Nations Refugee Agency, *UNHCR welcomes breakthrough Mexico legislation on protection*, 10 December 2010.

³¹ United Nations Refugee Agency, *UNHCR hails Mexico as new refugee law comes into force*, 28 January 2011.

³² *ibid* United Nations Refugee Agency, *UNHCR welcomes breakthrough Mexico legislation on protection*; <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492706&submit=GO#>>. Unfortunately UNHCR statistics for 2011 were not available at the time of writing this paper, and will be available as of February 2012.

³³ COMAR (Mexican Government’s Refugee Agency) in Talsma, L, *Human trafficking in Mexico and neighbouring countries: a review of protection approaches*, New Issues in Refugee Research (2012).

³⁴ This law remains in force.

³⁵ An example of the kind of claim that has triggered complementary protection in Mexico is that of a violent inter-familial dispute over land; another claimant was granted complementary protection due to threats related to non-payment of a debt. According to statistics provided to the authors by the Mexican Refugee Commission (Comisión Mexicana de Ayuda a Refugiados – COMAR): 21 claimants have been granted complementary protection in Mexico

remain to be approved by the Executive, currently existing in draft form only, though this has not prevented the implementation of that law.³⁶

This point on the regulations is important to flag for at least two reasons. Firstly, without the corresponding regulations finalised, it is impossible to conclude precisely and assess comprehensively what might be the impact of Mexico's project of migration and asylum reform on its protection practices. Secondly, it might reasonably be suggested that the implementation of the LRPC without its accompanying regulations yet in force is potentially problematic. In particular it raises questions as to whether the law will be applied uniformly to all claimants - an essential element of the rule of law.

Mexico's project of migration and asylum reform is made somewhat more complex by its difficult surrounding implementation environment. A recent ReliefWeb report described Mexico as 'one of the most complex migration realities in the world'.³⁷ Specifically, as articulated in the Human Rights Watch World Report (2011), 'hundreds of thousands of migrants pass through Mexico each year and many are subject to grave abuses...including physical and sexual assault, extortion, and theft'.³⁸ This same report explains that migrants in Mexico are increasingly the targets of attacks both by criminal groups and security forces - 'corrupt police and public officials' are allegedly implicated in these crimes.³⁹ The same Human Rights Watch report also estimates that approximately 18,000 migrants are kidnapped annually in Mexico.

Reports of Mexico's National Human Rights Commission (Comisión Nacional de los Derechos Humanos) similarly highlight the risks faced by migrants in Mexico. For example, a report released by the National Human Rights Commission in 2011 points to the extreme vulnerability of migrants in Mexico, in particular to kidnappings that violate the dignity and human rights of these migrants.⁴⁰

Certainly many of these individuals would not be classified as persons in need of international protection. Yet it is important to flag risks faced generally by migrants in Mexico as persons in need of such protection can be caught up in these mixed migratory flows.

Indeed there are too many recent cases of flagrant human rights abuses suffered by migrants in Mexico. Perhaps the most well-known case is that of mass graves discovered in the northern states of Tamaulipas and Durango in 2010; the victims were migrants of Central and South America executed by criminal gangs. In Tamaulipas, seventy two bodies were exhumed from

in 2011 pursuant to the LSPRYC. This number may be broken down as follows - Ghana (1); Guatemala (9); Honduras (2); Peru (3); El Salvador (5); Israel (1).

³⁶ The Mexican Refugee Commission (Comisión Mexicana de Ayuda a Refugiados - COMAR) has concluded the drafting of the Regulations to the LRPC and has shared them with UNHCR and several NGOs working with refugees, and receiving comments from them. It is unclear as to when these Regulations will be finalised. This paper draws on the third version in its analysis of LSPRYC.

³⁷ ReliefWeb, *Briefing Kit: Spokesperson for the UN High Commissioner for Human Rights (The dangerous journey of migrants through Mexico)* (2012).

³⁸ Human Rights Watch, *World Report 2011: Mexico* (2011) New York.

³⁹ *ibid* ReliefWeb, *Briefing Kit*.

⁴⁰ Comisión Nacional de los Derechos Humanos, *Informe especial sobre secuestro de migrantes en México (Special report on the kidnapping of migrants in Mexico)*, February 2011.

one mass grave, fourteen bodies remain to be identified – ‘[t]wo government investigators were sent to the crime scene and disappeared, their bodies were found soon after’.⁴¹

Importantly, such instances of violence have drawn the attention of the international community to Mexico’s difficult human rights situation. Coupled with the associated violence of Mexico’s drug war, such critical international attention might be interpreted as an important impetus for concrete responses to be adopted by the Mexican Government. Mexico’s extensive project of migration reform might be viewed, in part, in this light.⁴² The gaze of the international community was turned to Mexico’s migration policy and practice also when it hosted, in November 2010, the Global Forum on Migration and Development. This Forum took place just one month prior to the Mexican Senate’s approval of the LRPC - as such, one might legitimately surmise some interconnect in this context.

Australia

In Australia, a person in need of protection who does not meet the Refugee Convention definition is currently forced to apply as a refugee, despite knowing that the requirements of the Refugee Convention will not be met. When the refugee claim is inevitably rejected (including following an appeal to the Refugee Review Tribunal) the applicant then may ask the Minister to use his discretionary powers to grant protection. This system has resulted in an *ad hoc*, non-transparent and inconsistent approach to assessing protection needs.

Australia has been reluctant to legislate for complementary protection, despite being one of the few member countries of the Organisation for Economic Cooperation and Development without a system of complementary protection (until the recent enactment of such legislation). This reluctance was also despite numerous calls for such a system amongst international bodies,⁴³ and following numerous inquiries into the issue.⁴⁴ This reluctance is perhaps not surprising, given that immigration policy in Australia is a notoriously contentious and highly political issue.

In Australia, asylum seekers, particularly those arriving by boat, have long been used as political pawns, and ‘political posturing and even manipulation [...] has characterised the political

⁴¹ *ibid*; Amnesty International Mexico, *Victimas Invisibles: Migrantes en Movimiento en México* (2011) United Kingdom; Relief Wed, *Briefing Kit: Spokesperson for the UN High Commissioner for Human Rights (The dangerous journey of migrants through Mexico)*.

⁴² It is recognised that Mexico’s project of migration reform has been in train for more than one decade. Yet it is submitted that these recent occurrences were an important impetus for the laws to be enacted.

⁴³ In 2008, the Committee Against Torture recommended in their Concluding Observations on Australia that: ‘The State party should also [...] adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister’s discretionary powers’ Committee Against Torture, *Concluding Observations: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), paragraph 15. See also comments of the Human Rights Committee in 2009 at paragraph 8: UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Australia*, 7 May 2009, CCPR/C/AUS/CO/5.

⁴⁴ For example, the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009 (‘Senate Committee’).

discourse surrounding refugees and asylum seekers in Australia'.⁴⁵ Political figures and the media have wielded the perception of the threat posed by asylum seekers as an effective electoral weapon.⁴⁶ For example, refugee policy became a central issue in the 2010 federal election campaign, with both major parties issuing statements on asylum seeker policy that pandered to the anxieties of Australians in marginal seats.⁴⁷ The politicised debates centre particularly on 'boat people' - despite the fact that most asylum seekers arrive by air - discussion continues to focus on those asylum seekers arriving, without authorisation, by boat. Opinion poll data show that public opposition to boat arrivals has increased steadily over the last four decades.⁴⁸

Increased politicking has triggered populist hysteria in public discourse,⁴⁹ influencing Australia's response to irregular immigration. A recent 2011 study by public interest think-tank the Centre for Policy Development was extremely critical of refugee responses, noting that Australia's immigration policies are a 'disproportionate reaction' to the small number of asylum seekers arriving in Australia.⁵⁰ This hard-line immigration policy response has played out in mandatory detention for unauthorised boat arrivals and excision legislation.

Yet there are also many indications that Australians appreciate the value of immigration and the contributions of the many refugees who have come to Australia since the Second World War. Australia was one of the earliest parties to the Refugee Convention, and a key player in the post war movement to establish an international legal regime for the protection of refugees and of human rights more generally.⁵¹ Australia's response to managed refugee programs, such as following the Kosovo crisis, has historically been generous. In his 2009 Social Cohesion study, Professor Andrew Markus noted some positive public attitudes to immigration, including that 68% of Australians agree that immigrants make Australia stronger.⁵²

Crock attributes Australia's 'schizophrenic attitude towards refugees' to the 'culture of control which has always surrounded immigration',⁵³ suggesting that Australia is willing to provide assistance to asylum seekers - provided it is in a controlled manner on its own terms. It can be suggested that a perceived need to retain control has resulted in Australia's reluctance to formalise complementary protection.

⁴⁵ Crock, M, Keynote speaker 'Refugees in Australia: Of Lore, Legends and the Judicial Process', presented at *Annual Colloquium of the Australian Judicial Conference*, Darwin, NT, 31 May 2003 (published 2004 as 'Judging Refugees').

⁴⁶ Crock, M. *Scapegoating boat people a true-blue Australian tradition*, Sydney Morning Herald, 10 August 2011.

⁴⁷ Neumann, K., *Historians to the fore, or how to inform a much-needed debate about Australia's response to refugees*, Australian Policy and History, August 2010.

⁴⁸ Polling conducted by the Lowy Institute in 2010 found that 78 per cent of Australians were either somewhat concerned or very concerned about asylum seekers coming to Australia by boat: Hanson, F., *Lowy Institute Poll 2010 Australia and the world: public opinion and foreign policy*, Lowy Institute for International Policy, 2010, 3.

⁴⁹ *ibid*, 18.

⁵⁰ Menadue, J., Keski-Nummi, A., & Gauthier, K., *A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers*, Centre for Policy Development, August 2011.

⁵¹ Crock, M., *Refugees in Australia: Of Lore, Legends and the Judicial Process*, 3.

⁵² Power P., *Australian Attitudes to the Acceptance of Refugees - Summary of speech given to 'Racism Revisited: Anti Racism Revisited: Anti-racism Leadership and Practice' Conference, Murdoch University, Perth*, Refugee Council of Australia, March 2010.

⁵³ Crock, M., *Refugees in Australia: Of Lore, Legends and the Judicial Process*, 3.

Against this backdrop, many practitioners and advocacy groups have consistently called for the introduction of a complementary protection scheme.

There were a number of events which caused the issue to be brought to the fore. The first was in July 1997, in relation to a woman from the People's Republic of China who had been detained at the Port Hedland Immigration Detention Centre. She was at least eight months pregnant and asserted that, if returned to Australia, she would be forced to abort. The woman was nevertheless removed from Australia (being found not to be a refugee within the meaning of the Refugee Convention), and allegedly forced to abort shortly after her return to the China. The second event occurred in 1998, when the Government sought to have a Somali national removed from Australia, despite knowledge that an application had been made in respect of his claims under the Convention against Torture (CAT)⁵⁴ to the UN.⁵⁵

These events led to a renewed awareness of the shortfalls of the protection system. Then from 2000 - 2008, numerous Senate inquiries and proposed bills noted the lack of integration of core human right treaties within the refugee administrative determination process and recommended this be remedied through the introduction of complementary protection legislation.⁵⁶

Interestingly, in 2008 the (new) Minister expressed concern over the scope of his discretionary powers under the Act:⁵⁷

In a general sense I have formed the view that I have too much power [...] I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm.

On 9 September 2009 the Government introduced into Parliament the *Migration Amendment (Complementary Protection) Bill 2009* (Bill). However, the Bill was not debated and lapsed on 19 July 2010 when Parliament was discontinued for the 2010 federal election.

On 24 February 2011, the Bill, then incorporating some changes resulting from the Senate recommendations, was re-introduced into Parliament. On 19 September 2011, the Bill was passed in the Senate and received Royal Assent on 14 October 2011. It became the *Migration Amendment (Complementary Protection) Act 2011*. The new provisions will commence on a date to be fixed by Proclamation (or six months after the date of Royal Assent, whichever is first).

⁵⁴ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (CAT).

⁵⁵ *Sadiq Shek Elmi v. Australia*, CAT/C/22/D/120/1998, UN Committee Against Torture, 25 May 1999.

⁵⁶ See: Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000; Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, 2004.

⁵⁷ Senator Chris Evans, *Senate Standing Committee on Legal and Constitutional Affairs Estimates (Additional Budget Estimates)*, Committee Hansard, 19 February 2008, 31.

One of the most noteworthy aspects of the Act is the ease with which it was passed, after so many years in the making. This is particularly striking given the timing of the passing of the Act, which occurred in the height of controversy in respect of other arrangements relating to asylum seekers in Australia. On 25 July 2011, Australia and Malaysia signed the Australia-Malaysia Transfer and Resettlement Arrangement, agreeing to swap 800 asylum seekers arriving in Australia for 4,000 refugees in Malaysia. The agreement was contentious, and many argued it should be rejected because Malaysia is not a party to the Refugee Convention.⁵⁸

The Australian High Court ruled on 31 August 2011 that the agreement was invalid and unlawful due to the lack of human rights protections which would be provided to asylum seekers in Malaysia. In response, on 12 September 2011, the Government announced it would introduce legislation to enable asylum seekers to be processed in third countries such as Malaysia. The proposed amendments were released on 19 September 2011, the same day that the complementary protection-specific Act was passed. The proposed legislation was not passed.

The irony of this timing was not lost on many; the media noted: '[t]he legislation reads in stark contrast to the federal government's move this week to strip protections from another section of the Migration Act to allow offshore processing, bypass international obligations and render the immigration minister's discretion paramount.'⁵⁹ Greens Senator Sarah Hanson-Young also noted the hypocrisy, saying in parliament: 'it is somewhat paradoxical that we can discuss the need for protection, the need to expand protection for vulnerable people, while at the same time, in another vacuum, discuss how we strip those rights away from people.'⁶⁰

In the midst of the Australia-Malaysia Transfer debacle, the complementary protection legislation was passed. Scant media or public interest was triggered. This may be due in part to the way the Federal Government presented the Bill: not only as a commitment to protecting people at risk, but also as a matter of efficiency. The legislation was packaged as a tool of practicality, in response to current inefficiencies in asylum seeker processing.⁶¹

Complementary protection in Canada, Mexico and Australia

This part involves an analysis of the complementary protection schemes of Canada, Mexico and Australia. The analysis considers six common and essential features of complementary protection schemes and assesses the schemes of the three countries against international legal benchmarks. These six features, reflective of internationally recognised standards, offer a useful framework and spring-board for comparing and critiquing the three country case studies.

The analysis below demonstrates that despite a country's having legislated for complementary protection, the actual features of the scheme, and the degree of protection afforded, can differ

⁵⁸ Human Rights Watch, *Australia, Malaysia: Refugee Swap Fails Protection Standards*, 26 July 2011.

⁵⁹ *Needham, K., New laws to protect most vulnerable refugees*, Sydney Morning Herald, 20 September 2011.

⁶⁰ Senator Hanson-Young, Australia, Senate 2011, *Parliamentary Debates*, 19 September 2011, 6337.

⁶¹ Department of Immigration and Citizenship, *Fact Sheet 61a – Complementary Protection*.

significantly. This variance reflects the absence of any binding international agreement on complementary protection, and might be taken to suggest the need to develop some uniform standard for the granting of complementary protection.

Canada

Sections 95-98 of the IRPA govern ‘refugee protection’ in Canada. In accordance with these sections, ‘refugee protection’ is afforded both to Convention refugees (section 96) and beneficiaries of complementary protection (‘persons in need of protection’) (section 97). The category of ‘persons in need of protection’ covers claimants whose removal to their country of origin would subject them personally to a danger of torture,⁶² or would constitute a risk to life, or a risk of cruel and unusual treatment or punishment – the section 97 class constitutes the kind of complementary protection in focus in this paper.

A successful claim under either sections 96 or 97 results in the grant of ‘refugee protection’ and the deeming of the protected person as a refugee.⁶³ Such an approach is noteworthy because, as Mandal articulates: there is ‘merit in states marrying the two concepts of Convention refugee and non-Convention refugee into a single refugee status under national law’.⁶⁴

Additionally, complementary protection is afforded in Canada through the mechanism of a Pre-Removal Risk Assessment (PRRA). Pursuant to section 112 of the IRPA, any person subject to a removal/deportation order may apply to the Minister of Citizenship, Immigration and Multiculturalism for protection on the grounds of non-refoulement.⁶⁵

Mexico

Under the Mexican scheme, the scope of complementary protection is set out in Article 28 of the LRPC. Complementary protection is afforded where the claimant’s life is at risk if returned to their country of origin, or where they would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Importantly, it must also be understood that the scope of refugee protection under the LRPC goes beyond the five grounds for protection set out in the Refugee Convention, incorporating the wider grounds for protection of the Cartagena Declaration on Refugees. (The Cartagena Declaration on Refugees was adopted by a colloquium of experts from the Americas in November 1984. It expands the definition of a ‘refugee’, developed in response to massive flows of migrants from Central America in need of protection in the 1970s and 1980s. These groups were in dire need of protection yet did not fit within the Refugee Convention grounds of

⁶² within the meaning of Article 1 CAT.

⁶³ Reekie, J & Layden-Stevenson, *Complementary Refugee Protection in Canada*, 37.

⁶⁴ Mandal, R, *Protection Mechanisms Outside of the 1951 Convention* (‘Complementary Protection’), 63.

⁶⁵ McAdam, J, ‘Complementary protection: a comparative perspective’, [2006] HRightsDef 15; (2006) 15(2) Human Rights Defender 13; Mandal, R, *Protection Mechanisms Outside of the 1951 Convention* (‘Complementary Protection’). See also sections 112-114 Immigration and Refugee Protection Act.

persecution).⁶⁶ Therefore, the actual scope of complementary protection is much broader if one considers complementary protection to encompass all protection that goes beyond that which is codified in the Refugee Convention. Most Latin American countries have incorporated this wider definition into their national refugee laws.

Pursuant to Article 13 of the LRPC, refugee protection is claimants in Mexico on the following grounds:

- Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinion;
- Persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Both grounds for protection are also available to foreigners already in Mexico where the circumstances listed above arose in their country of origin during their time abroad, thereby preventing their return (which is termed *refugee sur place*).

It will be noted that persecution on the grounds of gender is added as a sixth ground for refugee protection under the Mexican scheme. This gender sensitive approach is indicative of a greater focus on vulnerability.

Australia

The scope of protection provided by Australia's complementary protection regime is set out in section 36 of the Migration Act. Pursuant to this section, protection visas are granted to (a) refugees (b) non-citizens to whom Australia has protection obligations because of 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; and (c) family members of refugees or persons in need of protection.

'Significant harm' is defined in subsection 36(2) to mean that:

1. the non-citizen will be arbitrarily deprived of his or her life;
2. the death penalty will be carried out on the non-citizen; or
3. the non-citizen will be subjected to torture; or
4. the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
5. the non-citizen will be subjected to degrading treatment or punishment.

There is one notable difficulty in accessing (complementary) protection in Australia. As is currently the case for refugee applicants, under section 46A of the Migration Act, non-citizens who arrive without a valid visa at a legislated 'excised offshore place' (which includes many

⁶⁶ Text of the Cartagena Declaration on Refugees 1984.

territories and islands off the coast of Australia) will be unable to apply for a complementary protection visa unless the Minister determines it is in the public interest for them to do so.⁶⁷ This means that, for those arriving in Australia by boat and land at an excised offshore place, complementary protection may be difficult to attain as submitting a protection visa application will be allowed only at the Minister's discretion.

Torture and cruel, inhuman or degrading treatment or punishment

As explained above, the most important feature of complementary protection is the international legal obligation of non-refoulement. Central to this obligation is protection from torture and cruel, inhuman or degrading treatment or punishment. Article 3 of the CAT expressly prohibits states from removing an individual where there are substantial grounds for believing that doing so would expose the person to the danger of being subjected to torture.

Article 13 of the Inter-American Convention to Prevent and Punish Torture contains a comparable provision – this Convention binds both Canada and Mexico. Similarly, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the European Convention of Human Rights (ECHR) prohibit the removal of persons who face a real risk of being exposed to torture or cruel, inhuman or degrading treatment or punishment.

Torture and cruel, inhuman or degrading treatment or punishment is generally viewed as a 'sliding scale, or hierarchy, of ill-treatment, with torture the most severe expression'.⁶⁸ For this reason, it is generally undesirable to prescribe exactly within which category a particular act falls, and the UN Human Rights Committee has indicated it is unnecessary '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'.⁶⁹

The Canadian and Mexican legislation both set out protection obligations in respect of 'cruel, inhuman or degrading treatment or punishment', however neither instrument offers any definition of the term. This is not necessarily problematic as it allows decision-makers in these countries to draw upon the evolving international jurisprudence to derive definitions and meanings of the term.

At the other end of the spectrum, the Australian legislation can be criticised for the inclusion of a lengthy and problematic definition of cruel, inhuman or degrading treatment. Subsection 5(1) states (in part) that:

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

⁶⁷ This policy was legislated for in September 2001 through the *Migration Amendment (Excision from Migration Zone) Act 2001* which amended the *Migration Act 1958*.

⁶⁸ McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, paragraph 66.

⁶⁹ UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, paragraph 4.

(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.

Meanwhile:

'degrading treatment or punishment' means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable.

The separation of these terms in the Australian legislation is questionable and contrary to standard treatment in international law, which does not separate or draw distinctions between these terms. McAdam argues that the result is a higher level of scrutiny than required at international law, as '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 it is'.⁷⁰

Meanwhile, unlike Mexico, the Australian legislation includes a requirement of intent: that the cruel or inhuman treatment or punishment be 'intentionally inflicted' and that degrading treatment or punishment be 'intended to cause' extreme humiliation. This creates a higher burden than is required internationally, which does not require intent. McAdam notes that international law and jurisprudence focuses 'on the nature of the alleged violation on the individual concerned, rather than the intention of the perpetrator'.⁷¹ The European Court of Human Rights observed in *Labita v Italy* that '[t]he question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account ... the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3'.⁷²

Certainly it is a positive development that Canada, Mexico and Australia have each legislated to protect people from torture and cruel, inhuman or degrading treatment or punishment. However, arguably the scope of non-refoulement obligations is wider than this. For example, the Australian Human Rights Law Resource Centre has observed European jurisprudence and noted that the non-refoulement obligation may be engaged where expulsion would result in a flagrant denial of a fair trial or a flagrant denial of justice.⁷³

⁷⁰ *ibid* McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, paragraph 69.

⁷¹ *ibid*.

⁷² *Labita v. Italy*, 26772/95, Council of Europe: European Court of Human Rights, 6 April 2000, paragraph 120.

⁷³ Human Rights Law Resource Centre, *The Right to Protection and the Obligation of Non-Refoulement - Submission to the Senate Legal and Constitutional Affairs Committee regarding the Migration Amendment (Complementary Protection) Bill 2009*, September 2009, paragraph 18.

Indiscriminate violence

At international law, non-refoulement obligations apply regardless of whether a person is specifically targeted or persecuted, and therefore do not pertain only to individuals subject to personalised violence. For example, as the European Court of Human Rights has stated, 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’.⁷⁴ Therefore non-refoulement obligations, and accordingly, complementary protection, apply in respect of indiscriminate or generalised violence where the requisite level of harm is met.

Mexico’s legislation affords protection on the grounds of indiscriminate violence. As discussed, the definition of a refugee in the LRPC is wider than the Australian or Canadian definition. The definition of a refugee covers indiscriminate violence - it includes people who have fled their country because their life, security or liberty has been threatened due to generalised violence, foreign aggression, internal conflict, mass violations of human rights or other circumstances that have seriously disturbed the public order.⁷⁵

Conversely, under the Australian legislation, protection does not extend to victims of indiscriminate violence. The Australian legislation specifically excludes protection where the risk of harm ‘is one faced by the population of the country generally and is not faced by the non-citizen personally.’⁷⁶ Canada similarly does not extend protection to victims of indiscriminate violence, expressly excluding protection where the risk is ‘faced generally by other individuals in or from that country’.⁷⁷

UNHCR has criticised Australia’s legislation for failing to secure protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts or serious disorder, and has said that it would ‘welcome the explicit inclusion of such persons in Australia’s codified complementary protection regime’.⁷⁸ This criticism might reasonably be applied to Canada also. McAdam asserts that this undermines complementary protection as a complementary form of protection and has strongly criticised this aspect of the Australian legislation, noting that it has no legal rationale, since international human rights law is not premised on exceptionality of treatment but proscribes any treatment that contravenes human rights treaty provisions’.⁷⁹

Commentators have voiced concern that the legislation may be interpreted to exclude protection for people such as:

⁷⁴ *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, paragraph 148.

⁷⁵ set out in Article 13.

⁷⁶ See subsection 36(2)(2B) Migration Act.

⁷⁷ See subsection 97(1)(b)(ii) Immigration and Refugee Protection Act.

⁷⁸ United Nations High Commissioner for Refugees, *Draft Complementary Protection Visa Model: Australia - UNHCR Comments*, January 2009, paragraph 13.

⁷⁹ *ibid* McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, paragraph 101.

- women and girls of a certain age or other category (such as imminent marriage) who, within a particular country, as a sub-population face the threat of female genital mutilation.⁸⁰
- people seeking protection from domestic violence, from a country where domestic violence is widespread and where perpetrators are not generally brought to justice.⁸¹

Failure to provide protection for people fleeing indiscriminate violence is problematic as they may still be at risk of serious harm despite their not being subject to personalised threats.

Death penalty

Article 6 of the ICCPR precludes removal to a place where a person may be arbitrarily deprived of their life.⁸² As the Human Rights Committee explains, this protection means:

...for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they 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.⁸³

All three case study countries have abolished the death penalty. Yet Australia is the sole country to expressly afford complementary protection on the basis of imposition of the death penalty. For instance, the Canadian legislation expressly provides that protection will not be afforded where the risk to life is not inherent or incidental to lawful sanctions.⁸⁴

However, in Australia, a higher evidentiary burden than that at international law is imposed in relation to protection on the grounds of the imposition of the death penalty. Subsection 36(2) requires that the death penalty ‘will be carried out’ on a person, rather than it being ‘reasonably anticipated that [a person] will be sentenced to death’. The higher evidentiary burden may create substantial difficulties, as it would be extremely challenging for a decision maker to satisfy himself or herself that the death penalty would not be carried out.⁸⁵ This means that the scope of protection in Australia regarding imposition of the death penalty is likely to be very narrow.

⁸⁰ Refugee Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, 5.

⁸¹ Amnesty International Australia, *Comments on the inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, September 2009, 7.

⁸² See also UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

⁸³ *Roger Judge v. Canada*, UN Human Rights Committee, 13 August 2003, paragraph 10.4.

⁸⁴ Section 97(1)(b)(iii) Immigration and Refugee Protection Act.

⁸⁵ See comments by the Australian Human Rights Commission in Australian Human Rights Commission, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 30 September 2009, (Australian Human Rights Commission Submission).

Protection of children

It is widely accepted that the non-refoulement obligation is implied in Article 37(a) of the Convention on the Rights of the Child (CRC). This Article states that ‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’.

The Committee on the Rights of the Child has declared that:

States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.⁸⁶

Article 6 of the CRC protects a child’s right to life. Article 37 protects a child’s right to be free from torture or other cruel, inhuman or degrading treatment or punishment, as well as their right to liberty, humane treatment and prompt access to legal and other appropriate assistance when detained. Additionally, the UN Rules for the Protection of Juveniles Deprived of their Liberty states that detention ‘should be used as a last resort’ and ‘limited to exceptional cases’.⁸⁷

Goodwin-Gill and McAdam argue that children fleeing generalised violence may also have a right of protection, arising from the requirement within the CRC that a child’s best interests shall be a primary consideration in all actions concerning them.⁸⁸ This view appears consistent with Committee comments (above). The Committee on the Rights of the Child has stated that the requirement to consider a child’s best interest ‘must be respected during all stages of the displacement cycle’⁸⁹ and emphasises that ‘non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.’⁹⁰

The UNHCR publication *Refugee Children: Guidelines on Protection and Care* provides guidance on protections that should be given to refugee children. It is submitted that the same principles apply in respect of child claimants of complementary protection. The Guidelines provide that children are entitled to the following safeguards during the application process:⁹¹

1. Determination of status by ‘a competent authority, fully qualified in asylum and refugee matters’ and formal review of a negative refugee status determination by a fair and independent tribunal.

⁸⁶ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paragraph 27.

⁸⁷ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly*, 14 December 1990, A/RES/45/113.

⁸⁸ Goodwin-Gill, G.S. and McAdam J., *The Refugee in International Law*, 324.

⁸⁹ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005)*, paragraph 19.

⁹⁰ *ibid*, paragraph 86.

⁹¹ UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, paragraph 8.

2. Priority processing for children and their families (especially where the consequence of a slow process is continuing detention).
3. Legal assistance from the moment of arrival throughout the entire refugee status determination process.
4. Child-friendly determination procedures.
5. Liberal application of the benefit of the doubt in assessing credibility and facts.
6. Appointment of a guardian/adviser to assist unaccompanied children through the process.

Importantly, in respect of the sixth point, it is worth noting that Article 20 of the CRC requires states to provide ‘special protection and assistance’ to unaccompanied children. UNHCR guidelines set out this requirement: ‘not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would promote his/her interests. Access should also be given to a qualified legal representative.’⁹²

Canada’s IRPA and IRPR feature various provisions to promote protection of children. Additionally Canada’s Refugee Protection Division Rules provide guidance on the protection of child applicants – for example, these Rules require a representative/adviser to be appointed for minor children in all dealings with the Immigration and Refugee Board of Canada (IRB). The Rules provide guidance on appropriate representatives (for example, a social worker) – the Rules correspond entirely with international standards.

Among the most notable provisions for child protection, section 60 of the IRPA provides that ‘a minor child shall be detained only as a measure of last resort’, and where a child is to be detained, the best interests of the child are to be observed. Section 249 of the IRPR detail the kinds of considerations to be taken into account where a child may be detained and include ‘the anticipated length of detention’, ‘the conditions of detention’ and the availability of services in the detention facility, including education, counselling and recreation’. These kinds of considerations indicate a commitment to the protection of children.

Mexico’s LRPC provides that in applying the law, the principle of the best interests of the child is to be observed.⁹³ The Act also requires, pursuant to Article 4, that in the application and interpretation of the law, the international conventions by which Mexico is bound must be observed – Mexico is a party to the CRC, therefore the international legal obligations are irrefutable. Yet despite this provision for the observance of the best interests of the child, obvious problems remain: children, in particular adolescent boys, are detained in most cases,⁹⁴ and are not always separated from adults as they should be in places of detention.⁹⁵ Yet this is

⁹² *ibid*, paragraph 8.3.

⁹³ Article 5 LRPC.

⁹⁴ See for example Article 5 of the LRPC which provides that in the application of the law, the principle of the best interests of the child will be observed. See also Article 20 which provides for the detention of minors.

⁹⁵ UNHCR Regional Office for Mexico, Cuba and Central America, 2008, *The International Protection of Unaccompanied or Separated Children along the Southern Border of Mexico 2006-2008*, <http://www.unhcr.org/4cbeb6a96.pdf>, (accessed 26 May 2011); UNICEF, *Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular en América Latina y el Caribe: Estándares jurídicos básicos y líneas de acción para su protección* (2009),

despite Article 107 of Mexico's Migration Law that requires separate places of detention for minors. There is also no guarantee that an asylum-seeking child will be represented by an (appropriate) adult guardian, and practitioners have also flagged practical difficulties of access to legal information and advice.

Similar to Mexico, there are insufficient protections for children in the relevant Australian legislation. This has led some, such as the Australian Human Rights Commission, to assert that in order to protect the rights of children the complementary protection regime should be made more comprehensive by enacting provisions specific to children in danger of specific harms.⁹⁶

In particular, it is recommended that provisions be inserted limiting detention of children. Prior to 2005, hundreds of children and their family members were detained in remote immigration detention centres, some for months or even years. In 2005, the Migration Act was amended to affirm 'as a principle' that a minor should only be detained as a measure of last resort.⁹⁷ However this provision is not enforceable, and does not appear to be adequately implemented.⁹⁸

In 2012, minor children are no longer held in Australia's high security immigration detention centres. However, they are still held in low security immigration detention facilities, such as immigration residential housing, immigration transit accommodation, and alternative places of detention. While this is preferable to high-security detention centres, this still constitutes restrictive detention. As at 30 November 2011, there were 441 children in immigration detention facilities and alternative places of detention,⁹⁹ including on the Australian mainland and the excised territory of Christmas Island.¹⁰⁰ Such detention is not subject to any independent assessment. There is no time-limit or right to a periodic review of detention.

Under the Australian legislation there is no requirement for decision-makers to consider the best interests of children who are in immigration detention, nor is there any legislative protection of a child's right to be heard in immigration proceedings.¹⁰¹ Child Rights, a children's NGO, notes that 'legal assistance for both children and their families is also inconsistent.'¹⁰²

In order to ensure Australia meets its international obligations with respect to the protection of children, a number of changes to Australia's complementary protection legislation will be required, including: a presumption against the detention of children for immigration purposes; a prompt assessment of any need to detain children for immigration purposes; periodic review by a court of the legality of continuing detention of children for immigration purposes; and a requirement that the principles of the CRC be respected, including that detention of children

http://www.unicef.org/mexico/spanish/publicacionesderechosninos_18102.htm (accessed 23 January 2011).

⁹⁶ Australian Human Rights Commission Submission, paragraph 41.

⁹⁷ Section 4A Migration Act.

⁹⁸ Australian Human Rights Commission, *Joint Select Committee on Australia's Immigration Detention Network - Australian Human Rights Commission Submission to the Joint Select Committee on Australia's Immigration Detention Network*, August 2011, (Australian Human Rights Commission, Joint Select Committee Submission) paragraph 204.

⁹⁹ This figure does not include community detention.

¹⁰⁰ Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 30 November 2011.

¹⁰¹ Child Rights, 2011 Child Rights NGO Report Australia.

¹⁰² *ibid.*

must be a measure of last resort and for the shortest appropriate period of time and the best interests of children must be a primary consideration.

In addition, there continues to be an inherent conflict of interest in having the Minister or his department delegate act as legal guardian of unaccompanied minors in immigration detention. The *Immigration (Guardianship of Children) Act 1946* provides that the Minister is the guardian of certain unaccompanied non-citizen children who arrive in Australia with the intention of becoming permanent residents. As guardian, the Minister is obliged to pursue the best interests of the child. As visa decision-maker, the Minister may need to make visa decisions that are contrary to a child's best interests.

The issue was articulated in *Odhiambo v Minister for Immigration*:

...as the person administering the *Migration Act*, the Minister has an interest in resisting challenges to decisions of delegates and decisions of the Tribunal that uphold delegates' decisions. That interest is directly opposed to the interest of an asylum seeker in setting aside a decision unfavourable to him or her and obtaining reconsideration of the application for a protection visa.¹⁰³

It is submitted that an independent guardian be appointed for all unaccompanied minors in immigration detention, including those seeking complementary protection.

In respect of all three case study countries, it is strongly recommended that child-specific provisions be incorporated into complementary protection legislation. In particular, each country's legislation should contain provisions relating to detention, the requirement to consider the best interests of the child, and the broader non-refoulement obligations pursuant to the CRC.

Climate change and environmental disasters

It is clear that the impact of climate change as well as environmental disasters may give rise to situations in which a person's basic human rights are placed at serious risk. Such a person would not normally qualify as a refugee according to the Refugee Convention, and it is doubtful whether the scope of complementary protection extends to protect people in these situations. As McAdam notes, 'the rights, entitlements and protection options for people displaced by climate change are uncertain in international law'.¹⁰⁴

Importantly, UNHCR has stated that the return of persons who have fled their country due to natural or ecological disasters 'might in exceptional circumstances reach a level of severity amounting to inhuman treatment'. The application of this reasoning would then give rise to protection from refoulement under international human rights treaties.¹⁰⁵ This position however

¹⁰³ *Odhiambo v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 194 at [91].

¹⁰⁴ McAdam J., *Climate Change Displacement and International Law: Complementary Protection Standards*, Legal and Protection Policy Research Series, Division of International Protection, May 2011.

¹⁰⁵ UN High Commissioner for Refugees, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, 6.

has not been tested before any international or regional bodies, and in all likelihood would be premised on fulfilling a very high threshold.

Therefore, although there is an increasing need to examine means to protect people affected by environmental disasters, ‘it appears unlikely that the ambit of complementary protection at international law is presently wide enough to encapsulate such persons’.¹⁰⁶

This view is reflected in the relevant complementary protection legislation of each of the three country case-studies. Currently there is no provision in the legislation of any of the three country case studies expressly providing for complementary protection to be available for people fleeing the effects of natural disasters or climate change.

In fact the Mexican scheme goes so far as to expressly exclude the grant of protection where disturbances of the public order are not a result of human actions. While Mexico’s LRPC affords refugee protection on the basis of serious disruptions to the public order (so one might reasonably interpret this to include devastating natural disasters), Article 4 XI of the draft regulations of Mexico’s LRPC provides that these disruptions must have been triggered by human actions, thereby ruling out naturally occurring events.

Ineligibility: security risks and character tests

The Refugee Convention provides a robust legal framework for denying protection on the basis that a person poses a threat to national security and public order.¹⁰⁷ UNHCR has opined that in the case of complementary protection, such denial of protection on similar grounds must be adequately defined and similarly applied.¹⁰⁸ The Canadian scheme provides a model of good practice - ineligibility for protection (including complementary protection) is provided for on the precise grounds set in sections F of Article 1 of the Refugee Convention. Specifically, section 98 of the IRPA provides that ‘[a] person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection’. Directly implementing provisions from the Refugee Convention seems the surest way to ensure compliance with international legal standards.

Mexico takes a similar approach to Canada, similarly conforming with international legal standards set out in the Refugee Convention in terms of ineligibility for refugee protection. Under the Mexican scheme, Article 27 provides that protection will not be granted according to those same three circumstances as set out in Article 1(F) of the Refugee Convention.

¹⁰⁶ Karlson E., *Research Paper: Complementary protection for asylum seekers—overview of the international and Australian legal frameworks*, Parliament of Australia, Department of Parliamentary Services, 30 September 2009 no. 7, 2009–10, ISSN 1834-9854, 20.

¹⁰⁷ Article 1(F) of the Refugee Convention provides that that the Refugee Convention does not apply to those having: (a) committed a crime against peace/war crime/crime against humanity, (b) a serious non-political crime; and (c) been guilty of acts contrary to the purposes of the UN.

¹⁰⁸ United Nations High Commissioner for Refugees, *Draft Complementary Protection Visa Model: Australia - UNHCR Comments*, January 2009, paragraph 31.

Further, as it relates to Mexico, in line with international law (specifically Article 31 of the Refugee Convention), Article 7 of the LRPC provides that protection claimants will not be sanctioned due to their having entered irregularly into Mexico. Therefore, complementary protection claimants cannot be excluded from protection on such grounds. This is an important element of protection, and a particularly contemporary issue in light of the porous borders of receiving states.

Similarly, in Australia in relation to refugees, a protection visa will only be granted to a ‘person to whom Australia has refugee obligations’ (within the meaning of the Refugee Convention).¹⁰⁹ This means that the exclusion clause of Article 1F of the Convention applies to refugee applicants in Australia. In respect of complementary protection however, the exclusion net is cast wider. While the same grounds apply pursuant to section 36(2C)(a), section 36(2C)(b) also provides for exclusion if the Minister ‘considers on reasonable grounds’ that the person is a danger to Australia’s security or a threat to Australian community.

This is concerning, because the exclusion clauses for complementary protection are wider than for Convention refugees and because of the lack of transparency and predictability inherent in the use of ministerial discretion. This leaves open the possibility that wide range of people may be excluded under section 36(2C). Of course there is an obvious difference between the non-granting of a protection visa and refoulement. The Act does not expressly provide that these persons would be returned, yet their resulting status is unclear - in the Australian context this would therefore presumably mean indefinite detention.¹¹⁰

There is already a largely unfettered scope for exclusion: in order to obtain a permanent visa, including a protection visa, an applicant must satisfy Public Interest Criterion 4002 of the *Migration Regulations 1994* (Cth) which states: ‘[t]he applicant is not assessed by the Australian Security Intelligence Organisation [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*’ (Cth).

There are concerns of a lack of transparency of these ASIO security assessments and limited access to independent oversight of assessments.¹¹¹ For example, on 15 December 2011, ASIO issued an adverse security assessment against a Kuwait child refugee, who had been held in detention for over a year and repeatedly attempted suicide.¹¹² No decision was given to the applicant for the basis for the adverse security assessment and it has been ventilated that ASIO’s assessment criteria bears little relation to security guidelines in the Refugee Convention.¹¹³

In addition, a protection visa can be refused or cancelled pursuant to section 501 of the Migration Act, which sets out that the Minister may refuse or cancel a visa if the applicant does not pass a character test. The grounds for not passing the character test are very broad, covering categories of: substantial criminal record; association with criminal conduct; past and present criminal or

¹⁰⁹ 36(2)(a) Migration Act.

¹¹⁰ McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009.

¹¹¹ Australian Human Rights Commission Submission, *Independent Review of the Intelligence Community*, 2011, 4.

¹¹² Needham J., *ASIO blocks child refugee on security grounds*, Sydney Morning Herald, 4 January 2012.

¹¹³ *ibid.*

general conduct; and significant risk of particular types of future conduct. This means that a person could be found to be in need of complementary protection, but could nonetheless fail the character creating the risk of visa cancellation or refusal and removal to the country where they he/she could suffer harm.¹¹⁴ Although a decision made by the immigration department to cancel a visa under section 501 is subject to merits review by the Administrative Appeals Tribunal, the Minister may overrule the decision of the AAT.¹¹⁵ A decision made by the Minister himself to cancel a visa is not reviewable.¹¹⁶

A person may be found to be a refugee or a person in need of protection, yet also be a danger in accordance with the Refugee Convention, fail the ASIO security assessment, or not the meet character test. In these circumstances, there is no certainty as to the action the Government will take. On the one hand, Australia's non-refoulement obligations are absolute and non-derogable. On the other hand, Australia has observed that it is not obligated to grant a particular form of visas to people who are excluded from protection; and that 'alternative case resolution solutions will be identified to ensure Australia meets its non-refoulement obligations and the Australian community is protected.'¹¹⁷ At the time of writing, no such solutions have been identified. One commentator noted that ASIO's adverse security assessment against the Kuwait child refugee, condemns the applicant 'to deportation or indefinite detention'.¹¹⁸

It is disappointing that Australia, unlike Canada and Mexico, has taken these steps to create broad grounds for exclusion which exceed those set out in the Refugee Convention, to apply these grounds through unreviewable ministerial discretion, and to continue to allow non-transparent security assessments as an additional basis for exclusion of protection.

What standard of proof is required?

The standard of proof that triggers the non-refoulement obligation at international law is enunciated in CAT - whether there are 'substantial grounds for believing' that a person would be in danger of being subjected to torture' (Article 3). The UN Committee against Torture has interpreted 'substantial grounds' as involving a 'foreseeable, real and personal risk' of torture.¹¹⁹ The 'substantial grounds for believing' test has been adopted by the European Court of Human Rights and the Human Rights Committee. The test is also contained in the provisions of the EU's Qualification Directive on complementary protection.¹²⁰

¹¹⁴ Australian Human Rights Commission, *Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act*, updated March 2010, paragraph 8.2.

¹¹⁵ Sections 501A(1)(b), 501A(1)(d), 501A(2), 501A(3) Migration Act.

¹¹⁶ Section 500(1)(b) Migration Act.

¹¹⁷ Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2009*, 10.

¹¹⁸ Needham J., ASIO blocks child refugee on security grounds, *Sydney Morning Herald*, 4 January 2012.

¹¹⁹ See for example *E.A. v. Switzerland*, CAT/C/19/D/028/1995, UN Committee Against Torture, 10 November 1997.

¹²⁰ *ibid* McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, paragraph 15.

The three countries have each incorporated this standard in their respective legislations – though they do so in different ways. Within the Canadian scheme, the standard of proof for claims relating to torture is that a person would be subjected personally ‘to a danger, believed on substantial grounds to exist’.¹²¹ The Federal Court of Canada interpreted this standard of proof in the case of *Li v Canada (Minister of Citizenship and Immigration)* to mean ‘more likely than not’ or on the ‘balance of probabilities’.¹²²

In this case, the Federal Court found that the legal test for section 97(1)(a) claims was more rigorous (requiring a higher threshold to be met) than the one applied in section 96 claims. (In Canada, the standard for section 96 claims is a ‘well-founded fear’ (consistent with the Refugee Convention) – Mexico and Australia similarly apply this standard for claims of refugee protection).¹²³ The court also extended this higher threshold to section 97(1)(b) claims (risk to life or to a risk of cruel and unusual treatment or punishment).¹²⁴ Yet as McAdam explains, even the court itself ‘recognised that there was “no rational sense” in adopting a higher standard’ of proof for section 97 claims.¹²⁵

Under the Mexican scheme, complementary protection may be granted on the basis that the claimant would be subjected personally to a danger, believed on substantial grounds to exist, of torture or other cruel, inhumane or degrading treatment or punishment.¹²⁶ There is no provision in the legislation as to how this standard should be interpreted. And given the relative newness of the legislation, this standard has not been tested judicially. There is no standard of proof provided for in the legislation as to the threat to life.

Pursuant to the Australian legislation, claimants must show ‘substantial grounds for believing that, as a necessary and foreseeable consequence’ of removal, there is a ‘real risk’ that they ‘will suffer significant harm’. The inclusion of the necessary and foreseeable consequence sets Australia’s approach at odds with that of Canada and Mexico, and international jurisprudence.

This is because the Committee against Torture has interpreted ‘substantial grounds’ to involve ‘a foreseeable, real and personal risk’, and not to involve a separate element of the same standard of proof. Similarly, while the Human Rights Committee has used the term ‘necessary and foreseeable risk’, it has been used to ascertain whether there is a ‘real risk’ that the non-refoulement obligation would be engaged, not to constitute an additional requirement.¹²⁷ This standard differs from the Refugee Convention standard, where the test is whether there is a ‘real chance’ of persecution (which includes a less than fifty per cent likelihood).¹²⁸

¹²¹ Immigration and Refugee Protection Act, s 97(1)(a); McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, paragraph 26.

¹²² *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1, 2005 FCA 1.

¹²³ See section 96 IRPA, Article 13 of the LRPC, and section 36 of the Migration Act.

¹²⁴ *ibid* McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, paragraph 26.

¹²⁵ *ibid*.

¹²⁶ Article 28 LRPC.

¹²⁷ See *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee, 11 August 1997.

¹²⁸ *Chan v Minister for Immigration and Ethnic Affairs*, (1989) CLR 379.

The consequence of the Australian legislative formulation is that various tests and jurisprudence, meant to explain each other, are instead combined into the standard of proof for complementary protection. The result is a higher standard of proof than international law requires and higher than for applicants under the Refugee Convention. McAdam voices criticism that the formulation, being different from international jurisprudence, risks isolating Australian decision-makers from the body of established jurisprudence¹²⁹ and is likely to:

1. cause substantial confusion for decision-makers;
2. lead to inconsistency in decision-making;
3. impose a much higher threshold than is required in any other jurisdiction or under international human rights law; and
4. risk exposing people to *refoulement*, contrary to Australia's international obligations; and
5. lead to more complaints to the international treaty monitoring bodies.¹³⁰

Elements of McAdam's reasoning might also be applied to Mexico and Canada. Certainly it is concerning that each of the three countries imposes a higher standard of proof for complementary protection claims than for claims located within Refugee Convention grounds. There seems no clear justification for imposing a higher threshold on certain claimants.

In this vein, UNHCR has stated that 'there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection.'¹³¹ Similarly, the UK Asylum and Immigration Tribunal has also held that there should be one standard of proof for both Refugee Convention and complementary protection claims, as '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.'¹³²

Status determination procedure

States have varied practices for determining the status of people in need of protection. However, UNHCR advocates for a single procedure, entailing an examination of the Refugee Convention grounds, followed, as necessary and appropriate, by an examination of the possible grounds for the grant of complementary protection.¹³³

The 2005 EXCOM Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection also encourages such a procedure.¹³⁴ Canada, Mexico and Australia's status determination processes are achieved in this suggested streamlined manner. This is certainly a positive approach to international complementary protection practice.

¹²⁹ *ibid* McAdam, J., *Submission to Senate Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, paragraph 5.

¹³⁰ *ibid* paragraph 24.

¹³¹ United Nations High Commissioner for Refugees, *Draft Complementary Protection Visa Model: Australia - UNHCR Comments*, January 2009, paragraph 24.

¹³² *Kacaj* [2001] INLR 354, para 12.

¹³³ UN High Commissioner for Refugees, *Agenda for Protection*, October 2003, Third edition, 34.

¹³⁴ (*para. q*).

Looking firstly at Canada's status determination procedure, Canada applies a single, streamlined process that conforms with the process described directly above. This approach is not stipulated in the legislation, however in practice the IRB examines the section 96 IRPA Refugee Convention grounds first before moving on to the section 97 criterion.¹³⁵ Mandal notes that this 'may partly explain why in the vast majority of cases (over 95%) where the IRB determines a need for protection, this is on the basis of the refugee definition in section 96' (rather than on complementary protection grounds).¹³⁶

This single procedure adopted by Canada is also the approach followed for status determination in Mexico, governed pursuant to Article 29 of the LRPC. Yet there is one concerning aspect of Mexico's status determination procedure worth highlighting: Article 15 of the LRPC provides that in determining the veracity of claims, advice will be sought from Mexico's Ministry of Foreign Affairs. While this Article is, in and of itself, adequate, Article 40 of the Regulations to the LRPC provides that in seeking such advice from the Ministry of Foreign Affairs, the name of the applicant may be provided.

This provision that permits the identity of the applicant to be revealed undermines the principle of confidentiality that Article 5 (VI) of the LRPC purports to protect. If it is assumed that Article 40 of the regulations exists in order that the most detailed information is available and considered, it is recommended that instead decision makers consider a wide range of country-specific reports undertaken by reputable actors.

Turning to consider Australia's status determination procedure - it is similarly a single integrated protection visa application process. The veracity of claims are considered with the use of Country Guidance Notes, which are reports prepared by the immigration department, drawing on many sources including reports by government and non-government organisations, media outlets and academics. However, one concern relating to the status determination procedure is that no legal or other assistance is provided to protection seekers on their arrival to Australia. This means that initial interviews are not always conducted in a fair and proper manner, interview notes may not contain an accurate record of events and an applicant may not be aware that the interview may be relied on at a later date.¹³⁷

One issue of concern common to Canada, Mexico and Australia is that of immigration detention. Many people will face periods of detention whilst undergoing the status determination procedure. A detailed discussion of issue of detention is beyond the scope of this paper, though the point must be made that there is a strong presumption against the detention of refugees (and by analogy, people seeking complementary protection) under international law.¹³⁸ In particular, mandatory detention of asylum seekers is inconsistent with UNHCR guidelines which indicate

¹³⁵ *ibid* Mandal, R., *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, 70

¹³⁶ *ibid*.

¹³⁷ Amnesty International Australia, *Australia's refugee determination process*, 23 March 2009.

¹³⁸ Articles 31(1) and (2) of the Refugee Convention. And, under Article 9(1) of the ICCPR and Article 37(b) of the CRC, no one is to be subjected to arbitrary detention.

that detention of asylum seekers should be the exception rather than the norm.¹³⁹ In this vein, one Australian case before the UN Human Rights Committee found that prolonged and indefinite detention may also amount to cruel, inhuman or degrading treatment as it may cause serious psychological harm.¹⁴⁰

Safe-country of origin provisions

Within this decision-making process, another developing trend (and potentially an issue of concern) is the incorporation of ‘safe-country of origin’ provisions within protection legislation.

Canada’s BRRRA introduces a ‘safe-country of origin’ provision, which allows the Minister to designate certain countries or parts of countries as ‘safe’.¹⁴¹ Claimants of countries designated as ‘safe’ are presumed not to be refugees or persons in need of protection. Their claim is then processed more quickly and they have fewer rights to appeal than other claimants.¹⁴² This approach risks prioritising fairness over efficiency.

Indeed Human Rights Watch has labelled the application of this provision as ‘problematic’, explaining that ‘[i]t is impossible to make a blanket determination that any country is safe for everyone’.¹⁴³ The provision is considered to limit a ‘thorough and objective consideration of the individual risks [claimant face] in their home countries’.¹⁴⁴

Further, the BRRRA does not set out any clear criteria by which a country will be designated a ‘safe-country of origin’. This is concerning because a ‘lack of clear criteria...runs the risk of injecting foreign policy and other political concerns into a refugee status determination process that ought to be free of bias’.¹⁴⁵ The Australian legislation also includes comparable provisions as a reason not to grant complementary protection.

Importantly, the introduction of the ‘safe-country of origin’ provision into Canadian and Australian law is reflective of a current trend in refugee and complementary protection practice. Indeed the United Kingdom as well as European Union legislative schemes also incorporate comparable provisions in their respective asylum laws. (Mexico does not incorporate such provisions in its legislation). This emerging trend requires careful consideration so as to ensure full compliance with international protection obligations.

¹³⁹ UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, guideline 3.

¹⁴⁰ *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee, 13 November 2002, paragraph 8.4.

¹⁴¹ Human Rights Watch, *Open Letter*.

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

What rights are afforded?

The UN Human Rights Committee has asserted that there is no legal justification for treating beneficiaries of complementary protection differently to Convention refugees.¹⁴⁶ Similarly, Mandal suggests that international protection for beneficiaries of complementary protection ‘goes beyond merely preventing their refoulement’ and necessarily includes entitlements to ‘benefit from minimum human rights standards which under various international instruments are applicable to all aliens in a territory’.¹⁴⁷ Mandal justifies this perspective in the following articulate and persuasive words:

Indeed, non-Convention and Convention refugees have similar, if not identical, needs. They are both without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes.¹⁴⁸

This perspective is also a key argument put forward by McAdam.¹⁴⁹ This paper subscribes to this view that beneficiaries of complementary and refugee protection alike should be afforded the full gamut of human rights protections that international law offers. This includes, *inter alia*, access to health, education and social services, and the right to engage in wage-earning employment. Family reunification rights are also essential - EXCOM has emphasised the importance of measures to ensure the unity of the refugee family.¹⁵⁰

In terms of the rights afforded to beneficiaries of complementary protection, overall both Canada and Australia are models of good practice. In Canada, pursuant to the IRPA, all claimants are afforded all rights set out in the preceding paragraph - no distinction is made between Convention refugees and ‘persons in need of protection’. This is also the approach followed by Australia in its Migration Act. This is one of the key strengths of the schemes of both countries.

Notably, under the Canadian scheme these rights (with the exception of family reunification) are afforded to all claimants from the moment that they lodge an application for protection. This means that a claimant will not have to wait until their application for protection is successful before being able to enjoy the aforementioned rights. This is not the approach followed by Mexico or Australia where these rights are only claimable once protection is granted. Though it is recognised (as a positive element of Mexico’s scheme), that asylum claimants do have access to basic health services while their application is processed, pursuant to Article 27 of Mexico’s Migration Law.

¹⁴⁶ UN High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (COM (2001) 447 final)*, 1 February 2002, paragraph 46.

¹⁴⁷ *ibid*, Mandal, R., *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, xiii.

¹⁴⁸ *ibid*.

¹⁴⁹ McAdam, J., *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007.

¹⁵⁰ See for example UNHCR Executive Committee Conclusions: ‘Family Reunion’ No. 9 (XXVIII) 1977, *Family Reunification No. 24 (XXXII)* (1981), *The Protection of the Refugee’s Family*, No. 88 (L) (1999).

This is an important point to highlight as this commendable rights-based approach enables access and the enjoyment of rights by claimants immediately. Prolonged waiting periods for status determinations therefore are no barrier to the enjoyment of minimum human rights standards. Importantly, claimants do not risk suffering a heightened vulnerability during the application process for lack of access to services or employment restrictions.

Under the Canadian scheme family reunification rights are afforded only once a positive status determination is made. Pursuant to the IRPA, this right of family reunification is afforded equally to all protected persons under the Act (to Convention refugees and beneficiaries of complementary protection alike). This approach is also followed under the Australian scheme.¹⁵¹

Yet in Canada, proposed changes to family reunification rights under Bill C-4 indicate a concerning trend. The effect of Bill C-4 is to place a five year ban on family reunification rights for all applicants who enter Canada by irregular means. Bill C-4 also proposes to deny the right to travel abroad for five years for irregular arrival. This provision, which effectively punishes irregular arrivals, is concerning as it is contrary to Article 31 of the Refugee Convention - that states shall not impose penalties on account of a claimant's irregular, or unauthorised entry.

Citizenship entitlements are also important to mention here. Under the Canadian scheme a protected person may apply for citizenship after three years of permanent residency in that country. By way of comparison, in Australia eligibility is after four years. Citizenship is also available to refugees and beneficiaries of complementary protection under the Mexican scheme. Yet in Mexico an interesting distinction is made: claimants of Latin American countries will be eligible for citizenship after two years of residency in Mexico; for all other claimants they will be eligible only after five years. This distinction raises interesting questions as to why such a regional distinction might be made.

Turning to examine more closely Mexico's approach, it is with respect to the rights afforded to beneficiaries of complementary protection (or lack thereof) that the Mexican scheme is perhaps most problematic. Pursuant to the Mexican scheme, beneficiaries of complementary protection are not afforded the same rights as refugees - the unfortunate result is to create two classes of protection under the legislation.

Under the LRPC, refugees are automatically and expressly afforded rights to work and to access education, health services and social security. Those granted refugee status may also apply for family reunification as soon as they receive a positive status determination.

Beneficiaries of complementary protection, on the other hand, have no such entitlements provided for under the LRPC - the Act is silent on the rights of beneficiaries of complementary protection. This is one of the key shortcomings (and legislative gaps) of the LRPC. (Though in practice, beneficiaries of complementary protection are permitted to work and continue to have access to basic health services and education once they have been granted protection).

¹⁵¹ See section 36(2)(c) Migration Act.

Rights of appeal

Article 14 of the ICCPR (and Article 6 of the ECHR) provide for a right of appeal in the determination of ‘rights and obligations in a suit at law’ and ‘to a fair and public hearing by a competent, independent and impartial tribunal’. However, the Human Rights Committee has never made a specific determination as to whether the process of refugee status determination is a ‘suit at law’ and thus covered by this provision.¹⁵²

For example, in *A v Australia*, Australia claimed that Article 14 of the ICCPR did not apply to refugee status determinations, as they were not suits at law and the Human Rights Committee did not ultimately need to make a decision on this point.¹⁵³ Harris and Partington noted in 1999 that ‘international law norms in this area [of appellate structures in asylum status determination] are essentially under-developed and provide little in the way of guidance’¹⁵⁴ - this appears to continue to be the case nowadays.

Even so, in practice there is an international norm for the right to appeal in refugee determinations - many countries apply this standard. For instance, the European Union’s 1995 resolution provides that ‘in the case of a negative decision, provision must be made for an appeal to a court or a review authority which gives an independent ruling on individual cases’.¹⁵⁵ Goodwin-Gill states that ‘the right to appeal against an adverse decision before an impartial tribunal independent of the initial decision-making body’ is a minimum standard’.¹⁵⁶

EXCOM Recommendations¹⁵⁷ also provide that it is a basic condition that any claimant not recognised as a refugee should be ‘given a reasonable time to appeal for formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system’.

Specific to complementary protection and the obligation of non-refoulement, the Human Rights Committee has emphasised that where ‘...the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture’.¹⁵⁸

As it relates to Canada, the BARRA significantly changes the appeal procedure - this is one of the most noteworthy and important changes that the BARRA introduces. It applies equally to

¹⁵² For instance, in *VRMB v Canada*, it was argued that immigration hearings were covered by Article 14. The Committee found the communication inadmissible on other grounds, but did not state whether the proceedings were a suit at law: *VRMB v Canada*, CCPR/C/60/D/603/1994, UN Human Rights Committee, 18 July 1997.

¹⁵³ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee, 30 April 1997, paragraph 6.5.

¹⁵⁴ Harris M., and Partington M., *Administrative Justice in the 21st Century*, Hart Publishing 1999, 55.

¹⁵⁵ European Union: Council of the European Union, *Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures*, 20 June 1995, paragraph 8.

¹⁵⁶ Goodwin-Gill, cited in Harris M., and Partington M., *Administrative Justice in the 21st Century*, Hart Publishing 1999, 55.

¹⁵⁷ UN High Commissioner for Refugees, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977 e-vi.

¹⁵⁸ *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee, 15 June 2004, paragraph 10.6).

claimants of Refugee Convention or complementary protection forms. The BRRRA creates the Refugee Appeal Division (RAD), which is located within the IRB. The RAD is yet to begin operation (pending the coming into force of the BRRRA), so its impact remains to be seen.

The RAD proposes to operate in the following way: a decision determining a claim for refugee protection may be appealed directly (either by the Minister or the claimant) to the RAD. As its name suggests, the RAD is specific (and limited) to appeals for refugee protection; it is an administrative tribunal that hears appeals on questions of fact and law. The creation of the RAD is an advance for protection in Canada - it promises to greatly enhance the ability of claimants to exercise their appeal rights - and as such, enjoy greater access to justice.

The appeals procedure as it currently operates pursuant to the IRPA (prior to the BRRRA beginning operation) affords only a limited ability to claimants to appeal decisions. Currently decisions are appealed directly to the Federal Court of Canada, for judicial review – no merits review is currently provided for under the IRPA. The Federal Court cannot substitute a decision; it may only remit a decision for reconsideration; whereas the RAD enables a decision to be overturned and substituted.

The key shortcoming of this approach is that there is no automatic right of appeal - rather, claimants may apply to the Federal Court for leave to appeal. In practice this is granted in very few cases. Therefore access to appeal has been very much a remote possibility rather than a guaranteed, easily exercisable right.

Yet it is important to flag that the RAD initiative has attracted some criticism. In particular criticism has centred on the unreasonably short amount of time afforded for an appeal of a negative decision to be lodged – an appeal must be lodged within fifteen days of the applicant being notified of the outcome of the application. The Mexican scheme has similarly been criticised on these grounds, Mexico too affording just fifteen days for an appeal to be lodged.

This time frame is insufficient to ensure adequate time to prepare a case. This short time frame may be particularly problematic where the applicant does not understand the effect of the decision (either for language reasons or for a lack of understanding of the process). Therefore it might be suggested that this short time frame functions to disadvantage the most vulnerable.

Refugee advocate Peter Showler effectively articulates the issue:

That is an absurdly inadequate period of time to retain a lawyer who must review the evidence and hearing transcript to file a meaningful appeal. One of the reasons that refugee claimants are refused is due to poor legal representation. Refused claimants would be deprived of any possibility of finding alternative legal counsel for their appeal. The current time limits of 45 days used by the Federal Court have proven to be a reasonable minimum standard and should be adopted...¹⁵⁹

¹⁵⁹ Showler, P., *Maytree: For Leaders. For Change.* <<http://maytree.com/blog/tag/peter-showler/>> accessed January 2012.

As a half-way point between that which Canada and Mexico allow, and that for which Showler advocates, Australia allows twenty-eight days for an application for appeal to be lodged.¹⁶⁰

Turning to consider more closely appeal provisions pursuant to Mexico's LRPC, Article 25 provides for a right of appeal of negative status determinations. At first instance the applicant must appeal to COMAR. This is the same body that makes the original status determination decision. Unfortunately practitioners working in the field of refugee protection in Mexico were not aware of any instance in which a negative determination had been reversed or overturned at appeal. While this is not necessarily evidence of an ineffective system, it does prompt an observer to ponder why this might be the case and whether it is appropriate that the same body will review its initial decision.

Following an unsuccessful appeal to COMAR, a claimant may then appeal this decision judicially. While this is an important entitlement in the legislation, in practice three issues arise. Firstly practitioners working in the field of refugee protection in Mexico suggest that some judges presiding over appeals may not have a sound grasp of international laws mandating asylum. Secondly, the process for judicial review is inevitably long.

For an applicant in detention, this may mean spending up to one year in detention, as they will not be released from detention until their appeal is resolved – likely a significant deterrent to proceeding with an appeal. And thirdly, for all claimants, access to adequate legal information and advice remains an important challenge and barrier.

Practitioners have highlighted two further barriers to this appeal process in Mexico – firstly, that there is very limited access to pro bono lawyers in Mexico. Secondly, the judicial appeal process can be very time consuming - as applicants do not have a work permit prior to being granted complementary protection, applicants can face long temporal periods without being permitted to work, thereby being exposed to a heightened vulnerability.

The Australian legislation provides for a right of review against a negative status determination (including on complementary protection grounds). A decision is reviewed in the same way as refugee refusal decisions. A decision to refuse to grant a protection visa relying on exclusion grounds may be reviewed by the Administrative Appeals Tribunal (AAT), decisions to refuse to grant a protection visa not based on exclusion grounds may be reviewed by the Refugee Review Tribunal (RRT). However, a significant fee must be paid following a negative decision by the RRT.¹⁶¹ This may restrict the willingness of people seeking protection to appeal an initial negative decision.

One additional problematic element in the scheme is that a decision to refuse to grant a protection visa on security grounds, on the basis of an ASIO assessment or ministerial discretion,

¹⁶⁰ *ibid*, Australian Government Refugee Review Tribunal, *Refugee Review Tribunal Factsheet*.

¹⁶¹ The amount payable for an unsuccessful application to the Refugee Review Tribunal is \$1, 540 for each application lodged. This fee is not payable, or will be refunded, if the claimant is subsequently determined to be a refugee. Australian Government Refugee Review Tribunal, *Refugee Review Tribunal Factsheet R10*, 1 July 2011.

is not reviewable by the RRT.¹⁶² While the AAT has the power to review adverse intelligence assessments, access to the AAT is denied to people who are not citizens or holders of either a valid permanent visa or a special purpose visa.¹⁶³

Furthermore, Australian intelligence authorities are not required to disclose to people seeking protection the statement of grounds supporting an adverse security assessment. Although rejected protection visa applicants are entitled to go the Federal Court or the High Court to seek judicial review, this review is concerned only with whether a legal error occurred in the making of the decision under review, and a successful challenge is made near impossible by the fact that the applicants are uninformed of the case against them and relevant documents are withheld.

Cessation of protection

The Refugee Convention does not require a country to continue to offer protection if the threat which warranted protection is no longer present. Specifically, Article 1C of the Refugee Convention allows a state to divest itself of its protection obligations where refugees fall within at least one of the following clauses:

- voluntarily re-avail themselves of protection of their country of nationality (Article 1 C(1));
- having lost their nationality, voluntarily re-acquire it (Article 1C(2));
- have acquired a new nationality and enjoy the protection of that new nationality (Article 1 C (3));
- have voluntarily re-established themselves in their home country (Article 1C (4));
- can no longer refuse to avail themselves of the protection of their home country because reasons why the person was recognised as a refugee have ceased to exist (Article 1 C (5)).
- being a person who has no nationality, can no longer refuse to avail themselves of the protection of their country of former habitual residence because reasons why the person was recognised as a refugee have ceased to exist (Article 1 C (6)).

This paper takes the view that Article 1C of the Refugee Convention should apply equally to Refugee Convention refugees and beneficiaries of complementary protection. This approach would facilitate the greatest compliance with non-refoulement obligations.

Turning to look at the three country case studies, Canada's policy of cessation of protection (for both refugee and persons in need of protection) is set out in section 108 of the IRPA. Canada's approach aligns very closely with Article 1C of the Refugee Convention. The five subsections of section 108 (1) employ language which very closely mirrors the language of the Refugee Convention in Article 1C - the only noteworthy difference is that section 108 (1) subsumes the six sub-sections of Article 1C into five sub-sections. This suggests an intention to conform to international legal standards. Canada's approach is a sound example for other countries.

¹⁶² Section 500(4)(c) Migration Act.

¹⁶³ Section 500(1)(c) Migration Act.

Significantly, section 108 (4) of the IRPA incorporates an additional safeguard against refoulement, even once it has been established that the reasons for which the person sought protection have ceased to exist (as per section 108 (1) (e)). Section 108 (4) provides that:

Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

It is very important that such a provision exist in the legislation in order to ensure the fullest protection and compliance with non-refoulement obligations. Such a provision facilitates consideration of the person's human rights protection on an individual basis and so reflects the spirit in which the Refugee Convention is intended.

Mexico's approach to cessation of complementary protection is provided for in the LRPC. Article 32 sets out two situations where complementary protection may cease: firstly, where the claimant hid or falsified information in his or her application; secondly, where the circumstances that motivated the granting of complementary protection have ceased to exist.

Interestingly, cessation of refugee protection (as opposed to cessation of complementary protection) under the LRPC occurs in six situations. Article 33 of the LRPC provides for these six situations – they are identical to the six grounds set out in Article 1(C) of the Refugee Convention.

It is unclear why a different approach to cessation of protection is applied to refugee and complementary protection. Both approaches accord with international legal benchmarks – the effect seems more to create two processes for the cessation of protection where one would be sufficient, thereby unnecessarily overcomplicating the approach. It is suggested that it would be more prudent (and result in a more streamlined process) to treat cessation of protection equally.

In Australia, cessation of refugee protection visas generally occurs in two situations:

- where protection obligations are being re-assessed in respect of a person who has been determined a refugee at some point in the past, but is subsequently being considered for criminal deportation or visa cancellation on character grounds; and,
- where immigration authorities have become aware of circumstances that may invite cessation; for example, where a refugee returns to his or her home country shortly after grant of refugee status, or makes repeated trips home, or obtains and uses the passport of the home country.¹⁶⁴

¹⁶⁴ Department of Immigration and Multicultural Affairs, *The Cessation Clauses (Article 1C): An Australian Perspective*, Paper prepared as a Contribution to the UNHCR's Expert Roundtable Series.

These two situations are reflective of provisions in Article 1C of the Refugee Convention. Pursuant to section 116 of the Migration Act, the Minister may also cancel a protection visa if satisfied that any circumstances which permitted the grant of the visa no longer exist.

Summing up

Irrespective of a state legislating for complementary protection, what is important is that the provisions are fully implemented. That is to say, it is of limited value that a country legislates for broad human rights protections if these provisions have no effect for lack of implementation. This is an important point to pick up on, particularly as countries may grapple with resource constraints in endeavouring to meet protection obligations proscribed under international law.

Relevantly, a provision in the draft regulations of Mexico's LRPC is of concern, providing that the implementation of the scheme is subject to the human, material and financial resources available.¹⁶⁵ The effect of this kind of provision is to risk limiting implementation of the LRPC, relegating human rights protection to an issue of discretion rather than guaranteeing human rights as envisioned in the act. It is essential that all rights provided for under the legislation of each of the three countries can be claimed.

For all countries, full implementation of laws governing complementary protection must be a priority. Implementation may be facilitated through a range of measures, for example education programmes that train practitioners/decision-makers on the contents and application of new or amended laws. Of course education programmes that inform claimants of their rights are also essential. Importantly, these education programmes should be rolled out throughout the country, ensuring that the laws (and their proper application) are implemented fully and in a uniform manner in all geographic locations. Up-to-date copies of legislation must also be easily accessible (for example, on-line) - this is the practice of all three countries studied in this paper.

Measures to limit lengthy and complex bureaucratic processes for claimants also contribute to full implementation of laws. Bureaucratic processes that are difficult to navigate or corruptly administered limit access to protection, ultimately undermining the value of legislating for complementary protection.

This paper has critically analysed the complementary protection schemes of three countries - Canada, Mexico and Australia. Each of these countries, each currently amending their protection policies, evokes topical issues for comparison and reflection. It is evident that there is no single, consistent or uniform approach followed by states in implementing complementary protection. While international law clearly sets out non-refoulement obligations, we have seen that the actual practice (observed through the laws and procedures) of states shows significant variance.

As this paper reveals, the nature and extent of complementary protection afforded differs greatly between states. Of particular concern are instances where states fall short of their obligations at international law - by narrowing the scope of protection provided, limiting the rights available to

¹⁶⁵ Tercero Transitorio, Reglamento de la Ley sobre Refugiados y Proteccion Complementaria.

(successful) claimants, and frustrating the ability of claimants to obtain and retain protection.

This paper points up important strengths and shortcomings of the complementary protection schemes of Canada, Mexico and Australia. In so doing, it is hoped and intended that this paper provides useful guidance for full compliance with international obligations.

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