DISCRIMINATION AND THE PAPUAN REFUGEES IN AUSTRALIA

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> "[they are] ... activists ... economic opportunists ... who can paddle their boat back home ..."
>
> Mr Hurford, Minister for Immigration and Ethnic Affairs.

> "By treating the issue as a flow of job-hungry blacks Mr Hurford absolved Indonesian authorities of responsibility for the wholesale displacement of Melanesians in the coastal area of Irian Jaya facing Australia"
>
> Mr Bernard Collaery, Solicitor representing the Papuans.

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The Story[2]

On 10 June 1985, five Papuan[1] men arrived on Boigu Island, the northern-most piece of Australian land, from the Papua New Guinean village of Buji, eight kilometres away. They had walked the 250 kilometres from the Irian Jayan fishing village of Merauke, mainly through jungle in order to avoid army patrols and border posts. They spent three months in a secret refugee camp on the Fly River (in PNG) and, as the camp became more crowded, decided to travel south to Buji. From there they crossed to `sanctuary' in Australia. The men were taken to Thursday Island by immigration officers where they were treated in hospital for malaria and subsequently "accommodated" in the police cells. After two weeks they were released, although were required to report to immigration authorities on Thursday Island three times a week (SMH 6/7/85, Age 20/7/85)[2].

The men alleged that they and other Papuans living in the Merauke area had been ill-treated by the Indonesian authorities in Irian Jaya. They were not members of the Organisasi Papua Merdeka (OPM), the armed liberation movement which has been fighting Indonesian rule in Irian Jaya since 1969 (Osborne: xiv). Rather they claimed to be members of the Melanesian Union from Gag to Samurai (MUFGS), a group "fusing faith and culture" (Age 2/8/85), which is Christian and non-violent although also struggling for independence (Age 30/7/85). One member of the group described an incident in which he was beaten and bayoneted in the leg for being in the street "a little tipsy" after curfew (SMH 6/7/85). He bears a "crater-like" scar on his thigh, and claims that he was denied medical attention for the wound. All men have marks and scars from being beaten and "twitched" (needled) with sticks (Age 30/7/85). They suffered restrictions on their freedom of movement, including an 8pm curfew, and limitations were imposed on fishing locations and the sale price of fish. The men allege that Javanese settlers took land from Papuans and soldiers arrested and beat young men who resisted (SMH 6/7/85). They claim further that a leader of MUFGS was taken to hospital by Indonesian officials and killed by injection, and provided their solicitor with the name of the victim and the doctor involved. One man also gave Mr Collaery precise details of the location where he saw a bulldozer covering an alleged mass grave (Age 30/7/85). The five Papuans fear that they will be killed if they return to Irian Jaya. They described instances where captured refugees were shot in prison as an example to others desiring to leave (SMH 6/7/85).

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1 The word "Papuan" describes a member of the indigenous New Guinea people. For our purposes, it can be used interchangably with "Melanesian".

2 For the key to references in brackets, see the Bibliography.

The Australian government responded to the claims of the five men with extraordinary alarm. The Minister for Immigration and Ethnic Affairs, Mr Hurford, was said to be "deeply concerned" about possible Indonesian reaction if they were granted refugee status, and about the possibility of a "mass influx" of Irian Jayans wishing to settle in Australia (SMH 6/7/85). Mr Hayden, the Minister for Foreign Affairs, said that the government must consider the prospect of "an uncontrolled flood" of refugees into Australia which could cause "economic and social disruption" (SMH 10/7/85). Mr Hayden also doubted that the men would encounter retribution if they went home, and suggested that the Indonesian government's transmigration programme, (under which many Indonesians, mainly Javanese, are being resettled in Irian Jaya), caused only "minor cultural disturbance" in the province (SMH 10/7/85). On 18 July Mr Hurford announced that the men would not be given permanent residence status in Australia if found to be genuine refugees, but may be sent to a third country. Mr Hurford suggested that they may end up in a "cold climate" (Austria or the UK) and that once they know that

> ... they cannot improve their lot economically by staying permanently in Australia they may ask to be put back on Boigu and hop back into their little boat and go back where they came from ... (SMH 19/7/85).

Cabinet later confirmed Mr Hurford's statement: in a letter to Bernard Collaery dated 19 July the permanent head of the Department of Immigration and Ethnic Affairs (DIEA) declared that the government's decision was "not to grant permanent residency status to a certain class of people, which specifically includes your clients". In a speech to the Refugee Council of Australia on 15 August Mr Hurford stated that the exclusion would affect any people from the "north", including Papuans.

In early September, the Prime Minister offered a second approach to the problem, namely that the five Papuans, who by that time had applied for refugee status, "were not getting refugee status ... [W]e do not want to see any exodus of West Irianese in Australia" (Aust 17/9/85). Yet a third alternative was mooted. The government suggested that it would consider accepting refugees who had been processed by the United Nations High Commissioner for Refugees (UNHCR) in PNG border camps, but would ban those coming directly to Australia (SMH 31/10/85). At the same time the DORS Committee recommended that the Papuans be granted refugee status. Mr Hurford sent the report back for "further clarification" (Aust 31/10/85).

On 30 January 1986, after three more Papuans had arrived in the Torres Strait, the PNG government refused a request from Mr Hayden to resettle all eight men (SMH

1/2/86). In May 1986, still no decision was forthcoming - the Papuans had not been given temporary entry permits, which meant that they could not move freely in Australia or work (CT 21/5/86). Finally in the third week of June, eleven Papuans present in Australia were granted temporary entry permits, while two were granted refugee status. Dr Mochtar, the Indonesian Foreign Minister, stated that Indonesia will not take back the remaining nine (Age 1/7/86). Mr Hurford reiterated that none of the Papuans would be granted permanent residency but Australia would look for a third country to take them (Aust 30/8/86).

I. INTRODUCTION

1. Proposals and problems

This paper focuses on the case of the first five Melanesians to arrive in Australia. I have a broad and a specific aim. The broad aim is to address some moral and legal issues which arise from the plight of the Papuans and the government's response to it. The specific aim is to argue that any denial of permanent resident status to the men by the Minister for Immigration and Ethnic Affairs (the Minister) on the basis that they 'come from the north' is unlawful racial discrimination within s.9 of the Racial Discrimination Act 1975 (Cth) (RDA). I also suggest that a denial of refugee status on the same grounds would amount to unlawful discrimination, and that any requirement that refugees follow UNHCR procedure in the PNG border camps in order to be considered for permanent residency may constitute indirect discrimination.

The following section outlines the main difficulty for my argument, namely that it encroaches upon the politically sensitive area of immigration law. Part two of the paper explores the concepts of territorial asylum and refugee status, and asks whether the Papuans are refugees within the relevant international convention. Part three first examines the notion of discrimination, racial discrimination in particular. It then details the argument that the Minister, if he acts on government policy, engages in unlawful discrimination. Thirdly, it considers the administrative remedies available to the five Papuans.

2. Discrimination and Immigration

The pivotal rule of immigration law, both international and domestic, is that the State 'enjoys an absolute and uncontrolled discretion, or sovereign power' (Goodwin Gill 1978:3). It is for the State to determine who shall enter its territory, who shall remain, and under what conditions. In international law, this sovereign power appears to be subject to the State's treaty obligations:

> ... as a matter of well-established international law and subject to its treaty obligations, a State has a right to control the entry of non-nationals onto its territory ... (Abdulaziz:27)

Moreover it has been suggested that under international law a State's discretion in the immigration field must be exercised in conformity with the jus cogens - the body of fundamental principles which cannot be derogated from (Goodwin Gill 1978:85). Thus, if the principle of racial non-discrimination is part of the jus cogens (Goodwin Gill 1978:85, Brownlie:598), it will restrict a State's otherwise unfettered discretion.

In Australia the power to control entry and deportation of non-citizens is exercisable by the Minister (and sometimes DIEA officers) under the Migration Act 1958 (Cth). An entry permit may be granted on arrival or, subject to s.6A, after the non-citizen's entry into Australia (s.6(5)). Section 6A(1) sets out the conditions under which the Minister may grant a permanent entry permit to non-citizens already on Australian soil. (These conditions are exhaustive: Kioa (1985)62 ALR 321, per Mason J at 342). However the discretion to cancel a temporary permit, or grant a new temporary permit, or deport a prohibited non-citizen (someone holding neither a temporary nor a permanent entry permit) is unconditional on the face of the Act (ss.7,18). The Minister may also deport legally present non-citizens on a number of grounds (ss.12-14). Non-citizens may not be deported if they have been in Australia as permanent residents for ten years or longer.

The Act gives the Minister 'a level of discretion unknown in any other legislation' (HRC:5). One reason for this is that it is 'machinery' legislation: it includes no statement of immigration policy and no guidelines for selection of immigrants.[3] For our purposes it is of particular note that the Act provides no procedure for the determination of refugee status, no indication of what may constitute a 'compassionate or humanitarian' ground under s.6A(1)(e), and no statement of the Minister's formal declaration to the Human Rights Commission that

> ... the principle of non-discrimination means that policy is applied consistently to all applicants regardless of their race, colour, nationality, descent, national or ethnic origin, sex or religious beliefs ... (HRC:21).

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[3] In this sense the current Act reflects its predecessor, the Immigration Restriction Act 1901 (Cth). The latter was a vehicle enabling the Executive to give effect to the "White Australia" policy (HRC:5).

There are two questions worth addressing at this point. First whether non-citizens, in particular prohibited non-citizens (PNC's), have legal rights which serve to qualify the Minister's discretion under the Migration Act; and second whether migration policy has any legal effect.

There is an English view that PNC's have no rights in law (Sornarajah:503). One rationale for this was expressed by Barwick CJ in Salemi (No. 2) (1977)137 CLR 396: 'it cannot be said that a power to order deportation is a power to affect the right of a prohibited immigrant' (at 404). The implication is that PNC's have no legal rights but merely certain privileges which can be withdrawn at the discretion of the conferring authorities (cf Sornarajah: 504). In theory this approach has not been practised in Australia. However in reality courts have been slow to defend the rights of non-citizens at the expense of the Minister's discretion.

The very existence of cases in which the plaintiffs are PNCs illustrates that they have a basic right to seek judicial review of the Minister's decisions.[4] Moreover Gibbs CJ has propounded a 'fundamental principle that anyone within the territory of Australia - including an alien who is a prohibited immigrant - is entitled to the protection of the laws ...' (Kioa at 331).[5] It sounds promising, but until very recently this has been something of a straw principle. The decisions have refused to impose any qualification on the Minister's power under the Migration Act. Only rare dissenting judgments contained encouraging signs. In Salemi the minority found that the exercise of the deportation power under s.18 of the Act was subject to the rules of natural justice. For example:

> ... The provisions of the Migration Act contain no clear or express exclusion of the rules of natural justice in relation to the power conferred by s.18, nor can any inference to that effect be extracted from the scheme of the Act ... (per Stephen J at 440-1).

In Pochi, Murphy J thought that the Minister's discretion to deport under s.12 of the Act (now repealed) was

[4] There are also mechanisms for review of decisions on their merits, such as the Administrative Appeals Tribunal (see HRC: 88-9)

[5] As a result of Australia's treaty obligations, PNC's are accorded some international legal rights. In particular Article 2 of the International Covenant on Civil and Political rights 1966 (ICCPR) and Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD) state that the rights in those conventions shall be assured to everyone in the State's jurisdiction.

conditional on an obligation not to violate family life. He went further and stated a general principle:

> ... All Acts [and therefore all statutory powers] should be construed (at least in the absence of unmistakable language to the contrary) as subject to the unexpressed qualification that the power be exercised humanely according to modern civilized standards ... ((1982)43 ALR 261 at 270).

Murphy J's principle is unlikely to be adopted (cf Anderson/Rowe:61-2). The outlook is especially discouraging since the government's decision to drop the proposed Bill of Rights which would have incorporated international humanitarian norms into Australian law. Moreover, in the particular context of immigration law, the Federal Court declined to follow Murphy J, observing that the disintegration of the deportee's family is not as a matter of law an overriding qualification to the power to deport (Tabag (1982)45 ALR 705, per Jenkinson J at 731 and Keely J at 718). Nevertheless embryonic limitations on the Minister's discretion under the Migration Act are beginning to emerge. First, the likely violation of the non-citizen's family is a relevant consideration which the Minister is obliged to take into account (Nevistic (1981)34 ALR 639, Tabag, Kioa). Second, the guarantee of freedom of religion under the Commonwealth Constitution (s.116) requires the Minister to consider the principle of freedom of religion when exercising powers under the Act (Lebanese Moslem Association, Federal Court of Australia, Pincus J, 25 July 1986, unreported [at 38-9]). Third, in Kioa a four to one majority (Gibbs CJ dissenting) found that post-Salemi legislative developments rendered s.18 subject to the rules of natural justice.

The decisions in Kioa merit closer attention. The legislative developments in question were the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) and amendments to the Migration Act itself. The first point about the case is that s.5(1) of the ADJR Act, which lists the grounds upon which a person may seek judicial review of an administrative decision, does not impose obligations upon the decision-maker where apart from the section such obligations would not exist (see eg per Mason J at 341). Thus, in order to apply the grounds in s.5(1) to decisions made under the Migration Act, it is necessary to argue independently that the powers under the Act are qualified by the appropriate procedural rules. The second point is that Mason, Wilson and Deane JJ disagreed with Brennan J about which legislative factors were decisive to establish the application of the rules of natural justice to powers under the Migration Act. (We can assume that if they apply to s.18, they apply to all powers under the Act.) The first three judges relied on s.13 of the ADJR Act. This requires the Minister, upon application by the non-citizen, to furnish reasons for his decision. It was

argued that the absence of an obligation to give reasons was a relevant and possibly decisive factor in previous decisions that powers under the Migration Act were not subject to the rules of natural justice (see esp. per Wilson J at 355-6). Brennan J on the other hand emphasized the `complex' of amendments to the Migration Act:

> The complex of powers contained in ss.6,6A,7 and 18 are directed to the status and disposition of the immigrant. The affection of the immigrant's interests is of the very nature of those powers and the repository must have regard to those interests in exercising them. If the legislature intended the Minister ... to have regard to the interests of the [PNC], the legislature may be presumed to intend that the [PNC] should be heard before those powers are exercised. (at 376-7)

For Brennan J, obliging the Minister to observe the rules of natural justice is only one way that regard for a PNC's interests is manifested. The grounds listed in s.5(1) of the ADJR Act, for example, would be others. Therefore his principle places a broader qualification on the Minister's discretion than one which simply imposes an obligation to observe natural justice on the basis of s.13.

Let me draw the strands together. The powers under the Migration Act are susceptible of limitation. The Minister is obliged to take relevant humanitarian considerations into account and to follow the rules of natural justice, and therefore does not have an absolute discretion. S/he may have a broad obligation to `have regard to the interests' of a non-citizen (following Brennan J). The principle of racial non-discrimination is arguably either a relevant consideration or a rule affecting the interests of non-citizens. Thus it would serve to qualify the Minister's discretion. (See further Part III, section 3)

I turn now to the status of migration policy. In Salemi a crucial question was the role of an amnesty announced by the (then) Minister in 1976: illegal immigrants who `meet the normal standards of health and good character will be granted resident status' (quoted at 454). Salemi met the requirements and yet became the subject of a deportation order under s.18. Barwick CJ declared that although the Minister's refusal to extend the amnesty to the plaintiff was `regrettable' and his reasons for the refusal `untenable',

> ... The Minister's statement was no more than a statement of policy. Statements of policy as a rule do not create legal obligations, though they may understandably excite human expectations as distinct from lawful expectations ... (at 406).

Barwick CJ is claiming two things. First that policy, migration policy in particular, has no legal effect per se. The remainder of the court (Murphy J dissenting) agreed. Second that declarations of policy do not have an indirect legal effect. Stephen and Jacobs JJ disagreed, holding that the amnesty created a 'legitimate expectation' that Salemi would be permitted to remain. The possession of a legitimate expectation in turn created a legal right to be accorded natural justice (eg per Stephen J at 438). The minority characterization of legitimate expectation was preferred in Kioa: it is sufficient that the expectation is reasonable - it is not confined to the expectation of enforceable legal rights.[6] Thus, while the policy of non-discrimination which underpins the Migration Act does not of itself have legal force, it may give rise to a reasonable expectation that the policy be followed. Arguably then, if migration policy has been applied in a discriminatory fashion, adversely affected non-citizens (such as the Papuans) have a right to be accorded natural justice.

II. TERRITORIAL (POLITICAL) ASYLUM AND REFUGEE STATUS

At international law, a State's obligations to protect asylum-seekers and refugees, which derive from the Refugees Convention and possibly customary international law, constitute exceptions to the rule that it has an absolute discretion to determine who shall enter its territory. In this part, I deal briefly with the notion of territorial asylum, but concentrate mainly on the legal rights and obligations associated with refugees, and propose that the Papuans have refugee status.

There are at least three reasons why it is important to establish that the Papuans are refugees. First, refugee status is one condition upon which a grant of permanent residency may be made (s.6A(1)(c)).[7] Second, if the Papuans are refugees, then by comparison with other groups of refugees, they have probably suffered racial discrimination either on the basis of national origin or because they are Melanesians from Irian Jaya. Third, their refugee status brings out the irony of the government's response. One reason that the government is denying the Papuans permanent residency is that they are refugees from Irian Jaya. Consider an Irian Jayan who comes to Australia, marries an Australian and then applies for permanent residence under s.6A(1)(b). It is implausible that it would be refused under normal circumstances. The irony is that the government is

[6]. Here the court followed previous cases, in particular the Privy Council in Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629: per Gibbs CJ at 330, per Mason J at 345 and per Brennan J at 371.
[7]. Others are territorial asylum (s.6A (1)(a)) and 'compassionate or humanitarian grounds', (s.6A (1) (e)).

refusing protection to precisely those persons who are accorded it explicitly at international law (under the Refugees Convention) and implicitly at Australian law (s.6A(1)(c)).

1. Territorial Asylum

There is no international convention on territorial asylum.[8] However Article 14(1) of the Universal Declaration of Human Rights provides that there is a 'right to seek and enjoy in other countries asylum from persecution'. Article 3 of the Declaration on Territorial Asylum (res.2312(XXII) of 14 December 1967) goes further and asserts that States have obligations not to reject at their frontier or expel persons entitled to invoke Article 14(1). Exceptions are made in the cases of national security, safeguarding the population, or a mass influx of persons (Article 3.2). The Declaration does not of itself create obligations under international law. Nonetheless, because it was adopted unanimously by the General Assembly in 1967, it is persuasive evidence that these obligations are part of customary international law (Shearer:204-7). In Australia, grants of political asylum are rare (Mark/Lansdowne:23). They are most often accorded to defecting diplomats, sportspersons, ballet dancers or actors, or sailors who jump ship.

2. Refugee Status

The international obligations of States with respect to refugees are regulated by the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.[9] Australia is a party to both the Convention and the Protocol. A refugee is defined as

> [any person who] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling ... to return to it. (Article 1A(2)).

Contracting States are obliged to apply the provisions of the Convention without discrimination as to race, religion or country of origin (Article 3). The most important substantive obligations on States are not to expel a refugee lawfully in their territory except on grounds of 'national security or public order' (Article 32.1) and not to expel or return ('refouler') <u>any</u> refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened ...'

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[8]. There is a Draft Convention. See the Report of the UN. Conference on Territorial Asylum: UN doc. A/CONF. 78/12 (21 April 1977).

[9] Respectively 189 UNTS 150, 606 UNTS 267.

(Article 33.1).[10] Thus, assuming that the Papuans are refugees, the Australian government is prohibited under international law from returning them to Indonesia.

In theory, there are two ways in which the provisions of the Convention and Protocol may be incorporated into Australian law. First by direct implementation through statute and second, assuming that the provisions form part of customary international law, by direct incorporation at common law. The legislature has not implemented the Convention in Australia, and nor have the courts accepted the doctrine of incorporation (Crawford/Edeson 72-77). Thus Australia has no municipal obligations comparable with its obligations at international law (Simsek (1982)40 ALR 61, Mayer (1985)61 ALR 609). It is anomalous that s.6A(1)(c) recognises the international legal concept of refugee and impliedly confers on the Minister a power to determine refugee status (Mayer).

Nonetheless the Refugees Protocol and Convention have been implemented administratively in Australia. In 1977 the inter-departmental DORS Committee was created to `evaluate claims to refugee status under the Convention, and to make appropriate recommendations' (Goodwin Gill 1983:168). Where refugee status is not appropriate, the Committee may recommend that other humanitarian or compassionate factors are present (DIEA Guidelines:5). While the determinations and advice of the Committee do not have legal force, `in practice those recognised as refugees by the Minister on the recommendation of the Committee have generally been accorded residence in Australia without limit as to time' (Goodwin Gill 1983:168). The implication is that in most cases Australia not only fulfils its obligation of non-refoulement but also accords the refugee permanent residency.

3. Are the Papuans refugees?

The central notion in the definition of `refugee' is that of a `well-founded fear' of persecution. It contains both a subjective (`fear') and an objective (`well-founded') element (DIEA Guidelines:2, UNHCR Guidelines:11-2). To establish the subjective element, it may be sufficient for the applicant to show that s/he falls within a particular group objectively shown to suffer oppression (Mark/Lansdowne:23-4). In the following discussion I assume that the Papuans are telling the truth. That they are is borne out by my own

[10]. Important procedural provisions include: a refugee shall have free access to the courts of law on the territory of all Contracting States (Article 16.1) and the expulsion of a refugee lawfully in a State's territory shall be only in pursuance of a decision reached in accordance with due process of law (Article 32.2).

obs rvation of photographs showing bayonet wounds, and the testimony of their solicitor.

Both Bernard Collaery and Father Mullins of Thursday Island are convinced that the men genuinely fear persecution if they are returned to Irian Jaya (SMH 19/7/85). Moreover, Mr Luke Hardy, of the Refugee Council of Australia, commented on his return from Thursday Island that the Papuans are `in total terror of being sent back to Irian Jaya' (Asia Pacific Solidarity, Sept 1985:6). The evidence of those who have had personal contact with the Papuans, and in addition the objective fact that Melanesians are persecuted in Irian Jaya (see below) suggest that the subjective element is satisfied.

Evaluation of the objective element requires consideration of the general human rights situation in Irian Jaya. There is overwhelming evidence that the indigenous Melanesian people have been subject to human rights abuses by the Indonesian authorities since the Dutch Colony was turned over to Indonesia in 1962. In mid-1984 10,000 Papuans, about one per cent of the indigenous population, entered PNG illegally. This influx cannot be explained as the result of traditional border-crossings, or of a wish to improve economic status (Tsamenyi). Indonesia has pursued a systematic transmigration programme through which it aims to settle 500,000 Javanese in Irian Jaya by 1989. The result was observed by Robyn Osborne while travelling in Irian Jaya: there is `a high degree of hostility between Papuans and Indonesians. Local people told me that they resented the foreigners. Indonesians ... said that the `Irianese' were primitive and needed guidance from a superior culture' (Osborne:xvi). Osborne also claims that institutionalized racism exists in the system imposed by the Indonesians, that there is no democratic representation of Papuans, and that the word `Papua' is banned (Background Briefing). Teaching of the Malay language is compulsory (SMH 6/7/85).

It is well-documented that the Indonesian authorities engage in much more serious human rights infringements, including reprisals against the civilian population. TAPOL states that many mass killings have taken place since the mid-1960's, usually of villagers, as part of the army's campaign to obliterate guerilla resistance (TAPOL:73). Amnesty International reports that there are continued instances of torture and ill-treatment by the police and military intelligence. There were unconfirmed reports of deaths in detention of suspected OPM supporters who had been forcibly repatriated to Irian Jaya from PNG (Amnesty 1986:227). It was alleged that in the applicants' home region of Merauke in 1978, 122 people had their hands and legs tied, were put into weighted cobra bags, and drowned (Osborne: 144). These are only the beginning of a variety of detailed and independent reports of the gross

ill-treatment of Papuans by the Indonesian authorities in Irian Jaya. The only reasonable conclusion is that the applicants' fear of persecution is well-founded.

Two final elements in the definition of `refugee' remain to be considered. First whether in this particular case the applicants had been persecuted for a reason stated in the definition, and second whether the applicants are unwilling or unable to return to their country. The second condition is undoubtedly fulfilled. As for the first, while the DIEA Guidelines suggest that `there is no universally accepted definition of persecution' (2), they do outline several factors `which may always be considered as being persecutory' (3). One of these is:

> Continued harassment, detention or arrest of anyone because of known or suspected political opinions, race, religion or membership of a particular social group.

It would seem that the Papuans' case falls within this category; they have been harassed, at the very least, because of their Melanesian race and/or their known or suspected political opinions. There is little doubt that the applicants are refugees.

III. RACIAL DISCRIMINATION

The Convention on the Elimination of All Forms by Racial Discrimination (CERD) defines `racial discrimination' as

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the effect or purpose of nullifying or impairing ... human rights and fundamental freedoms ... (Article 1.1)

Section 9(1) of the RDA makes any act of racial discrimination as defined in CERD unlawful. My purpose in this part is to show that any decision taken pursuant to the government's policy to deny all applicants from `northern regions' permanent residency is an unlawful act within s.9(1). I propose also that the `proper channels' requirement could constitute indirect discrimination and would be unlawful if indirect discrimination is captured by s.9(1).

The first section examines the concept of discrimination, both at international law and in Australia, and asks particularly about the notion of racial discrimination under CERD and the RDA. The second section takes the facts of the applicants' case and shows that they have been subject to unlawful discrimination. The third outlines possible administrative remedies and suggests some tactics which should be pursued.

1. The meaning of discrimination

There is little doubt that customary international law contains a norm of non-discrimination (Brownlie:596-8). The problem is to specify the content of the norm, the content of racial discrimination in particular. McKean (1970) gives a series of examples to show that international bodies have not considered discrimination to be a distinction or differentiation simpliciter, but an arbitrary or invidious distinction. Judge Tanaka, in support of this view, treats the principle of non-discrimination as co-extensive with the principle of equality before the law. The latter is not absolute equality but `means relative equality, namely the principle to treat equally what are equal and unequally what are unequal' (306). Unequal (or different) treatment is permissible if it is reasonable. There are three elements in the international law notion of reasonableness. First there must be a `logical and material link' between the difference itself and the difference in treatment (Tanaka:314). Second, the different treatment must be proportionate to the justification of the treatment (Brownlie:597). Third, there is a burden of proof on those seeking to show the reasonableness of a difference in treatment (Tanaka:309). Judge Tanaka however complicates the analysis of racial discrimination by concluding that any differentiation made on the basis of colour, race, or tribal or national origin is <u>inherently</u> unreasonable and unjust.

An important feature of Judge Tanaka's characterization of discrimination is that it embraces <u>indirect</u> discrimination. Indirect discrimination occurs when a neutral requirement or practice has a disparate effect. He states that `[t]o treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently... to treat unequal matters differently is not only permitted but required. The issue is whether the difference exists' (305-6). This implies that if a neutral (equal) requirement or practice has a `different' or unequal effect, it will be incompatible with the principle of equality and therefore discriminatory. There is considerable support for the view that the international norm of non-discrimination is the negative statement of the principle of equality, and therefore prohibits indirect discrimination.[11]

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[11] For example McKean (1983:285-8), Meron (289), Vierdag, who propounds a principle of `material non-discrimination' which `aims at attaining material equality, ie equality not only as to legal, but also as to social and economic conditions' (166-7), and Sundberg-Weitman who bases her claim that `the prohibition of discrimination normally includes indirect discrimination' on German authority (108). See also the <u>German Settlers in Poland Case</u>: `There must be equality in fact... as well as ostensible legal equality...' PCIJ (1923), Ser B, No 6 at 24.

Two questions arise. First whether Tanaka's characterization of racial discrimination is correct; and second whether racial discrimination within CERD (and the RDA) is the same concept as it is under general international law.

Judge Tanaka is probably theoretically wrong to say that all racial distinctions constitute discrimination. A racial characteristic may be a bona fide occupational qualification (see Brennan J in Gerhardy (1985)57ALR 472 at 575).[12] A plausible reworking of his notion of racial discrimination is that racial distinctions create a very strong presumption of discrimination. Thus the onus of proving that a racial distinction is justifiable, especially when it does not favour the individual or minority group in question would be difficult to discharge.

There is also international judicial authority that not all distinctions made on racial grounds are discriminatory. In Abdulaziz it was argued before the European Court of Human Rights that the applicants' husbands had been denied entry into the UK as a result of racially (and sexually) discriminatory immigration rules. The rules imposed stricter entry conditions on the husbands of `non-patrials' than on either the wives of non-patrials or the spouses of patrials. The stated purpose of the rules was to protect the labour market at a time of high unemployment (8). The Court found discrimination on the basis of sex, but refused to do so on the ground of race.

The Court pointed out that the rules made no differentiation on the ground of race or ethnic origin on their face. They did however distinguish between patrials and non-patrials (a nationality-based distinction) but this was justifiable because the `main and essential purpose' of the rules was to protect the labour market (33). The Court seems to make the additional claim that even if the rules did distinguish on the basis of national origin, that would be justifiable if the reason was to protect the labour market. The tenor of the decision is that some racial distinctions, especially in the context of immigration matters, are justifiable. It approves the majority of the Commission which had concluded:

> Whilst a ... State could not implement `policies of a purely racist nature', to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute `racial discrimination' (33).

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[12] For example to employ an aboriginal as a model for the reason that s/he is aboriginal would not be discriminatory.

It expressly rejects the view of the minority of the Commission that the rules were indirectly racist because their effect was to prevent immigration from the `New Commonwealth' and Pakistan (33). In so doing it perhaps lends support to the (misguided) proposition that discrimination does not extend to indirect discrimination, at least in the immigration field. A better analysis is to reconcile the two aspects of the Court's decision: the disparate effect of the rules is not discriminatory because it is a justifiable and proportionate response to the current high unemployment in the UK.

There are two views about whether CERD adopts the international law concept of discrimination. Meron, after reference to the preamble and Article 2 of CERD, concludes that the `objective of the Convention is the attainment of racial equality' and therefore that `facially neutral policies or practices that have a disparate impact on some racial groups should be prohibited' (289). He therefore endorses a broad notion of discrimination and the view that indirect discrimination is implicit within it. In Gerhardy on the other hand at least two judges take the restricted view that `[w]hatever may be the connotation of ... `discrimination' in international law generally', Article 1.1 of CERD and s.9(1) of the RDA `relate to all formal discrimination including benign discrimination' (per Brennan J at 518). Wilson J offers a rationale for this position, namely `if the Convention did not intend `racial discrimination' to bear an inclusive meaning, there would be no need to make any provision for special measures' (505). He concludes that the definition in the Convention and the Act is not `confined' to arbitrary, invidious or unjustified distinctions (505).

The High Court's characterization of racial discrimination within the Convention is unsatisfactory for two reasons. First it overemphasizes the notion of a formal racial distinction as constitutive of discrimination. Although the Court's discussion reaches the same result, it is far narrower and more technical than Judge Tanaka's. Both assert that racial distinctions are discriminatory, but the strong implication of the High Court decision is that a formal distinction simpliciter is both sufficient and necessary for discrimination. This would exclude the possibility of indirect discrimination. Judge Tanaka however emphasizes the inherently unreasonable character of the racial distinction, and, as we have seen, his analysis extends to racially discriminatory effects. Second, the Court artificially divorces racial discrimination within CERD from the concept under international law generally. Perhaps the approach was pursued in order to legitimize the preferred restrictive interpretation of s.9(1) of the RDA. But it does not sit well with the rule that treaty provisions should be construed according to the meaning attributed to them at international law, as should any

corresponding statute provisions (Koowarta (1982)39 ALR 417 per Brennan J at 491-2; see also Crawford/Edeson 110-7). It is more plausible to construe discrimination within CERD, in the absence of any indication to the contrary, and in line with the background international law and the views of commentators (eg Meron), as any invidious or unjustified distinction etc. Thus, the special measures Article is a confirmation of rather that an exception to the general rule (Sadurski:29-30).

2. The Papuan Refugees in Australia

If the Minister were to deny the Papuans either refugee status or permanent residency, that would be an act by a person within s.9(1) of the RDA. It would have the effect of `nullifying or impairing' their right to equality before the law (see the preamble to Article 5 of CERD). Before examining whether the difference in treatment of Irian Jayan refugees constitutes racial discrimination under s.9(1), we need to deal with two difficulties created by Articles 1.2 and 1.3 of CERD respectively.

Article 1.2 provides that CERD shall not apply to distinctions etc made by a State between citizens and non-citizens. It does not refer to distinctions between classes of non-citizens. I am arguing here that the Papuans are being treated unfavourably by comparison with other groups of non-citizens, in particular refugees. And the distinction is being made on racial grounds (Irian Jayan origin). Dimic (1982)4 ALN 204 and Yildiz (1982)46 ALR 112 both raised the question of the distinction under s.12 (now repealed) of the Migration Act between classes of non-citizens. Section 12 dealt with the deportation of criminal `aliens', who were a particular class of non-citizens defined in the Act according to nationality. While alien non-citizens could be deported for having committed a criminal offence, there was no corresponding provision for non-alien non-citizens. In Dimic the claim was wrongly interpreted to be one of discrimination between citizens and non-citizens, and rejected on the basis of Article 1.2 (N206). However in Yildiz the distinction between nationality (present legal status) and national origin was applied (following Ealing London Borough Council v Race Relations Board [1972]AC 342). Since s.12 distinguished between aliens and other non-citizens by nationality, not national origin or any other criterion within Article 1.1 of CERD, it was not racially discriminatory (121). The Federal Court neither supported nor rejected the view expressed in Dimic, and to that extent it does not exclude non-citizens from the protection of the RDA (cf Anderson/Rowe:107, fn207). Undoubtedly Article 1.2 excludes distinctions etc made on the basis that they are non-citizens (`non-citizens qua non-citizens', Schwelb:1008). Thus to deny a non-citizen voting rights would be permissible. But CERD and the RDA

would prohibit distinctions made between classes of non-citizens on racial grounds (see Schwelb:1008).

Article 1.3 of CERD states that:

> Nothing in this Convention shall be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

In Dimic the applicant's argument was dismissed on the alternative ground that s.12 was a legal provision affecting nationality and therefore not covered by CERD (N206). There are three responses to a similar argument in the present context. The first is to confine the operation of Article 1.3 to legal provisions which existed when the Convention was drafted in 1965. This approach is plausible if one agrees that its overall object is the attainment of equality (see Meron), and also that international standards applicable in the field of racial discrimination have become more stringent since 1965 (Brazil:225). Indeed some writers suggest that the norm of racial non-discrimination is now part of the *jus cogens* (eg Brownlie:598). Since s.6A of the Migration Act did not exist in 1965, it is not excluded by Article 1.3. Secondly, even if Article 1.3 *does* apply to post-1965 provisions, s.6A does not affect nationality. Rather it deals with the notion of permanent residency, which is 'conceptually unrelated' to that of nationality. Thirdly, we are not seeking to impugn a legal provision at all (and therefore we are not invoking s.10 of the RDA), but an administrative act. Therefore Article 1.3 does not obstruct the application of CERD and the RDA to the facts here.

Once these difficulties are set aside, it remains to consider whether the government's distinction between refugees from Irian Jaya and others constitutes discrimination within s.9(1) of the RDA. There is no doubt that a differentiation has been made between classes of refugees on the ground of national origin. If the refugee 'comes from the north', s/he will not under any circumstances be granted permanent residency. If s/he comes from anywhere else (Kampuchea, Chile etc), no such bar applies. The government argues that the distinction is justified in order to avoid upsetting Indonesia (and thereby possibly undermining our relations with Indonesia), and in order to discourage the putative mass of hopeful Papuans waiting to burst into northern Australia.

We have canvassed two conceptions of racial discrimination: the *Gerhardy* and the broader international law conceptions. The twist is that strict adherence to the *Gerhardy* approach renders the government's arguments *irrelevant*. A racial distinction is necessary and sufficient for discrimination. If, on

the other hand, only invidious racial distinctions constitute discrimination, then the government's reasons are relevant and it is a matter of asking whether they are reasonable or justifiable in the international law sense.

The 'mass influx' reason offers an objective justification or 'logical and material link' between the difference in treatment (denial of permanent residency) and the difference between Irian Jayan refugees and others.[13] A State has a duty to protect its own citizens, and is justified in formulating immigration policy in the pursuit of that aim (cf the discussion in Abdulaziz in which protection of the labour market was an important factor). Therefore the crucial issue is whether the treatment is proportionate to the reason offered. The banning of all refugees from Irian Jaya is not a proportionate response to the fear that many more will follow. While it may be proportionate in the case of an actual mass influx, it is not in the case of a remotely possible mass influx, when the reality is the merest trickle. The government's reasoning is laughable when one considers the problems being faced by PNG on their western border. That is a genuine mass influx and the PNG government may be justified in taking prima facie discriminatory measures to protect its citizens. The entry of even a few hundred Papuans into Australia is not likely to have a significant effect on social or economic conditions. Unless the numbers of Papuans flowing into Australia increase, so that there is a real risk of social and economic disruption, the mass influx argument is not strong enough to displace the presumption of racial discrimination.

It is doubtful whether there is a sufficient link between the 'sensitivity of Indonesia' reason and the banning of Irian Jayan refugees for the action to be justifiable. The government has no duty to compromise its moral and legal obligations in order to preserve good relations with other countries. This was made clear by the Prime Minister in the wake of Indonesia's explosive response to a newspaper article examining how the Suharto family gained its wealth (SMH 10/5/86). It was said that Australia would uphold the principle (and practice) of freedom of the press, even if that meant offending Indonesia. Moreover, it is far from clear that a policy of appeasement towards Indonesia is in the long-term interests of the Australian people, and justifiable on that ground. Again it would seem that the government has failed to discharge the burden of proof.

Assuming that Gerhardy is followed, a decision to deny the Papuans permanent residency, or indeed refugee status, on the basis of their national origin would

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[13] Note that one exception to the obligations under the Declaration of Territorial Asylum is that of 'mass influx' (Art 3.2).

constitute unlawful discrimination under s.9(1). Even if the Gerhardy approach is incorrect, and racial discrimination under s.9(1) corresponds to the international law notion, the decision would be unjustifiable and therefore discriminatory. Moreoever, if the second characterization of s.9(1) is correct, the section prohibits indirect discrimination. Any requirement that the Papuans go through UNHCR channels in PNG in order to be eligible for permanent residency, although it (arguably) does not involve a racial distinction on its face, may have a racially disparate effect. That is, more refugees from Irian Jaya may be affected than any other class of refugees.[14] (Indeed, only Irian Jayan refugees are likely to be affected.) Thus such a requirement could be unlawful within s.9(1)[15].

3. Administrative relief

The Minister's discretion under the Migration Act is qualified by the obligations to observe natural justice (a ground for review under s.5(1)(a) of the Administrative Decisions (Judicial Review) Act), to take into account relevant considerations (ss.5(1)(e) and 5(2)(b)), and possibly by a broad duty to have regard to the interests of the non-citizen (supra Part I, section 2). The obligation to take relevant considerations into account is one aspect of the duty to properly exercise the power conferred by the Migration Act (reflected by s.5(1)(e) of the ADJR Act). It is plausible to argue by analogy that the Minister's discretion is also qualified by other aspects of that duty (see s.5(2) of the Act). Moreover, if Brennan J's principle is correct, additional grounds of review (eg s.5(1)(f) and (j)) would be available on the basis that they protect the non-citizen's interests.

The Minister is required, on application, to provide reasons for any decision made under the Act, including a decision to deny refugee status (s.13; Mayer). Therefore the Papuans' first step should be to apply for reasons for any decision which adversely affects them. This is a delaying tactic as well as of practical benefit in preparing a case. Assuming that the decision is made because of their national origin, the following arguments are possible; because of the immigration context, they are also somewhat tentative.

Firstly, the existence of policy that migration procedure be applied on a non-discriminatory basis gives

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[14] It may be possible to argue in the alternative that the relevant class is that of non-citizens. For a discussion of the difficulties of choosing an appropriate class or `pool', see Note on Orphanos [1985] 2 WLR 703 in (1986) 49 Modern Law Review 235.

[15] For this argument to succeed, evidence that the requirement actually affected more Irian Jayan refugees than others would be required.

rise to a legitimate expectation that it will be so applied; and since it has not been so applied in the Papuans' case, and they have been adversely affected, they have been denied natural justice.[16] Secondly, the Minister has failed to take a relevant consideration, namely the terms of CERD and the RDA, into account. In Kioa it was held that there was no obligation to consider the provisions of the ICCPR because the latter are not part of Australian law (eg per Gibbs CJ at 336). Since the RDA is part of Australian law, its terms are clearly relevant considerations. Thirdly, even if the Minister did take the provisions of the RDA into account, insufficient weight was attributed to them. This argument is plausible in the light of two factors: first, precisely because the RDA provisions are law in Australia, great weight should be attached to them; second, the decision was made pursuant to a government policy to ban all Papuan refugees. The latter suggests that little or no consideration was given to factors other than those of foreign policy. If insufficient weight is attributed to a relevant consideration, the decision could be set aside as an error of law (s.5(1)(f) of the ADJR Act, Tabag per Woodward J at 710 and Jenkinson J at 727; but contrast the view of Keely J that the weight to be accorded a relevant consideration is a question of fact: at 716). Fourthly, the decision was contrary to the RDA, and therefore contrary to law (s.5(1)(j) of the ADJR Act). Fifthly, the power was exercised in accordance with a policy without regard to the merits of the Papuans' case (ss 5(1)(e) and 5(2)(a) of the ADJR Act). This follows from the supposition that the decision not to grant permanent residency was made in pursuance of the government's blanket prohibition on Irian Jayan refugees.

IV. CONCLUSION

This paper has explored a number of moral and legal issues associated with the Papuan refugees' presence in northern Australia. In the field of immigration, it is notoriously difficult to make any legal argument against the government stick. The courts are loath to place restrictions on the sovereign power of the State; and the vast majority of immigration decisions are regarded as justifiable precisely because they implement immigration policy. I have attempted to show that the policy to refuse permanent residency to all Irian Jayan refugees is racially discriminatory and unlawful. It makes a racial

[16] The DORS Committee procedure has arguably accorded the Papuans natural justice on the question of refugee status. On the other hand, the Committee is unlikely to have granted a hearing on the specific issue of denial of the non-discriminatory treatment required by migration policy. DORS procedure has no direct significance to questions of permanent residency eligibility, and therefore cannot be said to have fulfilled the natural justice obligation in that sphere.

distinction between classes of refugees, which is either discriminatory *per se* or invidious and therefore discriminatory. The policy does not pursue a genuine and justifiable goal, namely the protection of Australian citizens: there is little or nothing to protect Australians from. Rather, the government is hiding behind the shield of its sovereign power in order to avoid political and diplomatic embarassment. It shows a cynical and reprehensible lack of respect for its moral and legal obligations both to eliminate racial discrimination and to protect persecuted individuals.[17]

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[17] I have benefited from the files of press clippings compiled by Frances Muecke of the Indonesia Coordination Group of Amnesty International, from discussions with Bernard Collaery and Gerard Rowe (University of New South Wales), and from comments by Andrew Byrnes (University of Sydney).

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