Chapter 4

HUMAN RIGHTS AND REFUGEES

It is important to appreciate that it is only in very recent times that human rights have become part of the subject matter of international law, so that today we may speak of a positive and binding legal code of human rights on the international plane, at a level well beyond the often vague and debatable claims in which all discourse about human rights necessarily had to proceed in the past.

Human rights are those rights recognised by international law while civil rights are those which translate human rights into the law of particular States. Human rights violations are a major cause of forced migration.

WHAT ARE HUMAN RIGHTS?

To speak of human rights requires a conception of what rights one possesses by virtue of being human. Sherstack (1984, 74) identifies human rights as those which are important, moral and universal. "It is obviously comforting to adorn human rights with those characteristics. But, these terms, if they are not to be considered mere truisms, contain certain ambiguities. For example, when we say a right is 'important' we may be speaking of one or more of the following qualities: (1) its intrinsic value; (2) its instrumental value; (3) its value to a scheme of rights; (4) its importance in not being outweighed by other considerations; or (5) its importance as structural support for the system of the good life". 'Universal' and 'moral' are perhaps even more complicated words. What makes certain rights universal, moral and important? Who decides? This is another way, perhaps, of getting at the question of what is the source of authority for human rights, or how can they be established or justified.

Human rights law establishes that basic civil, political, economic, social and cultural rights are for all persons within a State, whether or not they are citizens of that State. International human rights norms serve to legitimise protection and to improve the treatment of forced migrants within a host country. This role of human rights law is

especially important in countries that have not ratified the 1951 Convention or the 1967 Protocol.

Sohn and Buergenthal (1962, 519) argue that the Universal Declaration of Human Rights is not merely a resolution of the General Assembly recommending preferred conduct to the international community, but a solemn undertaking which provides an authoritative interpretation of the United Nations Charter, and might even be said to be part of customary international law. This view can be illustrated by reference to the memorial filed by the United States with the International Court of Justice on its claim against Iran in regard to the seizure of the embassy in Tehran (cf. Fensterheim 1985, 185 and 197-8). The United States claim relied mainly on agreements signed between it and Iran. It referred also to alleged Iranian violation of international human rights law. The United States argued that such multilateral instruments as the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights had established fundamental principles of customary law of which Iran was in breach. It was legally irrelevant whether the United States and Iran were signatories of the Covenant on Civil and Political Rights because it merely expanded obligations already existing under conventional and customary law.

In the *Barcelona Traction case* (ICJ Reports (1970), 53-64) the International Court of Justice drew what it saw as an essential distinction between "the obligations of a State towards the international community as a whole" and those arising as against another State. There is an interesting parallel here with D. D. Raphael's (1967, 65) distinction between human rights that are universal in the strong sense (viz. held against everyone else) and those that are universal in the weak sense (viz. held against particular governments). The obligations of a State towards the international community as a whole are by their very nature the concern of all States. "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. They are obligations erga omnes" (against everyone). Such obligations derived from the outlawing of acts of aggression, and genocide, and "also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". The argument here is that there may be, in virtue of Barcelona Traction, a part of "international human rights law which has achieved the position of *jus cogens* - law which is binding on all States and also having status of peremptory norms" (Brownlie 1993, 512-515).

Where then does the international law of human rights stand? Garcia-Amador cited in Sohn and Buergenthal (1962, 129-32) suggests that the emergence of international human rights law has transcended the old debate between those who argued for an international standard of justice and those who ranged against them who insisted on equality of treatment for nationals and aliens. Vincent (1974, 113-114) states that one of the celebrated arenas for this debate was Latin America. European States and later the United States, were inclined to assert an international standard of treatment which would justify intervention to protect their people and their property in Latin America: and Latin Americans were inclined to allow no excuse for any kind of interference in their internal affairs. In requiring a minimum standard of treatment for all human beings, it may be argued, international human rights law has removed, at least at the minimalist level, the contentious distinction between nationals and aliens. Nevertheless, the admission and expulsion of foreigners is one area where the domestic jurisdiction of States remains largely untouched.

It may be argued that certain doctrines such as the principle of non-discrimination on racial grounds, and the principle of self-determination are now part of customary international law, and even of *jus cogens* (Brownlie 1993, 512-515). Jenks (1958, xi and l) pointed out that the Common law of mankind is in an early stage of its development and that international law can be intelligently expounded only if this new Gestalt is adopted. The difficulty with this view is that it makes of what might possibly develop, but which has not yet developed and might not be the touchstone for the interpretation of contemporary international law (cf. Vincent 1974, 294-310). It is surely more realistic to follow the line that contemporary international law gives to the individual, and to groups other than States, such as nations and races, as subsidiary themes to the law between States rather than as developments which have made that law itself a subsidiary theme. As Professor Rosalyn Higgins (1978, 11) has stated:

> "There is now a legal yardstick against which the behaviour of States may be judged and a point of reference for the individual in the assertion of his claims."

The doctrine underlying the international law of human rights, whatever its stage of development, and however many the signatories of its covenants, is that it is in principle universal. It does not suggest, except where special regional arrangements have been made, which must then not conflict with general international law, that there are different rules for Africans, and Chinese, and Muslims.

INTERNATIONAL BILL OF HUMAN RIGHTS

Human rights law aspires to guarantee to all people certain fundamental rights. It aims at unconditional guarantees for all persons rather than the more limited and conditional guarantees of refugee and humanitarian law. The substance of human rights law is expressed in the International Bill of Human Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Universal Declaration of Human Rights includes both civil/political and economic/social rights. These two constellations of rights have distinct philosophical underpinnings and coexist uneasily in international law. Civil and political rights flow from the liberal democratic tradition which defines rights in terms of an individual's immunity from State interference with personal freedom. Economic and social rights reflect the socialist emphasis on the duty of the State to provide specific economic goods essential to human survival. This conceptual conflict between rights as immunities and rights as entitlements resulted in the division of the Universal Declaration of Human Rights into two separate Covenants on Civil/Political and Economic/Social Rights.

Civil and political rights are those rights which historically have been regarded as the basic rights from which the whole philosophy of human rights developed, namely the protection of the individual from the arbitrary exercise of power by the all powerful State. It is for this reason that those rights are often referred to as first generation rights. A common claim made abut those rights is that they are "negative" rights, in the sense that the State is required to refrain from certain actions as against the individual, with the result that the individual can enjoy the freedom to be left alone to pursue, within acceptable limits, happiness and prosperity. This is a correct assertion in principle, but the fact is that States often have to undertaken "positive" acts such as training police, or establishing appropriate organs in order to safeguard civil and political rights. Articles 1 to 18 of the Universal Declaration set out the civil rights and 19 to 21 political rights.

Economic, social and cultural rights encapsulate those rights concerned with the material, social and cultural welfare of people and are set out in Articles 22 to 28 of the

Universal Declaration. These rights are "positive" rights since they require an activist response by the State to ensure the provision of social goods and services such as housing, clothing, food, education or social security - conclusive to the realisation and enjoyment of those rights by all persons.

In recent years there has been the development of solidarity rights. Examples are the right to peace and the right to the enjoyment of a healthy environment. It is not considered these have any established status in international law or that they can be considered as part of the current human rights regime. Indeed care should be taken when considering such principles that they not be seen as displacing the universally accepted civil, political, economic, social and cultural rights.

In evidence to the Joint Committee on Foreign Affairs and Trade (1992) it was asserted that human rights - in particular civil and political rights - are essentially Western constraints reflecting a Western world view, born out of European political history and imperialism. This criticism might be applied to international law in general. Developing countries have resisted the imposition of human rights values on the basis that those rights are merely another manifestation of neo-colonialism and Western cultural imperialism. Accordingly, non-Western value systems are not reflected and perhaps not even acknowledged. It may be the practical observance of human rights by each country in the context of its own particular culture and political system. If this view is to be considered then it must be acknowledged that there are alternative ideas about human rights.

The Australian approach to human rights takes as a basic premise the insistence that human rights are both universal and indivisible. It takes as its basic reference point the preamble to the Charter, where reference is made to Members' determination to:

> "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small."

This clearly recognises that human rights were intended to be regarded as universal in application, that is, they were meant to apply to all countries, not merely Western countries. It is not proposed to discuss the dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other. It was addressed purely to be aware that the International Bill of Rights consists of a number of instruments.

International refugee law has proven limited in scope and vision regarding the circumstances that engender forced flight, thus necessitating a new approach. If one is to compartmentalise law I do not believe there should be a separate branch of law covering refugees. In Australia until relatively recently it was part of administrative law. Now, following Canada and to a lesser extent the United Kingdom, the law of refugees has gone its own way. One of the problems with separating it is that it now has its own Tribunal which will in time develop its own precedents and practices.

If there was a need to develop a refugee law a human rights approach to refugees would be preferable. It is unfortunate that international refugee law became involved with the traditional concepts of State sovereignty including the State's right to control its immigration and make decisions about the admission and expulsion of all those not linked by the bonds of nationality. In any event, the United Nations human rights framework, in its capacity as a moral, if not legal, arbiter of all State and international policies, has substantial potential to establish refugees as full subjects of rights under international law; to reorient international attention towards the conditions which cause people to flee; and, consequently, to produce policies designed to prevent refugee-producing situations.

To be sure, the imposition on States of a legal obligation not to expel refugees arriving massively at the borders may and do sometimes generate problems threatening the public order, bearing in mind that in the final analysis *non-refoulement* through time implies temporary refuge. Consequently, a 'safety valve' is indispensable especially in view of the contemporary international law climate where there always exists a danger that 'soft law' raise over 'hard law' diluting principles. This 'safety valve' however should never turn a blind eye to the predominance of the principle of humanity on which the whole international refugee protection policy has been founded.

The 1951 Convention and 1967 Protocol contain forty-eight articles enumerating the rights of refugees. These rights are generally governed by the principle found in Article 7 of the Convention:

> "Except where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally."

However, in practice, this principle is inadequate to guarantee refugees the full range of human rights. First, the principle applies only to refugees. Only those who fit the definition enter into the protected realm of the Convention. Second, the responsibilities of States towards aliens are generally unclear. When an alien is subjected to abuse, the only agent legally entitled to come to the alien's defence, under the principle of diplomatic protection, is the alien's home State. However, a refugee does not have access to the theoretical protection of his home State. These two comments point to the general inadequacy of the Convention and Protocol in assuring the full range of human rights to those who fit the Convention definition and the complete inability of the instruments to assume the rights of *de facto* refugees who are not covered by that definition. International human rights law presents an opportunity to transcend the constricting world of refugee definitions and root the refugee's claim to rights in his status as a human being.

The International Bill of Human Rights sets forth an exhaustive array of rights. The International Covenant on Civil and Political Rights establishes the individual rights most familiar to the western tradition, including: freedom of speech; association; religion; freedom from discrimination; equal protection under the law; and the right to participate in one's government. The International Covenant on Economic and Social Rights sets out the responsibility of States to "take steps ... to the maximum of available resources ... with a view to achieving progressively the full realisation of rights to such goods as education, work, food, clothing, housing, and health care". (Henkin 1980, 260-261). If a State does not generate rights to its own citizens, it has failed in its obligation to its fellow contracting States. Because of a sensitivity to what is deemed foreign interference in internal affairs, most States rarely make use of their ability to hold accountable other States in the area of human rights abuses. Such sensitivity causes human rights law to function more as a moral standard subtly pressuring States to advance towards a greater realisation of human rights for their citizens than as a legal guarantee of such rights. A universal moral standard is essential to improving refugee policy. Although both the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social

Rights contain articles requiring the application of these rights in a non-discriminatory manner (ICCPR, Article 2 paragraph 1; ICESR, Article 2, paragraph 2) nowhere is it made clear that States must guarantee the rights of non-nationals. Henkin (1990, 49) comments on this inconsistency:

> "The Age of Rights is also the age of refugees. Many millions of people have been displaced since the Second World War, and at every time since then many millions continue to be in refugee status, not permanently resettled in some other State. States that have recognised the human rights of their own inhabitants have not been willing to recognise a right of persons not in their territory to be admitted and settled there, even if their lives depend on it. And the human rights idea limited to persons subject to some States' jurisdiction and permanently entitled to be there by the States' law, has found no way to provide rights for the many millions of human beings who become refugees."

If the limits of the international system have made it difficult to realise human rights for those belonging to a State, those limits have made it doubly difficult to protect the rights of refugees who do not have the protection of a State. Refugees are nowhere specifically provided for in the United Nations human rights framework. They are therefore unable to benefit fully even from the indirect effect that human rights law may have in persuading States not to mistreat human persons.

I do not propose to examine these instruments in detail. I propose only to examine their effect on refugee law.

Article 1 of the United Nations Charter includes among its purposes:

> "(3) to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all ... "

Articles 55 and 56 record the "pledge" of UN Member States to take joint and separate action to achieve:

> "(c) universal respect for, and observation of, human rights and fundamental freedoms for all ..."

The International Court of Justice has had occasion to consider, albeit obiter, the legal affect of articles 55 and 56 of the United Nations Charter and has stated in the *Advisory Opinion on The Legal Consequences of the Continued Presence of South Africa in Namibia*, (ICJ Reports 1971, 16) that they "bind Member States [of the UN]

to observe and respect human rights". The US Supreme Court in *Oyama v California* ((1948) 332 US 633) and the High Court of Ontario in *Re Drummond Wren* ((1945) 4 Ont. Rep. 778; 781) applied these Articles to attempts to enforce racial discrimination by restrictive covenants relating to the occupation of property. In *Filartiga v Pena-Irala* (630 F (2nd) 876 (1980)) a United States Court of Appeal applied the Articles in holding that official torture is now clearly and unambiguously prohibited under international law and that a plaintiff can rely on this customary international law in a civil suit against a defendant who is a non-United States citizen.

To give effect to the United Nations Charter, the Universal Declaration of Human Rights was adopted by the United Nations on 10 December 1948. There was at the time of drafting an Australian proposal to establish an International Court of Human Rights, however this was not proceeded with (Personal Communication DFAT).

Article 13(2) states:

> "2. Everyone has the right to leave any country, including his own, and to return to his country".

This creates a right to leave any country, including one's own, which may be referred to as a 'right to leave' or ' the right of emigration'. It also creates a right to return to one's country which may be referred to as 'the right to return' or 'the right of remigration'. It does not create a right to enter any country, that is, other than one's own: a right which may be labelled as the 'right of entry' or 'the right of immigration'. Article 13(2) does not alter the right of a State to require visas or travel documents nor does it fetter in any way the right to seek and enjoy asylum.

The provisions of article 13 have been reiterated in Protocol No. 4 to the European Convention on Human Rights 1963, article 12 of the International Covenant on Civil and Political Rights 1966, and article 22 of the American Convention on Human Rights 1969.

The right to freedom of movement was legally recognised as early as 1215 in the English Magna Carta, in the following terms:

> "It shall be lawful to any person, for the future, to go out of our Kingdom, and to return safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the Kingdom: excepting prisoners and outlaws, according to the law of the land, and of the people of the

> nation at war against us, and Merchants who shall be treated as it is said above" (Halsbury 1977, 401).

The Inter-American Commission on Human Rights (IACM) has expressed the view that "no State has the right to prevent an individual from leaving the country except when that individual is accused on a common crime" (6 Caba 9). IACM also expressed the view that, where a State prevents an alien from returning to his own country, that constitutes a violation of ADRD VIII.

Article 14 of the Universal Declaration considers asylum. It states:

> "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution."

The right to seek asylum established by this article is regarded as part of customary international law. The Convention relating to the Status of Refugees of 1951 gave substance to article 14. This Convention is discussed thoroughly elsewhere. It must be recalled that international legislation does not recognise the individual's right to asylum. However, States are not free to act as they please because of the principle of *non-refoulement* contained in article 33 of the 1951 Convention and the Declaration on Territorial Asylum limits the right to return people. In effect, the principle of *non-refoulement* has now assumed the character of an international rule of law.

Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights are silent on asylum.

At the regional level, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms affords refugees and asylum-seekers alternative and sometimes greater means of enforcement of the rights contained in the Universal Declaration. Under the European Convention, nationals and non-nationals may seek to redress for violation of their rights. Article 13 guarantees that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Article 5 sets forth procedures and guarantees against the deprivation of liberty. Article 14, similar to Article 2 of the Covenant on Civil and Political Rights, guarantees the right of non-discrimination in the enjoyment of the rights and guarantees set forth in the European Convention. The Article expressly mentions nationality as a method of discrimination.

Subsequent protocols to the original European Convention recognise a number of rights of special interest to refugees and asylum-seekers. Article 4 of Protocol No. 4 prohibits the collective expulsion of aliens. Article 1 of Protocol No. 7 forbids the expulsion of an alien lawfully residing in the territory of a High Contracting State except in accordance with a decision reached in accordance with the law.

The European Convention established the European Commission of Human Rights and the European Court of Human Rights. Both the European Commission and Court recognise that the protection of aliens against expulsion to countries where their lives or freedom are at risk is part of human rights law. Foreign nationals have sought redress for violations of the right to protection against inhuman or degrading treatment or punishment (Article 3) and the right to have family life respected (Article 8).

Despite the application of human rights law to refugees and non-nationals in the European Human Rights instruments, the current debate in Europe concerning refugees and asylum-seekers largely ignores the human rights issues. Over the past two years Mrs Ogata, the UN High Commissioner for Refugees, has made it her special mission to bring human rights concerns and refugee conventions and principles closer together. She has many times addressed the UN Committee on Human Rights and spoken passionately about the overlap (Personal Communication, DFAT).

Chapter 5

HUMAN RIGHTS IN AUSTRALIA AND CANADA

In the previous chapter it was suggested that if a State does not guarantee rights to its own citizens, it has failed in its obligation to its fellow contracting States. It was pointed out that because of a sensitivity to what is deemed foreign interference in internal affairs, States rarely make use of their ability to hold accountable other States in the area of human rights abuses. What hope, then, does human rights law offer a refugee?

The distinction between rights and freedoms is not considered in detail. Just about every expectation people have of the constitutional and legal system can be asserted in general terms as human rights - rights, that is, that should by some means or other be legally declared and made secure. In the Universal Declaration of Human Rights one finds expressed succinctly at a high level of abstraction a comprehensive set of standards reaching potentially to all parts of the legal system of a modern State. It speaks, as mentioned in chapter 4, of rights to vote and hold public office, rights to freedom of expression, rights to a fair trial, rights to work and so on. "The concept of liberties or freedoms in a duly precise scheme of legal terminology is the concept of areas of option and opportunity for human activity that are residual in nature. These areas of conduct are free of specific legal regulation. In them the individual is free to act or do nothing without legal direction" (McRuer 1969, 1493-96).

HUMAN RIGHTS IN AUSTRALIA

The importance Australia attaches to human rights was expressed by the Minister for Foreign Affairs, Senator Evans when he tabled Australia's National Action Plan on 22 February 1994 at the 50th session of the United Nations Commission on Human Rights (UNCHR) in Geneva. Senator Evans said: "The fundamental objective of Australia's pursuit of improved standards of human rights is to safeguard the dignity and to improve the well being of the individual." Nowhere are considerations of international instruments of human rights more important than in the area of refugees.

The content of these rights, although not only applying to refugees, is dealt with in the ICCPR.

However, Human Rights Law in Australia can best be described as haphazard. I do not intend to enter the debate on whether or not there should be a Bill of Rights in Australia. Australia, unlike Canada, does not have a formal document setting out the rights of its people. Indeed, in the East Asia geopolitical region, only Australia and New Zealand do not have constitutionally entrenched Bills of Rights. Australia has always relied on its Common law, legislation and international treaties. The result is the Justices of the High Court have accrued immense power by saying what are rights and what are not rights. Of course, for the High Court to make such a determination there has to be litigation. Courts can only rule on matters brought before them - they are not proactive. In terms of existing mechanisms only the wealthy can take a matter to the High Court.

In considering the role of the High Court in defining human rights it would be worth taking into account the words of Brennan J in Mabo v Queensland [No. 2] ((1992) 175 CLR 1 at 29):

> "In discharging its duty to declare the Common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency ... The law that governs Australia is Australian law."

At p. 42 Brennan said:

> "The expectations of the international community accord in this respect with the contemporary values of the Australia people. The opening up of international remedies to individuals pursuant to the Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the Common law the powerful influence of the Covenant and the international standards it imports. The Common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the Common law, especially when international law declares the existence of universal human rights. A Common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

Three provisions in the Australian Constitution deal with human rights. These are section 80 which provides that a citizen, when charged on indictment for a federal

offence, has the right to a jury trial within the State where the alleged offence took place; section 116, which prohibits federal legislative power with respect to religion; and section 117, which protects residents of one State from special disability or discrimination, based on residence, in other States. Charlesworth (1986, 53) argued that the Australian High Court has traditionally taken a narrow view of these provisions and thus has prevented the Court from offering any real protection to human rights. Bailey (1990, 84-86), however, has submitted that the Constitution should be recognised as containing a much larger catalogue of rights.

Since the late 1980s the High Court has taken a keen interest in developing the constitutional guarantee of rights. For example, in *Street v Queensland Bar Association* ((1989) 168 CLR 461), the High Court used section 117 of the Constitution for the first time, to strike down Queensland legislation, which protected that State's lawyers from interstate competition.

An attempt was made in 1988 to insert fuller guarantees of rights into the Constitution. The proposals were to extend the right to trial by jury, to freedom of religion and to fair terms for governmental acquisition of property by the States. 69 per cent of voters were against the proposal. This figure represented the lowest level of support for any referendum proposal ever put to the Australian electorate (Galligan, 1990, 350-352).

IMPLIED RIGHTS

Since 1992 the High Court has ruled that certain basic rights underpin or do not underpin the Constitution. Reference is made to the decisions in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 177 CLR 106, *Dietrich v R.* (1992) 177 CLR 292 and *Theophanous v Herald and Weekly Times* (1994) 124 ALR 1. The Court has implied into the Constitution various freedoms albeit limited - "freedom of communication with respect to discussion of government and political matters", "freedom of participation, association and communication in relation to federal elections", "freedom of political discourse" are examples. On the other hand, there is no right to counsel at the public expense. However, the right to be represented by a lawyer was a usual component of the right to a fair trial to be enjoyed by a person charged with a serious criminal offence.

Ratification with reservations of the ICCPR in 1980 as an executive act has no direct legal effect on domestic law. It should be noted that the Convention was signed in 1972. The First Optional Protocol to the ICCPR came into force for Australia on 25 December 1991. As a result Australians who have exhausted their remedies under domestic law may communicate with the Human Rights Committee established under the ICCPR alleging that the nation has violated their rights guaranteed under the ICCPR. The committee then investigates such communications. The rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions (*Bradley v The Commonwealth* (1973) 128 CLR 557 at p. 582). No legislation has been passed. It is interesting that the Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that that rights enshrined in the ICCPR are incorporated into domestic law. The provisions on the ICCPR and its Declarations do not really assist an applicant for refugee status. In *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321 - one of the earlier decisions of the High Court on procedural fairness in immigration matters - it was held "there was no legal obligation on the delegate of the Minister specifically to take into account the provisions of the Covenant [ICCPR] or the Declaration [of the Child], as distinct from the general humanitarian principles which they embodied and which the delegate was obliged to take into account ..."

In *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 32 ALD 420, the Full Bench of the Federal Court held that ratification of the Convention on the Rights of the Child was a statement of acceptance of its provisions by Australia and provided parents and children with a legitimate expectation that actions by the Commonwealth which affected or concerned children would be conducted in a manner which adhered to the relevant principles of the Convention. Furthermore, the breaking up of a family unit is a consideration of major significance and one which the decision-maker was required to take into account. This case was appealed to the High Court. The High Court held on 7 April 1995 (*MIEA v Teoh* (1995) 128 ALR 353) that ratification of an international convention was a positive statement by the Commonwealth to the world and to the Australian people that the executive government of the Commonwealth and its agencies would act in accordance with the convention. The majority said that the statement was an adequate foundation for a legitimate expectation, in the absence of some statutory or executive indication to the contrary, that administrative decision-makers would act in conformity with the convention. The Court held that Government decisions had to conform with the terms of treaties Australia had signed, even if such terms had not been incorporated in domestic legislation. The Court held

that a legitimate expectation amounted only to a procedural right to have a treaty considered, as opposed to a legal right to enforce the terms of the treaty. On 10 May 1995 the Government announced it would legislate to put beyond doubt the status of international obligations. A statement issued by the Minister for Foreign Affairs, Senator Evans, and the Attorney-General, the Hon. M Lavarch said:

> "We state on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law."

This means that even though the Government may sign a document in front of the world stating it will do the right thing, that Australian people have no right to expect that it will do the right thing. Legislation, the Administrative Decisions (Effect of International Instruments) Bill, was introduced on 28 June 1995. The Bill will restore the situation which existed before the Teoh case, in which if there were to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they would be made by parliamentary and not executive action. The Bill, effective from 10 May 1995, will eliminate any expectation which might exist that administrative decisions, whether at Commonwealth, State or Territory level, will be made in conformity with provisions of ratified but unimplemented treaties, or, that if a decision is to be made contrary to such provisions, an opportunity will be given for the affected person to make submissions on the issue. Another opportunity of slightly more open, informed decision-making is to be quashed before the real effects are seen by the public. A more positive approach would include the preparation of a guide for decision-makers to Australia's international obligations. It is a reprehensible admission that our decision-makers do not know Australia's current international obligations.

The Human Rights and Equal Opportunity Commission Act 1986 has scheduled to it the ICCPR, as well as other international legal instruments. It assigned to the Commission it created the function, inter alia, of inquiring into and reporting on any act or practice that may be inconsistent with or contrary to human rights as declared in the scheduled instruments (s. 11 (i) (f)). The evident intention that the establishment of an Australian Human Rights and Equal Opportunity Commission would be one part of an overall program to incorporate international human rights obligations into domestic law was made more explicit in the preamble to the former Human Rights Commission Act 1981 which stated:

> "Whereas it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms."

In *Jago v Judges of the District Court of NSW* ((1988) 12 NSWLR 558 at p. 569) Kirby P expressed the view that, where the inherited Common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the Common law. In *Dietrich v The Queen* (1992) 177 CLR 292 at p. 306) Mason CJ and McHugh J stated:

> "... the applicant points to the status accorded to the ECHR in English law. In common with the status of the ICCPR in Australian law, the ECHR is not part of English domestic law and thus rights contained in the ECHR cannot be enforced directly in English courts; furthermore, if domestic legislation conflicted with the ECHR, English courts would nevertheless be required to enforce the legislation. However, it is 'well settled' (*R v Home Secretary, Ex parte Brind*, [1991] IAC 696 at pp 747-748) that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations. English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law.
>
> "Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach ..."

The above has demonstrated that the concept of human rights is still developing in Australia. The lead has come from the courts. The courts, quite properly, are not progressing the notion with undue haste. A refugee, to obtain relief, would have to seek redress in a supreme court which is expensive and slow. Therefore, it would be almost impossible for a refugee to obtain relief pursuant to human rights law.

HUMAN RIGHTS IN CANADA

The ICCPR came into force for Canada on 19 August 1976. The First Optional Protocol was effective from 9 January 1982. Since 17 April 1982 Canada has had a constitutionally entrenched Charter of Rights and Freedoms. (In 1960, Parliament

enacted the Canadian Bill of Rights). The Charter does not however, bring much relief to an applicant for refugee status.

Section 6 of the Charter is concerned with the rights and liberties of Canadian citizens and of permanent residents of Canada with regard to mobility rights and the right to move and gain a livelihood. Section 6(1) states that "Every citizen of Canada has the right to enter, remain in and leave Canada". Section 6(2) states:

> "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."

Article 12 of the ICCPR extends the right of mobility to "everyone lawfully within the territory of a State". However, these provisions do not help a refugee seeking asylum.

Section 7 of the Charter states:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice."

It has been held, pursuant to this section, that the denial of an oral hearing to a person who claims refugee status would violate the principles of natural justice (*Singh v Minister for Employment and Immigration* [1985] 1 S.C.R. 177).

Sections 15, 27 and 28 are the equality rights provisions. Section 15 provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Similar provisions are contained in article 14 of the European Convention on Human Rights and article 2 of the ICCPR.

How then does human rights law help a refugee seeking asylum? I submit it provides little, if any, assistance although Einfeld J in *Premalal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117 at 128-129, did come close to finding human rights law was of assistance. He held that the doctrine of legitimate expectation has usually been tied to the concept of a right. Although the right does not have to be a legal one, there must be a right, interest or privilege which will be granted or renewed or which will not be denied without an opportunity being given to

the person affected to give his case. International agencies readily concede their status as fora of last resort. The European Court of Human Rights reminds States that international machinery for protecting fundamental rights is subsidiary to the national systems of safeguarding rights. The Court has stated that the national authorities are in a better position than the international judge to determine the appropriateness of limitations upon rights (*Handyside v U.K.*, para. 48; *Lithgow v U.K.*, para. 122; *Weeks v U.K.*, para 50). The ICCPR requires grievors to first exhaust domestic remedies before coming forward. In other words, there is an initial reliance on national agencies to protect human rights. It would be a natural extension of such reliance to encourage national judicial bodies to enforce international human rights standards.

Neither the Canadian Charter nor any other human rights instrument nor Australian law spells out the needs of a refugee; the need to be re-united with family, the need to be eventually returned to one's country of origin. Such needs give rise to rights. In other words, in respect to asylum-seekers what rights need to be recognised? These may be subdivided into pre-admission rights and post-admission rights. *Non-refoulement* is the core of refugee law. The norm of *non-refoulement* should be a right. Neither Australia nor Canada have clear statements of policy on rights of resettlement. In neither country are the rights of asylum-seekers spelt out. In chapters 7 and 8 the development of refugee policy in both countries is traced. It emerges that refugee policy is but a part of wider migration policy. There is, however, a fundamental difference between migrants and refugees; for example the need for legal protection for a refugee, needs for medical care and so on.

RIGHT TO ASYLUM

The right a refugee needs most is a right to asylum. Worldwide, there is no right to asylum. For example, not only is the Hong Kong Bill of Rights 1991 silent on rights for asylum-seekers, it specifically excludes immigration matters. After the German experience I would be surprised if any country ever provided a right to asylum. It will be recalled that the German constitution provided for asylum for all who sought it. The result was that Germany was flooded by asylum-seekers after the break-up of the eastern-bloc. Germany from July 1993 amended its constitution to remove this provision. Carrier sanctions which make it more difficult to reach a country to seek asylum impinge on freedoms namely article 12(2) of the ICCPR - "Everyone shall be free to leave any country, including his own". Article 14 of the Universal Declaration of Human Rights 1948 provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

Bailey (1990, 312) wrote:

> "The legal status of non-citizens in a community is, along with the recognition accorded to the rights of prisoners, a useful indicator of the extent to which that community observed human rights."

In both countries non-citizens have access to courts and in many circumstances they are able to obtain legal aid and the assistance of an interpreter. However in Australia the wide discretion to deport and the detention of prohibited non-citizens raise human rights concerns.

It is disturbing to see how willing the Australian Government can be to introduce laws which deny people their human rights. Applicants for refugee status lack due process rights. There is no presumption in favour of bail, no right to silence, no right to an interpreter, no right to representation in the Refugee Review Tribunal, however, in practice an applicant is permitted an interpreter and representation.

The Migration Amendment Act 1992 was rushed through Parliament to prevent Australian courts ordering the release from custody of boat people. This was in clear contravention of the Universal Declaration of Human Rights which states that all are equal before the law. Similar legislation would not be enacted in Canada where before legislation is drafted the Parliamentary Counsel ensures the proposal conforms to Charter requirements. As pointed out in chapter 7, one section of the 1992 Act was overruled by the High Court.

Migration Legislation Amendment Bill (No. 3) 1995 has raised human rights issues in relation to China's fertility control policy. There is little doubt that this policy of coerced sterilisation or abortion constitutes a breach of fundamental human rights. In evidence to the Senate Legal and Constitutional Legislation Committee (L & C 145) the Deputy Secretary of the Department of Immigration and Ethnic Affairs, Mr D. Richardson, said:

> "We are not in any way taking issue with what we would consider to be a fact, that in parts of China the implementation of that policy can involve practices which clearly constitute an abuse of human rights."

However, in a case before O'Loughlin J on 18 March 1995, as reported in the Australian, 19 March 1995, counsel for the Immigration Department said forced

sterilisation was not necessarily an act of persecution. This is an example of lack of policy integration.

What the Department is not seeking to do is balance a claim for refugee status on the basis of fear of persecution because of China's fertility control policy against the question of any violation of human rights. With this Bill perhaps human rights are subservient to foreign policy. Limiting the definition of refugee to exclude such persons is certainly not in the spirit of article 14 of the Universal Declaration of Human Rights. Whether or not it offends article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which states "no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture", is a matter for determination.

The Department of Immigration and Ethnic Affairs does not have responsibility for ensuring Australia's human rights obligations are met. That is the responsibility of the Attorney General's Department. Immigration is responsible for control of the borders at any cost. If it is to be guaranteed that human rights are considered in refugee determination then it would be preferable to transfer refugee determination to the Attorney General's Department.

In respect of human rights, the Canadian Government is operating within the rules. Whilst Australia is most vocal about human rights in other countries, especially those of its near neighbours, it would do well to consider its records in respect of human rights and asylum-seekers. The obsession with control is at variance with human rights obligations. Succinctly, human rights law does not give an asylum applicant much hope.

Chapter 6

EUROPE - THE TREND-SETTER

Having considered the concept of protection in law, the following three chapters consider the development of policy in Europe, Australia and Canada so as to show the system of control and, indeed, how difficult it is for a single refugee to enter a sovereign State. The discussion in this chapter revolves around the questions: What is fortress Europe? Who is in control?

No Western government acts unilaterally when it comes to dealing with refugee issues. Australia and Canada participate in what is known as the Intergovernmental Consultation on Asylum, Refugee and Migration Policies, consisting of regular meetings of immigration officers from Western countries including the United States, Canada, Australia and most European Union countries. Canada, the United States and Mexico meet on a regular basis to discuss migration issues of mutual concern. While an agreement on immigration is not part of the North American Free Trade Agreement negotiations, it is understood to be part of the informal agenda.

During 1992-93 the Canadian Government entered into negotiations with the United States Government to forge an agreement based on the Dublin Convention, which would require asylum applicants to file a single claim in the first country entered. This would result in fewer applications in Canada as about one-third of asylum-seekers coming to Canada arrive via the United States. The Dublin Convention will be considered in detail later in this chapter.

The number of applications for asylum in Europe has greatly increased in recent years as shown in Tables 1 and 2. These show the extent of the problem Europe has faced. Attention is particularly drawn to the number of applications submitted in Germany. The result of this was referred to in chapter 5.

Another feature of the current development in the European situation is that an increasing percentage of asylum seekers have been coming from non-European

geographically and culturally distant regions. Over 70 percent of the approximate one million asylum seekers who arrived in Europe between 1993 and the end of the decade came from developing countries. One third originated from the Middle East, 15 percent from the Indian sub-continent, about 10 percent from Africa and over 20 percent from Eastern Europe (MRG 1990, 10-12). By 1988 flows from chronic refugee generating countries such as Sri Lanka, Iran, Lebanon and Ethiopia had stabilised or decreased, however flows from countries on the periphery of Western Europe - Turkey, Poland and Yugoslavia - had increased substantially. In 1989, the year of the breakdown of communism in Eastern Europe, the number of Eastern European asylum seekers exceeded one million. Table 1 gives the estimated number of asylum applications submitted in thirteen specific European States from 1983 to 1992. Table 2 compares the estimated number of asylum applications submitted in those thirteen States with Canada, USA and Australia.

When one compares the number of applications submitted in some European countries with Australia it is hard to understand why Australia has reacted in such a harsh manner - the small number of applications do not justify the result. It suggests over-reaction and policy drift.

European States, as a result, have entered into a number of Agreements and Conventions the aim of which is to discourage the arrival of asylum-seekers. The content of some of these instruments has been passed in many instances into domestic law before the international treaty is operative. The content where appropriate is adopted by Australia, Canada and the United States. However it is doubtful that Australia and Canada will follow the current trend in Europe to re-open the Convention to go back on UNHCR guidelines, for example, on persecution by non-State agents. Many in the EU, especially France but not the United Kingdom want to limit the existing guidelines (Personal Communication, DFAT).

Table 1. Estimated Numbers of Asylum Applications Submitted in Thirteen European States, 1983-1992

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1983-92
Austria	5 900	7,200	6 700	8 700	11 400	15 800	21 900	22 800	27 300	16 200	143 900
Belgium	2 900	3 700	5 300	7 700	6 000	5 100	8 100	13 000	15 200	17 700	84 700
Denmark	800	4 300	8 700	9 300	2 800	4 700	4 600	5 300	4 600	13 900	59 000
Finland	-	-	-	-	50	50	200	2 500	2 100	3 600	8 500
France	14 300	15 900	25 800	23 400	24 800	31 600	60 000	56 000	46 500	27 500	325 800
Germany	19 700	35 300	73 900	99 700	57 400	103 100	121 000	193 000	256 100	438 200	1,397 400
Italy	3 000	4 500	5 400	6 500	11 000	1 300	2 200	4 700	31 700	2 500	72 800
Netherlands	2 000	2 600	5 700	5 900	13 500	7 500	14 000	21 200	21 600	17 500	111 500
Norway	200	300	900	2 700	8 600	6 600	4 400	4 000	4 600	5 200	37 500
Spain	1 400	1 100	2 300	2 300	2 500	3 300	4 000	8 600	8 100	11 700	45 300
Sweden	3 000	12 000	14 500	14 600	18 100	19 600	32 000	29 000	27 300	83 200	253 300
Switzerland	7 900	7 500	9 700	8 600	10 900	16,700	24 500	36 000	41 600	18 100	181 500
United Kingdom	4 300	3 900	5 500	4 800	5 200	5,100	10 000	30 000	57 700	24 600	151 100
TOTAL	**65 400**	**98 300**	**164 400**	**194 200**	**172 250**	**220 450**	**306 900**	**426 100**	**544 400**	**679 900**	**2 872 300**

Source: Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, "Asylum Statistics", Geneva, May 18, 1993, Table 3, mimeo.

Table 2. Estimated Numbers of Asylum Applications submitted in Western Europe, North America and Australia, 1983-1992

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1983-92
Western Europe	**65 400**	**98 300**	**164 400**	**194 200**	**172 250**	**220 450**	**306 900**	**426 100**	**544 400**	**679 900**	**2 872 300**
North America	**25 000**	**31 400**	**28 400**	**41 900**	**61 100**	**102 000**	**122 000**	**109 600**	**100 500**	**141 200**	**763 100**
Canada	5 000	7 100	8 400	23 000	35 000	45 000	22 000	36 000	30 500	37 700	249 700
U.S.A.	20 000	24 300	20 000	18 900	26 100	57 000	100 000	73 600	70 000	103 500	513 400
Australia	**-**	**-**	**-**	**-**	**-**	**-**	**500**	**3 600**	**16 000**	**4 000**	**24 100**
TOTAL	**90 400**	**129 700**	**192 800**	**236 100**	**233 350**	**322 450**	**429 400**	**539 300**	**660 900**	**825 100**	**3 659 500**

Source: Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, "Asylum Statistics," Geneva, May 18, 1993, Table 3, mimeo.

Note: 1. Includes the thirteen countries listed in Table 1.

HARMONISATION

Faced with this increase, countries of the region, especially members of the EU, have sought to co-ordinate and harmonise response. A number of measures have been adopted in order to make it difficult for people from refugee-generating countries to travel to Europe. These include the imposition of penalties on the carriers of undocumented passengers, additional requirements, and the adoption of more restrictive admission criteria. Governments have introduced measures aimed at speeding up asylum procedures. However, the increase in numbers has been accompanied by an increase in the public expression of racist and xenophobic attitudes.

The position regarding refugee law in Europe is complicated by virtue of another tier of conventions. These will be discussed briefly as it is considered such a form of regional co-operation will be either emulated in the Australian and Canadian regions or laws and policies similar to those in Europe will be followed in Australia and Canada.

Two systems of European regional co-operation are directly relevant to asylum and refugee law. These are the Council of Europe and the European Communities and other forms of co-operation between the twelve Member States, specifically the European Union and the European Political Co-operation.

More important to my argument is the Conference on Security and Co-operation in Europe (CSCE) which was established by the Final Act adopted at Helsinki on 1 August 1975. CSCE involves all States of Europe as well as Canada and the United States of America. In the Final Act, as well as in other documents, the CSCE adopted principles and defined positions which are fully compatible with the principles of international refugee law.

The Council of Europe, established in 1949, has 26 Member States while 13 States have "special guest status". The Council has encouraged many legal instruments which relate to asylum, refugees and human rights.

The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 created a European Commission as well as a European Court of Human Rights. It set up the only truly effective system for the protection of human rights at an international level. Article 25 allows "any person, non-governmental

organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention" to lodge a petition with the Commission.

On receipt of a complaint of an alleged violation of human rights, the Commission first decides whether it is admissible under the Convention. The applicant must show, inter alia, that all possible remedies have been exhausted in the country where the alleged violation took place. The application must be made within six months of a final decision by the courts or authorities of that State. If a petition is rejected there is no right of appeal against it.

The right of individual petition is important for asylum-seekers and refugees. In cases of *refoulement* or other forms of removal, the person concerned may invoke Article 3 of the Convention which states "no-one shall be subjected to torture or to inhuman or degrading treatment or punishment." Although Article 3 is most often referred to, asylum-seekers and refugees may also invoke Article 4 (prohibition of forced or compulsory labour), 5 (deprivation of liberty), 6 (right to a fair and impartial hearing "within a reasonable time"), 8 (respect for private and family life), 9 (right to freedom of thought, conscience and religion), 10 (right to freedom of expression) and 13 (right to the grant of an effective remedy before a national authority).

The European Agreement on the Abolition of Visas for Refugees of 20 April 1959 exempts "from the obligation to obtain visas for entering or leaving the territory of another Party" by any frontier "refugees carrying 1951 Convention Travel Documents" issued by the "Contracting Party in whose territory they are lawfully resident." This exemption from visa requirements covers stays of less than three months. It is not valid for longer stays or for the purpose of taking up gainful employment in the territory of another Contracting Party. It is understood the Agreement has achieved its aim of facilitating travel for refugees resident in the territories of Contracting Parties.

The Appendix to the European Social Charter of 18 October 1961 states:

> "Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees signed at Geneva on 28 July 1951, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees".

The European Agreement on the Transfer of Responsibility for Refugees of 16 October 1980 concerns refugees who have moved their residence to another country. It provides that the responsibility for a refugee will pass from the country of asylum to the country of the refugees' residence after two years continuous stay in the latter country. This country assumes responsibility for issuing the Convention Travel Document. Periods authorised solely for study purposes, training or medical care do not count towards the two year period.

SCHENGEN AGREEMENT

On 14 June 1985, five Member States of the European Communities concluded in Schengen (Grand Duchy of Luxembourg) the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders. This Agreement concerns not only the movement of persons but also measures relating to narcotic drugs and firearms, co-operation between police services, mutual assistance in criminal matters, extradition, aliens law, mutual exchange of information, transport and movement of goods. The Agreement did not include measures of immediate concern to asylum-seekers or refugees.

It took five years to conclude the Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders. The Convention was signed at Schengen on 19 June 1990. On 27 November 1990, Italy became a party to the Schengen treaties. Similar instruments were signed on 25 June 1991 with Portugal and Spain, and on 6 November 1992 with Greece. Several provisions in the Convention concern movement of people. Chapter 7 is entitled "Responsibility for the processing of applications for asylum". Articles 28 and 38 apply specifically to asylum-seekers and refugees. However, most importantly, article 134 states that "The provisions of the Convention shall apply only insofar as they are compatible with Community law." Article 26, chapter 6 obliges Contracting Parties to incorporate into their domestic law provisions:

* obliging air, sea or land carriers to assume responsibility for aliens refused entry and at the request of the authorities - to "return the alien to the Third State from which he was transported, to the Third State which issued the

travel documents on which he travelled or to any other Third State to which he is guaranteed entry";

* obliging air and sea carriers as well as carriers of groups by coach "to take all necessary measures to ensure that an alien ... is in possession of all the travel documents required for entry into the territory of the Contracting Parties";

* subject to their constitutional law "to impose penalties on carriers who transport aliens who do not possess the necessary travel documents".

The Agreement between the Schengen countries and the Republic of Poland concerning the readmission of persons in an irregular situation of 29 March 1991 is "to compensate the burden which may result from the visa-exempt travel of nationals of the Contracting Parties" - specifically to enable Polish nationals to visit Schengen countries without exposing the latter to a large-scale movement of Poles or third country nationals transiting through Poland. The Agreement sets out the obligations of Parties to readmit their nationals and other persons who crossed their external borders and who are found to be irregular in the territory of one of the other Parties. The obligation does not apply to persons who carry visas or residence permits issued by another State Party. "External border" means the first-crossed border which is not an internal border of the Schengen countries. The provisions do not apply to persons to whom the requesting Contracting Party has issued a visa or an authorisation to sojourn. However, temporary admission to enable the requestory State to deal with a request for asylum or for a rendered permit is not considered as an authorisation to sojourn.

The Schengen Convention has not yet entered into force. The official reason is that the Schengen Information System is not functioning. The system is ambitious. Data is to be inputted at each border post in the language of the post. The start has been postponed four times and has now been postponed sine die. It is understood the former German presidency of the EU would have liked to have internal borders suppressed before 12 June 1994 when the European Elections were held. The French believe the German firm Siemens has not provided the most appropriate software. Because of the political wrangling going on in Strasbourg a three year delay is likely. Discussions with various Government officials and representatives of NGOs lead me to the view that it is unlikely the Schengen Convention will ever come into effect.

During February 1994 Member States of the European Communities were negotiating a Convention of the Member States of the European Communities on the crossing of their external borders. The objective of this instrument is to "conduct effective controls, in line with common criteria, on persons at the external borders" and to implement "a common visa policy" in order "to help eliminate risks to public order and public security ... and to combat illegal immigration".

The Convention is not meant to deal specifically with asylum-seekers or refugees. The fifth paragraph of the Preamble states:

> "Whereas the Member States of the European Communities intend to conduct these controls in compliance with their common international commitments, in particular the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967 relating to the status of Refugees as well as with more favourable constitutional provisions on asylum."

The Convention authorises the crossing of external borders only "at authorised crossing points permanently controlled by the Member States", provides for entry control of passengers and their hand baggage "at the airport at which the external flight arrives" and "for departure control at the airport from which the external flight departs".

Non-nationals require. inter alia, appropriate documentation to enter the territories of the Member States. Member States may refuse entry to persons whose "name appears on the national list of persons who are not to be admitted to the Member State to which he seeks entry" and a "joint list of persons to whom the Member States shall refuse entry to their territories shall be drawn up on the basis of national notifications". Special provisions govern the delivery of a residence permit "notably on humanitarian grounds or by reason of international commitments" to non-nationals "whose name is on the joint list".

While "entry into the territories of the Member States shall be refused to persons who are not nationals of Member States who fail to fulfil" the conditions required, a "Member State, may, however, on humanitarian grounds or in the national interest or because of international obligations" give a non-national of the Member States permission to enter its own territory.

Without prejudice to the 1951 Convention and the 1967 Protocol, Member States undertake to incorporate in their national legislation measures to oblige air, sea and coast carriers "to take all necessary measures to ensure that persons who are not nationals of Member States coming from third countries are in possession of valid travel documents and of the necessary visas, and to impose appropriate sanctions on carriers failing to fulfil this obligation. Several articles deal with harmonisation of visa policies in considerable detail.

This Convention when effective will further restrict people seeking asylum. It is expected that other groups of countries will negotiate similar Conventions.

DUBLIN CONVENTION

The European Council at its meeting in Edinburgh (11-12 December 1992) adopted resolutions on manifestly unfounded applications for asylum and third host countries. The Council agreed to incorporate the principles into national legislation by 1 January 1995. The resolutions lay down the criteria for determining that an application is manifestly unfounded and provides that such applications may be dealt with in an accelerated procedure. The resolution concerning host third countries provides that the concept of a host third country - that is a country outside the EU, other than the country of origin, to which an asylum applicant may be returned - be incorporated into national legislation by the time the Dublin Convention enters into force. It describes the procedure for applying the concept, lays down the criteria for determining a host third country and clarifies the relationship of this concept with the Dublin Convention. Its purpose in countries in which there is generally no serious risk of persecution is "to assist in establishing a harmonised approach to applications from countries which give rise to a high proportion of clearly unfounded applications and to reduce pressure on asylum determination procedures".

The Convention Determining the State Responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities of 15 June 1990, known as the Dublin Convention, is probably the most important instrument affecting asylum-seekers arriving in one of the 12 Member States. The Convention has been signed by the 12 Members but not yet been ratified by all. The Convention is aimed, in my view, at stricter controls of entry and will turn out to be a threat to refugee protection. It will do nothing to prevent migration flows from occurring in the first place.

The Convention defines "asylum-claim" and "asylum-seeker" as follows:

> "Application for asylum means: a request whereby an alien seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol (Article 1(b)).
>
> "Applicant for asylum means: an alien who has made an application for asylum in respect of which a final decision has not yet been taken" (Article 1(c)).

Article 2 provides that:

> "Member States of the European Communities reaffirm their obligations under the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of these instruments, and their commitment to co-operating with the services of the United Nations High Commissioner for Refugees in applying these instruments."

The Convention sets out rules for "determining the State responsible for examining applications for asylum". The rules are:

* Each application for asylum must be examined.

* The application must be examined by one single Member State.

* The application must be examined "by the responsible Member State in accordance with its national laws and its international obligations".

* Each Member State "shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto".

* Any Member State shall retain the right, pursuant to its national laws to send an applicant for asylum to a third State (that is, any State which is not a member of the European Communities) "in compliance with the provision of the Geneva Convention, as amended by the New York Protocol".

The State responsible for examining a specific asylum request is determined in the following order:

* The Member State where a close family member of the applicant resides with recognised Convention refugee status.

* The Member State which has issued a residence permit or the permit with the longest validity or with the latest expiry date.

* The Member State which has issued a visa or the visa with the latest expiry date or with the longest period of validity.

* In cases of irregular entry the first Member State of entry.

* When no entry visa is required, the requested State.

* If "the application for asylum is made in transit in an airport of a Member State," the requested State.

* If the above rules are not applicable, the first requested Member State.

The Convention also provides for the circumstances and conditions which govern the transfer or re-admission of applicants between Member States.

Article 9 of the Convention provides that "Any Member State, even if it is not responsible under the criteria laid out in this Convention may, for humanitarian reasons based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires." If the Member State accedes to the request, responsibility for examining the application is transferred to it. A Member State, however, cannot decline responsibility on the grounds that the requesting State should have returned the applicant to a "host third Country" in accordance with the London resolution of December 1992.

Pursuant to Article 11, a Member State which considers another Member State to be responsible for the examination of the application may as quickly as possible but within six months of application lodgement, call upon the other Member State to take

charge of the application. Paragraph 4 of the Conclusions on the transfer of asylum applicants under the provisions of the Dublin Convention (London, 30 November and 1 December 1992) provides that it is the duty of the first Member State to inform the applicant as soon as possible when a request is made under the provisions of Article 11 (and 13) to another Member State to take charge or to take back an applicant and of the outcome of the request. If the request that another State should take charge of a case is not made within this six month time limit, responsibility for examining the application rests with the State in which the application was made.

Transfer of the applicant for asylum to the responsible Member State must take place not later than one month after acceptance of the request to take charge or one month after the conclusion of any proceedings initiated by the asylum seeker challenging the transfer decision if the proceedings have suspensive effect. When it is agreed that the applicant should be transferred to the second Member State, the first Member State is obliged to ensure as far as possible that the applicant does not evade the transfer. The first Member State must decide how the transfer is to take place, that is, either on the applicant's own initiative, with a dead-line being set or under escort by an official of the first Member State. If transfer has been arranged for unescorted travel and because the applicant has not co-operated, the second Member State may begin examination of the application based on available information one month after it accepted the transfer of responsibility.

Member States are authorised to exchange information on individual cases to determine the Member State responsible for the examination of the application for asylum; to examine the application for asylum; to implement any obligation arising under the Convention.

REFUGEES IN ORBIT

It is claimed the Convention will do away with the phenomenon of "refugee in orbit" and guarantee that every request for asylum lodged in one of the Twelve Member States would be fully examined by one of the Member States until a decision is taken as to whether the applicant is to be considered a refugee with the meaning of the 1951 Convention. The orbit practice, whereby an applicant is passed from State to State, will be suppressed within the common territory of the Twelve in so far as a Member State will refer an asylum application to another Member State only if the latter is responsible for the examination. However, the Member State, considered responsible by the other eleven Member States for examining the application for asylum may

decide that it will not deal in substance with the application because it, pursuant to the London resolutions and its domestic law, considers that a third State, outside the common EC territory is the asylum-seekers' first country of asylum or "host third country". "The notion of 'safe third country' or 'host third country' is described as follows: An asylum-seeker is denied access to the refugee status determination procedure in a European country on the grounds that he or she already enjoyed, could or should have requested and, if qualified, would actually be granted asylum in another country" (ECRE 1995,4). In practice this means that countries, with reference to this notion, may refuse entry to an asylum-seeker solely on the grounds that s/he could or should have applied for asylum in a country through which s/he transited on the way to the destination.

Does the Convention really eliminate the orbit problem between the common territory of the Twelve European Community States and third States around the world? When the definition of what constitutes an examination of the application for asylum and Article 3(5) under which a Member State can refer an applicant for asylum to a third State, according to its domestic laws and the London resolutions are examined, it is not considered so. Furthermore, the provision which precludes asylum-seekers from submitting their applications to the country where they believe their application would be more likely to succeed and where they wish to integrate seems to be opposite to the position taken by the Executive Committee of the High Commissioners Programme in Conclusion 12 (xxix) on Extraterritorial Effect of the Determination of Refugee Status of October 1978. This Conclusion stated that governments:

> "... recognised that a decision by a Contracting State (of the 1951 Convention and the 1967 Protocol) not to recognise refugee status does not preclude another Contracting State from examining a new request for refugee status made by the person concerned."

In their resolution of 1 December 1992 on a harmonised approach to questions concerning host third countries, the EC Ministers responsible for immigration adopted the following principles which form the procedural basis for applying the concept of host third country:

> "(a) The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification;

"(b) The principle of host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees;

"(c) If there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country;

"(d) If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply;

"(e) Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country."

The resolution further states that where the authorities consider that a host third country may exist, the case may be considered under an accelerated procedure.

The resolution defines an application for asylum as manifestly unfounded if it clearly raises no substantive issue under the Geneva Convention and Protocol for one of the following reasons:

(a) There is clearly no substance to the applicants claim to fear persecution in his own country; or

(b) The claim is based on deliberate deception or as an abuse of asylum procedures.

An application for asylum may not be subject to determination by a Member State of refugee status when it falls within the provisions of the resolution on host third countries adopted 1 December 1992. Member States will aim to reach an initial decision on applications which fall within these terms as soon as possible. At the latest a decision should be taken within one month and any appeal or review procedures must be completed as soon as possible. The decision is to be taken by the competent authority at the appropriate level. The decision maker must be "fully qualified in asylum or refugee matters". The applicant must be interviewed before a final decision is made.

What are the criteria which determine a country as a host third country and the application manifestly unfounded? In such cases the State will not examine the claim in a substantive manner. Instead it can expel the asylum seeker forthwith. The resolution requires the following criteria to be met:

(a) in those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention;

(b) the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country;

(c) it must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum or that there is clear evidence of his admissibility to a third country;

(d) the asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention."

The resolution sets out the following principles on the relationship between the application of the concept of host third country and the Dublin Convention:

"(a) the Member State in which the application for asylum has been lodged will examine whether or not the principle of host third country can be applied. If that State decides to apply the principle, it will set in train the procedures necessary for sending the asylum applicant to the host third country before considering whether or not to transfer responsibility for examining the application for asylum to another Member State pursuant to the Dublin Convention;

"(b) a Member State may not decline responsibility for examining an application for asylum, pursuant to the Dublin Convention by claiming that the requesting Member State should have returned the applicant to a host third country;

"(c) notwithstanding the above, the Member State responsible for examining the application will retain the right, pursuant to its national laws, to send the applicant for asylum to the host third country."

The resolutions on host third country and on manifestly unfounded applications come into operation when the Dublin Convention comes into operation by 1 January 1995 at the latest. They are now known as the 1992 London and 1993 Copenhagen Rules on Immigration.

There may well be problems with the implementation of the Dublin Convention and resolutions. Without adequate safeguards for determining another country as a host third country, the refusal and transfer of an asylum seeker by a State includes a serious risk that asylum-seekers may not only be returned to countries where no appropriate structures exist for dealing with their claim but also a risk that the third State may return the applicant to the country of origin and thereby violate the principle on *non-refoulement*.

It must be remembered that a State has unfettered discretion not to make use of provisions in relation to first safe country and to allow an applicant to enter for humanitarian reasons, based in particular on family or cultural grounds. The Home Office in the United Kingdom has been criticised for applying the provision to those who have merely landed at an airport in another country in transit to the United Kingdom, even though they may have family and friends in the United Kingdom but not in the other country. Furthermore, the United Kingdom agreed in the 1992 Helsinki Declaration of the Conference on Security and Co-operation in Europe that it would share the burden of coping with the consequences of refugee movements. Literal adherence to the "first safe country" principle is clearly against its spirit.

Hathaway (1991, 46) points out that there is no requirement in the Convention that a refugee seek protection in the country nearest to their home, or the first one they flee to. Post-Protocol refugee law effectively allows refugees to choose the country they claim refugee status in. Article 14(1) of the Universal Declaration of Human Rights states that "everyone has the right to seek and to enjoy in other countries asylum from persecution". This position was supported by the Executive Committee of the UNHCR. EXCOM Conclusion 15 (xxx) 1979 stated:

> "Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State he may if it appears fair and reasonable be called upon first to request asylum from that State."

The concept of "safe third country" seems to be contrary to this Conclusion.

There is no doubt that the European Union countries are doing everything possible to discourage asylum-seekers at their borders. In addition they are using domestic laws to tighten "the thumb screws". The United Kingdom Asylum and Immigration Appeals Act 1993 illustrates this.

The Act recognises the primacy of the 1951 Convention and 1967 Protocol. In effect it adopts the Convention and Protocol as part of domestic law. This means the restrictive definition of a "refugee" is now recognised in English law.

The Act provides for fingerprinting of an applicant for asylum and any dependents including children under sixteen years of age. Where notice is given to a claimant to attend for fingerprinting and the claimant does not attend as directed within seven days, an immigration officer or constable may arrest the person without warrant and remove the person for fingerprinting. The fingerprinting of people who have not been charged with a criminal offence is unacceptable in a democratic society and should not be part of immigration procedures. Criminal law provides for finger pointing of a person charged with a crime to assist a constable in the recognition of the person. Finger pointing a suspected offender is not mandatory. Application for refugee status is not an offence.

Housing authorities are not required to secure accommodation or assist in obtaining accommodation for asylum-seekers and their dependents while a decision on the asylum claim is pending. This means asylum-seekers do not have the same access to housing under the provisions relating to homeless persons as do other persons in the population.

A claimant for asylum is protected from deportation while the claim is being considered. In the case of a person with limited leave to enter or remain in the United Kingdom whose claim for asylum is refused, the leave may be curtailed by the Secretary of State. Where a decision has been taken to deport a person whose leave has been so curtailed the Secretary of State may order detention pending deportation.

A right of appeal to a special adjudicator is provided where a claim for asylum is refused. The only ground for appeal is that removal would be contrary to the United

Kingdom's obligations under the Convention. The appeal must be lodged within 48 hours where notice of the decision has been personally served. A right of appeal on a point of law lies to the Court of Appeal or the Court of Sessions in Scotland from final determinations of the Immigration Appeal Tribunal in an asylum case. Leave to appeal is required from the Tribunal or, if the Tribunal refuses leave, from the appellate court.

The Act removed the right of visitors, short-term and prospective students and their dependents to appeal against a refusal of leave to enter or of an entry clearance. It also removed the right of appeal against a refusal of leave to enter or of an entry clearance, and the right to appeal against a refusal to vary leave to enter or remain, in circumstances where the refusal is mandatory.

CARRIER SANCTIONS

The Immigration (Carriers' Liability) Act 1987 was amended to provide that the Secretary of State may by order require persons of a description specified in the order to hold a visa if they wish to pass through the United Kingdom en route to another country. A carrier who brings such a person to the United Kingdom without the necessary visa may be liable for the charge specified in that Act. The Order issued by the Secretary of State lists persons from Third World countries.

This provision is proving costly to carriers. For example, fines totalling £stg 320 000 were outstanding as at 31 December 1993 against the Belgium maritime transport authorities for transporting persons without proper documentation from Ostende (Belgium) to the United Kingdom.

All asylum decisions are made by the Home Office Asylum Division. If people apply for asylum at a port of entry, immigration officers take the details but refer the case to the Home Office Asylum Division for decision. People already admitted to the United Kingdom for some other purpose may apply direct to the Home Office for asylum whatever their status under immigration law. The Home Office considers each case in detail. If it is satisfied that people meet the criteria of the United Nations Convention, they will be granted refugee status and will normally be given leave to remain for four years. If it does not believe people meet these criteria but accepts that there are strong reasons why they should not have to return to their country of origin at that time, they will be granted exceptional leave to remain outside the immigration rules. This is normally given for one year initially and then for two periods of three

years. If the Home Office does not accept either of these, and the person does not fit into any other part of the immigration rules, the application will be refused subject to any appeal rights.

I had the benefit of interviewing the Director and Senior Officers of the Asylum Division which consists of some 600 officers costing about £stg 11 million annually in wages alone. They left no doubt the Division considers applications to the letter of the law without any regard at all to any humanitarian aspects of a case whilst hiding behind a principle of natural justice that the decision maker must remain neutral.

According to the *Sunday Observer* (20 February 1994), in July 1993 14 per cent of applicants for asylum were refused. This had risen to 72 per cent by February 1994. Whilst one has to be very careful with immigration statistics published in Sunday tabloids, this figure does confirm the fears conveyed by many people that the Home Office was granting refugee status in very few cases, was granting exceptional leave to remain in a number of cases but generally refusing permission to remain. By granting exceptional leave to remain it was easy to turn off the tap at any time. This is in line with the policy of discouraging asylum-seekers in the United Kingdom.

Persons refused asylum are deported. This is proving very expensive. In Sweden (*Migration News Sheet*, March 1994, 7) 85 to 95 per cent of rejected asylum-seekers are deported. In 1992/93 16861 persons were deported at a cost of 148.5 million Skr. 200 million Skr was budgeted for 1993/94.

Draconian as this legislation may appear even harsher provisions are in the pipeline. In the Netherlands, for example, foreign children and spouses may have to leave the country if within 5 and 10 years the family head becomes jobless. Up to now, the right to stay became permanent after one year for children and three years for foreign spouses. Henceforth, the aliens police will examine annually the situation of a family head whose children and spouse were allowed into the country as dependents to see whether the spouse meets all the conditions regarding housing and income. This provision conflicts with the principle of respect for family life contained in several international agreements to which the Netherlands is party, for example, the 1990 Convention on the Rights of the Child.

Migration News Sheet is a monthly information bulletin on immigrations, refugees and ethnic minorities published by the European Information Network. It contains items of interest from newspapers and newsletters. Perusal of the *Migration News*

Sheet (January 1993-February 1994) indicated no softening of the hardline approach to refugee issues as the following headlines show:

France - Setting up a police force to deal with immigration
United Kingdom - New guidelines on methods to be used to enforce expulsion orders
Switzerland - Number of illegal entries at frontier with Italy has tripled
Denmark-Sweden - Stricter border controls between the 2 countries
Denmark-Germany - Stricter passport checks between the two countries
Russia - Government to impose strict immigration controls
Netherlands - Tough measures to combat fraudulent marriages.

With effect from 1 July 1993 the German Constitution was amended to enable border guards to turn away asylum-seekers who try to enter Germany from a neighbouring safe country. Germany and Poland signed an agreement to allow Bonn to refuse asylum-seekers at its border with Poland and deport rejected applicants who arrive from Poland.

In France, frontier police were empowered to refuse foreigners claiming to be refugees access to asylum procedures. Admission into France may be refused if the person arrives from a third country considered to be without any danger or travelled via an EU member State. This is not the situation in Australia.

The International Herald Tribune (19 March 1994) reported "Swiss Curb Asylum-Seekers". Legislation, effective from 1 July 1994, had been passed to give police power to arrest and jail foreigners failing to identify themselves and also giving the authorities sweeping rights to search homes. The law had been demanded by several newspapers and rightist parties to crack down on foreigners abusing their status as asylum-seekers, in some cases dealing in drugs while awaiting a decision on their cases. Foreigners who lacked a Swiss residency permit could be jailed for up to three months.

Country by country there are detailed reports of new tougher legislative measures and the numbers of asylum-seekers. One wonders what further legislative provisions can be enacted to prevent persons from seeking asylum.

Carrier sanctions must have a major deterrent impact on carriers approached by those fleeing persecution. Such people are often unable to obtain the correct documentation, and airlines in countries of persecution are not required to assess

whether a person seeking to travel without the proper documents is likely to be granted asylum. It should not be the airlines responsibility to assess likelihood of being granted asylum. Airline staff are not trained in International Law. By denying travel a claimant for asylum would be denied the opportunity of putting a case to an immigration officer and, if unsuccessful, being heard by a court of competent jurisdiction. The result is the more reputable carriers refuse to allow a prospective asylum seeker to travel. Some carriers seek an indemnity against the fine (£stg 2000 in the United Kingdom). It is by no means only the genuine refugees who will seek to take advantage of such an opportunity; and many genuine refugees will be unable to afford to pay. The result is that in many countries asylum may be arbitrarily denied by those whose decisions cannot be monitored or challenged. Airline companies have no direct responsibilities to governments or obligations under human rights agreements.

Essentially, the problem seems to be those who leave their country with some form of documentation. Once airborne, the traveller destroys or flushes into the toilet the passport and visas. I cannot ascertain why all airlines do not photocopy each travellers passport and visa and these copies be carried by the crew. It could then be proved that the traveller had documentation when departing and reduce the number of claims for asylum. It is, of course, recognised that this would not avoid the situation where overseas corrupt officials assist would be asylum-seekers to avoid controls.

The refusal to carry a passenger denies the asylum seeker "the right to leave any country, including his own" recognised in Article 14(2) of the Universal Declaration and Article 12(2) of the Covenant on Civil and Political Rights, and Article 2 of Protocol No. 4 of the European Convention.

The number of applications for asylum that have been rejected is increasing. The problem is what to do with asylum-seekers whose asylum applications have been rejected.

On 12 April 1994 the Parliamentary Assembly of the Council of Europe considered this matter. Most member States of the Council of Europe currently allow asylum-seekers whose applications have been rejected to remain in their territory on humanitarian grounds. The Assembly agreed that for those rejected asylum-seekers who wish to return to their countries of origin, steps should be taken to ensure their safe and dignified return. It was recommended that States of origin and temporary entry should adopt return policies combined with support measures to assist the social

and occupational resettlement of those applying to return. The recommendation also noted that rejected asylum-seekers who are not allowed to remain in their host country but do not return to their countries of origin, are in an unlawful situation and risk becoming clandestine immigrants.

The Assembly particularly recommended that the Committee of Ministers invite the Council of Europe Member States to inter alia "examine the possibilities for harmonising the conditions under which those who do not satisfy the criteria for the granting of refugee status may nevertheless be authorised to stay for humanitarian reasons; to take practical steps to curb the illegal and abusive exploitation of asylum-seekers whose asylum applications have been rejected with specific reference to trafficking and employment of clandestine migrants; to strengthen policies for bilateral and multilateral co-operation in the field of human rights and minority rights and contribute to the social and economic development of the countries of origin of asylum whose applications are rejected; to contribute by means of bilateral and multilateral co-operation policies to the reintegration of such asylum-seekers into the society and economy of their countries of origin; and to draw up bilateral and/or multilateral agreements, in close co-operation with the International Organisation for Migration and the non-governmental organisations concerned to:

* "promote initial and advanced vocational training schemes as well as educational and cultural programmes, taking account of personal circumstances, designed to assist the reintegration of asylum-seekers whose applications have been rejected;

* "set up programmes for voluntary assisted return to the country of origin" (IOM News 5/94, 1-2).

These recommendations are encouraging because a number of European countries have been quite zealous in deporting unsuccessful asylum-seekers. For example, during January to October 1993, 568 people (illegal immigrants including unsuccessful asylum-seekers) were deported from France, a 21 per cent increase over the previous year (Nundy 1994, 3).

Hundreds of unsuccessful asylum-seekers were condemned to the United Kingdom's worst jails after the United Kingdom suspended deportations following the death of a Jamaican woman deported in July 1993. She died from suffocation after a mouth restraint and a belt fitted with handcuffs had been used to arrest her (Tendler 1994, 5).

This chapter has shown that a barrier is being put up around Europe, including the United Kingdom, to keep out persons seeking asylum. Indeed in border control Europe is leading the way. It is very difficult to obtain refugee status in that part of the world. Is it any easier in the new world - Australia and Canada? The next two chapters examine the development of refugee policy and law in those two countries so as to show that the arrival of one person at Australia's gate is a matter of great consternation whereas Canada appears to have adopted a more generous approach. An examination of Australian and Canadian practice suggests both countries will become harder in their approach in light of European experience.

AUSTRALIA
REFUGEE STATUS DETERMINATION PROCESS