IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COURT OF APPEAL

JOSEPH TERRENCE THOMAS

Applicant

v

THE QUEEN

Respondent

PROPOSED WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS LAW RESOURCE CENTRE LTD IF IT IS GRANTED LEAVE TO APPEAR AS AMICUS CURIAE

Background

1. In framing its submissions the Human Rights Law Resource Centre Ltd ("HRLRC") has had regard to the following background circumstances which it has gleaned from available public information including, in particular, the revised reasons of the learned trial judge for the ruling made by his Honour on 7 November 2005 to admit into evidence the record of the interview of the applicant on 8 March 2003. Some of the circumstances set out below may be generally accepted and some may be disputed.

   (a) On 4 January 2003 the applicant was arrested at Karachi airport by Pakistani authorities and was detained by the Pakistani authorities until early June 2003.[1]

   (b) No charges were laid against the applicant by the Pakistani authorities.[2]

   (c) The appellant may not have had access to a lawyer at any time during his detention in Pakistan.

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[1] *DPP v Thomas* [2006] VSC 243 at [5]-[6].
[2] *DPP (Cth) v Thomas* [2005] VSC 85 at [13].

(d) The applicant may not have been brought before a judicial officer at any time during his detention in Pakistan.

(e) During his detention in Pakistan the applicant may have been severely mistreated by non-Australian authorities. The mistreatment may have included: being blindfolded, hooded and shackled; being threatened with bashings, execution, electrocution and having his testicles crushed; threats that his wife would be raped; and attempted strangulation. The applicant may have been told that he was outside the law and no one would hear him scream.[3]

(f) In January and February 2003, whilst in detention, the applicant was interviewed on six occasions by officers of ASIO, for a total period in excess of 20 hours.[4] During at least some of those interviews Pakistani officials appear to have been present and to have questioned the applicant.[5]

(g) On 8 March 2003, whilst in detention, the applicant was interviewed by officers of the Australian Federal Police.[6] One of the officers who interviewed the applicant was also present at all of the ASIO interviews and asked questions during at least some of those interviews.[7]

(h) The applicant received five Australian consular visits during his detention. Only one of those visits, on 22 January 2003, occurred before the ASIO interrogations and the interview with the Australian Federal Police. It also occurred 18 days after the applicant was initially detained.[8]

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[3] *DPP v Thomas* [2005] VSC 435 at [14], [16]; paragraph 5 of transcript of reasons of Chief Magistrate Gray in granting bail to the applicant on 14 February 2005, being appendix B to the judgment of Teague J in *DPP (Cth) v Thomas* [2005] VSC 85; *DPP v Thomas* [2006] VSC 243 at [8], [36], [38] and [41].
[4] *DPP v Thomas* [2006] VSC 243 at [26].
[5] *DPP v Thomas* [2006] VSC 243 at [31]; transcript of interview on 24 February 2003 at 40-1.
[6] *DPP v Thomas* [2006] VSC 243 at [9].
[7] *DPP v Thomas* [2006] VSC 243 at [47].
[8] *DPP v Thomas* [2006] VSC 243 at [7].

International law

2. The sources of international law are principally:

   (a) international conventions establishing rules expressly recognised by the relevant States;

   (b) international custom, as evidence of a general practice accepted as law;

   (c) the general principles of law recognised by civilised nations; and

   (d) as a subsidiary matter, judicial decisions and the teachings of the most highly qualified publicists of the various nations.[9]

3. In brief summary, customary international law is law which results from a general and consistent practice of States followed by them from a sense of legal obligation (as distinct from, say, comity or courtesy). The relevant practice does not have to be universally followed in order to amount to custom, but it should reflect wide acceptance among the states particularly involved in the relevant activity.[10]

4. Some rules of customary international law are recognised as peremptory, forming a body of jus cogens. These peremptory rules cannot be set aside by treaty or acquiescence, but only by the formation of a subsequent customary rule of contrary effect.[11]

5. Some rights arising under international law are viewed as sufficiently important that all States are regarded as having a legal interest in their protection. An obligation of a State in respect of such a right is owed

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[9] Statute of the International Court of Justice [1975] ATS 50, article 38.
[10] Restatement (Third) of the Foreign Relations Law of the United States (1987) section 102; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v United States*), 1986 ICJ 14; and for an example of a municipal court determining if a practice had become custom see *The Paquete Habana* (1900) 175 US 677.
[11] Vienna Convention on the Law of Treaties, 23 May 1969, [1974] ATS 2, 1155 UNTS 331, articles 53 and 64; Ian Brownlie, Principles of Public International Law, 6th Ed. (2003) at 488-489.

towards the international community as a whole; they are obligations erga omnes.[12]

6. A State cannot plead its internal constitutional arrangements as an excuse for not carrying out its international obligations.[13] A federal State (at least if it alone may represent the State internationally) is responsible for a failure by a constituent unit of the federal State to observe an international obligation of the federal State.[14] Conduct of an organ of a State which exercises judicial functions is considered an act of the State for the purpose of determining responsibility of the State under international law.[15]

7. Some regulatory activity in the field of international relations takes the form of declarations and instruments which are known as soft law. Soft law instruments can include resolutions of the United Nations General Assembly, pronouncements of other international bodies, administrative decisions by agencies of international organisations, joint communiqués and other instruments expressing shared political commitments of particular states, interpretive statements regarding treaties, and guidelines and reports prepared by expert groups.[16] Soft law can be used to create support for a treaty or to help generate norms of customary international law. Soft law may over time harden into customary international law. Certain provisions of the Universal Declaration of Human Rights[17] probably began life as soft law

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[12] *Case Concerning the Barcelona Traction, Light & Power Co. Ltd (Second Phase)* ICJ Reports (1970) at [33].
[13] *Treatment of Polish Nationals in Danzig, Advisory Opinion* (1932), 1932 PCIJ, ser A/B, No. 44; see also Vienna Convention on the Law of Treaties, 23 May 1969, [1974] ATS 2, 1155 UNTS 331, article 27 which provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; article 50 of the International Covenant on Civil and Political Rights (16 December 1966, [1980] ATS 23, 999 UNTS 171); article 28 of the International Covenant on Economic Social and Cultural Rights (16 December 1966, [1976] ATS 5, 999 UNTS 3) and Human Rights Committee General Comment No 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant, 26 May 2004 UN Doc CCPR/C/21/Rev.1/Add13.
[14] *Montijo Arbitration* (1875) 2 Moore 1421 (discussed in Ivan Bernier, International Legal Aspects of Federalism (1973) at 85; *LaGrand Case* (*Germany v United States)* (Request for an indication of provisional measures) (1999) 38 ILM 308 at 313.
[15] Draft articles on Responsibility of States for internationally wrongful acts, International Law Commission, November 2001, article 4.
[16] J L Dunoff, S R Ratner and D Wippman, International Law: Norms, Actors, Process (2002) at 88-89.
[17] UN General Assembly, 10 December 1948, UN Doc A/810.

and evolved into rules of customary international law and then into jus cogens.[18]

Domestic uses of international law

8. If an international convention to which Australia is a party has not been incorporated into Australian municipal law by statute, it cannot operate as a direct source of individual rights and obligations under Australian municipal law.[19] However, an unincorporated treaty may be invoked in various ways in the conduct of domestic affairs.[20] A statute of the Commonwealth or a state is to be interpreted and applied, as far as its language permits, so that it is in conformity with Australia's obligations under an international convention (at least in the case where the legislation is enacted after, or in contemplation of, Australia's entry into the relevant convention).[21]

9. An international human rights convention to which Australia is a party can:

   (a) be a legitimate and important influence on the development of the common law;[22]

   (b) serve as an indication of the value placed by Australia on the rights provided for in the convention and as an indication of contemporary values;[23]

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[18] For a discussion of soft law see C M Chinkin *"*The Challenge of Soft Law: Development and Change in International Law*"* 38 International and Comparative Law Quarterly 850 (1989); Christine Chinkin, *"*Normative Development in the International Legal System" in Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, 21 (Dinah Shelton ed, 2000).

[19] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J.

[20] See the examples given by McHugh and Gummow JJ in *Re Minister for Immigration & Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [100].

[21] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ.

[22] *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 321 per Brennan J and at 360 per Toohey J, who referred to an international agreement being used as a guide when the common law is unclear; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

[23] *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 75 (the approach in *Schoenmakers* (and other Federal Court cases) to the test for granting bail under the *Extradition Act* 1988 (Cth) was overruled in *United Mexican States v Cabal* (2001) 209 CLR 165); *Dietrich v R* (1992) 177 CLR 292 at 321 per Brennan J; cf *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817 at 860-862.

(c) be weighed as a factor in the exercise of judicial discretion,[24] including:

(i) in respect of the exclusion of evidence;[25]

(ii) in sentencing.[26]

"A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge."[27]

(d) be relevant to the interpretation and application of legislation. Legislation should be interpreted, so far as its language permits, consistently with human rights.[28]

10. It is not yet finally settled whether customary international law is incorporated into Australian common law or whether a rule of customary international law is generally not to be considered as part of Australian law until it has been adopted and made part of our law by the decisions of judges, by an Act of Parliament or by long established custom.[29] However, even if incorporation theory is held not to apply:

(a) customary international law is a source of Australian law[30] and can contribute to the development of the common law;[31]

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[24] See generally, Wendy Lacey, "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere", 5 Melbourne Journal of International Law 108 (2004).
[25] *McKellar v Smith* [1982] 2 NSWLR 950 at 962F; *R v Swaffield* (1998) 192 CLR 159 at 213 per Kirby J and see s. 138(3)(f) of the *Evidence Act* 1995 (Cth).
[26] *R. v Hollingshed* (1993) 112 FLR 109 at 115; *Walsh v Department of Social Security* (1996) 89 A Crim R 65; *R. v Togias* (2001) 127 A Crim R 23 at 37 [85] per Grove J, 43 [123] per Einfield JA; contra *Smith v R* (1998) 98 A Crim R 442 at 448.
[27] M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 Australian Law Journal 514 at 526.
[28] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[29] See the discussion in *Nulyarimina v Thompson* (1999) 96 FCR 153 and Kristen Walker, "Treaties and Internationalisation of Australian Law", in Courts of Final Jurisdiction: The Mason Court in Australia, 204 at 227-234 (Cheryl Saunders Ed, 1996).
[30] *Chow Hung Ching v The King* (1949) 77 CLR 449 at 477 per Dixon J, referring to international law being one of the sources of English law.
[31] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J

(b) a universally recognised principle of international law would normally be applied by Australian Courts,[32] except where it may involve the creation of a criminal offence.[33]

Every effort should be made to construe Australian legislation so as to avoid breaches of international law (including customary international law).[34]

11. In construing an international human rights convention, it is legitimate to have regard to the opinions and decisions of bodies established to receive reports or determine claims under the convention.[35] This is also consistent with the broader principle that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels.[36] International soft law instruments can be referred to by municipal courts for the purpose of understanding the broader international context and for the purpose of interpreting rules of international law.[37]

Torture and other cruel, inhuman or degrading treatment

12. Torture and other cruel, inhuman or degrading treatment by a State are prohibited by international treaty and international customary law.[38] "[T]he torturer has become – like the pirate and slave trader before him – hostis

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[32] *Chow Hung Ching v The King* (1949) 77 CLR 449 at 462 per Latham CJ, who expressed the view at 462 that "international law is not as such part of the law of Australia".
[33] *Nulyarimina v Thompson* (1999) 96 FCR 153; *Thorpe v Kennett* [1999] VSC 442.
[34] *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 per Gibbs CJ.
[35] *Commonwealth v Bradley* (1999) 95 FCR 218 at 237 [39] per Black CJ (with whom Tamberlin J agreed); *Commonwealth v Hamilton* (2000) 108 FCR 378 at 387 [36], 388 [39]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 91 [148]; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130 at 167 [148] per Kirby J; *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at 163 [43]; *Matadeen v Pointu* [1999] 1 AC 98 at 115F, 116C.
[36] *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 421E; see also *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 433 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
[37] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 219 per Stephen J; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 174-177 per Murphy J; *Re Little Joe Rigoli* [2005] VSCA 325 at [5] and footnote 1 per Maxwell P. Lord Bingham of Cornhill made extensive reference to international soft law instruments in his speech in *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575.
[38] For some background to the prohibition in the international sphere see David Hope (Lord Hope of Craighead, a Lord of Appeal in Ordinary), "Torture", 53 International and Comparative Law Quarterly 807 at 823-825 (2004).

humani generis, an enemy of all mankind."[39] The prohibition on torture is expressive of the idea that even where law has to operate forcefully, there will not be the connection that has existed in other times or places between law and brutality; rather, even in extremis, "there will be an enduring connection between the spirit of law and respect for human dignity".[40]

13. Torture and other cruel, inhuman or degrading treatment at the behest of a person acting in an official capacity are prohibited by the International Covenant on Civil and Political Rights ("ICCPR") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), both of which are widely adopted international conventions.[41] Australia is a party to the ICCPR and the Torture Convention, but Pakistan is not a party to either of them.[42] Article 2(2) of the Torture Convention provides that no exceptional circumstances whatsoever may be invoked as a justification of torture. Article 4(2) of the ICCPR does not permit any derogation from the prohibition on torture or cruel, inhuman or degrading treatment.

14. The customary international law prohibition of torture and other cruel, inhuman or degrading treatment by a State[43] is a peremptory norm of international law from which no derogation is permitted. It requires that States

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[39] *Filartiga v Pena-Irala* 630 F.2d 876 at 890 (2d Cir 1980).
[40] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House", 105 Columbia Law Review 1681 at 1727.
[41] International Covenant on Civil and Political Rights, 16 December 1966 [1980] ATS 23; 999 UNTS 171, article 7; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 10 December 1984 [1989] ATS 21; 1465 UNTS 85 articles 2 and 16. 156 states are parties to the ICCPR and 141 states are parties to the Torture Convention (source: http://www.ohchr.org./english/countries/ratification/4.htm and http://www.ohchr.org./english/countries/ratification/9.htm).
[42] The ICCPR was signed by Australia on 18 December 1972 and ratified by Australia on 13 August 1980. The Torture Convention was ratified by Australia on 8 August 1989. Pakistan is one of 47 states recently elected to the UN Human Rights Council and in being elected pledged to "uphold the highest standard in the promotion and protection of human rights": General Assembly Resolution 60/251, UN Doc A/Res/60.251 (3 April 2006).
[43] *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir 1980); *Prosecutor v Furundzija* [1998] ICTY 3,10 December 1998; *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575 at 599 [33]; Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702; and as indication of state practice see the European Convention on Human Rights, 4 November 1950, 213 UNTS 221 article 3, the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 article 5(2), the African Charter on Human and Peoples' Rights, 26 June 1981, reprinted in 21 ILM 59

discourage, disown and not condone the prohibited conduct. Further, violation of this rule of customary international law is a violation of an obligation erga omnes, an obligation owed to all other States.[44] States are under an obligation not to recognise an illegal situation resulting from a breach of an obligation erga omnes and not to render aid or assistance in maintaining the situation created by such a breach.[45]

15. The definition of torture in article 1(1) of the Torture Convention may reflect a consensus which is representative of customary international law.[46] The definition in the Torture Convention contains three principal elements:

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

(b) the pain or suffering is inflicted for purposes such as obtaining from the person or a third person information or a confession or intimidating or coercing the person or a third person; and

(c) the pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

16. If the mistreatment alleged by the applicant did in fact occur it may well satisfy the second and third elements of the definition of torture. In relation to the first element of the definition, there is a question as to what type of pain or suffering amounts to torture and as to the extent to which it is necessary to draw a distinction between torture and other types of cruel, inhuman or degrading treatment. This may not be an area in which there is merit in drawing fine lines of distinction. As Jeremy Waldron has pointed

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(1982) article 5, and the Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS TS 67.

[44] *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 at [151] to [155], *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575 at 602 [34]; *In re Estate of Ferdinand E Marcos* 25 F. 3d 1467 at 1475 (9th Cir. 1994); Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702, comments (n) and (o).

[45] Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* , International Court of Justice, 9 July 2004, General List No 131 at [155], [159].

[46] *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 at [160]-[161].

out, an official engaged in mistreating a detainee may not have a legitimate interest in having settled clearly in advance the precise point at which his misbehaviour trips over a threshold and becomes torture.[47] Commenting on Article 7 of the ICCPR (which prohibits torture or other cruel, inhuman or degrading treatment), the Human Rights Committee[48] has said that it did not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment. It felt the distinctions depended on the nature, purpose and severity of the treatment applied.[49] Similarly, the Inter-American Convention to Prevent and Punish Torture defines torture as any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for various purposes, including criminal investigation or as a means of intimidation. The Convention does not seek to specify degrees of physical or mental pain or suffering.[50]

17. On the other hand, some consider that special rules apply to torture (as distinct from other mistreatment)[51] and article 1(2) of the UN Declaration against Torture, adopted by the General Assembly by consensus on 9 December 1975, states that torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.[52] The Rome Statute of the International Criminal Court, in defining torture for the purposes of the definition of crimes against humanity, also refers to the degree of pain or suffering involved by defining torture as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.[53]

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[47] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House", 105 Columbia Law Review 1681 at 1695-1703 (2005).
[48] The committee established under the ICCPR to monitor the convention's implementation.
[49] General Comment No. 20, replaces general comment 7 concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment, 10 March 1992 at [4].
[50] 9 December 1985, OAS TS No. 67, article 2.
[51] *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575 at 611 [53] per Lord Bingham of Cornhill.
[52] Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, General Assembly Resolution 3452, Annex, 9 December 1975.
[53] [2002] ATS 15, article 7(2)(e). The Rome Statute of the International Criminal Court is to be found in Schedule 1 of the *International Criminal Court Act* 2002 (Cth). For a general discussion of the

18. In 1978, in its decision in *Republic of Ireland v United Kingdom*, the European Court of Human Rights did not consider that treatment which included wall standing, hooding, subjection to noise, sleep deprivation and a reduced diet of food and drink amounted to torture, although it was found to amount to inhuman and degrading treatment.[54] In their speeches in *A v Secretary of State for the Home Department (No 2)* Lord Bingham of Cornhill and Lord Hoffman were inclined to think that such conduct may today be regarded as torture.[55] There are indications that the European Court of Human Rights would today itself view differently the acts which were considered in *Republic of Ireland v United Kingdom* in light of the increasingly high standards being required in the area of protection of human rights and fundamental liberties.[56] In *Akkoc v Turkey*[57] the European Court of Human Rights considered a case where the applicant suffered ill treatment which involved electric shocks, hot and cold water treatment and blows to the head as well as threats made concerning the ill treatment of the applicant's children, which caused the applicant intense fear and apprehension. The treatment left the applicant with long term symptoms of anxiety and insecurity, diagnosed as post traumatic stress disorder and requiring treatment by medication. The Court found that the applicant was a victim of torture.

19. The following practices may amount to torture: the use of scenarios designed to convince a detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; use of a wet towel and dripping water to induce the misperception of suffocation; use of mild, non-injurious physical contact such as grabbing and light pushing.[58] Simulated amputations may also amount to torture.[59]

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definition of torture in international law see Nigel S Rodley, "The Definition(s) of Torture in International Law", 55 Current Legal Problems 467 (2002).

[54] *Republic of Ireland v United Kingdom* (1978) 2 EHRR 25 at 66-67.

[55] [2006] 1 All ER 575 at 611 [53] and 622 [97]

[56] *Selmouni v France* [1999] ECHR 66 at [100] to [105].

[57] [2000] ECHR 458 at [114] to [119]

[58] These practices are described in Karen J Greenberg and Joshua L Dratel, The Torture Papers: The Road to Abu Ghraib, at 227-228 (2005) and are commented upon in *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575 at 611 [53] per Lord Bingham of Cornhill and 631-2 [126] per

20. The jurisprudence of the Human Rights Committee indicates that the following forms of treatment or punishment may, depending on their nature and severity, constitute violations of the prohibition on torture or other cruel inhuman or degrading treatment:

(a) prolonged solitary confinement;[60]

(b) incommunicado detention;[61]

(c) refusal of prompt and regular access to doctors and lawyers;[62]

(d) oppressive conditions of detention (such as lack of natural light, very confined cells, and lack of adequate medical care);[63]

(e) detention causing mental distress or deterioration;[64]

(f) mental anguish suffered by a mother over the disappearance of her daughter and the continuing uncertainty surrounding her fate.[65]

The treatment which the applicant may have experienced while in detention could also be a breach of article 10 of the ICCPR which provides that all

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Lord Hope Craighead. See also Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt: Situation of Detainees at Guantanamo Bay, UN Doc E/CN.4/2006/120 (27 February 2006) which held that such treatment and conditions do amount to torture in violation of art 7 of the ICCPR.

[59] *Estrella v Uruguay*, Communication No 74/1980, 17 July 1980 [1.6], [10].

[60] General Comment No. 20, replaces general comment 7 concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment, 10 March 1992 at [6].

[61] General Comment No. 20, replaces general comment 7 concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment, 10 March 1992 at [11].

[62] General Comment No. 20, replaces general comment 7 concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment, 10 March 1992 at [11].

[63] *Diedrick v Jamaica*, Communication No 619/1995, UN Doc CCPR/C/62/D/619/1995 (4 June 1998); *Young v Jamaica*, Communication No 615/1995 (1998).

[64] *Massera v Uruguay*, Communication No R 1/5, 15 August 1979; *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/99 (2002).

[65] *Quinteros v Uruguay* Communication No 107/81 UN Doc CCPR/C/OP/2 (1990). Similarly the European Court of Human Rights has found that misinformation and not granting an applicant full access to files relating to her husband's disappearance and death caused the applicant serious suffering and amounted to degrading treatment: *Gongadze v Ukraine*, ECHR Case No 34056/02, 8 November 2005 at [184] to [186].

persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

21. The exclusion from judicial proceedings of evidence obtained as a result of torture is required by article 15 of the Torture Convention. The rule of exclusion applies equally whether the forum State or another State was responsible for the torture.[66] It is also submitted that both because of:

(a) the status of the principal rule prohibiting torture and conduct which encourages or condones torture; and

(b) the evidence of State practice,

customary international law requires the exclusion from judicial proceedings of evidence obtained as a result of torture.[67]

22. The United Nations Declaration against Torture declares in article 12 that any statement which is established to have been made as a result of torture *or other cruel, inhuman or degrading treatment* may not be invoked as evidence against the person concerned.[68] The Human Rights Committee holds the view that evidence obtained as a result of cruel, inhuman or degrading treatment should be excluded from judicial proceedings in order to discourage violations of article 7 of the ICCPR (prohibition on torture and other cruel, inhuman or degrading treatment) and article 14(3)(g) of the ICCPR (no compulsion to confess guilt).[69] The International Commission of Jurists has declared that

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[66] *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575; Tobias Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", 17 European Journal of International Law 349 at 360 (2006).

[67] See the authorities collected in Nicholas Grief, "The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law", 2 European Human Rights Law Review, 201 at 214-215 (2006); and Tobias Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", 17 European Journal of International Law 349 at 364-365 (2006).

[68] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452, Annex, 9 December 1975

[69] General Comment No. 20, replaces general comment 7 concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment, 10 March 1992 at [12]; General Comment No. 13: Equality before the Courts and the right to a fair and public hearing by an independent Court established by law, 13 April 1984 at [14].

evidence which is obtained by means which constitute a serious violation of human rights is never admissible.[70]

23. The Commonwealth Parliament has enacted the *Crimes (Torture) Act* 1988 (Cth) in order, in part, to carry out Australia's obligations under articles 4 and 5 of the Torture Convention.[71] In effect, through a combination of sections 3(1) and 6, the Act defines torture in the same manner as in the Torture Convention. It provides that where a person who is a public official or who is acting with the consent or acquiescence of a public official does an act outside Australia that is an act of torture which, if done by the person in Australia would constitute an offence against the law in force in Australia, the person is guilty of an offence against the Act. A person can only be charged with an offence against the *Crimes (Torture) Act* if the person is an Australian citizen or present in Australia. It would be odd if, under the *Crimes (Torture) Act*, Australian courts could try the foreign officials responsible for torture, but could nonetheless receive evidence obtained by such torture.[72]

24. Torture is also described as a crime against humanity and a war crime under the Commonwealth Criminal Code.[73] Australia's concern in respect of torture is further demonstrated by section 22(3) of the *Extradition Act* 1988 (Cth) which provides that an eligible person is only to be surrendered in relation to a qualifying extradition offence if, amongst other things, the Attorney General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture.[74]

25. If the statements made by the applicant in the interview conducted on 8 March 2003 were obtained as a result of torture or cruel, inhuman or degrading treatment, to admit them into evidence would be contrary to

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[70] The International Commission of Jurists, Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, made at Berlin 28 August 2004 at [7].
[71] See the Attorney-General's Second Reading Speech in respect of the *Crimes (Torture) Bill* 1988 delivered on 23 March 1988, Parliamentary Debates 1988, House of Representatives Vol. 160, page 1227.
[72] See the comment of Lord Bingham of Cornhill in *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575 at 603 [35].
[73] Sections 268.13, 268.25 and 268.73.
[74] See also *Extradition (Torture) Regulations* 1990 (Cth).

international law. It would amount to condoning or encouraging torture or serious mistreatment, contrary to a peremptory norm of international law which Australian Courts would be expected to apply. It would degrade the legal system.[75]

26. If the applicant was subjected to torture or cruel, inhuman or degrading treatment, but it is not found that the statements made in the interview conducted on 8 March 2003 were obtained as a result of that conduct, it may still be the case that to admit the statements into evidence amounts to condoning or failing to disown torture or cruel, inhuman or degrading treatment. The interview was preceded by six sessions of questioning by ASIO officers, which were in turn preceded by (or took place at about the same time as) the alleged serious mistreatment of the applicant.[76] All of this occurred during a continuous period of detention without charge. It also appears that the applicant informed ASIO officers of at least some of his mistreatment during the course of an interview on 24 February 2003. The response, in part, was that the applicant was "going to come across various types in this game".[77]

27. Although it may be found that there was not a strict causal relationship between the interview of the applicant and the serious mistreatment, the two events are connected in such a way that it may be considered necessary to exclude the record of interview in order emphatically to disown torture or other cruel, inhuman or degrading treatment in accordance with Australia's international obligations and to protect the reputation and integrity of the judicial process. If before or during his questioning by Australian officials the applicant informed them of the serious mistreatment to which he had been, or was being subjected, and strenuous efforts were not immediately made to halt that mistreatment, the connection between the interview and the

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[75] *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575 at 618 [82] per Lord Hoffman, 639 [150] per Lord Carswell.
[76] *DPP v Thomas* [2006] VSC 243 [36]-[38].
[77] Transcript of interview on 24 February 2003 at 40-1.

mistreatment, and the case for exclusion of the interview in order to ensure compliance with international law, would be strengthened.

Arbitrary detention

28. "Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law."[78] Protection of the individual against arbitrary interference by the State with his or her right to liberty is a fundamental human right.[79] Incommunicado detention is the most important determining factor as to whether an individual is at risk of torture.[80]

29. Article 9(1) of the ICCPR prohibits arbitrary detention. The principal right to be free of arbitrary detention is facilitated by the procedural guarantees in articles 9(2) to (5),[81] which include, under article 9(4) of the ICCPR, the right of a person in detention to take proceedings before a Court so that the Court may decide without delay on the lawfulness of the detention. Articles 9(1) and (4) apply to all persons deprived of their liberty by detention, irrespective of whether criminal charges are brought.[82]

30. The obligation of a State under article 9 (and the rest of the ICCPR) is to ensure to all individuals within its territory and to all individuals subject to its jurisdiction the rights recognised in the Covenant.[83] An individual is within a State's jurisdiction if the individual is within the power or effective control of the State.[84] The European Court of Human Rights has acknowledged that under the European Convention on Human Rights the responsibility of a

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[78] *A v Secretary of State for the Home Department* [2005] 2 AC 68 at 127 [74] per Lord Nicholls of Birkenhead.
[79] *Aksoy v Turkey* [1996] ECHR 68 at [76].
[80] Interim report on torture and other cruel, inhuman or degrading treatment or punishment by the Special Rapporteur of the Commission on Human Rights, 1 October 1999 A/54/426 at [42].
[81] Joseph, Schultz and Castan, The International Covenant on Civil and Political Rights – Cases, Materials and Commentary (2nd Ed, 2004) at 304.
[82] Human Rights Committee, General Comment No 8, Right to liberty and security of persons, 30 June 1982 at [1].
[83] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 9 July 2004, International Court of Justice, General List No 131 at [108] to [111].
[84] Human Rights Committee General Comment No 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant, 26 May 2004 at [10]; *Montero v Uruguay*, Communication No 106/1981, 31 March 1983, CCPR/C/18/D/106/1981.

Contracting State can be involved by the acts or omissions of their authorities which produce effects outside their own territory.[85]

31. Detention can be arbitrary even though it is lawful in the place where it occurs. Arbitrariness includes elements of inappropriateness, injustice and lack of predictability and involves an assessment of what is reasonable and necessary in all the circumstances.[86] Australia has submitted to the Human Rights Committee that the drafters of the Covenant considered that the notion of arbitrariness included incompatibility with the principles of justice or with the dignity of the human person.[87]

32. The absence of judicial review of detention provides a strong indication that detention is arbitrary.[88] Incommunicado detention for three days, during which it was impossible for the detainee to gain access to a Court to challenge his detention, has been held to constitute a breach of article 9(4).[89] Incommunicado detention of up to five days has also been identified as a breach of article 9.[90]

33. The Human Rights Committee has expressed the view that access to legal representation is a necessary element of the entitlement to judicial review of detention contained in article 9(4) of the ICCPR.[91]

34. Customary international law prohibits a State policy of arbitrary detention.[92] For these purposes detention may be arbitrary if it is incompatible with the

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[85] *Drozd and Janousek v France and Spain* [1992] ECHR 52 at [91]; *Cyprus v Turkey* [2001] ECHR 331 at [76]
[86] *Van Alphen v The Netherlands*, Communication No 305/1998, 15 August 1990, CCPR/C/39/D/305/1988.
[87] *A v Australia*, Communication No 560/1993, 30 April 1997, CCPR/C/59/D/560/1993 at [7.6].
[88] *Aksoy v Turkey* [1996] ECHR 68 at [78]; *C v Australia*, Communication No 900/1999, 13 November 2002 CCPR/C/76/D/900/1999 at [8.2]; *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Abbasi* [2003] UKHRR 76 at [66].
[89] *Hammel v Madagascar*, Communication No 560/1993, 3 April 1987, CCPR/C/29/D/155/1983 at [19.4] and [20].
[90] Concluding observations of the Human Rights Committee: Spain 3 April 1996 CCPR/C/79/Add.61 at [12].
[91] *Berry v Jamaica*, Communication No 330/1998, 26 April 1994, CCPR/C/50/D/330 1988 at [11.1].
[92] Human Rights Committee, General Comment No 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declaration under article 41, 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6 at [8]; Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702 (which refers to prolonged arbitrary detention); Johan Steyn (Lord Steyn, Lord of Appeal in Ordinary), "Guantanamo Bay: The Legal Black Hole", 53 International and Comparative Law Quarterly 1 at 12 (2004); Jordan J Paust, "Judicial Power

principles of justice or the dignity of the human person or if the person detained is not given early opportunity to communicate with family or to consult counsel.[93] In the opinion of the editors of the American Restatement, this rule of customary international law is (as is the case with that prohibiting torture) a peremptory norm, violations of which are violations of obligations owed to all other States.[94] The Human Rights Committee also considers that the prohibition of arbitrary deprivation of liberty is a peremptory norm of international law.[95]

35. It is submitted that it is a violation of international law for a State to encourage or condone prolonged arbitrary detention or to render aid or assistance to the practice of prolonged arbitrary detention.[96]

36. Australia had a right under international law to complain about any arbitrary detention of the applicant and to insist upon its cessation. That right arose because of the erga omnes nature of the obligation not to engage in arbitrary detention and under the older law of diplomatic protection and responsibility for injury to aliens. Under the diplomatic protection able to be exercised by a State in respect of its nationals, if a national is subjected to harm by an agency of another State, the State of the person harmed may make a claim. Failure to provide those guarantees which are generally considered indispensable to the proper administration of justice is one type of recognised harm. Before the State of the injured national may make a formal claim, the national would usually be expected to exhaust any remedies available under the domestic law

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to Determine the Status and Rights of Persons Detained Without Trial", 44 Harvard International Law Journal 503 at 505-506, 509 (2003); as to evidence of State practice see the Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, UN Doc A/810 article 9, the European Convention on Human Rights, 4 November 1950, 213 UNTS 221 article 5, the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 article 7, the African Charter on Human and Peoples' Rights, 26 June 1981, reprinted in 21 ILM 59 (1982) article 6.

[93] Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702, comment (h).

[94] Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702, comments (n) and (o).

[95] Human Rights Committee, General Comment No 29, States of emergency (Article 4), 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11 at [11].

[96] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 9 July 2004, International Court of Justice, General List No 131 at [159]; Restatement (Third) of the Foreign Relations Law of the United States (1987) section 702.

of the State causing the harm, except where such remedies are clearly a sham or inadequate.[97] International law does not appear to recognise that a State is under a duty to intervene to protect a citizen who is suffering injury in a foreign State (at least where the State of the citizen is not encouraging or participating in the infliction of the injury), but it may be the normal expectation of a citizen that if subjected abroad to a violation of a fundamental right, their Government will not abandon them to their fate.[98]

37. Based on the information known to the HRLRC, the applicant's detention in Pakistan was arguably in contravention of the rule of customary international law prohibiting prolonged arbitrary detention and (if Pakistan had been a party to the ICCPR) would have been in contravention of articles 9(1) and 9(4) of the ICCPR.

38. The detention appears to have been arbitrary for the purposes of the ICCPR and may also have been contrary to Pakistani law. In the absence of expert evidence as to the content of Pakistani law, the legality of the detention would appear to fall to be determined by reference to Australian law.[99] The HRLRC is not aware of whether expert evidence was called in relation to this issue or of whether the learned trial judge considered the legality of the detention under Pakistani law. It ought not to be assumed that the laws of a civilised country would permit a person to be detained in custody for many months without recourse to a lawyer or any capacity to challenge the lawfulness of that custody.

39. During his detention the applicant was told by Pakistani officials on a number of occasions that if he cooperated he would be returned to Australia.[100] During an interview by ASIO officers on 27 January 2003 the applicant was told that the officers had no influence or control over the

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[97] See generally Ian Brownlie, Principles of Public International Law, 6th Ed. (2003) at 497-498, 506-508; Restatement (Third) of the Foreign Relations Law of the United States (1987) section 703, 711.
[98] *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Abbasi* [2003] UKHRR 76at [69], [98].
[99] *Standard Bank of Canada v Wildey* (1919) 19 SR(NSW) 384 at 388, 390-391; *The Parchim* [1918] AC 157 at161; *Von Arnim v Federal Republic of Germany* (No 2) [2005] FCA 662 at [11].
[100] *DPP v Thomas* [2006] VSC 243 at [36].

applicant's custody and that they had no idea what the future of that custody would be. It was added: "And that's not our – frankly, that's not our concern. The consular people might have an interest in that sort of thing"; and then "About all we can do for you is reflect back to our Pakistani colleagues and to our Government as to whether we consider that you've been co-operative or not".[101] The learned trial judge found that the applicant believed that he was at risk of indefinite detention in Pakistan or of removal to the United States or Cuba and decided to seek to minimise that risk, and to maximise the chances of return to Australia, by answering the questions put to him in the 8 March 2003 interview.[102]

40. It would seem that Australia took advantage of the applicant's detention by Pakistani authorities in at least two ways. First, the detention enabled Australian officials to conduct the interview of 8 March 2003 and the earlier ASIO interviews. (Pakistani officials apparently told Australian officials in early February 2003 that if the applicant were to be charged he would have to proceed to trial, which would bring the current information gathering to an end. Pakistani authorities said they were taking account of Australian interests in gathering further information from the applicant.[103]) Secondly, it would seem from the findings of the learned trial judge that the fear of indefinite detention (which Australian officials may not have sought to assuage) was a factor in causing the applicant to answer the questions put to him in the 8 March 2003 interview. Such conduct may amount to encouraging or condoning (or failing to disown) a breach of a peremptory norm of international law, which itself would amount to a breach of customary international law.

41. Australia's conduct could also be construed as being knowingly concerned in the arbitrary detention of the applicant, which may amount to a breach of Australia's obligation under article 9 of the ICCPR, read in conjunction with

[101] *DPP v Thomas* [2006] VSC 243 at [31].
[102] *DPP v Thomas* [2006] VSC 243 at [42].
[103] Communication from Australian officials in Islamabad to Australian officials in Canberra 5 February 2003. Page 460 of voir dire materials.

article 2(2), to protect people from violations of the right to be free from arbitrary detention (including by refusing to encourage, condone or give effect to third party violations).

42. Further, at the times the applicant was being questioned by Australian officials he may have been subject to Australia's jurisdiction, in the sense of being within the power or effective control of Australia, whether or not Pakistan also continued to exercise such power or control. Indeed, the fact that the learned trial judge held that the applicant was a protected suspect under s. 23B of the *Crimes Act* 1914 (Cth), and thus a person in the company of an investigating official for the purpose of being questioned about a Commonwealth offence, affords strong support for this view. If this analysis is correct, Australia had an obligation at those times to ensure to the applicant the rights recognised by the ICCPR (article 2(1)). To the extent that Australia failed to do so, it acted in contravention of the ICCPR.

43. It is submitted that a Court should not, as a matter of public policy, admit evidence which is essentially connected with a serious breach of international human rights law. Such conduct is also contrary to Australia's values as illustrated by our adherence to the ICCPR. Protection from arbitrary detention is the hallmark of the rule of law and the judiciary should refuse to countenance behaviour which threatens the rule of law or basic human rights.[104] As noted in paragraph 22, the International Commission of Jurists has declared that evidence obtained by means which constitute a serious violation of human rights is never admissible.

44. Additionally, articles 2(2) and (3) of the ICCPR require a State party:

(a) to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ICCPR; and

(b) to ensure that any person whose rights as recognised under the ICCPR are violated shall have an effective remedy.

To the extent that the rights of the applicant as recognised under the ICCPR have been violated, the Court has an opportunity to give limited effect to those rights and to give the applicant a limited remedy in respect of the violation by excluding evidence obtained in connection with the violation.

Legal representation

45. As noted in paragraph 33, a right to legal representation has been recognised for the purposes of article 9(4) of the ICCPR. The Human Rights Committee has expressed the view that a breach of article 14(3) of the ICCPR (minimum guarantees in respect of criminal charges) can arise from a denial of legal representation during an investigation before an accused person is charged.[105]

46. Rule 93 of the UN Standard Minimum Rules for the Treatment of Prisoners ("Minimum Standards")[106] provides that for the purpose of his defence, an untried prisoner is allowed to receive visits from his legal adviser with a view to his defence and to hand to his legal adviser confidential instructions. Although a person in the applicant's position may not fall within the definition of untried prisoner in rule 84, rule 95 provides that, at a minimum, persons imprisoned without charge shall be accorded the same protection as untried prisoners. Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), as adopted by the General Assembly, states that a detained person shall be entitled to have the assistance of legal counsel, shall be informed of his right promptly after his arrest and shall be provided with reasonable facilities for

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[104] *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42 at 61H-62A, B per Lord Griffiths and at 67G per Lord Bridge of Harwich and 76C, F per Lord Lowry.
[105] *Kurbanov v Tajikistan*, Communication No 1096/2002, 12 November 2003, CCPR/C/79/D/1096/2002.
[106] Adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders UN Doc A/CONF/611, annex I and endorsed by the Economic and Social Council ESC Res 663C, UN Doc E/3048 (1957). In 1971 the General Assembly invited member States to implement the Rules and to consider incorporating them in national legislation: GA Res 2858. In 1977 the Economic and Social Council adopted procedures for the implementation of the Rules which provided that States whose standards for the protection of all persons subject to detention or imprisonment fell short of the Rules should adopt the Rules: ESC Res 47, UN Doc E/Res/1984/47 (1984).

exercising it. Principle 18 provides that a detained person shall be entitled to communicate and consult with his counsel.[107]

47. Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. It is submitted that the Minimum Rules and the Body of Principles should be taken into account in determining the content of the obligation to treat detainees with humanity and dignity. The travaux preparatoires of the ICCPR support that approach in relation to the Minimum Rules[108] and the Human Rights Committee have applied the Minimum Rules in giving content to article 10 and, in connection with article 10, have asked State parties in their reports to indicate to what extent they are applying the Minimum Rules and the Body of Principles.[109] Carr J (dissenting in the overall result) used the Minimum Rules and the Body of Principles to construe article 10 in respect of a right to legal representation in *Wu v Minister for Immigration for Ethnic Affairs*.[110]

48. Section 23G of the *Crimes Act* provides that, subject to s. 23L, if a person is a protected suspect, an investigation official must, before starting to question the person, inform the person that he may communicate or attempt to communicate with a legal practitioner and arrange or attempt to arrange for a legal practitioner to be present during the questioning. The investigating official is required to defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication, and if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning. Section 23L sets out specific exceptions to the

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[107] General Assembly Resolution 43/173 of 9 December 1988.
[108] Mark Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (1987) at 233; *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245 at 265. For a discussion of the approach to interpreting treaties by Australian Courts, see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR at 230-231 per Brennan CJ and 251-256 per McHugh J.
[109] *Kurbanov v Tajikistan*, Communication No 1096/2002, 12 November 2003,UN Doc CCPR/C/79/D/1096/2002 at [7.8]; *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) at [9.3]; Human Rights Committee, General Comment No 21, Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art 10), 10 April 1992 at [5].
[110] (1996) 64 FCR 245 at 265.

requirements of s. 23G which the HRLRC understands do not apply to the case of the applicant.

49. Part 1C of the *Crimes Act*, which contains ss. 23G and 23L, was enacted after Australia's ratification of the ICCPR and it would appear that at least some of its provisions were introduced in order to fulfil Australia's obligations under the ICCPR.[111] It is submitted that s. 23G should be interpreted and applied, as far as its language permits, so that it is in conformity with Australia's obligations under the ICCPR:

(a) in respect of a detainee subject to its jurisdiction, to inform the detainee of his right to legal counsel and to allow the detainee the assistance of legal counsel (article 10); and

(b) to adopt such measures as may be necessary to give effect to the rights mentioned in sub-paragraph (a) (article 2(2)).

50. In *The Prosecutor v Delalic*[112] the International Criminal Tribunal for the former Yugoslavia considered circumstances where the accused had been interviewed by Austrian police in Vienna. The interview by the Austrian police was apparently conducted in accordance with Austrian law, which did not recognise the right of a suspect to counsel during questioning. Conversely, the rules of procedure and evidence of the ICTY provided for a suspect to have the right to be assisted by counsel during questioning. The Tribunal held that the violation of the right to counsel was sufficient to bring the matter within rule 5 which declared an Act null if it was inconsistent with fundamental principles of fairness. The statements made to the Austrian police by the suspect were held to be inadmissible.

51. In *Harrer v The Queen*[113] the Supreme Court of Canada considered the admissibility during a Canadian trial of a statement made by the accused during an interview in the United States with US officials. The statement was

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[111] See, for example, s. 23Q of the *Crimes Act*.
[112] *Prosecutor v Delalic (Decision on Zdravko Mucic's Motion for the Exclusion of Evidence)* Case No IT-96-21 (2 September 1997) [48] to [55].

made in accordance with US law, but if it had been taken in Canada by Canadian police in similar circumstances there would have been a violation of the accused's right to counsel under the Canadian Charter of Rights and Freedoms. It was held that the statement was admissible. The majority judgment noted that different issues would have arisen if the interrogation had been conducted by Canadian officials or if US authorities had been acting as agents of the Canadian police, but because the interview was conducted by US officials in the United States, the Charter had no direct application.

52. The majority judgment said that if the admission of the evidence would be a violation of the principles of fundamental justice, the trial would not be fair. In assessing fairness the majority said:

(a) a sense of fairness should be informed by the underlying principles of Canada's own legal system;

(b) the fact that the evidence was obtained in another country in accordance with the laws of that country may be a factor;

(c) conformity with the law of a country with a legal system similar to Canada's own legal system has weight;

(d) it was not satisfied that the unfairness must be such as to shock the conscience in order to warrant rejection of the foreign evidence.

53. A country which is a party to the Vienna Convention on Consular Relations[114] can insist upon the provision of legal representation to one of its nationals detained in another country which is also a party to the Convention. Australia and Pakistan are both parties to the Convention. Article 36(1) of the Convention provides that with a view to facilitating the exercise of consular functions relating to the nationals of the sending State (being the State with consular representation in the territory of another State), consular officers shall have the right to visit a national of the sending State who is in detention, to

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[113] [1995] 3 SCR 562.
[114] 24 April 1963 [1973] ATS 7; 596 UNTS 261.

converse and correspond with him and to arrange for his legal representation. (Section 23 of the *Crimes Act* incorporates some of Australia's obligations under article 36.)

54. The International Court of Justice has held that where a State has violated article 36 in respect of an individual who has been convicted and sentenced to a severe penalty by the courts of the violating State, it must allow a review and reconsideration of the conviction and sentence by taking account of the violation and any causal relationship between the violation and the conviction and penalty.[115] The applicant has not been convicted by the courts of Pakistan, however the views of the International Court of Justice may provide some guidance as to the approach to be taken to violations of article 36.

55. The learned trial judge said that the officers of the Australian Federal Police who conducted the 8 March 2003 interview had ascertained that legal representation would not be permitted in Pakistan and were faced with a choice of conducting an interview or postponing it for an indefinite period to an indefinite place. It is submitted that Australia had a right to arrange legal representation for the applicant pursuant to article 36 of the Vienna Convention on Consular Relations and, to the extent that during periods of questioning by Australian officials the applicant was subject to the jurisdiction of Australia, it had an obligation to do so under articles 9, 10 and 14 of the ICCPR. If there were a failure to act upon the right and comply with the obligation, it is submitted that this would be a relevant factor in the exercise of the Court's discretion to admit or exclude the record of interview. (If Pakistani officials did inform Australian officials that the applicant would not be permitted legal representation, this strengthens the argument that the detention of the applicant was arbitrary.)

Sentencing

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[115] *Case Concerning Avena and Other Mexican Nationals (Mexico v United States)(Judgment)* (2004) ICJ Rep 128 [120] to [123].

56. The learned trial Judge accepted that the applicant suffered from depression or post traumatic stress disorder and that the applicant would serve his sentence of imprisonment in conditions of very significant personal limitation.[116] It may also be the case that imprisonment of the applicant, and the conditions of that imprisonment, will exacerbate the applicant's mental health condition and, in particular, rekindle memories of the alleged mistreatment of the applicant in Pakistan.

57. Courts in Australia have accepted the potential relevance and persuasiveness of international human rights to the exercise of the sentencing discretion.[117]

58. Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Human Rights Committee has expressed the view that persons deprived of their liberty enjoy all the rights set forth in the ICCPR, subject to the restrictions that are unavoidable in a closed environment. In particular, prisoners may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.[118] The exacerbation of a prisoner's mental health condition by his treatment in, and the conditions of, his detention may amount to a contravention of article 10 (and of article 7 in respect of degrading and inhumane treatment).[119]

59. As discussed in paragraph 47, the Minimum Rules and the Body of Principles should be taken into account in determining the content of the obligation in article 10 to treat prisoners with humanity and dignity. Rule 57 of the Minimum Rules provides:

> "Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking

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[116] *DPP v Thomas* [2006] VSC 120 at [13]
[117] *R v Hollingshed* (1993) 112 FLR 109 at 115; *Walsh v Department of Social Security* (1996) 89 A Crim R 65 at 68; *R v Togias* (2001) 127 A Crim 23 at 37 [85] per Grove J, 43 [123] per Einfeld JA; *Royal Women's Hospital v Medical Practitioners' Board of Victoria* [2006] VSCA 85 (20 April 2006) at [70] per Maxwell P, at [133]-[138] per Charles JA; contra *Smith v R* (1998) 98 A Crim R 442 at 448.
[118] Human Rights Committee General Comment No. 21, replaces General Comment 9 concerning humane treatment of persons deprived of liberty, 10 April 1992 at [3]; see not dissimilar remarks in *R v SH* [2006] VSCA 83 at [22].

> from the person the right of self determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation."

Rule 58 notes that the purpose and justification of a sentence of imprisonment is ultimately to protect society against crime. It says that this end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law abiding and self supporting life.

60. The Minimum Rules also require that a penal institution have all necessary medical and psychiatric services necessary to detect and treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation and that sick prisoners who require specialist treatment be transferred to specialised institutions or to civil hospitals.[120] Principle 24 of the Body of Principles requires that medical care and treatment be provided to a prisoner whenever necessary. On a number of occasions the Human Rights Committee has found that the provision of adequate medical care during detention was an important part of the obligation to treat persons deprived of their liberty with humanity and with respect for their inherent dignity.[121]

61. The right to life contained in article 6 of the ICCPR has been found to impose upon the State a responsibility for the life and wellbeing of those it detains and a positive duty to maintain an adequate standard of health for detainees.[122]

62. Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[123] recognises the right of everyone to the highest

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[119] *Wilson v The Philippines* 11 November 2003, CCPR/C/79/D/868/1999 at [7.4].
[120] Rules 62 and 22(2).
[121] *Kelly v Jamaica*, 10 April 1991, CCPR/C/41/D/253/1987; *Pinto v Trinidad and Tobago*, 29 July 1996, CCPR/C/57/D/512/1992; *Williams v Jamaica*, 17 November 1997, CCPR/C/61/D/609/1995.
[122] *Lantsova v Russian Federation*, Communication No 763/1997, 15 April 2002, CCPR/C/74/D/763/1997 at [9.2]; *Fabrikant v Canada*, Communication No 970/2001, 11 November 2003, CCPR/C/79/D/970/2001 at [9.3], where the Committee acknowledged that the State party was responsible for the life and wellbeing of its detainees but found that the allegations of the complainant had not been substantiated.

attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights[124] considers that the rights provided for by article 12 require that health facilities and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any prohibited ground. The Committee notes that by virtue of article 2(2) of the ICESCR there can be no discrimination in access to health care on grounds of civil or political status and that States may not deny or limit equal access to health services for prisoners or detainees. [125]

63. Similarly, principle 9 of the Basic Principles for the Treatment of Prisoners, as adopted by the General Assembly, states that prisoners shall have access to the health services available in their country without discrimination on the grounds of their legal situation.[126]

64. A prisoner whose rights under the ICCPR are violated:

(a) because his imprisonment imposes a hardship over and above that resulting from deprivation of liberty; or

(b) because he does not receive adequate mental health care,

is entitled to an effective remedy.[127] In considering remedies for breaches of article 10 due to conditions of detention and lack of medical treatment, the Human Rights Committee has recommended that States not only improve the conditions of detention but also consider early release of the prisoner.[128]

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[123] 16 December 1966, [1976] ATS 5; 993 UNTS 3. The Covenant was signed by Australia on 8 December 1972 and ratified by Australia on 10 December 1975.
[124] The Committee was established by the Economic and Social Council of the United Nations to assist the Council in carrying out its responsibilities under the ICESCR: Economic and Social Council Resolution 1985/17.
[125] CESCR General Comment No. 14, the right to the highest attainable standard of health, 11 August 2000 at [12], [18], [34].
[126] Adopted by General Assembly resolution 45/111 of 14 December 1990. See also Principles for the Protection of persons with mental illness and the improvement of mental health care, principle 20, adopted by General Assembly Res 46/119 of 17 December 1991.
[127] ICCPR, article 2(3).
[128] *Simpson v Jamaica*, 5 November 2001, CCPR/C/73/695/1996; *Wanza v Trinidad and Tobago*, 10 June 2002, CCPR/C/74/D/683/1996, where conditions of detention included a cell measuring 9 x 6 feet, very poor natural light and being confined to the cell for 22 to 23 hours a day. In *Polay Campos v Peru*, 9

65. A prisoner whose rights under the ICESCR have been violated:

    (a) because he does not receive adequate mental health care; or

    (b) because the State has not guaranteed that the right to health can be enjoyed without discrimination due to his status as a prisoner,

    would also usually be entitled to a remedy.[129]

66. The judiciary has the capacity to play a role in ensuring the enjoyment of the rights guaranteed by the ICCPR and the ICESCR and in providing effective remedies.[130] The Court cannot directly determine conditions of imprisonment or the standard of health care available to prisoners. However, any breach or anticipated breach of the principles referred to in article 10 of the ICCPR or article 12 of the ICESCR should, it is submitted, be taken into account in the exercise of the sentencing discretion.[131]

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January 1998, CCPR/C/61/D/577/1994 (1998), the Human Rights Committee held that, in the context of a convicted prisoner subjected to violations of articles 7 and 10 in terms of conditions of detention and a violation of article 14 in respect of a trial which failed to provide basis guarantees of fairness, an effective remedy under article 2(3) included that the prisoner be released in the absence of the possibility of a fresh trial which did offer all the guarantees required by article 14.

[129] CESCR General Comment No. 9, the domestic application of the Covenant, 3 December 1998 at [3], [10],

[130] Human Rights Committee General Comment No 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant, 26 May 2004 at [15]

[131] Section 16A(2) of the *Crimes Act* refers to the mental condition of the prisoner as a matter to be taken into account in sentencing and acknowledges that other matters, not listed in the sub-section, may be taken into account.